EMPLOYMENT TRIBUNALS

Claimant: **Miss J Philippou**

Respondent: **Secretary of State for Justice**

Heard by Cloud Video **On: 11-15 January 2021**

Before: **Employment Judge Reed**
Ms J Le Vaillant
Ms J Cusack

Representation
Claimant: **In person**
Respondent: **Ms G Hirsch, counsel**

JUDGMENT having been sent to the parties on 22 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. I should like to begin by apologising for the delay in producing these reasons. Although the request was sent to the tribunal in January, I was only made aware of it on 17 May.

2. In this case the claimant Ms Philippou made a number of claims against her former employer the Secretary of State for Justice. She said that there had been a breach by the respondent of his obligations under the flexible working legislation; that she had been indirectly discriminated against on the ground of sex; and that she had been unfairly dismissed. The claims were all resisted by the respondent save in relation to flexible working.

3. We heard evidence from the claimant herself and on her behalf from Ms Wilmott who was at the relevant time her manager.

4. For the respondent we heard from Ms Johnson, who rejected Ms Philippou's initial application for flexible working, from Ms McAlister who granted it and from Ms Moody who was generally involved throughout the period. On the basis of their evidence and the various documents we were shown we reached the following findings.

5. Ms Philippou commenced employment with the respondent in 2009 and began working for the Prison and Probation Ombudsman in 2012. Essentially her job was to investigate complaints made by prisoners and those subject to probation. She worked in central London.

6. In 2014 she made an application for a career break which was granted and took effect at the start of 2016.

7. In the meantime, in 2015, she moved house from Surrey to Dorset and was therefore located considerably further from the respondent's offices.

8. In December 2017 she made an application for flexible working, seeking both a change from full-time to part-time working and to spend the bulk of her time working not at the respondent's offices but from home.

9. There was a meeting between herself and Ms Johnson on 12 April 2018 at which the matter was discussed and the outcome was that on 1 June 2018 she was informed by Ms Johnson that her application was refused.

10. The issue in relation to part-time working was resolved at about that time but the question of the location at which she would carry out that work remained outstanding. She appealed against the refusal in June 2018 and indeed commenced proceedings in the Tribunal in that month.

11. Towards the end of 2018 she did undertake several weeks' work for the respondent, entirely from home. She then commenced another period of maternity leave.

12. She was due to return to work in September 2019 and therefore her appeal was considered by the respondent before that date. She was called to a meeting with Ms McAlister which took place on 27 August 2019. Initially Ms McAlister indicated that Ms Philippou would have a response by 16 September but she revised that timescale and eventually produced a decision on 27 September Effectively she accepted Ms Philippou's application for flexible working. Notwithstanding that fact, Ms Philippou resigned her employment on 30 September 2019.

13. S80F of the Employment Rights Act 1996 provides that a qualifying employee (which Ms Philippou was) may apply to her employer for a change in her terms and conditions of employment. Such a change can relate (inter alia) to hours or location of work.

14. Under s80G of the 1996 Act, an employer to whom such an application is made must deal with the matter in a reasonable manner, notify the employee of the decision within the decision period (3 months in the absence of any agreement to the contrary) and shall only refuse the

application because he considers one of more of the following grounds applies

(i) the burden of additional costs,

(ii) detrimental effect on ability to meet customer demand,

(iii) inability to re-organise work among existing staff,

(iv) inability to recruit additional staff,

(v) detrimental impact on quality,

(vi) detrimental impact on performance,

(vii) insufficiency of work during the periods the employee proposes to work,

(viii) planned structural changes, and

(ix) such other grounds as the Secretary of State may specify by regulations.

15. Under s80H of the 1996 Act an employee who makes an application under s80F may present a complaint to the tribunal that the employer has filed to comply with the obligations set out above, or has based a rejection on incorrect facts. Where the tribunal finds the complaint well-founded it shall make a declaration to that effect and may make an award of compensation. The amount of compensation shall be such amount, not exceeding the permitted maximum of 8 weeks' pay, as the tribunal considers just and equitable in all the circumstances.

16. Under s19 of the Equality Act 2010 a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to B's sex.

17. A PCP will be discriminatory if
    a) A applies it to men
    b) It would put women at a particular disadvantage
    c) It puts B at that disadvantage
    d) A cannot show it to be a proportionate means of achieving a legitimate aim.

18. Under s95 of the 1996 Act an employee is dismissed if she terminates her contract in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct. It is well established that that conduct must amount to a fundamental breach of contract on the part of the employer.

Flexible working

19. It was accepted by the respondent that Ms Philippou had made a valid application under s80F of the 1996 Act. Ms Phililppou claimed there had been breaches by the respondent of his duties under s80G.

20. It was clear that the respondent had failed to notify the claimant of the decision in relation to her application within 3 months (that period including the disposal of her appeal). The period in this case was considerably more than 18 months.

21. It was also said by the claimant that the application was not dealt with in a reasonable manner but other than the delay we did not consider there was a breach of that requirement.

