Case No: 1403472/2019

EMPLOYMENT TRIBUNALS

Claimant: Ms V Rayson

Respondent: Taunton School Education Charity Ltd

Heard at: **Bristol** **On:** **14, 15, 16, 17 and 18 September 2020 & in Chambers on 21 September and 10 December 2020**

Before: Employment Judge Midgley
Mr J Shah MBE
Mr K Ghotbi-Ravandi

Representation
Claimant: Miss A Macey, Counsel
Respondent: Miss A Palmer, Counsel

RESERVED JUDGMENT

The Tribunal (by a majority) determined that the claims of direct and indirect discrimination on the grounds of sex, unfavourable treatment because of exercising the right to maternity leave and/or making a flexible working request, and wrongful dismissal are not well founded and are dismissed.

REASONS

The claims and parties

1. By a claim form dated 16 August 2019 the claimant brought claims of sex discrimination under s.13, 18 and 19 of the Equality Act 2010, discrimination and detriment on the grounds of pregnancy or maternity under the Maternity and Parental Leave Regulations and wrongful dismissal. The Respondent defended all of those claims.

2. The respondent is the charitable body responsible for the running of Taunton School, a well-known and long-established independent school in the Southwest of England ("the School").

3. The claimant was employed by the respondent at the School as the Sports Club Manager from September 2017 until her resignation in 2019. The claims arise from the manner in which the claimant's flexible working request in respect of that role was rejected by the respondent in the period when it was anticipated that the claimant would return from maternity leave.

Procedure, Hearing, and Evidence.

4. The Tribunal was provided with an agreed bundle of 321 pages. In addition, the Tribunal was provided with the following documents by the Respondent at the outset and during the hearing:

4.1. A cast list ("R2") which was agreed;

4.2. A chronology ("R3") which was agreed by the claimant as accurate in its contents but not complete;

4.3. Additional pages of an excel spreadsheet consisting of the staff rota for the duty supervisors and sports centre manager ("R1"), this was not agreed by the claimant, who maintained that it contained some limited inaccuracies;

5. For the claimant we were provided with witness statements for the claimant and for Mr Foster-Burnell, the Regional Organiser for Unison who had supported the claimant at her appeal hearing. The claimant gave evidence by affirmation and answered questions from Miss Palmer for the respondent and from the tribunal.

6. For the respondent we were provided with the following witness statements from staff at the school:

6.1. Mrs Raj Perry, and HR Adviser at the School;

6.2. Mrs Nicola Miller, the School's Chief Operating Officer; and

6.3. Mrs Nadine Latte, the Schools Foundation Director.

7. The respondent's witnesses gave evidence by affirmation and answered questions from Miss Macey, counsel for the claimant, and from the tribunal.

8. On the third day of the hearing, during the claimant's cross-examination of the respondent's first witness, Mrs Perry, Miss Palmer indicated that the respondent had in its possession a job description for the role of Business Development and Pools Manager, a role held by Lucy Cottrell from February 2018 until sometime in 2019. The claimant sought disclosure of that document on the grounds that it identified a role which consisted of part of the claimant's former role as Sports Club Manager, arguing that it demonstrated that it was possible to divide the claimant's role as part of a job share or otherwise.

9. Following clarification that the claimant was not seeking to suggest that she should have been placed into a new role, whether that of the Business Development and Pools Manager or some other role, but only to argue that she could have performed aspects of her role on a job share basis and that the respondent had permitted such a course during her maternity leave, the

respondent agreed to disclose the document. The documents disclosed consisted of the letter of appointment, contract of employment and job description for the role ("R3").

10. The Tribunal apologises to the parties for the delay in the promulgation of this Judgment. As will be apparent, there is a significant difference of view in relation to some of the facts and the conclusions to be drawn from them. That first became apparent following the Tribunal's first day in chambers. The Tribunal agreed the basis of a majority decision on the claims during the first chambers day and the majority's draft findings of fact were produced in late September. Thereafter, all members of the Tribunal have worked very hard, as diaries have permitted, to see whether the extent of the disagreement could be reduced. Mr Ghotbi-Ravandi particularly has applied himself with considerable dedication, given his reliance on software to read the documents and this Judgment to him, and with an exceptional level of detail. The thoroughness, care and focus with which he and Mr Shah approached their responsibilities is, it is to be hoped, evident from the content of the reasons below, and I am grateful to them. Pressures of work meant that there was some delay in the production of the majority's conclusions, which is my responsibility alone.

11. This was a difficult case in relation to the question of proportionality in the indirect discrimination claim, with cogent and forceful competing arguments on each side. Ultimately it was not possible to reduce the areas of dispute or for the Tribunal to agree, indeed the numbers of the claims agreed upon decreased rather than increased through those discussions; that does not mean that it was wrong to seek to do so. However, we recognize that the resulting delay will have added to the anxiety and concern of the parties and we are sorry for that.

The Issues

12. The issues had been discussed and agreed at a Case Management hearing before Employment Judge Bax on 22 January 2020. The parties' positions at the time of the hearing can be summarised as follows:-

Section 18 Equality Act 2010:

13. The respondent accepted that the following matters had occurred and constituted unfavourable treatment:

    13.1. the respondent had advertised the claimant's job on a permanent basis whilst she was on maternity leave;

    13.2. on return from her maternity leave, the respondent had instructed the claimant that her role required her to undertake shiftwork; and

    13.3. the respondent had rejected claimant's request to work fixed hours in her role and required her continued to work flexible hours.

14. What was the reason for the actions at paragraph 13.1 to 13.3 above? Was it because the claimant had exercised her right to ordinary maternity leave?

15. The respondent advanced a positive case as to the non-discriminatory reasons for each of those acts namely:

15.1. Advertisement - the respondent had to ensure it had cover in place if the claimant did not return to her role;

15.2. Shiftwork - shift work was a contractual requirement of the claimant's role and the claimant had been working shifts up to the point her duties were amended because of her pregnancy;

15.3. Refusal of fixed hours - the nature of the claimant's role was incompatible with the fixed hours requested by the Claimant.

Section 47E Employment Rights Act 1996

16. The respondent accepted that advertising the claimant's role on a permanent basis was a detriment.

17. Was the claimant subjected to that detriment on the grounds that she had submitted a flexible working application?

Section 13 Equality Act 2010:

18. Did the respondent inform the claimant that it was a traditional school and could not accommodate different working patterns?

19. If so, did the respondent make the comment because of the claimant's sex?

20. The claimant relies upon a hypothetical comparator - is there no material difference between the comparator circumstances and the claimant's?

21. If so, can the claimant prove primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

22. If so, can the respondent prove a non-discriminatory reason for any proven treatment?

Section 19 Equality Act 2010

23. The respondent accepts that it applied a criterion that the role of Sports Club Manager should be undertaken full-time and required shiftwork and that it would have applied the PCP to persons who were not of the same sex as the claimant.

24. Did the PCP place (or would it place) those who share the claimant's protected characteristic, namely sex, at a particular disadvantage compared to others not of the same gender, because of their gender?

25. If so, the respondent accepts the claimant was placed at a disadvantage because she was unable to return to her post due to child caring responsibilities. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies upon the following arguments:

25.1. the business aim or need sought to be achieved is ensuring the safe and effective running of the respondent's sports club [the claimant accepts this was a legitimate aim];

25.2. the treatment was reasonably necessary because shiftwork provides broad cover of the hours of the respondent's sports club opens [the claimant denies that it was reasonably necessary for the shiftwork in the role to achieve the legitimate aim];

25.3. the treatment was proportional because shiftwork achieves the business aim without disadvantaging the respondent's employees and pupils and maintains the safe and effective operation of the sports club [this is denied by the claimant, who argues that permitting the role to be filled with a job share through which the claimant would not have to work shift hours would be a more proportionate means of achieving the legitimate aim].

Wrongful dismissal

26. Did the respondent's conduct as alleged in paragraphs 13 to 25 above breach the implied term of mutual trust and confidence?

27. If so, it is admitted that the claimant was entitled to a week's notice pay.

Background Facts

28. The following findings are made on the balance of probabilities in light of the evidence presented during the hearing. Given the extent of the disagreement on the facts, the factual findings of the majority (Mr Shah MBE and EJ Midgley) and the minority (Mr K Ghotbi-Ravandi) are set out separately in relation to each disputed issue; the minority findings are in italics for ease of reference. For the avoidance of doubt, use of the term "we" below refers to the majority view:-

29. The respondent is an independent school accepting children from nursery age through to senior school.

30. The school has approximately 650 employees (including casual staff). Approximately 62% of staff are female and 38% are male. The School maintains and applies numerous policies, including a maternity policy and a flexible working policy. In consequence, staff are engaged in many flexible working practices by the School, including part-time working, term time working, flexi-time, career breaks/sabbaticals, zero hours contracts and shift swapping. There are 374 staff members working in a part-time capacity, of which 302 are female and 72 are male (a split of 81% to 19%); they are engaged largely in administrative or teaching roles.

The relevant sports facilities

31. The respondent's facilities include sports facilities which are used by both the respondent's students, the sports club and members of the public. The facilities include two swimming pools, a fitness centre, squash courts, cricket nets, tennis courts and sports pitches, three sports halls, and a dance studio ("the Facilities"). The sports club has only one set of changing rooms, which are used by both the pupils and members of the public.

32. The Facilities are open from 5:45 AM until 10 PM Monday to Friday and 7 AM to 8 PM at the weekend, for 50 weeks of the year. Given the requirement for

staff to be on site 30 minutes prior to the opening times, as described in paragraph 44 below, the facilities need to be manned for over 114 hours each week

33. Members of the sports club have access to the Facilities between the hours of 5:45 AM and 8:30 AM and 5 PM until 10 PM. This serves three functions. First, it generates revenue for the School. Secondly, it facilitates and advances the School's integration within its local community in the sense that members of the public are present within the School and using its Facilities, rather than the school merely being located within the community. Thirdly, it facilitates recruitment to the School, both by enabling the School to identify those of school age who are strong swimmers whom the School might wish to recruit, and secondly because it acts as a shopfront to those in the swimming club, showcasing the Facilities, coaching and support that the School can offer.

34. Members of the public can pay to be members of the sports club and so have access to the Facilities outside of school hours. Taunton Deane Swimming Club is one of the largest bodies amongst the members of the sports club. It has a contract of significant value with the School (approximately £90,000 per annum) to enable its members to use the pools outside of school hours. The School also runs a 'swim school' and 'learn to swim' program through which members of the public receive swimming tuition at the School's swimming pools.

35. The Facilities are managed by the Sports Club, in conjunction with the maintenance team who maintain and repair the estate involved. The Director of Co-Curricular provides oversight of the Facilities during their use by the School's pupils. The Sports Club Manager is responsible for the oversight of the Facilities whilst they are being used by the sports club and members of the public, and had overall responsibility for the Facilities.

36. The immediate responsibility for the management of the sports club and its Facilities rests with the Sports Club Manager. At the time of the claimant's appointment the Sports Club Manager reported to the Events, Commercial and Leisure Manager, Lucy Cooper. That latter role was a full-time role, which reported to the Operations Manager.

37. At the time of the events which are the subject of these claims, the Operations Manager role was vacant. In consequence Mrs Miller, the School's Chief Operating Officer, had taken on responsibility for its functions. In July 2018, as described in the chronology below, Mrs Cooper resigned from her role and the post of Events, Commercial and Leisure Manager remained vacant from 20 July 2018. This increased the workload both of the Sports Club Manager and the Chief Operating Officer.

38. Mrs Miller had overall responsibility for Health and Safety at the School and reported to the Health and Safety Committee and to the Headmaster.

The Operation of the sports club and role of the Sports Club Manager

39. The Sports Club Manager ("the Manager") is a full-time role, with a contractual requirement to work "about" 40 hours a week and more if the School required it. The postholder is contractually required to work "weekends, evenings and early mornings" as needed without any payment of overtime (see clause 15 of

the contract of employment).

40. *The minority member found "The Claimant's contract of employment does not state that she is required to work more than 40 hours per week if the School requires. It simply says "Times will not be fixed but Will depend upon the needs of the business.""*

41. The Manager is responsible for the complete management of the swim school, the fitness suite, the swimming pools and all sports facilities as well as line management of the 50 staff members who work at the Facilities. The Manager's responsibilities include all matters of health and safety within the Facilities, and business development and budget responsibility for all elements of the sports club itself.

42. The sports club engages approximately 21 lifeguards and 25 swimming teachers, who work variable shift patterns. Given the nature of both roles, there is a relatively high turnover of staff within them. The lifeguards and swimming teachers only work when the sports club is open. Their recruitment, training and management is the responsibility of the Manager.

43. *The minority member found "It is important to note that:-*

    43.1. The working pattern for the lifeguards and swimming teachers was determined by allocation in advance to specific shifts govern by a Rota. Once the allocations had been fixed, the staff could swap shifts or their shift would be covered by others in the event of unavoidable absence such a sickness.

    43.2. No documentary evidence was provided to corroborate Mrs Miller's testimony to show that the high turnover among lifeguards and swimming teachers was related to the nature of these roles. It can just as easily have been related to the terms and conditions of their employment than to the nature of these roles. In the absence of any corroboration, it is difficult to draw the right inference."

44. Aspects of the day-to-day management of the Facilities are delegated by the Manager to duty supervisors, who are also referred to as 'Duty Managers' (hereinafter referred to as 'DMs'). The School employs three DMs who work on a shift basis from 5:15 AM until 1:15 PM and from 4:30 PM until 10:30 PM, thus ensuring they are on site approximate 30 minutes before the sports club opens and 30 minutes after it closes. At least one DM would be on duty during each shift.

45. The role of DM is a less responsible role than that of Manager. When on shift the DM has delegated responsibility for the immediate reaction to health and safety incidents at the Facilities, the management and mentoring of lifeguards and swim teachers on site (in the sense of ensuring that there were sufficient numbers present during the shift, and addressing any issues of sickness or misconduct that occur during the shift), but if a DM were unable to resolve an issue when it arose, or if a more serious issue occurred during their shift, they would refer the matter to the Manager.

46. The DMs were paid approximately £18,000 a year gross and were required to work 40 hours per week, although each had signed an opt out from the

obligations in the Working Time Regulations.

47. The DMs arrive before the sports club opens and prepare the Facilities. They test the pools, open the gym, make sure all lifeguards have arrived on shift and cover any lifeguard breaks, they monitor the fitness suite and deal with enquiries from members and users and check on the pool plant. Once their shift finishes, they undertake administrative tasks such as responding to emails from members and staff, preparing facilities ready for the School, carrying out pool checks, answering phone calls and attending meetings. Those latter duties take place between 8:30 AM and 5 PM.

