Appeal No. UKEAT/0195/20/VP(V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 13 May 2021

Before

THE HONOURABLE MRS JUSTICE EADY

(SITTING ALONE)

MISS L HUGHES APPELLANT

PROGRESSIVE SUPPORT LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR JOHN HALSON Solicitor Instructed by Mark Reynolds Solicitors 55 High Street Runcorn Cheshire WA7 1AH
For the Respondent	MR RHYS JOHNS Of Counsel Instructed by Antrobus Solicitors Suite 167 Courthill House 60 Water Lane Wilmslow Cheshire SK9 5AJ

Summary

Sex Discrimination – Indirect discrimination – Section 19 Equality Act 2010

The Respondent provides support services to adults with disabilities who require assistance on a 24 hour a day, 7 days a week basis. The Claimant was employed by the Respondent as a Support Worker, under a contract that guaranteed her a minimum number of working hours. After the Claimant returned to work following a period of maternity leave, the Respondent had agreed that she could be allocated hours of work that took into account her childcaring responsibilities ("considerate hours"). After the Respondent became aware that the Claimant had been working elsewhere when it had understood she was unable to work due to her parental responsibilities, the considerate hours arrangement was withdrawn and, from 12 December 2018 until early in January 2019, the Respondent allocated hours to the Claimant as required by the needs of the service and without regard to her childcare commitments. The Claimant was unable to work all the hours offered during this period and worked fewer hours than those to which she would otherwise have been entitled under her guaranteed hours contract. The Respondent spoke to the Claimant about this, suggesting that, if she could not work the guaranteed minimum hours, she might need to go on to a zero-hour contract. Ultimately the parties were able to reach an accommodation that enabled the Claimant to continue on the guaranteed minimum hours contract, working considerate hours once again. The Claimant lodged a claim with the Employment Tribunal, however, in respect of the period for which this accommodation had been withdrawn; she claimed that the Respondent had applied a provision, criterion or practice ("PCP") to her, requiring her to work whatever hours were allocated to her, and that this amounted to unlawful indirect sex discrimination.

The Respondent resisted the claim. Whilst accepting that it applied a general policy to its staff that required them to work, "24/7" to meet the needs of the service, it contended that it sought to do so in consultation with its employees. It did not, however, deny that it had applied a PCP to the Claimant as she had alleged, albeit that it contested that this had any discriminatory impact relating to sex and contended that, in any event, any such PCP was objectively justified. At an earlier case management hearing, the ET had identified the issues to be determined in respect of this claim as being: (i) whether the PCP put female employees at a particular disadvantage? (ii) whether it had put the Claimant at such a disadvantage? and (iii) whether it was a proportionate means of achieving a legitimate aim?

At the full merits hearing, however, the ET dismissed the Claimant's claim on the basis that the PCP alleged had not been applied to her. It considered that the evidence demonstrated that the

Respondent sought to consult with its employees in the application of its general "24/7" policy and it had not subjected the Claimant to any sanction when she was unable to work the hours offered to her during the period in question; in the circumstances, she had not been subjected to a *requirement* to work the hours allocated to her (which was how she had defined the PCP in her claim). The Claimant applied to the ET to reconsider this decision on the basis that the application to her of the PCP had not been put in issue. The ET refused this application. The Claimant appealed.

Held: *allowing the appeal*

The application of the PCP (as defined in the Claimant's claim) had not been put in issue by the Respondent and the ET had been wrong to determine the case against the Claimant on this question without giving her an opportunity to respond; it had thereby denied the Claimant a fair hearing.

