EMPLOYMENT TRIBUNALS

Claimant: Ms J Keating

Respondent: WH Smith Retail Holdings Ltd

Heard at: London South via CVP **On: 3 and 4 June 2021**

Before: Employment Judge Khalil sitting with members
Ms Fellows
Mr Matharu

Appearances

For the claimant: in person, assisted by Ms Shotton, a lay representative
For the respondent: Mr Manson, Solicitor

JUDGMENT

The claim for Indirect Sex Discrimination under S.19 Equality Act 2010 is well founded and succeeds.

The claim for Constructive Unfair Dismissal under S.94/95 Employment Rights Act 1996 is well founded and succeeds.

Reasons

Claims, appearances and documents

1. This was a claim for constructive unfair dismissal and indirect sex discrimination.

2. The claimant was supported by a lay representative, Ms Shotton and the respondent was represented by Mr Manson, Solicitor.

3. The Tribunal heard from the claimant and Mr Cruickshank, the claimant's former Manager. Both witnesses had prepared and exchanged witness statements.

4. The Tribunal had an agreed bundle of documents running to 51 pages.

5. Both parties provided oral submissions on the morning of day 2. This provided the claimant, a litigant in person, a chance to reflect on the evidence first and for the respondent to reflect on observations by the Tribunal that a number of matters had been

put to the claimant in cross examination which were not part of the respondent's pleaded case or evidence or part of the Tribunal bundle.

Relevant findings of fact

6. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

7. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

8. The claimant was employed by the respondent from 14 October 2015 as a retail assistant until her resignation with effect from 19 November 2018. The claimant had resigned by a letter dated 22 October 2018 with 4 weeks' notice.

9. The claimant has two children. Her older child is not and was not a dependent in 2018. The claimant's other child was aged 8 at the time. The claimant is a single parent. The claimant's older child does not live with the claimant and lives about an hour's bus ride away from the claimant.

10. The claimant's terms and conditions included, under the normal working hours section, a provision that the claimant was to work 20 hours per week, flexible to the needs of the business. It was also stated that the claimant could be asked to work an extra 8 hours per week where the trading patterns require more staff. Further, that the claimant may be required to work Saturdays, Sundays or Public/Bank Holidays (page 30).

11. In or around the end of July 2018, Mr Cruickshank identified a business need to introduce a Saturday rota for the weekday staff. The proposal was for the weekday staff to work 1 Saturday in 4. This was because of the operational and budget restraints in the Store caused by falling sales revenue and hence a consequential squeeze on the Store's budget. Although no evidence was put before the Tribunal to demonstrate the budgetary constraints, the Tribunal accepted Mr Cruikshank's evidence, in principle, in this regard.

12. Following the actual or anticipated departure of University students working weekends only, Mr Cruikshank proposed to 'replace' that labour with the weekday staff working, flexibly, on the aforementioned rota.

13. Mr Cruikshank explained he also had in mind a desire to increase product knowledge of those serving customers on a Saturday which could be achieved by utilising the

weekday staff. In addition, he explained he wished to avoid the prospect of needing to make any redundancies. These reasons were not given at the time, the notes of meetings and the subsequent letter did not record these reasons. Neither were these reasons pleaded in the grounds of resistance or set out in Mr Cruikshank's witness statement. They were raised for the first time in cross examination of the claimant. The Tribunal was not thus satisfied that these matters operated on Mr Cruikshank's mind at the time or were a genuine reason. The Tribunal was satisfied that Mr Cruikshank had a broad operational and budgetary reason to introduce the changes.

14. There was a significant dispute about the nature, number and content of the meetings which took place between the claimant and Mr Cruikshank in relation to the proposed changes. By the end of evidence, including Tribunal questioning and consequential questions arising from the Tribunal's questions, the Tribunal found as follows:

    - There was a meeting at the end of July 2018 at which meeting only Mr Cruikshank and the claimant were present. Mr Cruikshank confirmed in evidence that the document at page 36 was a pre-populated form (in relation to the name and working hours). It was surprising that this statement/concession was made so late in these proceedings. Under cross examination, Mr Cruikshank did not think there would have been any need for Mr Sandford to have been present at this meeting. The meeting note did not record Mr Sandford's attendance either.

    - At this meeting, whilst the claimant had signed the notes, she was not given a copy at the time. In addition, the words "no restrictions" and "once a month" were not recorded at the time. It would go against the grain of the other comment on the form "childcare costs to consider" which captured the claimant's stated concerns to Mr Cruikshank.

    - The Tribunal accepted that the document at page 37, which was a signature page of the claimant and Mr Cruikshank, dated 2 August 2018, was actually part of the meeting notes on 3 August 2018 at pages 38-40, albeit incorrectly dated. This was consistent with the separate numbering sequence on the pages (28 to 30).