48. The respondent's case, which we accept, is that the DM posts were, in general, filled by younger, less experienced staff than the claimant, as the Manager. By way of example, one of the duty supervisors, Max, was a university student and in August 2018 returned to university; another, Emily, had performance issues which the Claimant had to manage. Whilst the DMs were required to hold the same qualifications as the Manager (lifeguarding certificates, pool plant operators certificates and first aid qualifications), there was no requirement for them to have any or any significant management experience given they were not responsible for any final decisions in relation to disciplinary matters, rostering, or health and safety matters, as the Manager was. Similarly, whilst they were required to address any queries, complaints or compliments from members of the public or sports club, they were not ultimately responsible for any decisions in relation to them. Similarly, they were not and could not logically be responsible for managing their own performance whether generally or where capability or disciplinary issues arose.

49. *The minority member found "Paragraphs 45 and 47 describes fully the responsibilities of the DMs. They were expected to deal with health and safety incidents, manage and mentor lifeguards and swim teachers during their shifts (including addressing incidents of sickness and misconduct), making sure that the Facilities were safe and in an appropriate working condition for users, interact with members and staff by dealing with their enquiries and carry out administrative tasks. All of these were significant responsibilities which would have required the DMs to have either accrued the relevant skills through previous experience (like Mr. Peter Maycock) or the Respondent would have had to provide the required training before allowing them to take such sensitive responsibilities. Clearly, employing a university student, who would have had to leave the post after a very short period of time when his term started, would not have been in post long enough to have been trained adequately by the Respondent. Therefore, the Respondent must have been satisfied with the student's qualifications and experience to take on such a responsible position. A similar argument will show that Emily's inadequacies has more to do with the Respondent's attitude in its recruitment policy than the appropriateness of those it employed. Therefore, I do not accept the Respondent's case that it is acceptable for the DM role to be filled by such inexperienced and unskilled individuals just because they are supervised by a manager who can only be there for about one-third of the time the Facilities are open to users. I also do not accept the argument that the School's deliberate choice of inexperienced DMs should prevent a breast-feeding mother from returning to work on a part-time or job-share basis.*

50. One of the primary functions of the Manager was to oversee the activity on the

site at the Facilities during the sport club hours. That required observation of the DMs, the lifeguards and the swim teachers to ensure that each of those respective roles was fulfilled to the appropriate standard and to identify any issues and to address them either before or immediately when they occurred, if possible. The Manager would ensure that all staff were appropriately trained, that they attended when they were rostered and that they conducted themselves in an appropriate manner. The Manager was responsible for deciding any disciplinary issues in respect of lifeguards, swim teachers and DMs with the benefit of input of HR advice from the respondent's HR team.

51. We accepted Mrs Miller's evidence that to fulfill that responsibility effectively required the Manager's hours to overlap with the DMs for a significant period for observation, assessment and mentoring, whether formally or informally; her expectation was that those tasks and working on shift should occupy approximately 40% of the Manager's hours.

52. *The minority member found "Mrs. Miller confirmed in evidence that a work pattern with an 1 hour or so of overlap in the morning prior to 8:30am and 1 hour or so overlap in the evening after 5:30pm in addition to shift cover for absences would be acceptable to the business. Further, I could not find any corroborative evidence where the 40% proportion mentioned in paragraph 51 came from except being mentioned by Mrs. Miller for the first time under cross-examination. Nevertheless, during the hours of 8:30am and 5:30pm, when the Facilities are closed to members, DMs are at work (as described in paragraph 47) and being supervised by the Manager which must be part of Mrs Miller's expectation of 40% overlap."*

53. In addition, the Manager would train the Lifeguards and DMs once the sports club's hours had finished during the week or at weekends. Given the lifeguards were often young and there was a reasonably high turnover of staff in that role, the Manager was often required to conduct competency tests and training sessions for new recruits as well as the ongoing monthly training for existing staff. Similarly, the Manager was responsible for ensuring that the swim teachers were trained, and their training was up to date.

54. If the Manager was not on site, the administrative side of the role was covered by the DMs and the management and supervisory functions were covered by the Operations Manager.

55. A function of the Manager's role which was also of considerable importance, given the commercial nature of the sports club, was to act as a visible and accessible point of contact for members of the sports club. We find that this was a key element of the role and required careful diplomacy in managing the expectations and activities of sports club members who had paid to use the Facilities to ensure that they did not jeopardise the health and safety of the pupils who would subsequently use the Facilities or put them at risk. The Manager had connected responsibilities for overseeing the operation of the Facilities hire, booking and invoicing by members of the public. We accept that that element of face-to-face contact with sports club members, and in particular the Taunton Deane Swimming Club Captain, and members of the public was a necessary, effective and crucial function to preserve, promote and maintain a positive relationship between the commercial clients of the Facilities, members of the public and the School.

56. *The minority member found "Mrs. Miller did not expect that this would require the Manager to be present for 100% of the time when the DMs, lifeguards and swim teachers are rostered; to have done so would have required 3 Managers to cover the over 114 hours the Facilities were available to users."*

57. The primary purpose and function of the Manager, however, to which the two functions above were ancillary but connected, was to ensure the health and safety of the pupils using the Facilities. The Manager was responsible for producing and reviewing risk assessments to that end and for the overall response to, investigation of and reporting on such incidents. The Manager produced the risk assessments, identified the necessary controls and then observed the shifts to ensure those controls were effective when under pressure when the pools and Facilities were in use.

58. There were several points during the day where that requirement was most engaged: between 8:30 AM and 9 AM and 5:30 PM until 6 PM, given the proximity of members of the public and pupils at those times. Putting the matter bluntly, one concern was that a member of the public might be in the changing rooms when the pupils entered them. A second concern, which occurred with some regularity, was if a member of the swimming club were to wedge open a door giving access to the swimming pools then the pupils would be afforded unsupervised access to the swimming pool. Such a scenario was described by Mrs Miller as a Health and Safety "red flag" incident which would immediately need to be escalated to her, the Headmaster and the senior management team.

59. *The minority member found "My view is that such "red-flag" incidents, which started to occur during the Claimant's maternity leave and not before, should have been dealt with immediately and without delay, by the DMs on duty because, as explained in paragraph 45, when on shift, the DMs have delegated responsibility for the immediate reaction to health and safety incidents at the Facilities. Also, as explained in paragraph 54, when the Manager was off duty, her management responsibilities were covered by the Operations Manager. Further, as explained in paragraph 37, the Operations Manager's responsibilities were being covered by Mrs Miller in this period. Therefore, regardless of when such serious incidents occurred, the Manager or Mrs Miller would have been notified immediately and escalated appropriately irrespective of whether the Manager has worked a shift from the Rota or not. Finally, the Claimant's work pattern prior to her maternity leave did cover the critical times of the day mentioned in this paragraph and was acceptable to Mrs. Miller."*

60. We accepted Mrs Miller's evidence that such incidents tended to occur at the beginning rather than the end of the day; presumably because of the sequence of those using the pool - in the morning the pupils followed the sports club members; in the afternoon the reverse was true.

61. During school hours, the Facilities were run and managed by the relevant staff, including PE and sports teachers, all of whom held the necessary lifeguarding and first aid qualifications. The Manager would undertake the administrative duties of the role during those hours. Those duties were extensive and are set out in paragraph 16 of Mrs Miller's witness statement. Nevertheless, the Manager retained overall responsibility for the day-to-day running of the Sports Club during those periods.

62. In conclusion, we accept that the role of Manager holds significant responsibility and accountability at the School, which is demonstrated by the fact that during lockdown the Manager was not furloughed, being one of only 35 members of staff who remained in work, despite the fact that the sports club and swim school were closed.

63. *The minority member found "I also accept that the role of Manager holds significant responsibility and accountability at the School. However, I do not accept that this implies, explicitly or implicitly, that [the Manager] is required to commit to a regular shiftwork on the Rota and, under cross-examination, Mrs Miller confirmed this."*

The claimant's appointment and the initial performance of her role

64. Following an interview with Mrs Miller, the respondent's Chief Operating Officer, the claimant was appointed to the role of Manager on 30 August 2017, commencing on 26 September 2017. She was provided with a contract of employment which set out the requirement to work approximately 40 hours per week which "will not be fixed but will depend upon the needs of the business" and included "weekends, evenings and early mornings". The salary was initially £24,000 gross a year. There was no provision for overtime. The claimant was required to sign an opt out of the Working Time Regulations. The claimant had a six-month probationary period, which at that time was consistent with many similar management roles within the School.

65. The roles functions and responsibilities were set out in Schedule 1 to that contract, which details responsibilities in respect of the swimming pools, sports centre operation and more generally. It is unnecessary to set out each of those responsibilities, they have largely been addressed above.

66. At the time of the claimant's appointment, the School was bringing the swimming function in house and the claimant was tasked with setting up the swim school from scratch. Part of that function required the claimant to act as a mentor to the swim teachers. That required the claimant to be poolside during swimming lessons which were conducted by the relevant mentee.

67. In the period September to November 2017, the claimant worked a significant number of the early and late shifts worked by the DMs. This was in part due to the need to oversee the setup of the swim school. However, from December 2017, by agreement with her manager, Mrs Cooper, the claimant reduced the number of occasions on which she worked the shift hours, and tended to work more traditional working hours between 8 AM and 4 PM, or 10am until 6:30pm on weekdays. She worked occasional weekends. This was evidenced by the Excel spreadsheet (see paragraph 79 below) which was produced by the respondent and which the claimant accepted had been completed by her and saved to the shared drive of the respondent's computer system. The change to the claimant's core hours, aligning them with more traditional working hours, was not recorded on the claimant's HR file, which Mrs Perry stated would be the expected course for any formal change of that nature.

68. *The minority member found that "As explained in paragraph 64, the working hours were not fixed. Therefore, there was no change in contractual hours that would have required any formal notice to be included on the claimant's HR file.*

Therefore, all that happened was that a work pattern was agreed between the Manager and her line manager that suited the business needs as they judged it."

69. Mrs Miller was not told of that change.

70. *The minority member finds "I do not believe anyone needed to inform Mrs Miller of the Claimant's shift pattern because:-*

    70.1. Firstly, from her contract of employment and Mrs. Millers' response to my cross-examination (see paragraph 52), I am satisfied that what seemed to have been required of the Claimant was to work a bespoke shift pattern suitable to the demands of the role. Therefore, there was no change to inform Mrs. Miller about; nor was there any evidence that Mrs. Miller was required to be informed of the daily work pattern of every member of staff when they have agreed it with their line manager. As the Respondent was completely satisfied with the Claimant's performance prior to her maternity leave, it is clear that she had found the optimum shift pattern for her role.

    70.2. Secondly, it is inconceivable that Mrs. Miller did not know about the change to the Claimant's working pattern from December 2017. As clarified in paragraphs 37 and 54, Mrs Miller was providing cover, as part of her Operations Manager's responsibilities, for the Claimant when she was not on duty. Therefore, she must have been aware of the Claimant's work pattern in order to provide that cover.

    70.3. Finally, paragraph 79 confirms that the Claimant shift pattern was recorded and saved on the Respondent's shared drive; hence, available for all to see. As a highly competent and proactive manager, it is reasonable to conclude that, had Mrs Miller been in any way concerned about the impact of the Claimant's work pattern on the operation of the Facilities, she would not have waited for others to tell her the information she needed."

71. The claimant was given a positive three-month review by Mrs Cooper in January 2018. At or about that time the claimant informed Mrs Miller that, with Mrs Cooper's agreement, she had elected to stop doing shift hours and weekend work so she could spend time doing administration during the day. Mrs Miller was unhappy with that decision, given the need for the Manager's role to oversee and supervise the more junior roles of DM, lifeguard and swim coaches and its function as a front of house and point of contact for the sports club members. The change essentially meant that there was little or no face-to-face contact between the Manager and the sports club members and little opportunity for the necessary oversight of the more junior roles in the sports club.

72. *The minority member found "I do not agree with the assertion that the change to the Claimant's working pattern "essentially meant that there was little or no face-to-face contact between the Manager and the sports club members and little opportunity for the necessary oversight of the more junior roles in the sports club" because of the evidence of the Excel spreadsheet referred to earlier. Furthermore, as explained in paragraph 52, the Claimant's work pattern*

from December 2017 was the kind of flexibility that Mrs Miller wanted."

73. Consequently, Mrs Miller sought an explanation from Mrs Cooper, who explained that the change been permitted on the basis that it facilitated the claimant's administrative work. Mrs Miller was unhappy with that decision given that Mrs Cooper did not have the same detailed understanding of the operation of the sports club and the importance of the Manager's presence during its opening hours as Mrs Miller, who herself had formally been trained as a swim teacher and was more familiar with the operation of the sports club.

74. *The minority member found "I do not agree with the inferences drawn in paragraph 73 because:-*

    74.1. Firstly, as explained in paragraph 59 and 70.2 above, Mrs Miller must have been aware of the Claimant's work pattern in order to provide cover for when she was not on duty.

    74.2. Secondly, it is stated that the Claimant told Mrs Miller of her work pattern in January 2018. It is inconceivable that Mrs Miller would not have express her disapproval of this arrangement to the Claimant at that time, given her seniority.

    74.3. *Thirdly, it is inconceivable that, such an important role as the Sports Club Manager would be line managed by someone who does not have a detailed knowledge of the operation of the sports club and the relevance of the Manager's presence during its opening hours. After all, Mrs Cooper, as the Claimant's line manager, was tasked to provide the Claimant's initial training and assess her competence and performance during her probationary period; she (Mrs Cooper) would not have been able to carry out these tasks without a detailed knowledge of the operation of the sports club and the relevance of the Manager's presence during its opening hours."*

75. Mrs Miller subsequently met with Mrs Cooper with Mrs Jo Davey, the Schools Director of Human Resources, and required her to reverse the decision and remind claimant of the need to work flexible hours, and early and late shifts and weekends in accordance with the contract. Mrs Miller did not subsequently check to ensure that the changes had been reversed, assuming that Mrs Cooper would follow her direction.

76. *The minority member found "As explained above, Mrs Miller must have always been aware of the Claimant's work pattern in order to provide cover. Furthermore, Mrs Miller must have been happy with the way the Claimant was running the Facilities not to find it necessary to check if she (the Claimant) was following the flexible work pattern which she (Mrs Miller) wanted and confirmed in cross-examination."*

77. It is unclear and immaterial whether the claimant was informed of that instruction, but we find that in the period January 2018 until her maternity leave in November 2018, the claimant worked relatively few early or late shifts but delegated DM and lifeguards to cover them. There was limited opportunity for her to oversee the activities on shift as the fact that she worked until 6:30pm did necessarily entail that she was at poolside but may equally have been working from her office. However, the claimant occasionally saw Mrs Miller or

Mrs Perry and remarked that she was tired because she had been working an early or late shift. We find that such conversations are entirely consistent with the claimant having covered such shifts during the DMs' sickness or annual leave.

78. *The minority member found "I do not agree with what is implied paragraph 77:-*

78.1. Firstly, bearing in mind the Respondent's total satisfaction with the way the Claimant was managing the Facilities and their desire for her to return to work, on the same work pattern as before, after her maternity leave if she could, she (the Claimant) must have worked the appropriate number of early and late shifts relative to what was required of her role.