In any event, on the ET's findings of fact it was clear that it had accepted that the PCP had been applied to her for the period in issue: in order to work the guaranteed minimum hours to which she was entitled under her contract, she had been required to work whatever hours were allocated by the Respondent, as opposed to hours that took into account her childcare responsibilities. The ET had erred in looking at the matter retrospectively (as to whether the Claimant had been subjected to any later sanction for not working all the hours offered by the Respondent) but, in any event, it was apparent that the Claimant had lost out by not being able to comply with the requirement to work the hours allocated. Moreover, as the ET had also found, when the Claimant was unable to meet that requirement, the Respondent had suggested that she might move to a zero-hours contract, thus losing her entitlement to guaranteed minimum hours.

On the basis of the facts found by the ET, the only permissible conclusion was that a PCP had been applied to the Claimant from 12 December 2018 until early January 2019 as alleged in the ET1. The matter would need to be remitted to a differently constituted ET for determination of the remaining issues relating to disadvantage and objective justification.

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THE HONOURABLE MRS JUSTICE EADY

Introduction

1. This appeal concerns a claim of indirect sex discrimination relating to what was said to have been a requirement to be available to work such hours as might be allocated by the employer to meet the needs of the service. More specifically, the decision of the Employment Tribunal ("the ET") is challenged on the basis that it wrongly dismissed a claim following its erroneous finding that no such requirement had been made of the Claimant in this case.

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2. I refer to the parties as the Claimant and the Respondent, as below. This is the full hearing of the Claimant's appeal against a Judgment of the Liverpool ET (Employment Judge Buzzard, sitting with lay members Dr Roberts and Mr Gates, on 14-16 October 2019), sent to the parties on 19 October 2019, with Written Reasons following on 3 January 2020. By that Judgment, the ET dismissed the Claimant's claims of indirect sex discrimination and victimisation. This appeal relates solely to the Judgment of the claim of indirect sex discrimination; specifically, to the ET's finding that the provision criterion or practice ("PCP") relied on by the Claimant had not in fact been applied to her.

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3. Given the continuing need to reduce transmission of the coronavirus, and with the agreement of the parties, this hearing has taken place remotely by MS Teams. These remained, however, public proceedings and details of the hearing, including how to obtain access, were publicised in advance in the EAT cause list.

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4. The parties were represented by the same advocates as appeared before the ET and both produced skeleton arguments, which I was able to read before the hearing; I thank them for their assistance.

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The Background Facts

5. The Respondent is an organisation that provides 24-hour, 7-day a week care to service users, people who need extensive and regular care and/or assistance due to disabilities that they suffer. The Claimant had worked for the Respondent for a number of years. She was part of a workforce of around thirteen staff, some of whom were on contracts which

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guaranteed a minimum number of hours (which was the Claimant's position), others being employed on zero-hour contracts.

6. For those who were on guaranteed hour contracts, the Respondent operated a rule that such staff should not work elsewhere without obtaining the Respondent's written consent. That was to ensure that the staff concerned did not have restricted availability to work. More generally, the Respondent had a policy of attempting to allocate fairly, as between staff, those shifts that were seen as antisocial. As the ET recorded, it was not suggested that this was not a legitimate and reasonable approach for the purpose of encouraging good employer and employee relations.

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7. After the Claimant had returned from a period of maternity leave, following the birth of her daughter, however, the Respondent had agreed that she would be allocated shifts on the basis of what were described as "considerate hours". The ET found (see paragraph 33.6 of its Written Reasons) that considerate hours were "*an exception to the normal rule where everyone has got to muck in and do everything*". This concession was granted to the Claimant because she had explained to the Respondent that she had limited childcare available to her. The considerate hours were intended to ensure that the Claimant would not, as a result of childcare difficulties, encounter problems working the hours she was offered. Specifically, it had been agreed that the Claimant would not have to work for the Respondent beyond 9.00 am on a Thursday.

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8. In or around October 2018, however, it had been discovered that the Claimant had been working at a hairdressing salon on Thursdays. There was some dispute about precisely what the Claimant had been doing but, following a meeting on 13 November 2018, the Respondent determined that the considerate hours arrangement would cease from 12 December 2018. This decision was communicated to the Claimant by letter of 14 November 2018.