    - Mr Sandford and Mr Cruikshank were both present on 3 August 2018 and the notes were taken by Mr Sandford. The comment on page 40 after the full stop "but shouldn't be an issue" was added by Mr Cruikshank. The Tribunal rejected this was done at the time. Again, it went against the grain of the preceding question and comment – the claimant was asked about whether working Saturdays would be an issue and said she hadn't spoken to her (other) daughter but would do – and indeed the question which followed, about giving the claimant a week before meeting again. It was very irregular for a non-note-taker to annotate the notes of the note taker in this way.

15. Although the minutes of the meeting on 3 August 2018 recorded that there would be a further meeting in a week's time, this did not take place. A letter was written to the claimant on 29 August 2018 which the Tribunal understood to be generic/template form which the claimant said she did not receive until after her employment ended.

16. The letter at page 42, referred to an incorrect date of 9 August 2018. It also referred to a group meeting which Mr Cruikshank said in oral testimony did not take place. He also said that the changes were not effective until October 2018, but the letter referred to 1 September 2018. Given the content of the letter, the immediacy of the change and the number of errors, if received at the time, the Tribunal found it would have been responded to or the claimant would have said something to Mr Cruikshank. That is what she did as soon as she learned she had been rostered to work Saturdays in early September 2018, accepted by Mr Cruikshank.

17. The Tribunal accepted that Mr Cruikshank did say to the claimant in early September 2018, that she needed to sort it out with her colleagues and arrange swaps. The Tribunal did not accept that Mr Cruikshank, a Manager, swore at the claimant or was otherwise hostile/intimidating. Both parties were agreed and were forthright in saying that the relationship between the claimant and Mr Cruikshank had been good and despite the challenges of Saturday working. There was no evidence of any complaint from the claimant at the time in relation to what would be a very offensive comment by a Senior member of staff.

18. The Tribunal found that the claimant did on subsequent occasions attempt to speak with Mr Cruikshank thereafter, without success. The Tribunal noted Mr Cruikshank's responses under cross examination that he was not in the Store in September and October to have had meetings with the claimant, but in response to Tribunal questioning, he confirmed that he had been in Store at least once a week, he believed on Mondays, thus there were at least 7 days when he was in Store. The Tribunal also found that Mr Cruikshank's dis-interest was rooted in his desire for the claimant to sort out swaps with her colleagues or simply to find a child care solution herself – that became, overwhelmingly obvious to the Tribunal, when Mr Cruikshank confirmed to the Tribunal that he never explored himself with any of the other staff whether somebody was prepared to work an extra Saturday to mitigate against the claimant's child care reason for not being able to do so. This was a surprising neglect of his responsibility.

19. In relation to this aspect of the claim – specifically the number of staff in Store, how many were men, how many were women, how many had childcare responsibilities of dependent children and how many had partners, the evidence before the Tribunal was woefully inadequate. This was remarkable in a claim for indirect discrimination. Mr Cruikshank amended paragraph 5 of his witness statement and said his reference to the 4 people in that paragraph were only to those with childcare responsibilities. He also confirmed that those staff were not single parents. Under cross-examination of the claimant, the Tribunal were informed that there were 12 staff affected in total, upstairs and downstairs and 'about' 8 were women. There were no documents in the bundle explaining the composition of the workplace pool at all and nothing in the pleaded case or in Mr Cruikshank's witness statement. No evidence was offered by the respondent

that there were other women with primary child care responsibilities and/or single mothers with primary child care responsibilities who were able to work the Saturday rota or, the impact on male staff. The Tribunal drew on its collective experience and exercised its Judicial discretion to assess the impact of the respondent's PCP to work on a Saturday rota to women at large. The Tribunal found this was consistent with the Court of Appeal's observations in ***London Underground v Edwards EWCA Civ 876*** where there is an insufficient, unrepresentative or unreliable basis for comparison before the ET. The Tribunal will return to this in its conclusions.

20. On 9 October 2018, the claimant sent a text to Mr Cruikshank saying that she needed to discuss Saturdays (page 43). There was no response to that text. However, on the first Saturday the claimant had been rostered to work (13 October 2018), the respondent permitted the claimant to bring her daughter in to the Store. This had been approved by Mr Cruikshank. In cross examination, it was put to the claimant that this demonstrated Mr Cruikshank was being nice and/or supportive. The Tribunal found that this was a red flag to the claimant's obvious and significant child care issue.

21. On 15 October 2018, the claimant explained to Mr Cruikshank she had no-one to look after her daughter on Saturdays. Mr Cruikshank agreed under cross examination that it was a 'massive' issue for her. He also agreed he needed to come up with plan. The Tribunal found Mr Cruikshank was frustrated at this point, he said under cross examination he was being direct. He also accepted that he said to the claimant that if he permitted the claimant not to work on the Saturday rota, everyone else would want the same. The enquiry of others however was not made. Mr Cruikshank said he would have looked in to this further but did not do so because the claimant resigned. This conversation was on 15 October 2018, the claimant resigned on 22 October 2018. Even allowing for Mr Cruikshank working in another Store several days a week, by this time this issue needed to be dealt with and given urgency and priority.

22. The claimant resigned on 22 October 2018 with notice. Under cross examination, the claimant was asked why she did not leave immediately. The claimant responded that her health had deteriorated and that she was advised by her doctor to take 4 weeks. The Tribunal found this was in fact an answer to why the claimant was signed off and having been signed off sick for four weeks, she knew that she would not be required to work during her notice period.

Applicable law

23. Indirect discrimination – S.19 EqA

(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 ('PCP') 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

24. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606.*** This requires an objective assessment, having regard to all the circumstances.

25. The correct test for constructive dismissal was set out and established in ***Western Excavating v Sharp 1978 ICR 221*** as follows:

    Was the employer in fundamental breach of contract?
    Did the employee resign in response to the breach?
    Did the employee delay too long in resigning i.e. did he affirm the contract?

26. In ***Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*** it was confirmed that any breach of the implied term of trust and confidence is repudiatory.

27. In ***United Bank Ltd v Akhtar 1989 IRLR 507 EAT***, the EAT stated that it was possible to imply a term which controls the exercise of discretion under an express flexibility clause.

28. In ***St Budeaux Royal British Legion Club Ltd v Cropper EAT 39/94***, the EAT held that an express term allowing the employer to reduce hours, was subject to the implied duty to maintain trust and confidence.

Conclusions and analysis

29. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the applicable law to the issues including the burden of proof. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise

Indirect Sex Discrimination

30. The respondent applied a PCP of requiring the claimant to work 1 in 4 Saturdays.

31. This PCP did put women at particular group disadvantage when compared with men as women, statistically, are still the primary child carers of dependent children and more women than men are single parent child carers which disadvantages women more than man from being able to work on Saturdays when schools are not open. The Tribunal refers back to its findings in relation to its judicial discretion to draw on its collective industrial knowledge in the absence of a clear pool for comparison.

32. The claimant was put at that disadvantage. The claimant is a woman, has a dependant child, is a single mother and who could not afford childcare and had no family or other network she could call upon.

33. The Tribunal accepted the respondent had a legitimate aim for its decision to introduce a Saturday rota. This was because of the need to manage costs/the Store's budget and because of the respondent's desire to spread and share the need for Saturday working amongst the entire team. The Tribunal concluded the cost saving was because the respondent would not need to recruit dedicated permanent weekend only staff and could instead rely on asking the weekday staff to work on the rota as required, although expected to be 1 in 4 Saturdays. The aim of enhancing customer experience by relying on the increased product knowledge of weekday staff might have been a legitimate aim but the Tribunal has already found this was not a genuine reason being relied upon.

34. When analysing proportionality, it was here that the Tribunal concluded that the respondent's case, fundamentally, collapsed. This was because there was no consideration or exploration of any other less discriminatory way of trying to achieve its legitimate aims. For example enquiring of any of the other 11 staff whether they were prepared to work an extra Saturday. In the Tribunal's conclusion this was the obvious starting point. The prospect of recruiting only 1 dedicated Saturday worker was also not explored. Mr Cruikshank confirmed there was no premium cost to weekend labour. There may have been other options too. The Tribunal was left with an overwhelming impression that the claimant not doing the Saturday rota was never an option for the respondent.

35. It appeared to the Tribunal that there was either casualness and/or a lack of HR support for Mr Cruikshank, alternatively inadequacy of diversity training. There was no diversity and inclusion policy in the Bundle or training records of managers.

36. The Indirect Sex Discrimination claim is thus well founded and succeeds.

Constructive Dismissal

37. For reasons which substantially overlap with the conclusions reached above, the Tribunal concluded that because of the failure to have any regard to or any proper regard to the claimant's child care issues despite several opportunities to address it, the respondent's conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. More specifically, the Tribunal concluded that the conduct was likely to destroy or seriously

damage the relationship of trust and confidence. There was no reasonable and proper cause because of the Tribunal's conclusions above, in particular in relation to proportionality.

38. The Tribunal concluded that the express flexibility provisions were fettered by the implied term of trust and confidence. Where reliance on the clause would have an (avoidable or potentially avoidable) indirect sex discriminatory impact on the claimant, it was not consistent with the implied duty of trust and confidence to permit such discretion to be exercised. The reliance on the clause in this case in relation to the claimant undermined and breached the implied term of trust and confidence wholeheartedly.

39. The Tribunal concluded the claimant did resign in response to this breach of the implied term of trust and confidence and she did not delay too long when she resigned. The claimant's resignation on notice was only a 4 week period for which period the claimant had, on the same day, been signed off for 4 weeks and thus knew she would not be working.

40. The Tribunal has already found that Mr Cruikshank did not swear at the claimant or behave in a hostile or intimidating manner at the time. (In any event and for the avoidance of doubt, the Tribunal concluded there was no separate claim of harassment under the Equality Act 2010 before it. This was confirmed at the Case Management Hearing on 16 May 2019.).

41. No potentially fair reason was advanced by the respondent. The claim for constructive unfair dismissal is thus well founded and succeeds.

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Employment Judge Khalil
Date: 25 June 2021