78.2. Secondly, there is no evidence to indicate, nor did the Respondent suggest at any time during the hearing, that the Claimant did not spend any, or insufficient, time at the poolside during the overlap hours (those before 8:30am and after 5:30pm). Therefore, as the Respondent was totally satisfied with the Claimant's performance, it is more reasonable to conclude that she did supervise the activities on shifts appropriately.

78.3. Finally, the Claimant's duties and work pattern were amended by her line manager and the Health and Safety Officer after the Claimant informed the Respondent of her pregnancy in May and August 2018. There was no indication that the Respondent expected the Claimant to ignore these amendments. Nevertheless, prior to May 2018, the Claimant performed her duties in an appropriate work pattern in line with her contract of employment and, after May 2018, in line with the limitations and restrictions agreed with her line manager and the Health and Safety officer due to her pregnancy, to the Respondent's total satisfaction."

79. We accepted that the content of the Excel spreadsheet produced by the respondent was accurate. It demonstrates that:

79.1. In January, the claimant worked one early shift commencing at 6 AM when there were other duty supervisors on shift, and two late shifts in respect of which there was one other duty supervisor on shift. She therefore oversaw three shifts in that month to the level required by Mrs Miller; (the same point should be understood in respect of paras 79.2 to 79.6 below).

79.2. In February, the claimant worked one early shift commencing at 6 AM when there were no duty supervisors to cover the shift, and two late shifts when duty supervisors were on shift. She therefore oversaw 2 shifts in that month.

79.3. In March, the claimant worked five early shifts commencing at either 5:15 or 6 AM and in respect of which a duty supervisor was scheduled to work on only one occasion, and one late shift on which a duty supervisor was scheduled to work. She therefore oversaw 2 shifts in that month.

79.4. In April the claimant worked 2 early shifts but no duty supervisors were on duty at the same time. She therefore did not oversee any duty supervisor shifts for any significant period in that month.

79.5. In May the claimant oversaw 2 early shifts, again not at times when

duty supervisors were scheduled to work. She therefore did not oversee any duty supervisor shifts for any significant period of time in that month.

79.6. In June the claimant worked six early shifts commencing at between 5:15 and 6:15 AM, but each of those was to cover annual leave, non-working days or sickness absence. She therefore did not oversee any duty supervisor shifts for any significant period of time in that month.

80. *The minority member found* "*There is no evidence to indicate, nor was it suggested by the Respondent at the hearing, that Mrs Miller required the Claimant to oversee full shifts. In fact, she confirmed the work pattern she expected of the Claimant under cross-examination (see paragraph 52). To have expected full shift supervision at all times by the Manager would have resulted in a weekly working hours of over 114 which would have been impossible for one person to perform, requiring 3 managers.*

81. *So, from the data given in the spreadsheet mentioned in paragraph 79 and its sub-paragraphs, I conclude that between January and June 2018, the Claimant oversaw 22 complete shifts that included lifeguards and swimming teachers and 7 complete shifts that included DMs. These were in addition to the overlap hours (those prior to 8:30am and after 5:30pm). Bearing in mind that the Claimant also had management responsibilities for lifeguards and swim teachers whose number exceeded that of the DMs by a factor of 15 to 1, it is just as important for the Claimant to oversee them without DMs' presence. Judging by the Respondent's total satisfaction, this must have been the appropriate level of supervision that was required of the Claimant and consistent with her contractual requirements."*

82. We found that Mrs Cooper and claimant knew and understood that the requirement to undertake shiftwork was a contractual one, irrespective of the frequency with which the claimant fulfilled it in the period above. The claimant accepted in cross examination that she knew that it was a contractual requirement of her role.

83. In the period February to April 2018, the respondent provided the claimant with additional administrative support to ease the work pressures upon her.

The claimant's pregnancy and maternity leave

84. In May 2018 the claimant disclosed to Mrs Cooper and Mrs Miller that she was pregnant.

85. *The minority member found* "*It is important to note here that the additional administrative support was withdrawn after the Claimant's duties were amended by the Respondent when informed of her pregnancy in May 2018; i.e. just when she needed it most. It is reasonable to conclude that this is what may have necessitated the intervention of the Health and Safety Officer (Mrs Ryan) in August 2018 (see paragraph 88)*."

86. Mrs Cooper completed a risk assessment on 18 May 2018. The assessment identified that the claimant was required to undertake shiftwork. Necessary adjustments to the claimant's role were agreed, which included a restriction on the claimant remaining poolside for longer than two hours at a time, providing lifeguarding duties or working alone or handling chemicals or heavy items. She

therefore undertook more administrative work.

87. In the period May to June 2018 one of the DMs, Lewis, needed to work reduced hours and duties. This required the claimant to increase the number of DM shifts which she covered, as demonstrated by the Excel spreadsheet referred to above.

88. In July 2018 Mrs Cooper resigned her post to take up an opportunity elsewhere. The claimant obtained advice from a doctor that she should work no more than eight hours a day. Mrs Ryan therefore conducted a further risk assessment with the claimant at the beginning of August and emailed Mrs Miller raising her concerns about how the claimant's duties were to be covered given the restrictions on her working practices.

89. On 17 August 2018 one of the DMs, Louisa, left, increasing the workload of the remaining DMs and the claimant. At that stage, the three DMs in post were relatively new to their positions.

90. On 20 August 2018 Mrs Miller met with the claimant to discuss the position as a result of the DMs' inexperience and Louisa's departure. During that discussion, the claimant informed Mrs Miller that she had been working 8 AM to 4 PM on Monday to Friday and the she was "office based ….. only doing office duties." We note that during that discussion the claimant told Mrs Miller that she had not made HR aware of the change, and Mrs Miller told the claimant that that represented a material change to her position given that she was no longer carrying out the duties for which she had been employed, and that she would need to speak to HR and would need to recruit an extra DM to cover her role. It is clear from the nature and content of that discussion that both the claimant and Mrs Miller knew that the claimant's role required her to work outside those hours and in the Facilities to deliver training (statutory training for lifeguards and duty supervisors), conduct pool plant operation, and to mentor swim teachers. Each of those functions was one for which the claimant was personally responsible and which she could not simply delegate to the DMs. There is no suggestion in the minute of that meeting, nor did the claimant suggest in evidence, that she told Mrs Miller during the meeting that she had not been on site in the Facilities (i.e. poolside) from February until August 2018 except on rare occasions and then largely as cover for the DMs, and it is equally clear that the claimant's office only role was of concerned to Mrs Miller.

91. *The minority member found "I find the evidence provided by paragraph 90 particularly significant in understanding the Respondent's, and in particular Mrs Miller's, attitude to pregnant women:-*

    91.1. Firstly, by the time the Claimant and Mrs Miller met on 20 August 2018, the Claimant's work hours and duties had been amended to take into account the Claimant's pregnant condition following a risk assessment by the Health and Safety Officer (Mrs Ryan), a copy of which was sent to Mrs Miller Earlier that month. The fact that Mrs Miller felt the need to emphasise the Claimant's inability to perform her normal duties due to her pregnancy, and was not what she was employed for, can only be seen as intimidatory; especially when these restrictions were as a result of a risk assessment by the Health and Safety Officer.

91.2. Secondly, from the nature and content of that discussion, I think it is reasonable to conclude that the restrictions on the Claimant's normal working hours and duties following the risk assessment by the Health and Safety Officer, was seen by Mrs Miller as somehow the Claimant was failing the responsibilities in her job. I find this position to be discriminatory towards pregnant women.

91.3. Finally, there was no evidence to show, and the Respondent did not claim, that the Claimant "had not been on site in the Facilities (i.e. poolside) from February until August 2018 except on rare occasions". Clearly, the Claimant's presence at the pool side during this period was appropriate to performing her role, subject to the limitations imposed on her from May 2018 due to her pregnancy. There was, therefore, no reason for the Claimant to say such a thing to Mrs Miller in their meeting of 20 August 2018 and, to have said so, would probably have been contrary to the fact."

92. The claimant was on annual leave between 17 September and 31 October and commenced her maternity leave on 1 November 2018.

The appointment of the claimant's maternity cover, Mr Maycock

93. During her maternity leave the claimant's role was filled by Mr Peter Maycock, who had previous experience of running the sports club and who had acted as a DM.

94. Mr Maycock's tenure was a difficult one. First, in November 2018 there were issues with the sports club members' use of the facilities relating to their key passes for the pool and changing rooms. Whether directly or indirectly difficulties with the passes and doors had led members of the pool club to wedge open doors by which the swimming pool and changing rooms were accessed. Secondly, some of the doors were not closing properly, creating a potential red flag situation. These matters were drawn to Mrs Miller's attention by email and by members of staff emailing her photos of the doors in question, on one occasion it was the headmaster, Mr Glaser, who sent her such a picture.

95. Secondly, Mr Maycock struggled with preparing the roster for the DMs with the result that, when the claimant reviewed the roster at a later stage, 61 hours of pool club opening times were omitted from the DMs roster. In addition, Mr Maycock tended to work a significant number of the shifts himself, rather than overseeing the shifts of the DMs.

96. Thirdly, and possibly as a consequence of the matters above, Mr Maycock struggled with the administrative and financial elements of the role.

97. *The minority member found "These paragraphs provide significant evidence to aid the Tribunal's understanding of the Respondent's attitude to providing adequate maternity cover for the Claimant:-*

97.1. Firstly, from paragraph 93, it is clear that the Respondent was fully aware of Mr. Maycock's inability and lack of competence in managing the sports club and the Facilities; yet, they chose to proceed with this appointment.

97.2. Secondly, from paragraph 94, it is clear that all the red-flag issues

arose during the Claimant's maternity leave and not before. This should have been anticipated knowing Mr. Maycock's inadequate capability to cover the manager's role.

97.3. Thirdly, again from paragraph 94, the cover manager (Mr. Maycock) and the DMs did not deal with these "red flag" issues immediately as was required of them (see paragraph 45). Instead, they escalated them to Mrs Miller as was required of them (see paragraph 58). Therefore, it is reasonable to conclude that these delays must have put the safeguarding of the pupils at risk.

97.4. Fourthly, from paragraph 95, it is reasonable to conclude that the Manager cannot perform his/her role effectively if he/she is required to fit-in with the roster for the DMs to a significant extent; thus, illustrating the reasons for the Respondent's total satisfaction with the Claimant's work pattern.

97.5. It is also notable. from paragraph 95, that Mr. Maycock's inability in preparing the roster for the DMs was not picked up by Mrs Miller (who was Mr. Maycock's direct supervisor during this period) and was only noticed by the Claimant many months afterwards when she was going through the return to work process which is the subject of this hearing. This is a significant evidence in helping us understand how genuine the Respondent has been in giving their evidence in this hearing."

98. In consequence of all those matters, following a review the School decided that it would reverse its policy of permitting the fitness suite to be unsupervised during key times so that the fitness suite had to be manned at all times to ensure that access to the pools and changing rooms was supervised to minimise risk to the pupils. Mrs Miller considered the possibility of recruiting a replacement for Mr Maycock to take over the Manager role but, in February 2019 the respondent opted to appoint Lucy Cottrell to assist Mr Maycock with the administrative and rostering elements of the Manager's role and to work on time-limited and specific projects.

99. *The minority member found "Paragraph 98 provides crucial evidence in enabling the Tribunal to understand the Respondent's attitude to health and safety:-*

99.1. Firstly, despite emphasizing to the Tribunal as to how critical it was to avoid any serious health and safety incidents (known as red-flags), the Respondent had a policy of permitting the fitness suite to be unsupervised during key times prior to 2019. Mrs Miller, as the Director with overall responsibility for health and safety (see paragraph 38), must have been responsible for this policy; one that did not seem to have caused any difficulties prior to the Claimant's maternity leave.

99.2. Secondly, the appointment of Lucy Cottrell to "assist Mr Maycock with the administrative and rostering elements of the Manager's role and to work on time-limited and specific projects" did not remove the problem that arose from Mr. Maycock's tendency "to work a significant number of the shifts himself, rather than overseeing the shifts of the DMs".

99.3. The Respondent was fully aware of Mr. Maycock's competence as a

Manager, prior to appointing him to provide maternity cover for the Claimant, because he had performed this role before. Yet, instead of appointing an experienced and competent Manager as cover for the Claimant's maternity leave, it knowingly chose to appoint someone that found the role too difficult with the inevitable health and safety consequences.

99.4. It is, therefore, reasonable to conclude that the above show that what is needed for such a responsible role as the Sports Club Manager is not necessarily a single person on fulltime, but individuals with relevant competence and experience in the post."

100. Miss Cottrell had previously worked as a Duty Supervisor but had resigned given the commute for a 5:15 shift required her to leave home at 4am. A new role of Business Development and Pools Manager was created for her. The role was part-time working 15 hours (up to a maximum of 20 hours) a week at a salary of £7,800.00.

The Claimant's proposed return to work

101. On 7 May 2019, Mrs Perry phoned the claimant to discuss her return to work. The claimant indicated that she would like to return in or about August (her statutory maternity pay was to end on 31 July 2019), and that her partner had a new job which would involve shift work with the result that she would need to work her childcare around his shifts.

102. *The minority member found "It is important to note that the Claimant's maternity leave entitlement was to 31 October 2019."*

103. The following day, 8 May 2019, there was a significant incident when the air handling unit in one of the swimming pools released vapours into the pool complex which caused one pupil to require medical treatment in hospital and led to many members of the pool club and pupils suffering minor breathing difficulties. It is not suggested by the respondent that this was caused by any failing on the part of Mr Maycock or the DMs. However, it is clear us that in addition to the immediate serious health and safety implications of the incident, the School needed to act to preserve the positive relationship with the sports club members given the effect of the incident in conjunction with the difficulties regarding the pool club members' access to the pool and fitness suite.

104. In consequence, and particularly given that the Operations Manager post remained vacant, the Headmaster took a personal interest in the sports club security, and it was discussed at the Health and Safety committee and the Health and Safety Strategy group.

105. *The minority member found "Again more evidence to the Tribunal illustrating the poor attitude of the Respondent to health and safety; since, despite the fact that the issues described in paragraph 103 started 6 months before this incident, the Respondent still had not provided adequate level of cover for the Claimant's maternity leave. Paragraph 104 shows how important it was for the post of Operations Manager to be filled to take care of all those health and safety matters the Respondent insisted to be of paramount importance; and yet, it was left vacant for years even though Mrs Miller could not cope with the additional responsibilities that this imposed on her during the Claimant's*

maternity leave."

106. On 20 May 2019 the claimant emailed Mrs Perry and advised her that she had been offered childcare on Mondays, Wednesdays and Fridays and therefore was looking to return to work on a part-time basis. She asked whether there was any possibility of her child being enrolled in the nursery at the School and advised Mrs Perry that she was currently breastfeeding. Mrs Perry forwarded that email to Mrs Miller.

107. Mrs Miller replied to Mrs Perry the following day stating "I would be interested in employing her in an admin role but would need to speak to Lucy/Peter about what we would need her to do. Let's catch up."