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9. On 10 December 2018, the Claimant's solicitor wrote to the Respondent objecting that ceasing to offer the Claimant considerate hours from 12 December 2018 would be discriminatory.

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10. In any event, from 12 December 2018, as the ET found (see paragraph 33.17), the Respondent started to offer the Claimant shifts that no longer took into account any previous agreement regarding considerate hours. It was the Claimant's evidence (apparently not contradicted) that she was unable to cover all the shifts offered and that she had to reject some of the shifts offered to her and had missed out on others. As the ET recorded, however, it was not her case that she was actually required to work the shifts offered; her evidence was limited to the fact that she had been offered shifts which she had not been able to work (see paragraph 33.17).

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11. That said, five days after she started being unable to work all the shifts offered to her, on 17 December 2018, the Respondent held a meeting with the Claimant to ascertain what she intended to do about not fulfilling her contractual hours. The possibility of her moving to a zero-hour contract was discussed.

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12. After a period of leave, there was a further meeting with the Claimant on 4 January 2018, at which it seems to have been confirmed to the Claimant that she would need to adhere to the contractual terms if she wanted to be offered a contract that had guaranteed hours. The Respondent's evidence was that the Claimant confirmed that she had not worked at the hairdressing salon for three weeks and had ceased working there. She was asked to provide confirmation of her availability for work, and it is the Respondent's case that she could then be offered shifts taking into account that availability - another "considerate hours" arrangement. It is the Claimant's case that it was in fact agreed that she would then be given set shifts.

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13. Following that meeting, on 7 January 2019, the Claimant provided her availability to the Respondent. It is common ground that the shifts she was offered thereafter took into account that availability and, therefore, her childcare needs.

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The Case Before the ET; its Decision and Reasoning

14. In her ET1, in making her claim of indirect sex discrimination the Claimant had put her case as follows:

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> **"On 13 and 14 November 2018 The Respondent indirectly discriminated against the Claimant contrary to s19 EqA and s29(2)(a) EqA by imposing a provision,**

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criterion or practice on the Claimant requiring her to work whatever hours were allocated to her, instead of set hours, from 12 December 2018."

15. In its response, appended to the form ET3, the Respondent denied that it had applied at PCP to the Claimant; indeed, at paragraph 4(p), it averred as follows:

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> **"Under the Claimant's contract of employment, it states: 'As a permanent employee, 7-day work availability is expected. This includes all evenings, weekends and bank holidays… The Employer may require the employee to vary the pattern of their working hours to meet the needs and service'. Accordingly, given this, as a permanent member of staff, under her contract of employment, the Claimant must be available on a 24/7 basis, and her first priority in terms of availability must be to the Respondent."**

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16. The Respondent's case on indirect sex discrimination was put as follows (see paragraph 6 of the response attached to the ET3):

> **"As stated, the policy that all permanent support workers must be available 24/7 is objectively justified on the basis that it is a proportionate means of achieving a legitimate aim. 24/7 availability is required for permanent support workers as otherwise, the Respondent would not be able to provide its service to users for 24/7 support, and that then would jeopardise the health and safety of service users. Accordingly, in all the circumstances of the case, the Respondent denies being liable to the Claimant, whether as alleged or at all…"**

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17. At a telephone case management discussion hearing before the ET on 24 May 2019, the issues to be determined on the claim of indirect sex discrimination were described at paragraph 1 of the ET's case management summary, as follows:

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"Indirect sex discrimination

1.1 Did the provision, criterion or practice (PCP) of having to be available to work at any time put female employees at a disadvantage when compared to male employees.

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1.2 If so, did it put the Claimant at a disadvantage.