22. Otherwise, we reminded ourselves that s80G provides that the employer shall only refuse the application *because he considers that one or more of the following grounds apply*…

23. We were satisfied that Ms Johnson believed that her rejection was justified on the basis of, amongst other things, the detrimental effect on the ability to meet customer demand, detrimental impact on quality, and detrimental impact on performance. We therefore concluded that there was no breach of that particular provision. (It was also suggested that there was reliance on incorrect information but it was not apparent what that might have been)

24. In any event, we concluded that there was a breach of s80I as a consequence of the delay in dealing with the application and therefore that we were entitled to make an award of compensation.

25. We were bound to look to the respondent to see what mitigation there might be. It was suggested that Ms Willmott, the claimant's manager, was at least in part responsible for some of the delay. We did not see that that assisted the respondent, who was responsible for the acts of Ms Wilmott. The suggestion that the fact that she was a trade union representative, in circumstances where her acts were in her capacity as manager, in some way exonerated the respondent was unpersuasive.

26. It is true that the claimant was never required to work at the respondent's premises during the period in question and through the bulk of that period she did not work at all. We were also satisfied that there was no malice on the part of the respondent.

27. On the other hand, this was an immense delay. In all the circumstances we considered that it was appropriate for us to make an award towards the top end of the 8 week period provided for in the legislation. We made an award of 7 weeks' pay, or £3,556.

Indirect sex discrimination

28. Ms Philippou contended that the respondent had a provision, criterion or practice of requiring employees to carry out at least 60% of their contracted hours at the office. The respondent conceded that that requirement was applied to her.

29. We then had to ask whether such a PCP would put women at a particular disadvantage

30. It was conceded by the respondent that a considerably higher proportion of women than men have primary childcare responsibilities. Were we entitled then to assume that particular disadvantage existed within the respondent's workforce? Or would it be necessary for a claimant to produce evidence (presumably in the form of statistics) to establish that fact?

31. It was not obvious where such statistics might be found. The fact, for example, that a higher proportion of women than men were working part-time for the respondent would not necessarily demonstrate if childcare responsibilities were the reason. If all of those part-time workers had achieved that status by way of a formal application for flexible working, it is possible that there might be documents that existed tying hours to childcare but there was no obvious reason why that would be the case. For example, people may have applied for part-time work when they actually started working for the respondent in which case there would be no obligation for them to declare their reason. It might also be that an application would be made on an informal basis in which case again there would be no documents to establish the reason.

32. It seemed to us that the approach in the case of Shackleton v Lowe was the appropriate one for us. The appropriate concession having been made by the respondent as to the imbalance between the sexes as to childcare responsibilities, we concluded that particular disadvantage to women was made out.

33. We then had to consider whether the PCP put Ms Philippou to that disadvantage. The respondent contended that she was unable to establish that disadvantage. The first basis for that contention was simply causation. It was suggested that the real reason the claimant could not attend the office was nothing to do with her childcare responsibilities but rather the fact that she placed herself geographically in a position where she would find it difficult to get into London. There was evidence to support that contention within the initial career break application in which Ms Philippou seems to declare that the fact that she will be in Dorset means that it will be impossible for her to get into London except on a very infrequent basis. We were conscious, of course, that even when she had been granted the application by Ms McAlister, she refused to take it up.

34. The minority view was that indeed there was a break in the chain of causation and that the real reason for her inability to carry out 60% of her contracted hours in London was her geographical location and not her childcare responsibilities. The majority, however, accepted her evidence to the effect that it was childcare responsibilities that militated against working such a high proportion of her hours in the office. She insisted that her location would not stop her fulfilling the 60% requirement and the majority accepted that evidence.

35. We then had to consider whether, in the situation where Ms Philippou's application had been accepted on appeal, she could say she had in fact

been put to the relevant disadvantage. We were referred to the case of Little v Richmond Pharmacology. In that case, as here, the application for flexible working had been rejected at first instance but accepted on appeal. The ratio of that case is that one must take a holistic view of the application process and if at its end the decision is that the application is accepted, then there has been no particular disadvantage.

36. We were bound to say that that decision somewhat troubled us but we had to accept it was binding upon us. Ms Philippou suggested that the appeal had not been successful because of an imposition of a twelve month trial period but that was the nature of the application she actually made. The original application was in fact granted on appeal. We were bound to conclude on the application of the Little case that the claimant had not demonstrated that she was particularly disadvantaged by the application of the PCP and therefore the claim had to fail.

37. For the sake of completeness, we went on to deal with the defence of justification. The respondent said that there was a legitimate aim on its part namely the effective running of the office in which the claimant worked and that the refusal at first instance by Ms Johnson of her application for flexible working was a proportionate means of achieving that aim.

38. The claimant was perfectly entitled to point out that her application was accepted by Ms McAlister: if it was not reasonably necessary for Ms McAlister to reject that application, how could it be reasonably necessary for Ms Johnson to do so?