108. Mrs Perry and Mrs Miller subsequently met and discussed the implications of the claimant's email. Mrs Miller told Mrs Perry that it was essential to the sports club that it had an effective full-time manager and that the Manager would need to oversee the shifts of the DMs. Mrs Miller had been considering a mini restructure of the sports club staff given that Mr Maycock had indicated that he was considering handing in his notice as he was struggling with his role. Consequently, in light of the limited hours that the claimant was proposing, Mrs Miller concluded that the claimant would be unable to return to the substantive role of Manager, and suggested to Mrs Perry that she would be interested in creating an administrative role for the claimant which would support the Manager. That role would not have management responsibility but would be focused upon day-to-day administrative tasks such as answering emails, dealing with bookings, issuing certificates, and managing lesson timetables. The fact that the claimant was breastfeeding did not cause Mrs Miller any concern, given that a considerable number of staff at the School were breastfeeding mothers, and had been accommodated without difficulty.

109. We concluded that Mrs Miller had previously enjoyed a very positive working relationship with the claimant, was appreciative of her skills, aptitude and attitude, and was keen to retain her in some role, particularly within the swimming school, if at all possible.

110. On 22 May 2019 Mrs Perry and the claimant met to discuss the claimant's return to work. Mrs Perry and the claimant had a very good working relationship, and their discussion was open, supportive, and positive and focused on options to work around the claimant's needs. With the exception of the manner in which the claimant perceived the request to confirm she could not return to her substantive role; she regarded the meeting as positive and supportive.

111. *The minority member found "From paragraph 110, it is reasonable to deduce that the meeting between Mrs Perry and Mrs Miller must have taken place on 21 May 2019, only one day after the Claimant's email informing Mrs Perry of her intentions to return to work. This would not have given Mrs Miller, or anyone in HR, adequate time to investigate any possible solutions to enable the Claimant to return to work while breastfeeding. Further, from the evidence in paragraphs 107 and 108, it is reasonable to conclude that Mrs Miller had decided, as early as 21 May 2019, the Claimant could not be employed in her role of Sports Club Manager in a part-time or job-share capacity. In fact, judging by the speed Mrs Miller had made this decision, it is reasonable to*

conclude that Mrs Miller had already maid up her mind long before and had always expected the Claimant to return to work on a fulltime basis at the end of her maternity leave."

112. The claimant proposed to return to work on three days a week: Monday, Wednesday and Friday (when the claimant had secured a place for her daughter at nursery) working from 830 until 530, although she thought she might be able to offer limited flexibility around the start and finish times, given that her parents could assist her with childcare by dropping her daughter off and picking her up from nursery.

113. *The minority member found "During cross examination by me, the Claimant confirmed that this pattern would include the flexibility of overlap hours (prior to 8:30am and after 5:30pm) just like before. When pressed by me, she confirmed that she wanted to return to work on a similar daily pattern as before, but on a part-time or job-share basis."*

114. Mrs Perry told the claimant that the School required the Manager to work shifts and later referred to the need for the role "to be shift based". The claimant advised her that she had not worked shifts since January 2018 as, once she had set up the swim school, she had worked 11 AM until 7:30 PM with Mrs Cooper's approval. At that point, the claimant maintained that she had worked later shifts but only as cover for the duty managers.

115. *The minority member found "In cross examination by me, Mrs Perry clarified that by "shift" she meant 'with overlap hours prior to 8:30am and after 5:30pm; similar to Mrs Miller's expectations (see paragraph 52). However, this was clearly not obvious to the Claimant as, apparently, she referred to shifts as specific periods of duty on the Rota."*

116. Mrs Perry asked the claimant whether she would be able to return to the substantive post which required full-time hours and an element of shiftwork and the claimant said that she could not. Alternative roles, such as swimming teacher or mentor, were then discussed. The claimant indicated that if she were to work in that capacity she would not need childcare and could work for five or even seven days a week, starting at 5:30 or 6 PM. She suggested she might be able to work in a similar capacity to Mrs Cottrell or in an administrative capacity.

117. Mrs Perry asked the claimant to confirm that she would like to return in August 2019 and that she could not return to her substantive role; she required the confirmation so that she could start to explore alternative roles for the claimant in earnest. The claimant was upset because Mrs Perry had twice asked her whether she could take up her substantive role, perceiving it to be a request to 'resign' from her role before matters could be progressed, and that in consequence she misunderstood or misconstrued Mrs Perry's reference to 'shiftwork' believing it to be a requirement to work the shift hours of the duty supervisors.

118. *The minority member found "Based on the Respondent's evidence, I conclude that the Claimant's interpretation was reasonable because:-*

118.1. Firstly, although Mrs Perry and Mrs Miller clarified what they meant by 'shift' for the Claimant under cross examination at the hearing, they

never explained to her that they meant 'flexible' as before during her return to work negotiations. In fact, in her appeal hearing, the Claimant confirmed that the act of being given a copy of the Rota and being asked to fit her work pattern within it, when everyone knew that she could not take regular shifts on the Rota, rather confusing.

118.2. Secondly, the only choice she was given for returning to her substantive role was on a fulltime basis. So, it is reasonable to conclude that Mrs Perry was telling her that, if she could not return to work on a fulltime basis with regular shiftwork on the Rota, she had to resign from her substantive role.

118.3. Finally, from paragraphs 107 and 108, Mrs Miller was already considering other roles for the Claimant on 21 May 2019. So, there was no reason for Mrs Perry not to start exploring alternative roles before confirmation from the Claimant that she could not return to her substantive role on a full-time basis. Therefore, I conclude that Mrs Perry's insistence that she could only start exploring alternative roles after receiving the said written confirmation was a means of pushing the Claimant to resign her role as the Sports Club Manager.

119. Mrs Perry prepared a note of that meeting which we find to be an accurate note. Mrs Perry did not send the note to claimant but rather emailed her on 24 May. In that email Mrs Perry wrote "I explained that *being on shift* was always the expectation of the role and this will continue moving forward" (our emphasis). We accept that that accurately reflects the discussion with the claimant, and that Mrs Perry had understood the element of the role that required the claimant to be present for sections of the shift, as Mrs Miller had described it to her.

120. Mrs Perry set out the alternatives possibilities of the claimant's return to work that were discussed at the meeting, and asked the claimant to confirm that she did not "feel [she could] return to [her] substantive role as Sports Club Manager following the end of [her] maternity leave" before the school would begin to consider what alternatives were actually viable.

121. *The minority member found "As the notes of the meeting of 22 May 2019 was not shared with the Claimant, it is difficult to judge how accurately they reflected the discussions and I cannot support the stated accuracy of this evidence in paragraph 119. Further, although it is stated here that "Mrs Perry had understood the element of the role that required the claimant to be present for sections of the shift", her communication with the Claimant left her (the Claimant) in no doubt that she was expected to work in shifts in a similar way to DMs. Evidence showed that, had it been made to the Claimant that "being on shift" meant to be present for sections of the shift", the Claimant would have been perfectly happy with that daily work pattern. Also, paragraph 119 implies that Mrs Perry was not sure that "being on shift" meant "to be present for sections of the shift" before Mrs Miller clarified it for her. This evidence demonstrates that "being on shift" needed to be defined for all concerned to ensure no misunderstandings; but Mrs Perry and Mrs Miller did not do this for the Claimant, resulting in confusion.*"

The Flexible Working Request

122. The claimant sought advice from her union because she was concerned about resigning (as she put it) from her substantive role. In reality she was merely being asked to confirm that she did not believe that she could return on the terms of her substantive role. She was not actually being instructed or requested to offer confirmation of resignation from her role.

123. *The minority member found "I do not support the conclusion stated in paragraph 122. The Claimant was given to believe that if she could not return to her substantive role on a fulltime basis, then she had to relinquish it. So, it is reasonable for the Claimant and others to conclude that the only way to relinquish her role is to resign it."*

124. The claimant submitted a flexible working request in an email on 28 May 2019. The claimant confirmed in the request that her current working pattern was for full-time hours "which includes shiftwork". She proposed a return to work on a part-time basis working three days a week on Monday, Wednesday and either Thursday or Friday, working between 830 and 530. She suggested that those hours would permit her to see and manage the duty managers on both the early and late shifts and the swim coordinator, as well as completing the administrative and paper elements of her role including risk assessments and health and safety requirements. She suggested that working three days rather than five would save expense.

125. She argued that there were sufficient DMs "to cover all business at the sports club, so I would therefore not be required to do shift hours. I have previously worked similar hours and I don't believe this to have had a negative impact on the business." In essence she was suggesting the role could be covered by a manager working 3 days a week if additional responsibilities were transferred to the DMs. She expressly stated that she would like to commence the role from 12 August 2019.

126. *The minority member found "The evidence in these paragraphs demonstrate the confusion in respect of the meaning of "shift hours" and the misunderstanding it caused. While Mrs Perry claims that by "being on shift" she meant "to be present for sections of the shift", in the Claimant's world, "being on shift" meant covering full shifts. This was, clearly, impossible for the Claimant on a regular and full-time basis. Therefore, from the evidence in these paragraphs, I conclude that what the Claimant was trying to do was to 'bend over backwards' to find a way to satisfy the Respondent while being able to care for her new borne child."*

127. The flexible working request was forwarded by Mrs Perry to Mrs Miller. On 29 May Mrs Miller emailed Mrs Perry asking her to inform the claimant that "we considered a part-time option as a sports club manager after your meeting with her. Regrettably it isn't something we are able to offer as this is a full-time role." She then instructed Mrs Perry to "press on and get an advert ready for next week." She indicated that she would meet with Mr Maycock to advise him of those matters.

128. *The minority member found "It is important to note that, the Claimant confirmed, under cross examination, that she was looking for a similar daily pattern as before her maternity leave, with overlap hours with the early and late shifts as well as shift cover for absences, but to change her normal pattern to*

8:30am to 5:30pm rather than 10am to 6:30pm as was before her maternity leave. This paragraph also provides further evidence that the Respondent was determined to have one person in the role of the Sports Club Manager on a full-time basis and was not interested in exploring any other solutions that might enable the Claimant to return to work without sacrificing the care of her baby. So, in just over 8 days after the Claimant informed the Respondent of her potential availability, Mrs Miller rejected the Claimant's proposition for part-time working, refused to consider job-share and set in motion the Claimant's replacement even though she had not resigned. From all these, I conclude that the Respondent's attitude had always been that, if the Claimant could not return to work after her maternity on a full-time basis as before, then she had to leave her post. Furthermore, I conclude that this must have been the Respondent's attitude from the start of the Claimant's maternity leave."

The flexible working request meeting

129. On 3 June 2019 Mrs Miller, Mrs Perry and the claimant met to discuss the flexible working request. Prior to the meeting Mrs Miller had been told by HR that the purpose of the meeting should be to listen to the claimant's proposals and to understand how she saw them working in practice, rather than for the respondent to make proposals to the claimant. As Mrs Miller put it, she was told to "be on receive rather than transmit." However, she was concerned (as stated above) as to how the claimant proposed to cover her role in circumstances where the hours proposed were not when the sports club was open.

130. Regrettably, Mr Forster-Burnell, the Regional Organiser for Unison, was unable to attend to support the claimant. We find that this was a more difficult and stilted meeting than the meeting on 22 May; the claimant and Mr Foster-Burnell were of the view that the claimant's role could be fulfilled on a part-time basis (as they had proposed in the flexible working request itself, possibly because they believed the appointment of Lucy Cottrell meant the role was already being fulfilled on a part-time basis, although that was not in fact the case) and the claimant was consequently focused upon impressing that fact at the meeting. Mrs Miller was firmly of the view that the role needed to be full time and required the post-holder to be present on shifts and was focused on conveying that. The result was that the conversation was neither open nor flowing.

131. *The minority member found "There is no evidence to support the assumption that the claimant and Mr. Foster-Burnell were of the view that the claimant's role could be fulfilled on a part-time basis because they believed the appointment of Lucy Cottrell meant the role was already being fulfilled on a part-time basis. Evidence shows that no-one was disputing the fact that the role should be a fulltime position. My understanding of the Claimant's request is that, as the Respondent is determined not to consider job-share for this role, the Claimant was trying her best to fit a fulltime role into a part-time resource. This evidence convinced me that while the Respondent was going through the motion only, the Claimant was trying desperately hard to find a solution to enable her to keep her job and care for her baby at the same time.*"

132. Mrs Miller told claimant that the Manager role involved shiftwork and that she had understood that that was what the claimant had been doing prior to maternity leave. The claimant suggested that she had only been doing a few

shifts because "she was doing her sports club manager role during the day and doing swimming in the evening." Mrs Miller provided her with a copy of the draft roster that was then being operated and asked her how she saw her availability fitting in with the roster and how she planned to do her job in those hours. The claimant noted that the roster did not reflect the roster she had worked before she commenced maternity leave. Mrs Miller asked the claimant to take the roster away and come up with some proposals as to how she could see the shift patterns working with her proposal.

133. Mrs Miller was not thereby asking the claimant to work the roster shifts, but rather asking how she anticipated conducting the managerial aspects of her role in light of the shift patterns in the days and hours that she had proposed.

134. *The minority member found* "*From the evidence in these paragraphs, I conclude that, given how the Claimant would have interpreted "being on shift" to mean working full shifts from the Rota, it is reasonable for the Claimant to believe that she was expected to fit her work pattern to the Rota when she was presented with a copy of it. In fact, this is exactly what I understood this evidence to mean. After all, as the Claimant had managed her staff before with her flexible working pattern to the total satisfaction of the Respondent, being given a draft of the Rota and asked to fit her work into that now could only mean that she was expected to work shifts from the Rota like the DMs. If Mrs Miller's intention was as is being claimed here, then there would have been no need to provide the Claimant with a copy of the Rota. All that she needed to be asked would have been about working the critical times of 8:30am and 5:30pm, cover for absences and observing her staff in action during their shifts which she previously had done during overlap hours and absence cover."*

135. The claimant proposed that the DMs should cover the shift hours when she was working and that another employee could be engaged to share the Manager's role on the days that she was not working. The claimant said that she was available to work on a Monday, Wednesday and either Thursday or Friday and had some limited flexibility with the hours that she had proposed because her parents partner could do the nursery drop off or pick up if she needed to be in earlier or later. The claimant mentioned that she could offer some additional hours to mentor or teaching the swim school, and would be interested in doing evening work in the swim school if her flexible working request could not be granted, because she would not need childcare.

136. The claimant did not suggest that she had flexibility to work hours which would enable her to oversee the necessary elements of early or late shifts, as she suggested in her witness statement, but rather was simply indicating that she could offer approximately half an hour's flexibility at the beginning and end of the hours that she offered. Her partner worked a six-month roster which he received an advance and the claimant would be able to offer some additional hours in relation to the swim school, rather than her substantive role. That was the clear recollection of both Mrs Perry and Mrs Miller and was reflected in the outcome letter which Mrs Miller wrote only days later.