1.3 If so, was the PCP a proportionate means of achieving a legitimate aim?"

18. That characterisation of the PCP was not precisely the same as had been put in the claim form but, as recorded at paragraph 12 of the ET's Judgment following the full merits hearing, at the outset of that hearing the Claimant again stated that the PCP she was relying on was: "*requiring her to work whatever hours were allocated to her at short hours, instead of set hours"*. As the ET observed, save the additional point that the hours required to be worked were allocated at short notice, that was essentially the same as the description used in the ET1. And, in the Claimant's written submissions at the end of the full merits hearing, the same words were used as in the ET1.

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19. Although the question of the application of the PCP to the Claimant had not been raised either in the ET3 or in the issues identified at the case management hearing, at the full merits hearing the ET felt that the PCP had not been applied to the Claimant; that finding was fatal to the Claimant's claim of indirect sex discrimination. On that basis, the ET did not proceed to consider the other matters raised under this head of claim.

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20. The ET noted that, in her written submissions, the Claimant had recorded that the Respondent had accepted both that the PCP was part of her contract, and that it had been imposed on her. The ET, however, took a different view. At paragraph 15 of its Written Reasons, the ET stated that the Respondent had not, in fact, accepted that the PCP had been applied to the Claimant. Further explanation is then provided at paragraph 35 of the Written Reasons, where the ET explained its view (see sub-paragraph 35.4) that the Respondent's case regarding the PCP in the ET3 was "*contradictory*", as the submission that had been made on its behalf at the full merits hearing was that the PCP operated "*as a starting point*" and that the Respondent did not "*dictate hours of work to any employee without consultation*". The ET further observed (see sub-paragraph 35.5 of the Written Reasons) that the evidence produced by the Respondent had confirmed that the employees' hours of work were not dictated without consultation.

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21. Given the oral evidence it received, the ET concluded that the hours of work offered to the staff were not, in fact, dictated without consultation. More specifically, in relation to the Claimant, the ET found as follows:

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> **"35.5 The evidence was that the Claimant was guaranteed to be offered a certain number of hours each week, and the Claimant was offered those hours. After 12 December 2018, the Claimant was unable to work for some of those hours and handed them back to the Respondent. The hours were then covered by other staff. The evidence does not suggest the Respondent did anything which could be characterised as imposing any form of sanction for not working those hours, or asserting that the Claimant was "required" to work those particular hours. The only concern was that the Claimant was not working enough hours, a concern that was raised at a meeting which appears to be aimed at finding ways to ensure the Claimant could work more hours.**
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> **35.6 Within a matter of weeks during, which the Respondent had not disciplined the Claimant for working the hours offered, [the Respondent] met with the Claimant to discuss with her how they could make sure the Claimant was able to work more hours, to reach her guaranteed minimum hours."**

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22. The ET concluded that the Claimant had not been required to be available to work whatever hours were allocated to her, or any specific hours. For the period in issue, the ET accepted

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that the Claimant had not been able to work all the hours offered (and thus to work her guaranteed minimum), but found that the Respondent's response had merely been to meet with her to discuss how to ensure that, for the future, she could work the minimum number of weekly hours her contract otherwise guaranteed.

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23. On the basis of those findings, the ET held that "*the PCP the Claimant relies on was not applied to her*". That being so, the ET considered it unnecessary to go on to determine the other questions identified in relation to the indirect sex discrimination claim (specifically, whether the PCP alleged would put employees at a disadvantage or whether, in any event, it was objectively justified).

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24. On 1 November 2019 those acting for the Claimant applied for reconsideration of the ET's decision, on the basis that it had dismissed her claim on a ground that had apparently not been in issue at the hearing. The ET refused that application by a reconsideration decision dated 4 June 2020.

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The Claimant's Appeal

25. The Claimant appeals against the ET's dismissal of her claim of indirect sex discrimination on the following grounds:

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(1) The question whether the PCP had been applied to the Claimant had not been raised as an issue in the case and the Claimant was thus been denied the opportunity to make submissions on the point.

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(2) There was no evidence to support the contention that the Respondent did not apply PCP to the Claimant.
(3) The ET's reasoning wrongly concerned the question of what had happened *after* the date on which the Claimant had said the PCP had been applied.