39. If there was anything surprising about Ms McAllister actions, it was that she acceded to the request. There were particular considerations in the case of Ms Philippou that might suggest that was generous. Ms Philippou dealt with complaints from prisoners. There were obvious security and confidentiality issues that arose. CCTV images might have to be viewed by her and it would be clearly preferable for that to be done in a secure environment such as the office rather than couriering a laptop to her. Correspondence had to be sent to prisoners in particular envelopes which ensured that it was not seen by prison officers. That could only realistically be done from the respondent's offices. That part of the job could be undertaken by someone else if Ms Philippou was not physically present (and of course she would be present from time to time) but that would be a burden on the respondent which it was perfectly proper to take into account.

40. In addition to matters that were specific to Ms Philippou's role, there were general considerations that applied in relation to office workers. These were described at length by Ms Moody both in her evidence to us and in the expectations document that effectively she or the Executive Committee produced at page 244 of the bundle. The essence of this view might sensibly be described as collegiality. If employees are around each other they pick things up from each other, they can exchange information, they can support each other, and they can mentor each other. From an employer's point of view it is far easier to manage employees when they are in physical proximity than if they are working remotely. All sorts of reasons both personal to Ms Philippou and of general application suggested that the

sort of application she was making was one that the respondent might have sensibly declined.

41. Notwithstanding that, Ms McAlister granted the application albeit on a twelve month trial period. If that was exactly the same application that Ms Johnson considered in the same circumstances there would be no satisfactory rationale for the latter's rejection.

42. We were certainly satisfied there was no material difference in the application itself. There was, however, a material difference in the situation that confronted Ms Johnson at that particular time in early 2018. This was a time of upheaval for the respondent. The service was going to move office in May but eventually did so in September 2018 and there would be reduced capacity for employees in the new premises. That was clearly going to have an impact on what the respondent sensibly could do. There were technical issues involving IT that developed in the course of 2018. There was a "smarter working" initiative that was being introduced. In short, things had not reached the position of certainty at the time Ms Johnson took her decision as they had by the time Ms McAlister did. We concluded there was a significant difference between the position as it existed before Ms Johnson in 2018 and that which presented itself to Ms McAlister in 2019.

43. Our conclusion was therefore that the respondent had established justification in relation to the act of Ms Johnson and therefore had we in any event found that there was particular disadvantage to Ms Philippou by the application of the provision, criterion or practice we would have been bound to conclude also that the respondent had established a defence. For all those reasons the claimant's claim of indirect discrimination failed.

Unfair dismissal

44. The claimant resigned her employment. She claimed that that resignation was a consequence of a fundamental breach of contract on the part of the respondent such that it could be construed as a dismissal and furthermore one that was unfair. She said that the mistreatment she had been subjected to in the period referred to above amounted to a fundamental breach of the implied term within her contract to the effect that the parties will not without good cause conduct themselves in such a way as to destroy or seriously damage the relationship of trust and confidence between them.

45. The claimant said she was entitled to point to the considerable delay in actually addressing and dealing with her application for flexible working as amounting to mistreatment of her. We know of course that that went back to early 2018. It was suggested that effectively she lost the right to rely on that matter by waiver but we disagreed. On the authority of Kaur v Leeds Teaching Hospital she was entitled to rely on the totality of the respondent's conduct. She could assert that she had decided to "soldier on" despite that mistreatment but "aggregate" it with later actions to constitute a fundamental breach of contract.

46. We were keen, though, to establish what might have been the "final straw" that led her to resign and effectively she gave us three alternatives. Firstly, she said that Ms McAlister indicating an early date upon which she would

determine her appeal amounted to mistreatment of her because it indicated that she was not going to give the matter full consideration, given that she would be off on holiday throughout the entire period. We did not consider that amounted to mistreatment of Ms Philippou. There was no basis upon which she could sensibly have inferred an intention on the part of Ms McAlister not to deal with the appeal properly and indeed in the course of her closing submissions she appeared to resile from that suggestion.

47. The second act of mistreatment that it was suggested might amount to a final straw was the imposition of a twelve month trial period when the appeal succeeded. However, Ms Philippou had made it clear when the matter came before Ms Johnson that that was what she was interested in. Ms McAlister sensibly and rationally believed that when she was dealing with the appeal that was part of what the claimant was actually seeking and she was actually given the claimant what she wanted. The claimant must have been aware that that was the impression Ms McAlister had. If she wanted to modify her application by suggesting that there should be a three month trial period then it was incumbent upon her to make Ms McAlister aware of that and she failed to do so. It followed that this could not have been mistreatment of Ms Philippou and therefore could not have been the final straw.

48. The third act of mistreatment that the claimant said might amount to a final straw was that she believed that even at the end of the twelve month trial period the application would be rejected. The way the arrangement had worked in the interim would not be properly considered by the respondent at that time. She had simply no evidence that might sensibly have led her to that conclusion. Indeed, the approach of Ms McAlister, in our view, would reasonably have led her to precisely the opposite conclusion.

49. We therefore concluded there was no final straw. Indeed, other than the delay in dealing with her flexible working application, we did not consider Ms Philippou was mistreated by the respondent at all. Our conclusion was that there was no fundamental breach of contract by the respondent. Her resignation could not be construed as a dismissal and it followed that her claim of unfair dismissal failed.

Employment Judge Reed
Date: 24 May 2021

Reasons sent to the parties: 03 June 2021

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