137. Had the claimant realistically been suggesting that she was able to work the early or late shifts one would have anticipated, given that she had the benefit of union advice, that she would have made that plain, particularly when the question of overseeing the duty managers was discussed. She did not. The

position she suggested was entirely consistent with the terms of the flexible working request that she had submitted. Insofar as the claimant made reference to the ability to work in the evenings or at the weekend, that was limited to the scenario where she was not fulfilling her substantive post but rather was only engaged as a swim teacher, in which case she did not need to place her daughter into nursery and so had greater flexibility.

138. *The minority member found "My conclusions from the evidence in the above paragraphs are:-*

138.1. Firstly, by explaining that her partner's shifts were known six months in advance, the Claimant was indicating that her partner would, because he had sufficient notice, be able to provide the help she needed to be flexible.

138.2. Secondly, in relation to support at nursery pick up drop off times by relatives, there is no evidence that she mentioned anything about this being limited to half-an-hour flexibility in the mornings as suggested by the Respondent's evidence during the hearing. In fact, in cross examination by me, the Claimant confirmed that she wanted to return to work on a similar work pattern as before her maternity leave (though starting at 8:30 am rather than 10:00am) with the flexibility of overlap hours and covering shifts for absences.

138.3. Thirdly, the fact that the Claimant explained that she was available for evenings and weekends showed that she had the capacity to carry out her substantive duties in those times. The issue of child care is only relevant to the availability of the care for the child regardless of whether the Claimant was working as a swimming teacher or a Sports Club Manager. Had the Respondent been properly engaged in this process, and not been determined to ignore job-share as a possible solution, they would have seen this glaring opportunity."

139. When the claimant proposed that the role should be conducted by job share, Mrs Perry suggested that that would affect continuity and consistency, but neither she nor Mrs Miller set out the basis of the concerns which are addressed above. This was an unfortunate consequence of Mrs Miller's understanding that she was present at the meeting to listen and not to make proposals, rather than because those concerns did not in fact exist contemporaneously.

140. *The minority member found "My deductions are that the reason for not setting out the basis for "continuity and consistency" concerns was because such concerns could not be reasonably justified, and no evidence was ever produced to demonstrate these concerns were legitimate. In fact, as Mrs Miller (covering the responsibilities of the Operations Manager role) was providing cover for the Claimant when she (the Claimant) was not on duty, there had to be a proper process in place to ensure continuity and consistency between the two while the Facilities were open to the members. Clearly, handover arrangements between the Claimant and Mrs Miller, on a daily basis, worked very well as problems only started to appear after the Claimant went on maternity leave. This demonstrates that the concerns of 'continuity and consistency' could have been dealt with in the same way if the Manager role was shared by 2 competent and experienced people. There was no evidence*

to prove that these concerns were genuine. Being told to be in "receive" mode cannot be accepted as a reasonable argument to justify the approach adopted by such a senior Director; i.e. she (Mrs Miller) had decided, well in advance of the return to work negotiations, that the Manager role must be performed by one person on a fulltime basis and was not prepared to contemplate any other proposals."

141. The claimant was upset because from her perspective the meeting had begun with Mrs Miller stating that the role could not be done on anything less than a full-time basis, and therefore concluded that the respondent had no real interest in exploring options. As a consequence, she did not reply to Mrs Perry's request for confirmation that she would be able to return to the substantive role on a full-time basis or to Mrs Miller's request for her to explore the roster and to explain how her proposal would marry with the shift pattern within it.

142. In consequence, on 12 June when the claimant did not respond to a voice message from Mrs Perry chasing those matters, Mrs Miller emailed Mrs Perry indicating that she wished to inform the claimant that the School needed to progress matters and recruit a full-time manager as soon as possible.

143. Mrs Perry called the claimant later that day. During the discussion the claimant identified that the roster appeared to be missing 61 hours of cover across the duty supervisors shifts. There followed a discussion in which Mrs Perry explained that the School's concern was not only the requirement for the Manager to be available to cover shifts, but "also the presence on site across the week for continuity and consistency." Mrs Perry explained that for that reason it was the School's view that the Manager's role was not suitable for a job share. The claimant asked Mrs Perry to send her written reasons explaining why the School had concluded that the role could not be filled on a part-time basis. At the end of the meeting Mrs Perry advised the claimant that there was the possibility of a role as a swimming teacher with lessons from September 2019.

144. In the event Mrs Perry did not write to the claimant setting out the reasons as she suggested, but rather on 14 June Mrs Miller wrote to the claimant rejecting her flexible working request which contained the explanation. The reasons given were the permissible reasons within section 80G of the Employment Rights Act 1996, namely that the proposal would have a detrimental effect or impact upon:

144.1. the ability to meet service user demand;

144.2. the level of quality at the School;

144.3. the level of performance at the School;

144.4. the work available to be done during the periods would be insufficient; and

144.5. the School was unable to reorganise the work amongst its existing staff.

145. *The minority member found "It must be noted that no corroborative evidence was provided to substantiate the concerns listed in the letter of 144 June*

mentioned in this paragraph. Bearing in mind that I have to base my judgement on facts and not on unsubstantiated opinions, I can only conclude that, these unsubstantiated concerns were only 'window dressing' by Mrs Miller."

146. Within the letter Mrs Miller referred to the incidents at the swimming pool and its impact upon the pupils and Taunton Deane Swimming Club, and the School's conclusion that the Manager should oversee such technical areas. In addition, Mrs Miller detailed the School's concerns that the Manager should have complete oversight of the Lifeguards' skills, experience, training and professional development from a health and safety perspective and should be available to deal with escalated issues or concerns raised by the suite and pool users so as to be able to provide a management response within the appropriate time to avoid any "negative impact on both the School's use of the sports facilities and also continuing membership and, thereby, income generation." She stated that splitting the role across two members of staff would have a detrimental impact on those essential functions.

147. *The minority member found "It must be noted that the incident in the swimming pool mentioned here occurred while the Claimant was on maternity leave. The Claimant had always accepted, and understood the importance of, the Manager's responsibilities listed in Mrs Miller's letter of 14 June 2019 to the Claimant. Furthermore, the Claimant had discharged these responsibilities to the Respondent's total satisfaction prior to going on maternity leave. The problems only arose when the Respondent chose knowingly to provide inadequate maternity cover by placing an incompetent manager in the post. Therefore, I do not accept that, just because Mr. Maycock was a poor manager, a job-share arrangement by 2 competent managers would have caused the same problems at the Sports Club."*

148. Moreover, Mrs Miller stated that the Manager had to be flexible to work early mornings, evenings and weekends so as to effectively support the operation of the sports club and the needs of that service, and the claimant's proposed hours were insufficient to provide for the operational needs that were required. Finally, Mrs Miller indicated that as the School had an immediate need for a fully operational experience manager in the role it would advertise a full-time Manager role in the near future, but if the claimant decided that she could return on the substantive terms the School would not consider any applicants and the claimant would be entitled to return to her role. A similar course would occur if the claimant were to appeal her decision, and that appeal were to be successful. The claimant was reminded that the School would be recruiting swim teachers in September 2019 and Mrs Miller were be delighted if the claimant wish to return in that or any other capacity to the School.

149. *The minority member found "It must be noted that:-*

149.1. Firstly, the Claimant was willing to be flexible (including working mornings, evenings and weekends) just like before her maternity leave, and she confirmed this under cross examination. What she could not do was to be available on a full-time basis.

149.2. Secondly, the School had a "need for a fully operational experienced manager in the role" from soon after the start of the Claimant's maternity absence on 17 September 2018.

149.3. Thirdly, the Claimant was entitled to remain on maternity leave until 31 October 2019, and could have legally changed her mind about returning in August 2019.

149.4. Therefore, the urgent need, which was there from 17 September 2018 (i.e. more than 9 months before the date of this letter), was for a fully operational and experienced cover for the Claimant's maternity leave and not for a permanent replacement. I can only conclude that, the reason for the Respondent choosing to cope with an inadequate management in the Sports Club until the Claimant's return from maternity leave was that they expected, from the outset, that she (the Claimant) would be returning fulltime and, perhaps, this is what they had in mind when they granted her maternity leave."

150. On 14 June the school advertised the Manager's role with a closing date of 23 June (which was subsequently altered to 7 July). Regrettably, the claimant learnt of the advert before she received Mrs Miller's letter rejecting her flexible working request which explained the School's stance regarding the advertisement. The advert seriously damaged the relationship of trust and confidence between the claimant and the School. On 26 June and the claimant emailed Mrs Miller and Mrs Perry complaining about that chain of events.

151. On the same day, she appealed against the rejection of her flexible working request. The claimant proposed that she would work three days a week and the remaining elements of the role should be fulfilled by a job share. She identified that the DMs were collectively 61 contractual hours short over a four-week period which, if remedied, would provide greater coverage for the shifts across the week, and argued that enabled her request to be met more comfortably. The claimant requested an explanation as to why the role had been advertising on a full-time basis without any investigation of or advertisement for a part-time member of staff to cover her role.

152. Addressing the respondent's concern about health and safety, the claimant identified that she had previously been available by phone to DMs to cover health and safety issues that arose during their shifts and that she trained and supported the DMs so that they were able to address health and safety matters.

153. However, the claimant did not address the respondent's concern about oversight of the DMs themselves or the swim school staff and lifeguards. Rather she proposed that the duty supervisors should take on that role during the shifts and she would retain oversight, which did not engage with the respondent's prevailing concern for observational management by the Manager in person. The claimant did however propose that she would offer one-to-one meetings with the DMs and could be flexible when needed to conduct training.

154. Mrs Perry emailed the claimant on 27 June 2019 and advised her that "the School had an immediate need for a fully operational and experienced manager in the role". She explained that if the claimant's appeal was successful she would be able to return to the Manager's role on a part-time basis and there would be no appointment to the full-time post. She was clear the claimant had not been dismissed.

155. On 28 June the claimant was invited to an appeal hearing to take place on

9 July 2019 which was to be chaired by Mrs Nadeem Latte, the Foundation Director, and a member of the Senior Management Team.

156. On 8 July 2019 the claimant filed a grievance. The grounds of the grievance were that the respondent had dismissed the claimant's proposal job sharing out of hand at the meeting on 3 July, that the respondent had requested the claimant to identify how she would fit in with shifts, but had made a decision before that information was provided, and that Manager's role had been advertised on the same day as her flexible working request had been rejected. She complained that that latter course was a "clear fundamental breach of my contract of employment" and that the respondent's approach to her flexible working request and return to work was discriminatory.

157. It was agreed that the appeal should address the claimant's grievance in addition to her challenge to the outcome of the flexible working request.

158. The appeal took place on 9 July. Mrs Latte was accompanied by Joe Davey, the HR Director. The claimant was accompanied by Mr Foster-Burnell, the Unison Representative. A minute was taken of the meeting.

159. Prior to the meeting Mrs Latte met with Mrs Miller to understand the basis on which she had rejected the flexible working request. Mrs Latte read and considered the minutes of the meetings of 24 April, 22 May, and 3 June 2019, together with the claimant's flexible working request, the letter of 14 June rejecting that request and the claimant's appeal letter. We accept that Mrs Latte met with Mrs Miller to understand the School's position so that she could consider that as against the claimant's arguments set out in the flexible working request and minutes of the meetings referred to above, and that she approached the hearing with an open mind. We rejected Miss Macey's argument that she had closed her mind to the claimant's arguments and merely acted as a mouth-piece for the School's position during the appeal hearing. The issue is logically only relevant in so far as the claimant argues that we should draw an inference in relation to the allegation of direct discrimination on the grounds of sex for the reasons addressed below.

160. *The minority member found "I accepted Miss Macey's argument that Mrs Latte had closed her mind to the claimant's arguments and merely acted as a mouth piece for the School's position during the appeal hearing; hence, relevant to the allegation of direct discrimination on the grounds of sex."*

161. Early in the meeting, Mrs Latte set out her understanding of the School's rationale for the Manager's role to be full-time with oversight of the DMs' shifts and added to it elements of her own experience as a member of the Senior Management Team. She identified that the Health and Safety committee (on which she sat) had recently spent much of its most recent meeting discussing health and safety issues in the sports club, because it was acknowledged that that area had the greatest risk for the School, and that for that reason the School was not content for the sports club to be managed by DMs who were more junior to the Manager. In addition, she identified that the complexity of the Manager's role had increased during claimant's maternity leave with the result that these School had concluded that having a single point of contact for the sports club was of imperative importance, and therefore the role was not suitable for a job share.

162. *The minority member found "It is note-worthy that health and safety at the sports club became an area of greatest risk only since the Claimant went on maternity leave; purely due to inadequate and incompetent cover. No evidence was provided to show that this risk could not be managed in the same way as before the Claimant's maternity leave by two competent and experienced managers on a job-share basis."*

163. Whilst Mrs Latte was, in that last instance, expressing a view which represented both her own and the School's, we are satisfied that she did so intending that the claimant could engage with the concerns, rather than because she had closed her mind to any alternative, because it appeared to her that the claimant did not appear to be engaging with the issues that underlined the School's position. Mrs Latte had discussed the claimant's proposal for elements of her role to be covered by the DMS, and set out the School's concerns about that proposal.

164. *The minority member found "The fact is that Mrs Latte's role was to hear the appeal and make an unbiased judgement. Her role, as the appeal manager, was not to try to persuade the Claimant that the school was right before she has even heard the appeal. Bearing in mind the significant amount of time Mrs Latte spent with Mrs Miller prior to the appeal hearing meeting in order to understand the schools position, and expressed a view which represented both her own and the School's at the start of the appeal hearing, I am satisfied that she did so because she had closed her mind to any alternatives.*"

165. The minutes record Mrs Latte stating that "the School had covered her absence on maternity leave with adequate cover and that it had honoured her right to maternity leave on the understanding that she would return to work on a full-time basis." In her witness statement (para 25), she accepted that she had made the comment but suggested that she had been mistaken in suggesting it. At the outset of her evidence to the Tribunal Mrs Latte sought to resile from that position, arguing that on reflection, as a staunch feminist and a working mother of three children, it is not something that she would have said, because she understood that maternity leave is an absolute right rather than one which is conditional upon returning to a substantive role. Again, the claimant argues that we should draw an inference from that that Mrs Latte committed the act of direct discrimination as alleged.

166. *The minority member found "I believe Mrs Latte did make the statement "the School had covered her absence on maternity leave with adequate cover and that it had honoured her right to maternity leave on the understanding that she would return to work on a full-time basis" because:-*

166.1. Firstly, bearing in mind that Mrs Latte and Mrs Davey (HR Director) would have reviewed the minutes of the meeting, before forwarding them to the Claimant, soon afterwards when their memories were still fresh and, Mrs Latte had another opportunity to consider this when writing her witness statement, it is difficult to believe that she only realized that she would never have said such a thing at the hearing 14 months later.

166.2. Secondly, by claiming that she would never have said such a thing, she is implying that the minute-taker (Ms. Kate Short) deliberately falsified

the minutes by making note of something that had never been said; which is unlikely.