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(4) To the extent that the ET decided that the absence of any sanction being applied to the Claimant meant she had not been "required" to work the hours allocated to her, it imposed too narrow an interpretation of the PCP.

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26. The Claimant says that the ET's Judgment cannot stand and her appeal should therefore be allowed and the claim for indirect sex discrimination remitted to a differently constituted ET for consideration afresh.

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The Respondent's Case

27. For the Respondent, it is contended that, in terms of the PCP relied upon, the Claimant's case before the ET had been put broadly and had fluctuated between the pleadings and the evidence. In reality, the PCP referred to a policy supplied to staff in the Claimant's position but which was only applied to the Claimant herself in an adjusted way. The ET had thus not erred in finding it had not been applied to the Claimant.

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28. Allowing for a broad approach in the statutory language, where, as here, the policy had been subject to consultation with staff, it could not be said to give rise to any requirement or obligation. The Claimant had not been entitled to work "considerate" hours on 13 December 2018 because of her breach of the moonlighting policy. That did not mean that the alternative was a rigid application of the Respondent's policy, whereby the Claimant was required to work any and all hours offered.

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29. On the ET's findings of fact, that is not what occurred in this case. The Claimant was not required to work any hours that presented difficulties for her. Moreover, the considerate hours arrangement had then been reinstated, when the issues between the Respondent and the Claimant were resolved in early January.

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The Relevant Legal Principles

30. Indirect discrimination is defined by section 19 of the **Equality Act 2010**, as follows:

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> **"(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."**

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31. As made clear by sub-section 19(1), in any complaint of indirect discrimination, the first question is thus whether the PCP in issue has been applied to the complainant. There is no definition of "provision to the criterion or practice" for these purposes, although the case-law makes clear that these words are not to be read narrowly (see, for example, *British Airways Plc v Starmer* [2005] IRLR 862, addressing the same terms used within the legacy statute, the **Sex Discrimination Act, 1975**).

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32. As the Court of Appeal has more recently observed, in *Ishola v Transport for London* [2020] EWCA Civ 112, [2020] ICR 1204 (a case related to the same words used in the context of disability discrimination protection under the **Equality Act**), the words "provision, criterion or practice":

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> **"… are not terms of art but are ordinary English words…they are broad and overlapping…not to be narrowly construed or unjustifiably limited in their application."**

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See per Simler LJ at paragraph 35.

33. The finding of a PCP is one of fact for the ET to make on the evidence before it, see *Jones v University of Manchester* [1993] IRLR 218 (a case determined under the **Sex Discrimination Act, 1975**, but the point is the same in respect of a claim under **the Equality Act, 2010**). It is, however, for a Claimant to identity the PCP that it is said to give rise to the discriminatory disadvantage, and it is that PCP that an ET must address, not some alternative postulated by the employer. As Sedley J stated in *Allonby v Accrington & Rossendale College and others* [2001] EWCA Civ 529 [2001] ICR 189 (here referring to the former statutory language "*requirement or condition*" but, again, the point remains the same under the present statute):

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> **"12. It is for the applicant to identify the requirement or condition which she seeks to impugn…If the applicant can realistically identify a requirement or condition capable of supporting her case, as Ms Allonby did here to the Employment Tribunal's satisfaction, it is nothing to the point that her employer can with equal cogency derive from the facts a different and unobjectionable requirement or condition. The Employment Tribunal's focus moves directly to the question of unequal impact."**

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34. A PCP can relate to both formal and informal practices of employers and there is no requirement that the employee should have been coerced or expressly ordered to comply with it; context will be important in determining whether a PCP has been applied but it may, depending on the particular circumstances of the case, be no more than a strong formal

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request, and see the Court of Appeal's Judgment in *United First Partners Research v Carreras* [2018] EWCA Civ 323 (relating to the same words used in the context of a disability discrimination claim), in particular, in the Judgment of Underhill LJ at paragraph 31.

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35. That said, as Simler LJ went on to make clear in *Ishola*, the concept of a PCP does not apply to every possible act of unfair treatment of an employee. If an employer's seemingly unfair act is found not to be directly discriminatory, it would be wrong to seek to convert it "*by process of abstraction*" into the application of PCP. (See Simler LJ in *Ishola,* at paragraph 37); as always, context will be key.

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Discussion and Conclusions

36. In this case, the Claimant's submission on indirect sex discrimination had been quite specific: she was complaining that she had been subjected to a PCP, imposed on 14 November 2018, that from 12 December 2018 she would be required to work whatever hours were allocated to her rather than set (or "considerate") hours which the Respondent had allowed her to work previously. Given the findings of fact in this case, it is hard to resist the conclusion that that is, indeed, what the ET found had occurred.

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37. The starting point for the ET was the PCP, as alleged by the Claimant. It is right that, at the case management hearing, the identification of the issues to be determined in respect of the indirect sex discrimination claim assumed the PCP was "*having to be available to work at any time*". That essentially reflected the way the PCP had been framed by the Respondent in its ET3 but, as the ET noted at the full merits hearing, the Claimant had made clear that her case in this regard was as she put it in her ET1: that, on 13 November 2018 (confirmed by letter of 14 November 2018), the Respondent had imposed a PCP on the Claimant requiring her to work whatever hours were allocated to her, instead of set hours, from 12 December 2018.

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38. On the face of the pleadings, and to the extent that the issues identified at the case management hearing reflected the parties' positions, this was not a point in dispute. The Respondent's position in its ET3 apparently accepted that a PCP to work at any time had been applied to the Claimant; it might have used different language to that used by the Claimant in her ET1, but it had not identified this as a point in dispute. Moreover, as the

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Claimant's closing submissions at the full merits hearing made clear, this was not something she had understood to be in issue.

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39. Given that the ET plainly saw this to be a determining point in the case, it is unfortunate that it did not clarify the position at the outset of the hearing. That position is all the more surprising as it seems that the entirety of the first day of the hearing was allowed for the parties to clarify the issues to be determined. The Claimant's understanding was that this clarification had not identified any issue arising relating to the application of the PCP to her. It seems, however, that the ET considered that the evidence before it put this point into contention. Although it refers to an apparent contradiction in the ET3, I cannot see why the ET should have thought that; certainly, the only contradiction it identified seems to have arisen from the evidence rather than from the pleadings.

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40. It is obviously trite law that a party should be given the opportunity to respond to the case against it. Where a point has been conceded, it is entirely proper for a party to proceed on the basis that it need not address that issue. If the case is then determined against them on that point, the party in question is entitled to complain that they had not been given a fair hearing. In this case, the Claimant (entirely properly) sought to make that complaint by way of application for reconsideration, but that was rejected by the ET. The ET was wrong to dismiss that application, just as it had been wrong to determine a case against the Claimant on a point that had not been identified as having been in issue between the parties. On that basis I have allowed the appeal on the first ground raised.

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41. Should I be wrong about that, I have also considered the appeal against the ET's decision on its merits. On that question, the conclusion I have reached enables me to be satisfied that this is not a point that remains to be determined; the answer is provided by the ET's own findings of fact.

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42. In considering this question, I first note that the complaint of indirect sex discrimination related to a relatively short period; the Respondent returned to offering the Claimant considerate hours in early January 2019. I also accept that the ET was entitled to find that the PCP in part reflected the Respondent's concern that the Claimant had not been entirely transparent about her difficulties previously (putting it neutrally, she had allowed the Respondent to think that she did not work particular days or hours because of childcare

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difficulties when she seemed, in fact, to have been working elsewhere at those times). As the ET found however, as from 12 December 2018, the hours allocated to the Claimant were no longer adapted in consultation with her to fit her childcare responsibilities but were dictated solely by the needs of the Respondent's service. For the ET this was not the application of a PCP, because there was no penalty imposed on the Claimant for declining to work particular hours offered to her. In that sense, it felt that she was not required to work whatever hours were allocated. That conclusion depends, however, first, on adopting a retrospective analysis of what took place, and second, on the adoption of a very narrow understanding of what a requirement is.