166.3. Therefore, it is reasonable to deduce that this statement was made and her retraction at the start of her evidence is, at best, dubious.

166.4. Finally, note that Mrs Latte insisted that the school had covered the Claimant's maternity leave with adequate cover. This is clearly not true as the School's own evidence showed that the cover the School provided was found to be totally out of his depth soon after he took over, resulting in all the problems at the Facilities that the Respondent has outlined.

166.5. I, therefore, conclude that Mrs Latte committed the act of direct discrimination as alleged."

167. There was discussion of the claimant's proposals. At that stage claimant suggested that there was a possibility of her working four days a week, and at the weekend. This was not a concrete proposal in the sense that the claimant did not say that she could work four days a week and at the weekend but, we find she floated the possibility that she may be able to work up to 4 days a week and occasionally at the weekend. Mrs Latte confirmed the claimant's request that she would have the option to provide further information in relation to the flexible working request after the meeting and Mrs Davey confirmed that the advert had been placed on hold pending resolution of the situation.

168. *The minority member found "I find that, the proposal of a 4-day plus weekend working pattern was a credible and serious compromise that would have met everyone's concerns. Yet, the Respondent chose not to explore this option. Clearly, even in the "receive mode", the Respondent had no interest in engaging in the process in good faith. It is, therefore, reasonable to conclude that the Respondent had no interest in any solution that would have been flexible enough to accommodate a breastfeeding mother to return to the role of Sports Club Manager."*

169. Mrs Latte rounded up by identifying that the School required someone who could manage relationships within the School and wider community as well as covering matters of health and safety and that in the School's view the Manager's position was of a senior management level which was a full-time position as the manager needed to be present to oversee their staff, and to direct to mentor them. Mr Foster-Burnell stated that was a very old-fashioned view and that by requiring the role to be a full-time one would discriminate against the majority of women. The minute records Mrs Davies stating that the School "was a traditional school but that some structures were better suited to full-time roles, and that it had been agreed that this was one of them." We accept Mrs Latte's evidence that that remark was made in the context that Mrs Davey was drawing a contrast between a health club (where part-time work might be appropriate in the role) and the School (where it was not, in the School's view).

170. *The minority member found "No evidence was provided, either by Mrs Latte or by Mrs Davey, to explain why a job-share could not work in a school sports club, but it could in a health club in a non-school setting. All evidence so far has shown that the Sports Club's problems were to do with the inadequacy of*

the management the Respondent chose to provide as maternity cover for the Claimant; it had nothing to do with whether that cover was on a job-share basis or not. I can only conclude that Mrs Davey's explanation was no more than trying to dig a senior colleague out of the whole she had just dug herself into."

171. On 15 July 2019 Mrs Davey telephoned the claimant and told her that it looked likely that the Manager's role was to remain a full-time one and the claimant would receive the outcome of her appeal that or the following day. She asked whether the claimant would be interested in an administrative role in the sports club working limited hours but for five days a week on basic pay.

172. *The minority member found "I note that, in the 15 July 2019 telephone conversation, Mrs Davey (HR Director) did not refer to the possibility of a 4-day plus weekend work pattern as a fulltime option suggested by the Claimant at her appeal hearing. It is, therefore, reasonable to conclude that the Respondent had no intention of taking this possibility seriously; especially, bearing in mind that her appeal outcome was due to be issued that day or the next. So, the only alternative offered to the Claimant was demotion.*"

173. On 15 July 2019 the claimant forwarded amended minutes of the appeal meeting to Mrs Davey. In evidence the claimant confirmed that the amendments had been made reflecting the notes that Mr Foster-Burnell had made at the meeting. They were not agreed by Mrs Latte.

174. On the same day the claimant wrote to Mrs Miller tendering her resignation. The claimant identified her discrimination complaint as the reason for her resignation.

175. Mrs Miller replied by letter dated 16 July reiterating the possibility of the administrative role and indicating that the School was willing to explore how the position might work for the claimant if she was interested. She responded to the claimant's complaints of discrimination and encouraged the claimant to withdraw her resignation and consider her options following the outcome of the appeal.

176. On 17 July Mrs Latte wrote to the claimant providing the outcome to the appeal against the flexible working request and the grievance. Mrs Latte accepted in cross examination that elements of the claimant's grievance had not been addressed in the outcome letter and she regretted that, albeit that the focus of the grievance was the manner in which the flexible working request had been handled and the claimant's primary focus was the outcome of the flexible working request itself, and she had focused on those matters in the outcome letter.

177. *The minority member found "I find that Mrs Latte's not addressing elements of the Claimant's grievance and their dismissal in cross examination rather negligent. The third item in the Claimant's grievance letter specifically deals with the fact that she proposed a job-share arrangement in the meeting of 3 June 2019 which was dismissed instantly without exploring this option. This is another example of the Respondent not being engaged in the Claimant's return to work process in good faith."*

178. Mrs Latte had received and considered the further information provided by the claimant (which is summarised in the outcome letter) and had spoken to

Mrs Miller and Mrs Perry to understand the school's position as discussed at the appeal hearing. We accept that the outcome letter reflects the detailed and careful consideration of the key issues by Mrs Latte.

179. *The minority member found "I find that the outcome letter did not reflect a detailed and careful consideration of the issues by Mrs Latte; especially, when taking into account her admission that she had not considered elements of the Claimant's grievance."*

180. Amongst the conclusions drawn by Mrs Latte was her view that was not possible to separate out the hours when the Manager covers duty shifts from those when they are fulfilling their overarching management responsibilities and that the 61 hours a month which the claimant had identified as being missing from the shift were in fact hours during which the Manager was expected to be carrying out those functions. In her view if the DMs were to be responsible for carrying out those functions themselves, there would be no mechanism by which they could be effectively managed and developed following observation from a senior manager. Crucially, given the primary function of the Manager's role was to ensure that any health and safety risk posed to the pupils was reduced to the lowest possible level, she concluded that splitting the role in a job share increased that risk unnecessarily. Thus, she accepted the argument that permitting the role to be fulfilled through a job share would have a detrimental effect on the quality performance and service particularly with regard to health and safety and that the school would be unable to reorganise the work inherent within the role amongst its existing staff as there was no one who could fulfil the job share with the claimant.

181. *The minority member found "It must be noted that the Claimant has never suggested that the hours when the Manager covers duty shifts should be separated from those when she is fulfilling her overarching management responsibilities (observation, mentoring and appraisal); she simply maintains that she does not have to take on regular shifts on the Rota (just like before) and her overlap hours will give her the opportunity to fulfil them – which is exactly what Mrs Miller confirmed (under cross examination) she wanted. Further, it should be noted that no evidence was produced to substantiate the assertion that a job-share for the Manager role would be detrimental to addressing the health and safety concerns mentioned in this letter. In fact, the Respondent did nothing to alleviate the problems that began to arise soon after the start of the Claimant's maternity leave with a single person, on a fulltime basis, in the role. So, it is reasonable to conclude that Mrs Latte has either misunderstood, or deliberately misconstrued, the Claimant's proposals in order to justify her own biased views."*

The Law

182. The claimant brings three claims under the Equality Act 2010. The first for direct discrimination, the second that she suffered detriment because she exercised or sought to exercise her right to ordinary maternity leave, and the last that she suffered indirect discrimination.

183. The relevant law is contained in sections 39 and 13, 18 and 19 of the Equality Act 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(d) by subjecting B to any other detriment.

13. Direct discrimination

(1) 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.

18 – Pregnancy and maternity discrimination

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

19. Indirect discrimination

(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.

23. Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

184. The tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

> (2) If there are facts on which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

185. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

186. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e. that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

187. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

188. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

189. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154). Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see

Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

190. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

Direct discrimination

191. Where a claimant brings a claim of direct discrimination, they must show that they were treated less favourably than an actual or a hypothetical comparator and that the reason for the treatment was the protected characteristic relied upon. The circumstances of the comparator must be the same, or not materially different to the claimant's circumstances. If there is any material difference between them, the statutory definition of comparator is not being applied (Shamoon). It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

192. A person is subjected to a "detriment" for the purposes of section 39 EQA if "a reasonable worker would or might take the view that the treatment accorded to her had in all the circumstances been to her detriment": Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

Pregnancy and maternity discrimination

193. A claim under s.18 EqA is akin to a claim for direct discrimination, but without the need for a claimant to identify a comparator; the claimant must show 'unfavourable' treatment rather than 'less favourable' treatment than a comparator.

194. There is still however a causation test in the word "because" in s.18(4). That requires the tribunal to look at the thought processes of the alleged discriminator (see Interserve FM Ltd v Tuleikyte [2017] IRLR 615).

Indirect discrimination

195. The burden of proving the PCP, the group and individual disadvantage lies on the claimant (Dziedziak v Future Electronics Ltd EAT 0271/11).

196. To ascertain the disadvantage, section 19 requires a comparative exercise and the EHRC Employment Code of Practice ("the Code") endorses the pool approach as a method (although not the only one) of establishing particular disadvantage under the EqA. The tribunal must identify a hurdle that has been

placed in the way of the complainant and consider the range of persons affected by it. This will direct attention on the 'pool for comparison', which is the focus of this section. The Code at para 4.18 stipulates the pool should be formed as follows: 'In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively'.

197. In Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 the Supreme Court observed at [14] that the (then) new formulation of indirect discrimination in s.19 Equality Act 2010:

> "was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in *Equality: the New Legal Framework*, Hart 2011, pp.64–68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question"

198. In Essop v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice , addressing Naeem, the Supreme Court had to resolve an issue about the correct choice of pool. Lady Hale JSC dealt with that issue as follows:

> "40. The second argument relates to the group or "pool" with which the comparison is made. Should it be all chaplains, as the employment tribunal held, or only those who were employed since 2002? In the equal pay case of Grundy v British Airways plc [2008] IRLR 74 at paragraph 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in Allonby v Accrington and Rossendale College [2001] IRLR 364, at paragraph 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that "There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition."
>
> 41. Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under s.14 of the Equality Act 2006, at para. 4.18, advises that:
>
> > In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively.
>
> In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact

upon the group without it. This makes sense. It also matches the language of s.19(2)(b) which requires that "it" – i.e. the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

199. The Code makes it clear that 'a statistical analysis may not always be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of people are too small to allow for a statistically significant comparison' — para 4.13.

200. in London Underground Ltd v Edwards (No.2) 1999 ICR 494, CA, the claimant was one of only 21 women in a total pool comprising 2,044 train operators. All 2,023 men were able to comply with a requirement for flexible working hours, as were all the women save for the claimant herself. An employment tribunal held that the claimant had nonetheless been indirectly discriminated against on the ground of sex. Given the background of the disparity in numbers between male and female train operators, it was appropriate to go beyond the specifics of the pool in question and take account of common knowledge that women are more likely to be single parents and have primary responsibility for childcare. The tribunal accordingly held that the requirement for flexible working was one with which the proportion of women who could comply was considerably smaller than the proportion of men.

201. Both the EAT and the Court of Appeal upheld the tribunal's decision. In doing so, the courts specifically sanctioned the right of tribunals to use their general knowledge and expertise to look outside the pool for comparison and to take into account national statistics showing that ten times as many women as men are single parents or look after children. In the words of Lord Justice Potter: '[T]he comparatively small size of the female component [in the pool] indicated… without the need for specific evidence, both that it was either difficult or unattractive for women to work as train operators… and that the figure of 95.2 per cent of women [able] to comply was likely to be a [maximum] rather than a [minimum] figure.

202. If it is established that the PCP causes a disadvantage to the group, that is enough - there is no need for the claimant to establish a causal link between the PCP and the protected characteristic, only that there is a causal link between the particular disadvantage suffered by the group and the individual (see Essop per Lady Hale at para 25). The reason why a particular group or an individual cannot comply with the PCP may be 'many and various'. The reason for the disadvantage need not be unlawful or under the control of the employer (Essop para 26).

203. In Essop the Supreme Court held that the Court of Appeal was wrong to hold that there was a need under s.19 EqA for a claimant to show both that there was a group disadvantage, and *the reason why* the PCP caused the group to have been subject to such a disadvantage. Lady Hale JSC, giving judgment of the Court, said at paragraph 24:

"The first salient feature is that, in none of the various definitions of indirect

discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. Thus, there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

204. All that is required is *correspondence* between the disadvantage suffered by the group and that suffered by the individual (Essop para 31).

Justification

205. In Homer the Supreme Court considered the necessary elements of and approach to a defence of justification:

"20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

> '… 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.'

He then went on at [165] to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

> 'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?'

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] IRLR 726 [31], [32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

24 Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."

206. In R (Tigere) v Secretary of State for Business, Innovation and Skills [2016] 1 ALL ER 191, the Supreme Court again identified the need, when considering

justification, for a Tribunal to both analyse the justification of the PCP and then carry out an analysis of the discriminatory effect of the relevant measure:

> "It is now well established in a series of cases at this level, beginning with Huang v of State for the Home Dept, Kashmiri v Secretary of State for the Home Dept [2007] UKHL 11, [2007] 4 All ER 15, [2007] 2 AC 167, and continuing with R (on the application of Aguilar Quila) v Secretary of State for the Home Dept , R (on the application of Bibi) v Secretary of State for the Home Dept [2011] UKSC 45, [2012] 1 All ER 1011, [2012] 1 AC 621, and Bank Mellat v HM Treasury (No 2) [2016] 1 All ER 191 at 204 [2013] UKSC 39, [2013] 4 All ER 533, [2014] AC 700, that the test for justification is fourfold: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?" (Tigere paragraph 33)."

207. The burden of establishing justification rests upon the Respondent. In Hardy & Hansons Plc v Lax the following was said of the concept of justification of indirect discrimination (albeit in respect of the then applicable provisions of the Sex Discrimination Act 1975):

> "32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.
>
> 33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby [2001] ICR 1189 and in Cadman [2005] ICR 1546, a critical evaluation is required and is required to

be demonstrated in the reasoning of the tribunal."

35 The employment tribunal, at para 9, referred to Allonby and stated:

> "It is understood that it was necessary to weigh the justification put forward by the [employers] against its discriminatory affect. Accordingly, it proceeded to consider the matters on which the [employers] relied in order to refuse the applicant's request that the RRM job be done on a job share or part-time basis."

Detriment on the grounds of having made a flexible working request

208. Section 47E ERA 1996 provides:

47E. Flexible working

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee—

(a) made (or proposed to make) an application under section 80F [an application for flexible working],

48. Complaints to employment tribunal

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section … 47E

(2) On a complaint under subsection (1) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

Discussion and conclusions

Unfavourable treatment because the claimant had exercised or sought to exercise her right to maternity leave (section 18 EQA 2010).

209. The respondent accepted that (a) it had advertised the claimant's job on a permanent basis whilst she was on maternity leave; (b) on return from her maternity leave, the respondent had instructed the claimant that her role required her to undertake shiftwork; and (c) it had rejected claimant's request to work fixed hours in her role and required her continued to work flexible hours, and that each of those amounted to a detriment.

210. The issue for the Tribunal in respect of each of those matters was whether the reason for the actions was because the claimant had exercised or sought to exercise her right to ordinary maternity leave.

(a) Advertising the Manager's role

211. Miss Macey argues that the Tribunal should draw an inference that the reason was the fact that the claimant had exercised her right to maternity leave on the grounds that Mrs Miller sought to advertise the Manager's role when she became aware of the flexible working application and did so within minutes of

rejecting the flexible working application. Finally, she argues that the Tribunal should draw an inference from Mrs Latte's comment that the School had "honoured" the claimant's right maternity leave on the understanding that she would return to work full-time, arguing that this demonstrated a discriminatory mindset throughout the School's senior management team.

212. We do not accept that we should draw an inference from those matters, as they represent a simplistic and unbalanced summary of the events. Rather, we find that the reason for Mrs Miller's decision to advertise the role was because (a) the role was a critical one within the function of the School, which needed to be fulfilled on a full-time basis (b) the current post holder, Mr Maycock, was struggling in the post and had indicated that he wished to resign, although he had not yet given notice and (c) the claimant indicated on 20 May 2019 and confirmed during her meeting with Mrs Perry on 22 May 2019 and in her flexible working request on 28 May 2019 that she would be unable to return to her role on a full-time basis. That position had been discussed and explored at the flexible working meeting on 3 June and the claimant had been asked to consider how her proposal might fit with the needs of the role. She delayed in responding to that request and in consequence, when Mrs Miller concluded that the claimant would be unable to fulfil the role as she could not meet the School's need for a full-time post, she both rejected the request and instructed Mrs Perry to advertise the role.

213. It follows that the reason for the advertisement was not the fact that the claimant had exercised or sought to exercise her right to take maternity leave, but rather the fact that the role was in danger of being vacant for the start of the Michaelmas term in September, and therefore there was a pressing need to advertise to ensure that a suitable applicant was in post. Miss Macey's argument that the claimant's maternity leave could continue until November 2019 overlooks the fact that the claimant had indicated that she wished to return in August 2019, (when her maternity pay expired), that the existing post-holder was unlikely to remain in post for much longer and in any event that he was not satisfactorily filling the position, and so needed to be replaced. Once it was clear that the claimant could not be the solution to the problem, the respondent had to advertise the role.

214. Furthermore, we do not consider it appropriate to draw an inference that Mrs Miller adopted a discriminatory mindset on the grounds of a remark which had been made by Mrs Latte after Mrs Miller had made the decision to advertise the post, as argued for by Miss Macey.

215. *The minority member concluded "Considering the facts that:-*

215.1. Mrs Latte spent a lot of time with Mrs Miller, prior to the appeal hearing, in order to understand the school's position, and

215.2. Mrs Miller had decided, from the outset, that the role of the Sports Club Manager must be filled by one person on a fulltime basis;

215.3. I conclude that there was a discriminatory mindset throughout the School's senior management team.

216. *The argument that there was an urgent and immediate need for a replacement because Mr. Maycock was struggling is not credible. The School*

was fully aware of Mr. Maycock's management capabilities before he was appointed as cover for the Claimant's maternity leave. Furthermore, the problems started to appear soon after Mr. Maycock's appointment in November 2018; well over 8 months before the Claimant's return to work negotiations started. Therefore, the "urgent and immediate" need for a replacement for Mr. Maycock was at the start of the Claimant's maternity leave and not 8 months later.

217. *The argument that the role had to be advertised as a fulltime permanent replacement in June because the it was in danger of being vacant at the start of the new term in September is not sustainable. The fact that the Claimant had a legal right to stay on maternity leave until November 2019 is relevant here; for, although the Claimant had indicated that she wanted to return to work in August, she could have changed her mind in order to give herself more time to find a solution which might have enabled her to work fulltime. Had this occurred, the Claimant would still have been on leave at the start of term in September and, if Mr. Maycock had resigned, the post would have been vacant and the School must have been aware of this.*

218. *Therefore, I conclude that Mrs Miller took this opportunity to force the issue; thus, demonstrating a discriminatory mindset which was then articulated clearly by Mrs Latte at the appeal meeting.*

(b) Informing the claimant that she would have to undertake shiftwork in the Manager's role.

219. The Tribunal unanimously found that the nature of the shiftwork in question was a requirement to be present during the DM's shifts to undertake supervision, appraisal and mentoring, and to ensure that the risk assessments and health and safety measures in place were effectively put into practice during the shifts. The majority are satisfied that the reason for that requirement was not because the claimant had exercised or sought to exercise her right to maternity leave, but rather because the respondent's experience with Mr Maycock in post, together with the incidents with the pool plant in June and issues with the sports club members in or about the same period had crystallised the need for the Manager to be present poolside, and at the very least close by within the Facilities, particularly during the early morning sports club opening times. In addition, being present on shift ensured that there was a single point of contact for those in the sports club in relation to any issues with the facilities.

220. We have found that the requirement was one that was always part of the role even if it was not one that the claimant had fulfilled as a consequence of her agreement with Lucy Cooper. It follows that the claimant was not informed she would have to undertake shift work because or she had exercised her right to maternity leave.

221. *The minority member concluded "The Tribunal have found, and the Claimant has always agreed, that the nature of the shiftwork in question was a requirement to be present during the DMs' shift to undertake supervision, appraisal and mentoring, and to ensure that the risk assessments and health and safety measures in place were effectively put into practice during the shifts. During cross-examination, the HR Advisor (Mrs Perry) and the Chief Operating*

Officer (Mrs Miller) confirmed that what they expected the Manager's daily work pattern to be was exactly the flexible way the Claimant was working prior to her maternity leave as illustrated by the evidence of the worksheets on the School's shared drive. The inference I have drawn is that by 'shift' for the Manager they meant a bespoke work pattern which is different and more flexible than that for the DMs. This conclusion is supported by the fact that when Mr. Maycock tried to fit-in his work pattern with the Rota for the Dms, he could not perform the Managerial duties that were expected of him and everything started to go wrong. I am entirely satisfied that the Claimant was deliberately led to believe, during the return to work negotiations, that by "shift" Mrs Perry and Mrs Miller meant a work pattern matching that for the DMs, with specific commitments on the Rota just like what Mr. Maycock had done and never clarified that they meant a bespoke work pattern that was flexible enough to enable her (the Claimant) to perform her duties as before. Bearing in mind that the School was totally satisfied with the Claimant's performance prior to her maternity leave, I am entirely satisfied that the reason for creating such a confusion on the meaning of the word 'shift' was because the Claimant had exercised or sought to exercise her right to maternity leave."

(c) Refusing to allow the claimant to work fixed hours

222. The fixed hours in question were those in the claimant's flexible working request, namely 830 until 530, with the possibility of 30 minutes flexibility on either the start or end times.

223. For the reasons that we have given in relation to the issue (paragraphs 219 to 220) above, the majority is satisfied that the reason for the rejection of those proposed fixed hours was not because the claimant had exercised or sought to exercise a right to maternity leave, but rather because they did not meet with the respondent's business needs for the Manager's role.

224. The claims that the claimant was treated unfavourably because she sought to exercise or had exercised her right to maternity leave are therefore not well-founded and are dismissed.

225. *The minority member concluded "From December 2017 to the start of her maternity absence in September 2018, the Claimant, with the agreement of her line manager (Lucy Cooper) had worked a daily pattern which generally consisted of 10:00am to 6:30pm with the flexibility of changes to the start and end times to create overlap hours, with the DMs and the other staff under her management, for the early and late shifts to enable her to perform her managerial duties. This was augmented by complete shifts on the Rota to observe DMs in full and to provide cover for their absences. I am totally satisfied, and this was confirmed under cross-examination, that all the Claimant was asking was to change the 10:00am - 6:30pm pattern to 8:30am – 5:30pm with the same flexibilities as before to ensure no detriment to delivering her managerial duties. Therefore, there was no request for a change in contracted hours as the flexibility sought would have been covered by what her contract stated and Mrs Perry and Mrs Miller confirmed (under cross-examination) they wanted and consistent with the business needs.*

226. *Therefore, I am totally satisfied that this request was deliberately misunderstood in order to make it easier to reject it because the Claimant had*

exercised or sought to exercise a right to maternity leave.

227. *The claims that the Claimant was treated unfavourably because she sought to exercise or had exercised her right to maternity leave are, therefore, well-founded and are upheld."*

Detriment for making a flexible working application (section 47 ERA 1999).

228. The detriment complained of is the decision by Mrs Miller to advertise the Manager's role. The claimant must show that the reason for the decision was the fact that the claimant had made a flexible working application.

229. It is important to note that the nature of the causative test is not a but for one (see Khan), but rather as Shamoon makes clear, the Tribunal must enquire into the thought process of the individual whose action is said to have caused the detriment.

230. Miss Macey argues that the coincidence of the rejection of the claimant's flexible working application and the decision to advertise the role necessarily entitle the Tribunal to draw the inference that it was the former which was the cause of the latter, if it does not establish a direct causative link between the two.

231. We reject that argument - if the reason for the advertisement were the fact of the flexible working request, then the logical point at which the advertisement would have been placed was on receipt of the request on the 28 May 2019. In the event, the advert was not placed until after it had been clarified (during the telephone discussion between Mrs Perry and the claimant on 12 June), after the flexible working request meeting, that there was no mechanism by which the School's requirements for the Manager's role could be married with the claimant's desire for part-time work. It was then that Mrs Miller gave the instruction to advertise the role. The reason for the advertisement was that detailed at paragraphs 212 and 213 above.

232. The claim of detriment because of making a flexible working request is therefore not well-founded and is dismissed.

233. *The minority member concluded "Considering the fact that, part of the Claimant's flexible working request included a proposal for a job-share arrangement which was rejected out of hand with no proper consideration by Mrs Miller and which was ignored by the appeal manager (Mrs. Latte), I accept Miss Macey's argument.*

234. *The claim of detriment because of making a flexible working request is, therefore, well-founded and is upheld."*

Direct sex discrimination (section 13 EQA 2010) – "a traditional school" which could not accommodate differing working patterns

235. The conduct said to form the less favourable treatment is an alleged comment made by Mrs Latte during the Appeal meeting on 9 July 2019 that the school could not accommodate differing working patterns because it was a traditional school.

236. The factual basis on which the allegation is advanced is not entirely clear. The claimant made no reference to the alleged comment in her witness statement. Mr Foster-Burnell's statement appears to suggest that the comment was in fact an inference that he drew from a remark made by Mrs Latte, but he does not explicitly state that she said the words pleaded in the Particulars of Claim.

237. In cross-examination, Miss Macey relied upon a comment recorded as being made by Miss Davey during the meeting, although that was not the pleaded claim. The minute records the relevant exchange as follows: Mrs Latte stated that the School wanted one full-time employee in the Manager's role, Mr Foster-Burnell replied that that was a "very old-fashioned view" and that requiring it to be a full-time only role was discriminatory, and Mrs Davey is recorded as stating "the school was a traditional school but that some structures were better suited to full-time roles, and that it had been agreed that this was one of them." Thus, the reference to a traditional school appears to have been made by Mrs Davey, not Mrs Latte.

238. The claimant accepted in evidence that the remark may have been made by Mrs Davey, and not by Mrs Latte. The majority found it striking that even in the edited and amended note of the meeting that had been prepared by Mr Foster-Burnell there was no reference to the comment that was alleged to have been made, and in particular no link was drawn between the comment "traditional school" and the unwillingness to consider alternative working patterns. We are certain that had such a remark been made Mr Foster-Burnell would have ensured that it was recorded in the minute which he prepared of the meeting.

239. On that basis we are not persuaded on the balance of probabilities that the comment was made as alleged. Furthermore, even were the comment to have been made, we conclude that it was not less favourable treatment because we are satisfied that Mrs Davey would have said the same thing to a man who was Manager who had made a flexible working request to fill the role on a part-time basis. There are no primary facts from which we could properly infer that the reason for the comment was the claimant's sex rather than the School's requirement for the Manager's role to be full-time.

240. The claim of direct discrimination is therefore not well founded and is dismissed.

241. *The minority member concluded "The Claimant accepted in evidence, and the Respondent did not contradict, that the remark may have been made by Mrs Davey who is a member of the School's senior management team as the HR Director, and not by Mrs Latte. Regardless of who maid this comment, I am satisfied that it was, or that the reason for it was, the Claimant's sex as it demonstrates a discriminatory mindset among the School's senior management team.*

242. *The claim of direct discrimination is, therefore, well-founded and is upheld."*

<u>Indirect discrimination (Section 19 Equality Act 2010).</u>

243. The respondent accepts that it applied a criterion that the role of Sports Club Manager should be undertaken full-time and required shiftwork and that it

would have applied that PCP to persons who were not of the same sex as the claimant.

Did the PCP place (or would it place) those who share the claimant's protected characteristic, namely sex, at a particular disadvantage compared to others not of the same gender, because of their gender?

244. The respondent accepts that it would have applied the PCPs to a man. The issue is whether the PCPs placed or would place women at a particular disadvantage because of their gender.

245. We are satisfied that the appropriate pool is those workers/employees are required to fulfil their job role on a full-time basis and to work differing shift hours on their return from a period of paternity or maternity leave. It would not be appropriate to identify the pool as the workforce generally, because that ignores "the context or circumstances in which [the PCP] is sought to be applied" (adopting the comments of Lord Justice Potter in University of Manchester v Jones [1993] ICR 474 at 505). Nor would it be appropriate to limit the pool to those returning from maternity leave because that would necessarily remove men from the pool for comparison, and because that is to create a "sub-group" in the manner expressly criticised by Lord Justice Elias in R (On the Application of Unison (No.2)) v The Lord Chancellor [2014] EWHC 4198 at paragraph 71.

246. The basis of the disadvantage identified by the claimant is that women are more likely to have caring responsibilities with the result that (a) full-time work is more challenging because of the need to care for their children and (b) it is more difficult for them to organise their time to ensure they can comply with the varying hours required for shiftwork for the same reason.

247. The respondent argues that the claimant must adduce some evidence from which the Tribunal could properly infer that women are placed at that disadvantage. The respondent relies in particular upon the comments of Lady Hale in paragraph 39 of Essop that "there is nothing peculiar to womanhood in taking the larger share of caring responsibilities in a family. Some do and some do not."

248. However, we reject the respondent's argument for the following reasons:

248.1. First, in Edwards the Court of Appeal sanctioned the right of Tribunals to use their general knowledge and expertise to look outside the pool for comparison and to take into account national statistics showing that ten times as many women as men are single parents or look after children.

248.2. Secondly, whilst Edwards was decided in 1999, and (prior to the effect of the Covid-19 pandemic) the increase in parental rights[1] has no doubt increased the number of men who have the primary child caring responsibilities within a family, there is no evidence before us to suggest that that figure has changed so significantly that the general principle no longer holds true, rather the statistics from the respondent's own workforce suggests that women form 62% of its workforce at large and 81% of its

[1] occasioned by the Paternity and Adoption Leave Regulations 2002, Shared Parental Leave Regulations 2014 (and similar legislation in 2014)

part-time staff, which is consistent with the differential in childcare identified in Edwards. The Tribunal is prepared to take judicial notice of the fact that the majority of women with young children who work part-time do so because of their child caring responsibilities, rather than for any other reason.