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43. Here, the Claimant was on a contract that gave her an entitlement to guaranteed minimum hours. For the period in question, however, she could not work those guaranteed minimum hours because she was unable to work some of the particular hours offered to her. In order to be able to work the full hours to which she was entitled under her guaranteed hours contract, the Claimant was required to make herself available to work the hours allocated by the Respondent, which did not allow for her childcare responsibilities. Adopting what I would consider to be an entirely natural understanding of the term, that was a requirement imposed on the Claimant. The fact that she might not have received a disciplinary penalty in in respect of her failure to work the hours allocated does not change this. First, because the ET was bound to consider the requirement imposed on the Claimant at the time it was imposed, and second, because it fails to take account of the financial detriment that she may have suffered by not being able to work the full guaranteed minimum hours that she was otherwise entitled to expect under her contract. Additionally, and in any event, the ET failed to take account of the fact that the Claimant was also told that, if she was unable to work the guaranteed minimum hours offered, consideration would need to be given to putting her onto a zero-hours contract. For the ET not to see that as potentially imposing some form of penalty or detriment on the Claimant, would be to adopt a very narrow approach which would both be inconsistent with the case-law and entirely contrary to how such a consequence would normally be understood by most employees.

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44. For the Respondent, it is said that whilst this can be seen as a requirement, if a very broad definition is adopted, such approach would not take into account the ongoing discussion between the parties which mitigated the policy that was otherwise in place (and which needed to be in place to meet the needs of the service).

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45. I do not agree that the approach I have adopted does other than apply an entirely natural understanding of what a requirement is. At risk of repetition, in order to work the minimum hours to which the Claimant was contractually entitled, and/or for her to remain on a guaranteed minimum hours contract, she was required to work those hours allocated by the Respondent. It is right that this was for a relatively short period, and the parties were able to soon reach an accommodation that removed this requirement in early January. It may also be the case that this subsequent accommodation may reflect the Respondent's general practice of seeking to apply its policy in consultation with its employees. That, however, does not detract from the fact that the policy was applied to the Claimant, without any accommodation, for the period in issue.

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46. On the ET's findings of fact, therefore, I am satisfied that its Judgment cannot stand. The only conclusion that can be drawn is that a PCP, as defined in the ET1, was applied to the Claimant from 13 December 2018 until 7 January 2019. The ET erred in adopting too narrow an interpretation of the PCP, but equally its conclusions cannot stand on the basis of its own findings of fact.

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47. I therefore allow the appeal and set aside the ET's Judgment, holding, in substitution, that a PCP was applied to the Claimant, in the terms claimed in ET1, from 13 December 2018 to 7 January 2019: in order to work her guaranteed minimum hours, and remain on the guaranteed hours contract, she was required to work the hours allocated to her by the Respondent.

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48. That, of course, is not the end of this matter. The real issues in this case are (1) whether this gave rise to a particular disadvantage to female employees, and, if so, (2) whether that was nevertheless objectively justified. Contrary to the Respondent's suggestion on the appeal, these are not matters that it would be appropriate for me to seek to determine at this stage; they must be remitted to the ET. That is unfortunate, given the time that has now passed (and given the relatively small sums that appear to be at stake) but it is a matter which requires assessment by ET and therefore needs to be remitted.

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49. Given the time that has passed, I agree with the Claimant that remission should be to a differently constituted ET. I direct that there should be a transcript of this Judgment, which might assist the ET charged with hearing the remainder of this claim.

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