248.3. Finally Edwards was cited with approval by Lord Justice Elias in R (On the Application of Unison (No.2)) v The Lord Chancellor [2014] EWHC 4198 in 2014 (see paragraph 74) and whilst the reference was in relation to the identification of the appropriate pool for comparison, the Supreme Court did not choose to distinguish or disavow the comments in Edwards referred to above.

249. Having identified the appropriate pool, the Tribunal must go on to determine whether women within the pool were placed at a disadvantage by the PCP. At that stage it matters not that some women are the primary carers and some are not because it is enough that some are and that they are put at the disadvantage in question - see Essop at paragraph 27. We are therefore satisfied that the PCP put women at a particular disadvantage.

250. The respondent accepts the claimant was placed at a disadvantage because she was unable to return to her post due to child caring responsibilities. The respondent must therefore show that the treatment was a proportionate means of achieving a legitimate aim.

251. *The minority member agrees with the majority's conclusion on this issue.*

Justification

252. The respondent relies upon the following arguments:

252.1. the business aim or need sought to be achieved is ensuring the safe and effective running of the respondent's sports club [the claimant accepts this was a legitimate aim];

252.2. the treatment was reasonably necessary because shiftwork provides broad cover of the hours of the Respondent's sports club opens [the claimant denies that it was reasonably necessary for the shiftwork in the role to achieve the legitimate aim];

252.3. the treatment was proportional because shiftwork achieves the business aim without disadvantaging the respondent's employees and pupils and maintains the safe and effective operation of the sports club [this is denied by the claimant, who argues that permitting the role to be filled by a job share through which the claimant would not have to work shift hours would be a more proportionate means of achieving the legitimate aim].

253. The first dispute between the parties is whether there was a reasonable business need for the role to be filled on a full-time basis at all. The claimant's position, reflected in her request for flexible working, was that the role could be completed on a part-time basis. We unhesitatingly reject that proposition. First, when the claimant was working reduced hours and duties prior to her maternity leave the pressures of work led to her experiencing increasing stress levels and the need for additional support to be provided. Secondly, when Mr Maycock

was in the role, despite the fact he was working on a full-time basis, the demands of the work meant that he struggled to fulfil the essential functions to a standard the respondent desired and some administrative support was provided following the appointment of Miss Cottrell.

254. The Tribunal are unanimously satisfied that there was a real need for the role to be fulfilled on a full-time basis. Additionally, we must consider whether there was a real business need for the role to involve an element of shiftwork to ensure the necessary supervision, mentoring and appraisal of the DMs whilst on shift. That requirement, or need, went beyond simple observation but also required the Manager to observe the DMs' interactions with lifeguards, swim coaches and sports club members, and their adherence to and real-time assessment of the effectiveness of the various practices that had been put in place to limit the health and safety risks to the pupils at the School and sports club uses.

255. In addition, the presence of the Manager on the poolside served an essential role in the commercial function of the sports club, by maintaining and promoting a positive relationship between the users of the Facilities and the School. We are satisfied that the presence of the Manager on the poolside or close by would facilitate the immediate identification of problems, and their quicker resolution, which would improve the relationship with the sports club members and simultaneously reduce any health and safety risk to the School's pupils, for example by identifying doors that had been wedged open. Face-to-face discussions, and more immediate responses are, in our view, far more likely to be well received and/or to assuage any growing discontent amongst the sports club users than emails and letters sent after the event, which are far less personal and far more corporate.

256. In the circumstances of this case, where the Operations Manager role was vacant, where there had been a number of red flag incidents relating to the wedging of doors and the malfunction of the pool plant, and where the DMs in post were inexperienced and new to their role, we are satisfied that the measure of requiring the post-holder to work full-time and to cover elements of the shift was rationally connected to the legitimate aim and reflected a real business need (applying the test as articulated in DeFreitas and R (Tigere).

257. We must therefore consider whether the respondent could have adopted a less intrusive measure to achieve the business aims. The claimant argues that permitting the role to be fulfilled by a job share would have achieved the same aim but would have had a less discriminatory effect. We remind ourselves that the respondent does not have to demonstrate that there was no less discriminatory means of achieving the objective (applying Hardys and Hanson plc v Lax), only that the means chosen struck the appropriate balance between the aim and the discriminatory effect.

258. Whilst the question of justification is a matter for the objective assessment of the Tribunal, we cannot conduct that assessment in isolation from the facts of the case, merely on the basis of the Tribunal's own view (no matter how objective) of how such matters might work. Rather, we must consider the evidence before us relating to the "working practices and business considerations involved" (applying Bikla-Kaufaus) and, on the basis of that evidence, reach the necessary objective conclusion.

259. Here, the relevant factual background prayed in aid by the respondent was its view that the role could not be satisfactory performed through a job share in relation to three fundamental aspects and responsibilities of the role. First, in relation to the safeguarding element of the role, given the potential risk caused by members of the public having access to pupils in the changing rooms. Secondly, in relation to the health and safety element of the role, in particular in relation to pool plant issues, the inherent dangers of a pool and sports complex, and finally in relation to the commercial function of the sports club, given the need for a single point of contact and for oversight of issues connected to the sports club. The essential nature of the respondent's concern was that where those functions had been split between a number of members of staff, the necessary continuity of the oversight, understanding of the prevailing issues, and consistency in the approach to their resolution was adversely affected in circumstances in which, notwithstanding that the risk might be low, the consequences if the risk were to materialise could be catastrophic.

260. We recognise that we must form our own objective assessment of that viewpoint. We note that the respondent's viewpoint was formed with the benefit (if one may call it that) of the experience of various functions of the Manager's role being split between the claimant and an administrative assistant (prior to her maternity leave) and subsequently between Mr Maycock and Miss Cottrell and the DMs (during it). The overwhelming consensus in relation to that experience amongst the respondent's senior management team was that it was entirely unsatisfactory. There was evidence in the bundle to establish those concerns and their causes; by way of an example a Headmaster does not usually spend his time sending photographs of doors to the Chief Operating Officer. Furthermore, the respondent had recently changed its operating practice to ensure that the fitness suite should be manned at all times because of concerns about the risks posed to pupils by members of the public using it. It is also relevant to that assessment, in our view, that the claimant's proposal involved transferring significant elements of the Manager's responsibility to the DMs during shift hours.

261. In the majority's view, judged objectively, the unique nature of the role and the demands occasioned by the circumstances in which it operated have the effect that the role was not appropriate for a job share. The respondent's concerns were each legitimate, appropriately considered and weighed and significant. In particular, we accept the need for continuity and consistency to ensure that the measures adopted in relation to health and safety and safeguarding were as effective as they could be. The parents who were paying significant sums for their children to attend the school would require nothing less, to say nothing of the statutory obligations on the school in relation to the care and protection of children. The operation of the Facilities cannot sensibly, logically or realistically be compared to the running of a community leisure centre for that reason in particular. Whilst a job share may be appropriate, and no doubt has been adopted in many community leisure centres, this was an entirely different environment with different pressures and risks and obligations. In our view the legitimate aim could not be achieved by the less intrusive measure of a job share.

262. Bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, we are satisfied

that the respondent struck a fair balance between the rights of the claimant and the interests of the pupils and sports club members.

263. Although it is not central to our decision, we observe that the prospect of the respondent being able to recruit an individual of the appropriate experience and skills on a salary of approximately £12,000, in circumstances where they would be required to undertake all the early and late shifts and the majority of the weekend work was limited at best, and fanciful at worst. Yet that was the nature of the claimant's proposal for a job share. Consequently, it is relevant to the assessment of whether there was a less discriminatory means of achieving the legitimate aim, that there was a very limited prospect of the less discriminatory method being successfully operated at all.

264. The respondent's application of the PCP was therefore justified in the circumstances of the case. The claim of indirect discrimination is not well-founded and it is dismissed.

265. *The minority member concluded "Contrary to what is stated in paragraph 253, I believe the first dispute between the parties is whether there was a reasonable business need for the role to be filled by a single person on a full-time basis or that the business needs could have just as easily be fulfilled by 2 people on a job-share basis. The Claimant has accepted that the role of the Sports Club Manager needs to be fulltime, but that she could only offer herself on a part-time basis due to her childcare responsibilities. Her position, reflected in her request for flexible working, was that the role could be completed on a job-share basis. Her attempt to try and fit the role into a part-time position was her attempt to 'bend over backwards' to overcome Mrs Miller's aversion to having the job shared between 2 competent managers.*

266. *The Claimant did not work reduced hours prior to her maternity leave as is stated in paragraph 253:-*

266.1. Firstly, in final month or so before her annual leave on 17 September 2018 (which continued into her maternity leave on 1 November 2018), the Claimant had been given (on GP advice) restricted hours and duties by the Health and Safety Officer. She, was therefore working 8:00am to 4:00pm each day, 5 days a week; i.e. 8 hours per daywhich equal 40 hours in a full weeks – thus, meeting her contractual requirements without any additional support contrary to what is stated in paragraph 253.

266.2. Secondly, from May 2018 when the School was informed of her pregnancy, the Claimant's duties had been limited by her line manager (Lucy Cooper) following a risk assessment. Nevertheless, she (the Claimant) performed her limited duties over 40 hours per week as was required of her by her contract of employment; again with no additional support (contrary to what is stated in paragraph 253) and to the Respondent's total satisfaction.

266.3. Finally, the additional support provided during January to April 2018, when she was working normally with no restriction or limitations, was purely because of the pressures of work rather than reduced hours. Furthermore, when the Claimant's work pattern and content was restricted following the Respondent being informed of her pregnancy in May 2018, the additional

support was withdrawn just when she probably needed it most.

267. *If the experience of Mr. Maycock is anything to go by, as the Respondent is relying on, it is that the most important element of anyone filling the role of the Sports Club Manager is their competence and not whether they commit themselves to working in exactly the same way as DMs; be flexible to meet the business needs rather than committing to specific regular shifts on the Rota.*

268. *The requirement for shift work was stated in the contract of employment and the Claimant also accepted this need. But this is what the Claimant was doing before her maternity leave (to the Respondent's total satisfaction) and, as she confirmed under cross-examination, she wanted to return to the same work pattern as before but on a part-time basis. She had not initially suggested in any way that the role should be part-time, but that the Respondent's insistence that the role must be performed by a single person would necessitate it to become part-time if the Claimant was allowed to return on a part-time basis.*

269. *I reject the argument that all the health and safety issues, referred to as "red-flag issues", are more likely to occur if the Claimant returned to her substantive role, on the same terms and conditions as before, but on a part-time basis in a job-share. These red-flag issues occurred during the Claimant's maternity leave and not before. Furthermore, during this period, the role of the Sports Club Manager was filled by a single person on a fulltime basis. The problems arose because of lack of management competence by Mr. Maycock (something that the respondent was aware of before appointing him to this role) and the lack of supervision of Mr. Maycock by Mrs Miller whose responsibility it was during this period.*

270. *In the circumstances of this case, where the Respondent had chosen to leave the Operations Manager role vacant for a number of years, there had been a number of red-flag incidents relating to the wedging of doors and the malfunction of the pool plant (all of which occurred during the Claimant's maternity leave), and the DMs in post were inexperienced and new to their role, I do not agree that the measure of requiring the post-holder to work full-time and to cover elements of the shift was rationally connected to the legitimate aim and reflected a real business need, but that these aims and business needs were best served by organized and competent management and supervision; something that the Claimant did provide to the Respondent's total satisfaction, prior to her maternity leave and fell apart during Mr. Maycock's tenure and Mrs Miller not supervising him.*

271. *We must therefore consider whether the respondent could have adopted a less intrusive measure to achieve the business aims. Contrary to what is stated in paragraph 257, the Claimant argues that permitting the role to be fulfilled by a job-share would have achieved the same aim but would have had a non-discriminatory effect.*

272. *The relevant factual background prayed in aid by the Respondent is set out in paragraph 259. However, the Respondent did not provide any evidence to support its concern that splitting this role between 2 competent managers would have adversely affected the necessary continuity of the oversight, understanding of the prevailing issues and consistency in the approach to their resolution.*

273. *I am satisfied that, given competent individuals in post, splitting the role's various functions would not put the business needs at risk. There was, of course, evidence in the bundle to establish the Respondent's concerns and their causes; by way of an example a Headmaster does not usually spend his time sending photographs of doors to the Chief Operating Officer, but this happened during the Claimant's maternity leave and after Mrs Miller ignored the various emails from the cover manager and the DMs. Furthermore, during Mr. Maycock's tenure, the respondent changed its operating practice to ensure that the fitness suite should be manned at all times because of concerns about the risks posed to pupils by members of the public using it; but this was in relation to incidents that occurred during the Claimant's maternity leave and not before. It is also relevant to that assessment, in my view, that the Claimant's proposal did not involve delegating any elements of the Manager's responsibility to the DMs during shift hours beyond that was already specified in the DMs' contract of employment and their job-description.*

274. *In my view, judged objectively, the nature of the role and the demands occasioned by the circumstances in which it operated did not prevent the role to be appropriate for a job-share. I accept that the Respondent's concerns were each legitimate and significant. In particular, I accept the need for continuity and consistency to ensure that the measures adopted in relation to health and safety and safeguarding were as effective as they could be. However, measures to ensure continuity and consistency were already in place to ensure a smooth daily handover between the Manager and Mrs Miller who was responsible for providing cover during this period when the Manager was off-duty. After all, the issues of health and safety and safeguarding of the pupils did not stop when the Manager's 40 working hours in the week ended. Or, if the Manager was supervising a full shift in the evening, she could not reasonably have been expected to have cover the early morning shift on the same day as well. It is, therefore, reasonable to assume that, if full shift presence of a Manager, in addition to DMs, was essential to the Respondent's business needs as stated in paragraph 255, then Mrs Miller must have made herself available for that early morning shift to provide cover which would have required a smooth handover between them. Therefore, I am not satisfied that the Respondent struck a fair balance between the rights of the Claimant and the interests of the pupils and sports club members by preventing the Claimant to return to work part-time after her maternity leave.*

275. *The respondent's application of the PCP was, therefore, not justified in the circumstances of the case. The claim of indirect discrimination is well-founded and it is upheld."*

Wrongful dismissal

276. Given that the claimant relies upon the allegations of discrimination and detriment above as the breaches of the implied term for the purposes of the wrongful dismissal claim, it follows that we conclude that the claim for wrongful dismissal is not well-founded and it is dismissed.

277. *The minority member concluded "Given that the Claimant relies upon the allegations of discrimination and detriment above as the breaches of the implied term for the purposes of the wrongful dismissal claim, it follows that the claim for wrongful dismissal is well-founded and is upheld."*

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Employment Judge Midgley

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Date 30 November 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE