RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Reyland**

Respondent: **Hanley Smith Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **4, 5, 6 May 2021 (and in chambers on 7 May 2021)**

Before: **Employment Judge Allen QC**
Members: **Ms A Berry**
Mr P Quinn

Appearances
For the claimant: In person
For the respondent: A Stroud, counsel

This has been a remote video hearing which was not objected to by the parties. The form of remote hearing was V: video - fully (all remote) by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to are in the tribunal file, and in the written statements, submissions, authorities and bundle of documents produced by the parties, which the tribunal had before it.

RESERVED JUDGMENT

1. **The claims of direct and indirect sex discrimination fail and are dismissed.**

2. **The claim of associative indirect disability discrimination fails and is dismissed.**

3. **The claim of unfair dismissal succeeds.**

4. **The compensatory award for unfair dismissal is reduced by 65%.**

5. **The claim of victimisation fails and is dismissed.**

6. **Listed for Remedy Hearing on 13 August 2021 by CVP.**

7. Case Management Orders are set out at the end of the Reasons.

REASONS

Claim

1. By claim form presented on 15 September 2019, the Claimant brought a claim against the Respondent for failure to comply with employer's obligations following a statutory flexible working request and direct and indirect sex discrimination, subsequently amended to include a potential claim for associative indirect disability discrimination.

2. By a 2nd claim form presented on 19 November 2020, C brought further claims for unfair dismissal and victimisation.

Issues

3. The issues were identified at Case Management Preliminary Hearings on 14 January 2020, 14 April 2020 and 18 January 2021. The issues were revisited with the parties at both the start and the end of the hearing and are as set out below:

Breach of the statutory right to request contract variation (ss.80F-80I ERA 1996)

a. Did the C make an application for a change in her terms and conditions of employment within the meaning of s.80F(1)(a)a ERA?

b. If so when was that application made? During the hearing it was agreed that the only potential application was that of 9 May 2019.

c. Depending on that date, a limitation (time limits) issue may arise by reference to the provisions in s.80H(5) ERA. During the hearing, the Respondent indicated that it did not wish to pursue a time limit argument.

d. If there was more than one application, does the limit on making a second application within 12 months (s.80F(4) ERA) apply?

e. Did the application comply with the requirements of s.80F(2) ERA, read together with Reg 4, Flexible Working Regulations 2014?

f. In dealing with the application, did the Respondent comply with the requirements set out in s.80G ERA, in particular:

i. Did it deal with it in a reasonable manner;

ii. Did it notify the Claimant of the decision within the applicable decision period;

iii. If it refused the application, did it do so on one or more of the permissible grounds;

iv. If there was an appeal did it comply with the requirements of s.80G(1A-C)?

Direct sex discrimination: s.13 EqA

g. By refusing the Claimant's request to work from home, did the Respondent treat the Claimant less favourably than it treated, or would treat, male employees in the same material circumstances?

h. The Claimant relies on the following comparators: Simon Riches, Ray Edwards, Roy Edwards and Duncan Shellard. They are all mangers. Alternatively, she relies on a hypothetical comparator.

i. If so, did the Respondent treat the Claimant in this way because of her sex?

Indirect sex discrimination: s.19 EqA

j. Did the Respondent apply a PCP of requiring employees to work from the Respondent's premises? This was accepted by the Respondent during the hearing.

k. Did the Respondent apply the PCP equally to men and women? This was accepted by the Respondent during the hearing.

l. If so, did the application of the PCP put women at a particular disadvantage when compared with men?

i. The disadvantage relied on by the Claimant is that it had a negative impact on the ability to provide childcare.

m. Did it put the Claimant at that disadvantage?

n. If the Tribunal is satisfied that all the elements above are made out, it is then for the Respondent to show that it acted proportionately in pursuit of a legitimate aim.

o. Has the Claimant brought the claim in time? During the hearing, the Respondent indicated that it did not wish to pursue a time limit argument.

p. If the Claimant has not brought the claim in time, is it just and equitable to extend time?

Indirect disability discrimination by association

q. The Respondent conceded that the Claimant's youngest child was disabled within the meaning of the Equality Act 2010. The question of knowledge of disability was potentially still live (if relevant).

r. If the Respondent did apply the PCP of requiring employees to work from the Respondent's premises, did the application of the PCP put individuals caring for someone disabled under s.6 of the EqA 2010 at a disadvantage when compared to individuals without that responsibility?

   i. The disadvantage relied on by the Claimant is that it had a negative impact on the ability to provide childcare.

s. Did it put the Claimant at that disadvantage? During the hearing the Respondent accepted that the PCP met the requirements of both group and individual disadvantage in this regard.

t. If the Tribunal is satisfied that all the elements above are made out, it is then for the Respondent to show that it acted proportionately in pursuit of a legitimate aim.

u. Can the Claimant bring a claim of indirect disability discrimination by association?

v. If the Claimant can bring such a claim, has she brought it in time? During the hearing, the Respondent indicated that it did not wish to pursue a time limit argument.

w. If the Claimant has not brought the claim in time, is it just and equitable to extend time?

Unfair dismissal

x. The Claimant conceded in submissions that there was a genuine redundancy situation and that the reason for her dismissal was redundancy, which is a potentially fair reason.

y. Was there adequate warning and consultation about the redundancy?

z. Did the Respondent act reasonably in identifying which employees should be at risk of redundancy?

aa. Did the Respondent adopt a reasonable method of selecting which employees should be displaced?

bb. Having done so, did the Respondent make reasonable efforts to identify any suitable alternative employment?

cc. Overall, did the Respondent act reasonably in deciding that redundancy was a sufficient reason to dismiss the Claimant?

dd. If the redundancy exercise was deficient in any respect, whether the Claimant would have been dismissed for redundancy in any event.

Victimisation

ee. The detriments alleged are (i) being selected for redundancy, and (ii) being dismissed.

i. Can the Claimant establish facts which, in the absence of any explanation from the Respondent, a Tribunal could infer that the dismissal was because she had done a protected act; and if she can:

ii. Can the Respondent show that the dismissal was in no sense whatsoever because of the protected act.

ff. If the Claimant establishes that her dismissal was an act of victimisation then the issues that arise in respect of compensation will include:

i. Whether the Claimant has established that she was entitled to compensation for injury to feelings; and

ii. Whether any claim for financial loss because of her dismissal should be reduced to reflect the possibility that she could or would have been lawfully dismissed.

4. It was agreed that remedy issues including re-employment, mitigation and precise calculation of compensation, would be dealt with at a separate hearing, if the Claimant was successful.

5. The tribunal was referred to pages in two bundles (neither of which were compliant with presidential guidance, which hampered the efficiency of the hearing considerably). At the hearing, the tribunal accepted additional documents from the Claimant, largely better copies of documents already in the bundle and two additional pages labelled [215a &b]. The Respondent did not object to the tribunal receiving those documents.

6. The tribunal read witness statements and heard evidence from the Claimant (two witness statements); and on behalf of the Respondent from Lynette Bonfield, Office Manager (who had been the Claimant's line manager); Simon Riches, General Manager (also two witness statements); and Karl Verley, Management Accountant, who worked with the Group companies of which the Respondent was a part – but not for the Respondent itself; and who heard the appeal against dismissal. We received a witness statement from Kay Mansfield former Director / owner of the Respondent, which had been signed on 1 April 2021. She did not attend to give evidence. We were only able to give very limited weight to the content of that witness statement given her non-attendance, which was never explained to the tribunal and the Claimant provided us with a list of challenges to assertions of fact made in Kay Mansfield's witness statement.

7. On Wednesday 5 May 2021 during the cross examination of Simon Riches by video link, it became apparent that Lynette Bonfield was in the room with him and that she had passed him a note. The hearing had to stop whilst this matter was

investigated. Simon Riches admitted that this had happened. Lynetter Bonfield then left the room that Simon Riches was in. That this incident had occurred was taken into account by the tribunal when weighing the evidence of the parties.

8. The hearing took place over three days. The tribunal heard oral submissions from both parties and both parties supplied written submissions to the tribunal. The tribunal reserved its decision and deliberated on day four (7 May 2021).

9. The Claimant sent an email to the tribunal after the conclusion of the hearing asking the tribunal to look at the Respondent's attitude towards her flexible working request. This was a matter that the tribunal had already noted and discussed in any event.

Findings of Fact

10. The Respondent is an aerospace engineering company specialising in the repair and overhaul of aerospace and aviation parts and components. The Claimant started working for the Respondent on 26 June 2005 as an administrator. She was promoted to Office Manager on 25 April 2014.

11. The Claimant initially worked full time and she was Office Manager when she went off on her first maternity leave in 2015.

12. She returned to work part time on 12 hours per week from 30 June 2016 and was part time until the end of her employment. Her role on returning to work was as an Administrator. At the relevant time, there were two other Administrators – both full time and in addition, Lynette Bonfield held the Accounts Assistant / Office Manager position. The Respondent's employees' contracts of employment contained an entitlement on the part of the Respondent to enforce short working.

13. The Claimant's 2nd period of maternity leave ended on 23 February 2018, although she wasn't able to attend work on that day as her youngest child was ill. After negotiation, the Claimant returned part time on 11 hours and 45 minutes per week.

14. In the period March 2018 to January 2020, the Claimant submitted 35 unpaid leave forms for a variety of reasons including her own ill health and that of her children. 14 of those forms are specifically labelled as 'dependent leave' or 'parental leave'. The Claimant's youngest child has suffered from poor health from a very young age - the Claimant says from around 10 weeks old. In an unpaid leave form dated 29 March 2018, the Claimant notified the Respondent that her son had had a bad seizure and had been taken to hospital by ambulance and treated for sepsis. In an unpaid leave form dated 3 September 2018, the Claimant notified the Respondent that her son had ended up in hospital with 2 seizures and was awaiting a brain scan and further appointments. In an unpaid leave form dated 28 September 2018, the Claimant notified the Respondent that her son had a neurology appointment on 16 November 2018. In an unpaid leave form dated 21 January 2019, the Claimant notified the Respondent that her son had been in hospital. In an unpaid leave form dated 17 June 2019, the Claimant notified the Respondent that her son had breathing problems and had been in hospital. In an unpaid leave form dated 24 September 2018, the Claimant notified

the Respondent that her son had been to A & E having had difficulty breathing. In an unpaid leave form dated 3 October 2019, the Claimant notified the Respondent that her son had been admitted to hospital with breathing problems and that her son would have a follow up hospital appointment on 11 October 2019[1].

15. In addition on 22 August 2018 the Claimant told her manager, Roy Edwards, then the Managing Director and Lynette Bonfield that her child had had a fit and was in hospital and that she wouldn't be in that week. On the basis of those communications, the tribunal was satisfied that the Respondent had constructive knowledge of the Claimant's younger child's disability at all relevant times.

16. The Claimant told us that she had effectively made previous requests for altered hours on 21 July 2018 and 2 November 2018, which had been considered by the Respondent, but both parties agreed that such requests had not fallen within the definition of statutory flexible working requests.

17. On returning from maternity leave in 2018, the parties agreed that the Claimant's tasks were primarily:

    a. Collating of Invoice/PO/GRN;
    b. Creating Tracware Invoices;
    c. Posting of Tracware invoices;
    d. Separating pink purchase orders from invoices.

18. The Respondent's evidence in relation to these tasks was as follows:

    a. Collating of Invoice/PO/GRN: the Respondent says that this is a task that cannot be carried out off site as it involves collating a number of documents from various sources plus external invoices from suppliers that need to be kept in the office, and are used by others;

    b. Creating Tracware Invoices, the Respondent says that this continues from the point above and involves the documents collated previously. Once the invoice is printed in the office it is attached and all invoices are then passed onto accounts for entering;

    c. Posting of Tracware invoices, the Respondent says this was once done from home and could be done remotely. This had been done historically due to the implementation of a new computer system creating a backlog that required clearing. This has been up to date since then and is now a task carried out in the office. It is a monthly task and takes no more than 1 hour and so it would not be practical to allow home working for just one such task once a month.

    d. Separating pink purchase orders from invoices, the Respondent says that there is no requirement for this to be done off site as ample staff and capacity exists in the office to carry out this task. Also, the files that these

[1] That 3 October 2019 communication post-dates the decision in relation to the flexible working application

documents reside in are in use by others and as such cannot be removed from the office.

19. The Claimant did not dispute much of the Respondent's evidence in this regard but she did consider that if special arrangements were made, sufficient work could have been found to permit her to work from home if her child was unwell.

20. The Claimant had been told in June 2018 that she could work from home for part of her hours and her laptop was equipped with remote access in order that she could do so. However in July 2018 she was told that this would have to stop 'due to GDPR'. That led to the Claimant raising a grievance – which led to a grievance meeting on 9 August 2018 at which the Respondent reiterated that she couldn't work from home. The grievance outcome letter of 16 August 2018, referring to the earlier arrangements, states:

> It was agreed that Roy had allowed Sam to work from home for an additional 4hrs 45min to assist in reducing a work backlog. Following a management review the working from home additional hours were stopped. The backlog of work will be distributed amongst the existing administration personnel to be carried out during normal working hours. Working from home is not considered as a suitable option as it will have a detrimental impact on our ability to meet customer demands due to the need to raise internal documentation and answer telephone communication. Other workers who previously had company equipment and carried out finance related duties were stopped from this activity approximately 12 months ago for the same reason as there would be an impact on our ability to meet customer demands.
>
> It was also referenced that any contracted hours lost will be reviewed and actioned in accordance with existing legislation based as the reasons you have given for the absence. Therefore as described above the company consider your request to work at home not acceptable."

21. The Claimant appealed and at the grievance appeal meeting on 17/9/18 with the then Directors / owners Jon and Kay Mansfield, she was told that there was concern about her using her home computer for work in the context of the GDPR and there was a discussion about Lynette Bonfield having worked from home in the past. The Claimant explained her difficult family situation and made it clear that it wasn't easy for her to work from home but that she wanted to be able to do so if her son was ill, so that she could continue to earn money – even if it meant working out of office hours. The Respondent made it clear that she could continue to take dependent leave when her child was ill but that this would be unpaid leave. Towards the end of the meeting Jon Mansfield stated "you know you don't have to work for us".

22. The grievance appeal outcome letter of 18 September 2018 stated:

> We also explained that we require administration staff to work in the office rather than at home as that offers the Company the greatest flexibility in order to best meet our customer needs. Whilst in the workplace, you can fulfil any task necessary and can be easily switched jobs to match needs at the time. Working from home restricts what you can do and does not allow us to readily change the task. You said you would prefer to complete your contracted hours at work and that working from home is difficult, but owing to your son's medical issues you could not guarantee being able to attend.
>
> We agreed that we would look into the possibility of offering you occasional non-sensitive

> tasks to be completed at home when you have been unable to attend work because of your son's illness We would need to discuss this issue further with Roy and Ray following their return from holiday and then confirm our decision. We also agreed to meet you again next August when it was hoped your family situation may be easier to manage.

23. Ms Bonfield had previously worked at home and she had a work laptop for remote access which was still in her possession until summer 2018. Some limited home working by Ms Bonfield took place in 2017 and at the start of 2018.

24. The reasons put forward at this tribunal hearing by R for homeworking not being suitable (particularly if out of office hours) were:

    a. The commercial sensitivity of the Respondent's paperwork if it went astray whilst out of the office;

    b. The practicalities stopping or greatly hampering the Claimant in performing her tasks at home – including the handling of unrecorded original paper invoices, the need to collate various documents from different sources, many of which were in paper form, the process by which pink slips were sent and retrieved from the workshop in physical form, the number of individuals that the Claimant would need to speak to during office hours;

    c. The low volume of work which could actually be done at home (amounting to a few hours a month at best) unless there was a specific discreet task which could be carried out at home;

    d. The need to cover for other office workers (e.g. in answering phones);

    e. The difficulties which the Claimant herself had identified with doing any work at home when her children were awake.

25. On 9 May 2019 the Claimant says she made a formal statutory request which stated:

> *Please take this email as a request to change my hours as of 9th September 2019.*
>
> *After my meeting with Kay and Jon Mansfield, it was agreed a follow up meeting would take place in August and it would be to discuss changing my hours once my eldest son starts school this September.*
>
> *I have spoken to nursery regarding days and hours for my youngest son, and the new hours I am requesting from 9th September is:*
>
> *Mondays, Thursdays and Fridays: 9:15am - 12:45pm.*
>
> *This is due to child care costs as I would be dropping my youngest to nursery at 8am and my older son to school at 8:50am.*
>
> *Once my youngest son is eligible for 3 year funding at nursery from April 2020, I would be looking at upping my hours with another morning.*
>
> *I did also mention previously that I am happy to work extra hours from home until then but if this is not possible on a regular basis, then at least be able to work from home when*

> *my children are to poorly to attend nursery / school to stop me losing working hours and pay. Especially with my youngest as you are aware he suffers with his health and has had numerous hospital admissions.*

26. It did not state that it was an application for flexible working under s80F ERA 1996; nor does it explain what effect, if any, the employee thinks making the change applied for would have on the employer and how, in her opinion, any such effect might be dealt with.

27. There was a meeting on 19 July 2019 between the Claimant and Roy Edwards, which included reference to the difficulties facing the Claimant and on 22 July 2019, the Claimant chased for a response to her flexible working request.

28. The Respondent's ultimate response was on 7 August 2019 from Roy Edwards and it stated:

> *Re: Flexible Working Application Outcome*
>
> *I confirm receipt of your application to work flexibly on the 9th May 2019. I have considered your request for a new flexible working pattern and I am pleased to confirm that I am able to accommodate your application*
>
> *Your new working pattern will be as follows:*
>
> *Mondays, Thursdays and Fridays: 9:15am-12:45pm*
>
> *Your terms and conditions, which are proportioned according to your hours, will be adjusted pro-rata. Your new working arrangements will begin from 9th September 2019.*
>
> *I note your comments that you may wish to increase your hours from April 2020. I would wish to reiterate that the change to your working pattern will be a permanent change to your terms and conditions of employment and you have no legal right to revert back to your previous working pattern or increase your hours. You may of course submit a further flexible working request when eligible to do so and we will consider any request in accordance with business needs at the time of any application.*

29. At the time, both parties appeared to regard the request as being a statutory request. The Respondent agreed to the new working hours but did not address the part of the Claimant's 9 May 2019 email where she stated "I did also mention previously that I am happy to work extra hours from home until then but if this is not possible on a regular basis, then at least be able to work from home when my children are to poorly to attend nursery / school to stop me losing working hours and pay".

30. On 13 August 2019, the Claimant in response stated "As you have said in your email you have accepted my request to work flexibly. Am I to assume this means working my contracted hours from home if the boys are too ill to attend nursery or school?"

31. The Respondent responded on 22 August 2019.

> There has been no change in working procedures in respect of administration staff in the office. Staff are expect to work in the office, this enables flexibility to meet our business needs. When working in the workplace staff can cover most tasks as necessary that allows personnel to switch jobs to help with the job completion as required. Working from home restricts this flexibility.
>
> The Company are a family friendly employer and will seek to assist you in any other way that we can should your children or indeed any other dependent mean that you are unable to attend work, Whilst I am sorry we are unable to deal with this part of your request, as was the case at your appeal hearing in September 2018, I do hope that you understand the logistical problems that this would cause.

32. The Respondent has accepted that at this time, it had a policy of not permitting administrative staff to work from home and it accepts that this amounts to a PCP.

33. The Respondent stated that this policy had been in place since early 2018. In paragraphs 5, 9 and 11 of the addendum to the Respondent's response the Respondent sets out the following in relation to its aim in imposing this PCP:

> 5 The tasks listed which the Claimant undertakes in the schedule are all legitimate and proportionate aims of the respondent in order to run its business. The manner of the work undertaken (PCP) is necessary for it to comply with its contractual obligations as an aircraft repair and overhauls company. Being part of the aviation industry the Respondent is part of one of the most highly regulated industries save for the nuclear industry. As such everything comes back to documentation and traceability. Every nut and bolt used can be traced back to its manufacture and the regulations around control of documents and record keeping are so security stringent that the company cannot afford the risk of any physical documents leaving the building. If work took place on an aircraft and problems or worse was later to arise then the paperwork checks would go back to the processes that the Claimant may be involved in. If the respondent could not be accountable it would result in the Civil Aviation Authority (CAA) revoking its approval meaning it could not perform any work and jeopardise the business if not close it with the resultant loss of jobs.
>
> 9 The PCP has nothing to do with cost for example ie not putting in a remote computer access system, but to do with such a process being unworkable due to the nature of the work. A policy allowing work from home could put at risk the economic future of the company and it employees with documents going outside of the workplace. To ensure that security measures, given the sensitive nature of its work, are complied with it is not permitted. In addition the safety of individuals ie those affected by the repairs to aircraft is a factor as to why the PCP is set up coupled with client needs to avoid any mistakes.
>
> 11 The rights of the other workers also form a legitimate, proportionate aim for the PCP. The Claimant works as part of a chain and physically passes documents on to other workers to fulfil their roles. For example the Booking in of jobs at item 3 on the schedule requires a physical presence by the administrative worker involved. The document is physically taken down by the worker to the workshop for staff to perform the work. This cannot be performed off-site and involve work as part of chain across numerous departments to pass on the physical work pack which is contributed to by different workers at different stages. The work detail may change and cannot be done by someone off site as they may have to react to such changes quickly in order to perform their part of the process.

34. The Claimant's hours from September 2019 were 10.5 per week.

35. The Claimant's 1st ET1 was presented on 15 September 2019 and the Respondent correctly accepted that this was a protected act. The Claimant says that the following acts subsequently took place:

a. On 19 October 2019, Roy Edwards came to her desk in the open plan office and stated 'just to let you know, in regards to your claim, looking forward to it';

b. On 7 November 2019 and 18 November 2019 the Claimant heard Roy Edwards and Simon Riches discussing her tribunal claim in an office with the door open;

c. On 19 December 2019 the Claimant became aware that other people in the office were aware of her tribunal claim and had been discussing it amongst themselves;

d. On 10 January 2020, having had a solicitor's appointment in the morning, when she arrived at work, she sensed an uncomfortable atmosphere and someone had put a sign up stating that nothing should be placed on the shredder – where the Claimant had previously placed a lightweight fan;

e. On 6 February 2020, the Claimant's co-workers ignored the phones and the Claimant had to answer them all morning;

f. On 16 July 2020, Ms Bonfield sent an email to the Claimant asking her for £25 of contributions to the staff lottery fund (5 month's worth).

36. The Claimant had some periods of absence for work related stress and anxiety.

37. The Claimant was furloughed with effect from March 2020 and did not return to the workplace prior to her dismissal with effect from 31 October 2020.

38. By telephone on 17 July 2020, the Claimant was notified by Simon Riches that there was a potential redundancy situation and her role was at risk. She asked if the office staff at risk included the other two administrators and Ms Bonfield and he said yes. The Claimant says that Mr Riches also said that two people would be made redundant.

39. The Claimant does not challenge that the redundancy situation was genuine.

40. The Claimant received a letter dated 23 July 2020 from Simon Riches which stated:

> I am writing further to the telephone conversation held on Friday 17th July with myself. As discussed, we have seen a significant downturn in demand for our maintenance activities and with our forecasted projects as a result of the current pandemic. With the continued uncertainty and no foreseeable significant increase in sales to our pre-pandemic levels, we are in the unfortunate position of having to look at restructuring the business to reflect our reduced forecast and operational demand and with this consider the possibility of redundancies. As part of the proposed restructure, within the Office Administration Team we are considering reducing our Administrators from 3 people to 1 person and it has been identified that your current role is at risk of redundancy.
> A consultation meeting has been arranged for 09:30 Wednesday 29 July 2020 to discuss this in more detail. For those individuals currently furloughed, if you feel uncomfortable in leaving your 'bubble' and coming in for a face to face meeting we can

> make alternative arrangements by way of Zoom video call or telephone conference call. Please let me know by 15:00 Tuesday 28th July if you wish your meeting to be conducted remotely.
>
> At the meeting you will have the opportunity to:
>
> • Discuss the reasons for the proposed redundancy
> • Put forward any suggestions which may avoid the need for the proposed redundancy
> • Ask any questions you may have with regard to the proposed redundancy
> • Explore any alternative positions which are available across the Group
>
> You have the statutory right to be accompanied at the consultation meeting. Your companion may be either a work colleague or if applicable a trade union official of your choice.
>
> This is still part of the consultation process and no final decision has yet been made. We are open to any suggestions that you can put forward. We encourage you to share any ideas that you may have for avoiding redundancies with us, as consultation is a two way process.
>
> We will also endeavor to see whether any alternative post is available within the Group and we will discuss this with you at the meeting. We recognise that this must be a very difficult time for you and if you have any queries regarding the content of this letter please do not hesitate to contact us.

41. In subsequent emails the Claimant was initially given the impression that the 29 July 2020 meeting would be an individual meeting – it was subsequently clarified by email that this would be a group meeting and the Respondent apologised for the confusion.

42. The group consultation meeting on 29 July 2020 took place attended by Ms Bonfield, Mr Riches, the Claimant and the other two Administrators.

43. Mr Riches explained that due to the Covid-19 induced downturn in the aviation industry, the Respondent needed to restructure and that this was why redundancies were being looked at across the business including in administration. The Claimant learned at this meeting that Ms Bonfield was not to be included in the pool for selection and that 2 of the 3 Administrators would be selected for redundancy. They were informed that there would be subsequent one to one meetings. There was no reference made to the Claimant's part time status – and there was no reference to how the one, presumably full time equivalent, role required would be filled if the Claimant was successful in any redundancy selection exercise.

44. The Claimant was invited by letter dated 12 August 2020 to a one to one meeting on 17 August 2020. This was postponed to 24 August 2020.

45. At the meeting on 24 August 2020, the Claimant was informed that the Respondent had used a matrix for scoring the candidates and that she could appeal or challenge the scoring.

46. The Claimant's initial scoring matrix was as follows (the tribunal has added the references A to G on the left hand side for ease of reference):

		1 point	**2 points**	**3 points**	**4 points**	**Score**
A	Length of service with the Company	0 to 12 months	1 to 5 years	6 to 10 years	More than 10 years	4
B	Absence record in previous twelve months*	11 or more days	7 to 10 days	3 to 6 days	0 to 2 days	1
C	Timekeeping record	Frequently late or frequently leaves early or takes longer lunch break than entitled to	Only occasionally late or early to leave	Generally works contractual hours	Never late and always keen to work such hours as are necessary to complete the task	1
D	Disciplinary record for misconduct / poor performance	On final written warning	On written warning	On verbal warning	No disciplinary record	4
E	Job performance and quality of work	Quality of work is marginal and error correction is often necessary	Quality of work is generally acceptable but error correction is necessary from time to time	Above average quality of work produced on a regular basis with limited errors	Consistently achieves a high standard of work and errors rarely made	3
F	Quantity of work and achievement of targets	Requires regular supervision in order to achieve minimum expectations / targets and rarely exceeds them	Normally achieves minimum expectations / targets and sometimes exceeds them	Consistently achieves at least minimum expectations / targets and often exceeds them	Always exceeds minimum expectations / targets by a significant margin	2
G	Relevant skills qualifications and training	Very few technical and practical skills and / or appropriate qualifications and training to perform their current job or a similar job role	Adequate technical and practical skills and / or appropriate qualifications and training to perform their current job or a similar job role but needs to be	Above average technical and practical skills and / or appropriate qualifications and training to perform their current job or a similar job role	Significant technical and practical skills and / or appropriate qualifications and training to perform their current job or a similar job role – applied	3

			developed / improved		consistently and to a high standard	
						18

47. Ms Bonfield had scored categories E (job performance and quality of work); and F (quantity of work). Mr Riches scored the other categories.

48. At the meeting on 24 August 2020, the C was given her scores. She was able to identify areas of concern to her about the scoring. Also at that meeting, the Claimant raised the possibility of alternative employment and the possibility of job sharing by a full time Administrator dropping by say 10 hours per week in order to accommodate the Claimant.

49. The Claimant challenged her scores for categories B (absence); C (timekeeping); E (job performance and quality of work); F (quantity of work); and G (skills and qualifications).

50. Minutes of the meeting produced by the Respondent were challenged by the Claimant. The Claimant had secretly recorded this and many other meetings. In particular the Respondent's minutes stated that the Claimant had been told that there was no alternative employment but this was not said at the meeting. Mr Riches' explanation for this was that he had meant to say it but had forgotten to do so in the Claimant's meeting.

51. At a subsequent one to one meeting on 2 September 2020, the Claimant was told that she was in the bottom two out of the three candidates and she was told that her suggestion of a job share was not viable and that the person who had come top would not entertain it. The Claimant was told that there was no alternative employment available.

52. The Claimant was given revised scoring – now a total of 20 – which was still two marks behind the candidate who had come first. The categories where the Claimant's scores had increased were C (timekeeping) – now up from 1 to 2; and G (skills and qualifications) – now up from 3 to 4. The C's challenge to the category B (absence) score was not agreed to at that meeting. Mr Riches said that he took advice on this point.

53. The Claimant again challenged the minutes supplied by the Respondent after that meeting.

54. On 4 September 2020 the Respondent wrote to the Claimant inviting her to a further meeting stating as follows:

> Having considered your counter proposals and investigated the possibility of alternative positions within the Company, it now appears that we are moving closer to the conclusion of this consultation period and you are therefore advised that this meeting may result in the termination of your employment.

55. Ultimately that meeting took place on 1 October 2020 and a dismissal letter was issued on the same day.

56. The dismissal letter originally sent out had to be corrected and it was reissued with corrections on 13 October 2020. The Claimant was told that she would be dismissed with effect from 31 October 2020 with 12 weeks notice from 2 October 2020 – paid partly in lieu. At the meeting on 1 October 2020 she was told that there was no alternative employment and that there was no possibility of a job share which was described as 'not viable'. She was told of the nature of the redundancy and notice pay entitlement.

57. The Claimant had already appealed by letter dated 5 October 2020. She claimed that the redundancy selection process had not been fair and that she had been victimised for having brought a discrimination claim to the Employment Tribunal. She alleged a number of procedural errors in the way in which the Respondent had conducted itself during the redundancy process. She raised again her suggestion that two people could have been saved from redundancy if both were part time. She challenged her score for category B (absence) on the basis that work related stress absence should be discounted; and for category C (lateness) on the basis that 10 of the supposed late arrivals had been due to hospital appointments. She also challenged Ms Bonfield's exclusion from the pool.

58. The appeal letter was addressed to Mr Riches. In his 2nd witness statement at paragraph 26 he had originally stated: "that concluded my involvement in the matter". However in light of the documentary and witness evidence contradicting that remark, he retracted that statement during his oral evidence. In fact he had considerable input during the appeal stage.

59. An appeal hearing took place on 29 October 2020 with Karl Verley and Jacqui Mace, Group HR and Payroll Manager. The Claimant was given an opportunity to state her position in relation to her challenges to the decision to dismiss. At the end of the meeting the Claimant was told that they would need some time to look into all of the matters raised.

60. On 6 November 2020, Mr Riches responded to an email from Mr Verley providing responses to questions posed by Mr Verley. Within those responses, Mr Riches made comments that Mr Verley agreed were inappropriate, including saying that Mr Riches believed that the Claimant's stress was self inflicted or fabricated. The tribunal accepted that Mr Verley ignored this inappropriate material.

61. On 10 November 2020 Mr Riches emailed Mr Verley and Ms Mace as follows:

> Had a thought as I put down the phone to you, I think Sam's lateness might be worse that 17%, I will need some time to check though. I have a feeling the lateness doesn't take into account sick days or unpaid leave days. So rather than for example being late 17 times in 100 contacted days, if she was off work for 20 of them, 17 late days out of 80 makes her score even worse. Is it worth me doing some further investigating?

62. On 17 November 2020 Mr Riches emailed Mr Verley and Ms Mace to the effect that having looked again at the Claimant's category C (timekeeping / lateness) figures, she had been late on 27 out of 87 shifts – amounting to 31% late. He attached the clocking report. There was no evidence before the tribunal that anyone at the Respondent looked again at the lateness scores of the other two

Administrators. However the tribunal notes that the Administrator who scored highest overall had scored '4' for lateness – meaning that she was 'never late'.

63. In the appeal outcome letter 18 November 2020, the Claimant was informed that her score for category B (absence) had been increased from 1 to 3 on the basis that work related stress absence should be disregarded; but that the Respondent had decreased her score for timekeeping from 2 to 1 – following the intervention from Mr Riches. This left the Claimant with a total score of 21 – which was one mark lower than the successful candidate.

64. The Claimant's suggestion that the one full time equivalent role now required could be shared was dismissed on the basis that "It was not felt that it would be conducive to ensuring continuity for these tasks to be shared and in fact one of the Administration roles had differing duties to the other two roles. The tasks that this administrator was already trained in were an essential part of ensuring the Company compliance for certain regulatory manuals and the running of the administration department, therefore it was felt that the other two roles could be lost with little impact to the day to day running of the business." This strongly suggested that the Respondent wanted to keep this individual in post – and was contrary to the assurances that the Claimant had previously been given that the process was neutral as between the three Administrators. In any event, the Claimant had the relevant skills and experience to deal with the regulatory manuals. Mr Verley was unable to account for why that particular explanation had been given save to say that it was something that he had been informed of by Mr Riches in a telephone conversation.

65. Mr Verley did not disagree that there had been administrative errors during the redundancy process, however he viewed them as having been corrected and that the process overall had been fair.

Credibility of witnesses

66. Where there was a conflict between the evidence of the Claimant and either Mr Riches or Ms Bonfield, we generally preferred the Claimant's evidence. She had provided comprehensive witness statements and her evidence was consistent with the documentary evidence before the tribunal. Mr Riches' evidence was marked by his failure to be able to back up what he had said in his witness statement, in particular about matters that had occurred prior to his engagement. The tribunal's view of Mr Riches and Ms Bonfield's integrity and credibility was affected by the incident during the hearing on Wednesday 5 May 2021 as recounted above. In addition, in relation to Ms Bonfield, the tribunal was surprised that she did not volunteer in her witness statement that she had scored two of the categories in the redundancy scoring matrix – which she accepted in oral evidence.

67. The tribunal's view of Mr Verley's evidence was more mixed. He did openly accept that a number of errors had taken place in the redundancy process but he was strikingly unable to explain satisfactorily explain the references made in the appeal outcome letter to the supposedly unique abilities of the other Administrator relating to the regulatory manuals.

Submissions

68. The tribunal received written and oral submissions from both parties. The Claimant in her submissions accepted that there had been a genuine redundancy situation and that the reason for her dismissal was redundancy (albeit that she was still arguing that her selection was made as an act of victimisation). The Respondent in its submissions sensibly indicated that it was not seeking to take a time limit point in relation to the flexible working or discrimination complaints arising from the refusal of 22 August 2019.

69. The tribunal was referred by the Respondent's counsel to *Hacking & Paterson v Wilson* UKEATS/0054/09; *Macmillan v MoD* UKEATS/0003/04; *Shakleton Garden Centre v Lowe* UKEAT/0161/10; *CHEZ Razpredelenie Bulgaria v Komisia za zashita ot diskriminatsia* [2015] IRLR 746; *Nicolls v Rockwell Automation Ltd* UKEAT/0540/11; and *Russell v College of North West London* UKEAT/0314/13.

70. The Claimant made reference in her submissions to *Coleman v Attridge Law* [2008] ICR 1128, ECJ and [2010] ICR 242; *Hardy v Lax* [2005] ICR 1565*;* and *Hainsworth v MoD* [2014] EWCA Civ 763.

Relevant Law

Unfair Dismissal

71. The relevant parts of sections 94, 98 and 123 Employment Rights Act 1996 (ERA) state:

> ***94 The right***
> *(1) An employee has the right not to be unfairly dismissed by his employer.*
>
> *. . .*
>
> **98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> . . .
> (c) is that the employee was redundant,. . .
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.
>
> **123 Compensatory award**
> (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in

> consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

72. Redundancy is a potentially fair reason for dismissal.

73. The hallmarks of a fair redundancy process are the warning and consultation of any employees affected; the adoption of a fair basis on which to select for redundancy; and the taking of such steps as may be reasonable to avoid or minimise redundancy by redeployment within the organisation (including group companies).

74. The tribunal members reminded themselves that it was not for them to step into the shoes of the employer and substitute their own views; that the hearing before the tribunal is not a repeat of the internal redundancy process; and that they should not re-score the candidates. To be fair, redundancy selection criteria need not be wholly objective but as far as possible they should not depend solely upon the opinion of the person making the selection. It will usually be sufficient for the employer to show that it set up a good system of selection and that it was fairly administered. There will ordinarily be no need for the employer to justify all the assessment on which the selection was based. The tribunal should not subject the system adopted to an over-minute analysis.

75. The determination of the pool from which those employees to be made redundant are selected is principally a matter for the employer and it is difficult for an employee to challenge it when the employer has genuinely applied its mind to the question.

76. As part of its decision making, the tribunal must consider whether there were any procedural flaws which caused unfairness by looking at the fairness of the whole of the disciplinary process and it must determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

77. The ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals.

The right to request contract variation (flexible working)

78. The detailed provisions relating to this right are contained in sections 80F to 80I ERA 1996.

79. Section 80F(1 and 2) states:

> (1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—
> (a) the change relates to—
> (i) the hours he is required to work,
> (ii) the times when he is required to work,
> (iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations, …

(2) An application under this section must—
(a) state that it is such an application,
(b) specify the change applied for and the date on which it is proposed the change should become effective, [and]
(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with, …

80. In light of the clear conclusion below, the remaining parts of the legislation are not repeated here.

Discrimination and victimisation

81. The relevant parts of sections 13,19, 23, 27 and 136 Equality Act 2010 state:

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.

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.

27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from 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.

82. The question of whether a Claimant is always required to provide evidence that a PCP such as a refusal of home working puts women at a disadvantage when compared with men is not settled in law. If a tribunal is contemplating relying upon judicial notice of a feature of society (such as the burden of child care

falling predominantly on women - aside possibly in relation to families where one or both parents are highly paid) it must inform the parties so that they can comment upon it.

Indirect discrimination by association

83. The European Court of Justice in *Coleman v Attridge Law and anor* [2008] ICR 1128, ECJ, established that *direct* associative discrimination is covered by the EU Equal Treatment Framework Directive (No.2000/78). The ECJ case of *CHEZ Razpredelenie Bulgaria v Komisia za zashita ot diskriminatsia* [2015] IRLR 746 appears to also open the door to a potential claim of indirect discrimination by association. An electricity company placed meters out of reach in predominantly Roma areas. This was to the complainant's detriment even though she was not herself of Roma origin. She lived in a Roma area and was not provided with a meter she could easily check. The court considered that both associative direct and indirect discrimination claims were open to her based upon its reading of the EU Racial Discrimination Directive 2000/43 (and the relevant Bulgarian law).

84. Article 2(2)(b) of the Racial Discrimination Directive states:

> indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

85. Article 2(2)(b) of the Equal Treatment Directive states:

> indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless—
>
> (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
> (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

86. Of course the UK left the EU on 31st January 2020, which was followed by a transition period which ended on 31st December 2020. However in (very) broad terms under the terms of the European Union (Withdrawal) Act 2018 any EU-derived domestic legislation will continue to have effect after the exit day. Under section 3 of the 2018 Act, any direct EU legislation which was operative immediately before exit day continues to form part of domestic law. Decisions of the ECJ made before exit day continue to be relevant for interpreting EU law.

Conclusions

Breach of the statutory right to request contract variation

87. The parties agree that neither the 21 July 2018 nor 2 November 2018 'requests' were statutory requests. The tribunal conclude that in her request dated 9 May 2019, the Claimant also did not make an application for a change in her terms and conditions of employment within the meaning of section 80F(1)(a) ERA. Such an application is strictly required to comply with s80F(2) and the Claimant's application did not state that it was a flexible working application or explain what effect, if any, she thought making the change applied for would have on her employer and how, in his opinion, any such effect might be dealt with.

88. Therefore the flexible working claim must fail and it is dismissed.

Direct sex discrimination: s.13 EqA

89. The first issue for determination under this head of claim is whether in refusing the Claimant's request to work from home, the Respondent treated her less favourably than it treated, or would treat, male employees in the same material circumstances.

90. The Claimant relied on the following comparators: Simon Riches, Ray Edwards, Roy Edwards and Duncan Shellard. The Claimant accepted that they are all mangers. Alternatively, she relies on a hypothetical comparator.

91. The tribunal found that the men referred to are not correct comparators for C as they did different managerial work. The same point applies to Richard Parrish who was referred to during the hearing. He was an engineer of some sort, who was allowed to work from hospital on one occasion. However the Claimant can rely on a hypothetical comparator – a hypothetical male administrator in the same circumstances as the Claimant. There is no evidence that such a male administrator would have been treated any differently to the Claimant. Indeed the evidence points towards a blanket rule about homeworking being introduced at some point in 2018.

92. The direct sex discrimination claim therefore fails and is dismissed.

Indirect sex discrimination: s.19 EqA

93. The Respondent accepts that it applied the PCP of requiring administrative staff to work from the Respondent's premises and that it applied that PCP equally to men and women.

94. The first issue for determination under this head of claim is therefore whether the application of the PCP put women at a particular disadvantage when compared with men.

95. In looking at this question of 'group disadvantage', the tribunal concluded that although there was no evidence presented by the Claimant, the tribunal could take judicial knowledge of the greater burden on women of child care (aside possibly in relation to families where one or both parents are highly paid) and that

this greater burden extended to care for sick and / or disabled children. The tribunal were of the view that this is a sufficiently well known fact in relation to those of average earning levels that specific evidence, although desirable, is not essential. The tribunal informed the parties that it was considering taking this approach and invited submissions. The tribunal rejected the Respondent's contention that the particular disadvantage related only to the ill health of the Claimant's son rather than being a disadvantage that could be seen as disproportionately falling on women, on the basis that it was women who are much more likely to have caring responsibilities for sick or disabled children.

96. The next issue is that of individual disadvantage – whether the Claimant was in fact put at that disadvantage. The tribunal concluded that the Claimant's evidence of her individual circumstances suggest that she was disadvantaged because when she needed to stay at home to look after her youngest son in particular, she had to take unpaid dependant leave in the absence of any homeworking provision.

97. The way in which the disadvantage is phrased in the list of issues is that it had a negative impact on the Claimant's ability to provide childcare. That is probably not the best way of phrasing the actual disadvantage as the Claimant did provide the child care – she just did not get paid to work on those days. Taking into account that the Claimant was unrepresented, and looking at her claim as a whole, the tribunal were prepared to read the words 'whilst maintaining an income' at the end of that description.

98. As the Tribunal is satisfied that the elements above are made out, it is then for the Respondent to show that it acted proportionately in pursuit of a legitimate aim.

99. In summary, the aims relied upon are the commercial sensitivity and the practical protection of the documents which the Claimant would have needed to work on at home. The Respondent emphasised the importance of those issues to its survival and the practical restraints on the Claimant performing her day to day tasks away from the office.

100. The tribunal concluded that the Respondent had demonstrated that it had such legitimate aims and that the refusal of home-working was a proportionate means of achieving those aims. The Respondent's industry is heavily regulated and the risk to the Respondent and its workforce of a loss of documents would be high. It was not practical for the Claimant's day to day work to be done from home. The Respondent had contemplated the prospect of ad hoc work that could be done from home and it was willing for the Claimant to do that if it arose – but this could not be applied to her day to day work.

101. It follows that the claim for indirect discrimination fails and is dismissed.

Indirect disability discrimination by association

102. The Respondent has accepted that the PCP of requiring administrative staff to work in the office puts individuals caring for someone disabled at a disadvantage when compared to individuals without that responsibility and that it put the Claimant at that disadvantage.

103. The Respondent's submissions on this cause of action were concentrated on whether it was possible for such a claim of indirect discrimination by association to be brought before the tribunal at all.

104. The language of section 19 Equality Act is clear. The relevant protected characteristic (in this case disability) must be that of the Claimant employee.

> *(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.*

105. The only basis on which it might be thought that this could be argued is in relation to the reference in the ECJ case of *CHEZ Razpredelenie Bulgaria AD v Komisia*. To permit the claim would require the tribunal to effectively re-write the primary legislation to bring it into line with the Equal Treatment Directive. Given the clear language of the Equality Act, this tribunal was unwilling to do so on the basis of the (understandably) limited argument before it on this point.

106. Legally fascinating though such a point may be, the tribunal did step back to consider whether this claim actually adds much to the Claimant's claim that isn't covered by the sex discrimination point already. The tribunal did not consider that it did.

107. Had it been possible to run such a claim, the tribunal would have come to the same conclusion in relation to justification as it did on the indirect sex discrimination claim and the claim would have failed in any event.

Unfair dismissal

The Claimant has accepted that there was a genuine redundancy situation and that redundancy was the reason for her dismissal.

108. The tribunal concluded that there was adequate warning and consultation about the redundancy given the phone call of 17 July 2020, the letter of 23 July 2020, the group meeting of 29 July 2020 and the one to one meetings of 24 August 2020 and 1 October 2020. The Respondent was clearly listening to the Claimant at those meetings, given that some of her scores were altered as a result of her arguments.

109. The tribunal concluded that the Respondent acted reasonably in identifying which employees should be at risk of redundancy. The Claimant complains firstly that she was included and secondly that Ms Bonfield was not included in the pool. The tribunal concluded that the identification of the pool is largely a matter for the

Respondent and that there was clearly a rational basis for including the 3 Administrators in a pool together and for excluding the Accounts Assistant / Office Manager who had a different role.

110. In assessing whether the Respondent had adopted a reasonable method of selecting which employees should be displaced, the tribunal reminded itself again that it must not step into R's shoes but that it must look at whether the criteria adopted were objective or where subjective, were capable of fair application and then whether they were applied fairly. The tribunal were satisfied that the criteria used were capable of being applied fairly.

111. In relation to the process followed. The tribunal looked at the following factors identified by the Claimant in order to ask itself whether taken individually or cumulatively, they placed the employer outside the range of reasonable responses:

a. the initial letter of 23 July 2020 and subsequent emails initially gave the Claimant the impression that the meeting on 29 July 2020 was an individual rather than a group meeting;
b. the scoring for category B (absence) was initially incorrect (later corrected on appeal from 1 to 3);
c. the scoring for category C (timekeeping) was initially incorrect. This was changed after challenge by the Claimant and subsequently amended back down following the Claimant's appeal, after Mr Riches' intervention. There was no evidence that the other candidates' scores were looked at again in this regard;
d. the scoring for category F (quantity of work) was a 2 and not a 3. It is not of course for the tribunal to re-score the Claimant – but it can ask whether the score she got was within the range of reasonable scores and the tribunal was satisfied that it was;
e. the scoring for category G (qualifications) was initially incorrect (later corrected on challenge);
f. the minutes of the meeting on 24 August 2020 were incorrect in a number of respects and had to be corrected following intervention by the Claimant;
g. the date of the first 1:1 consultation meeting was incorrectly cited in the ET3 and the redundancy letter (as 17 August 2020 instead of 24 August 2020);
h. the wrong date was cited on the 1st version of the dismissal outcome letter – this was subsequently corrected;
i. the appeal outcome letter was apparently in error when referring to the unique capabilities of the retained Administrator in relation to the manuals. This was a comment made according to Mr Verley's oral evidence following a telephone call with Mr Riches. It either demonstrates that an ex post facto reason is being proffered by the Respondent or that the selection process was skewed towards the selection of that Administrator rather than the Claimant – either way it did not point towards a fair process having been undertaken.

112. Many of those defects were corrected and most of them were minor and did not go to the heart of the decision, although the tribunal was unimpressed and somewhat troubled by the number of errors. The two matters which troubled the tribunal most were (c) and (i) in the paragraph immediately above – both of which involved an intervention by the original decision maker, Mr Riches, in the appeal process to the detriment of the Claimant.

113. The tribunal also asked itself whether the Respondent had made reasonable efforts to identify any suitable alternative employment. The tribunal were satisfied that in the difficult post Covid-19 climate faced by the Respondent, there were no alternative vacant roles available within the Respondent or any of the Group Companies. However the tribunal took a wider view of 'alternative employment' in the sense of taking of such steps as may be reasonable to avoid or minimise redundancy by redeployment within the organisation. The Respondent accepted at the hearing that a job share of some sort would have been necessary if the Claimant had scored highest but from the start of the redundancy process, the Respondent had not referred to needing one 'full time equivalent' Administrator but rather to needing one person (who by implication would have been working full time) – which by its nature would appear to exclude the Claimant. There is no evidence before the tribunal that at an early stage (i.e. before telling the successful candidate that she had been successful) the Respondent had tried to ascertain whether each of the three administrators could or would work part time. This was an important failing, particularly in light of the contractual entitlement to enforce short working.

114. The tribunal then took a step back from these individual matters and asked itself if cumulatively it concluded that the errors in the process place the decision outside the range of reasonable responses. The tribunal's conclusion was that the decision to dismiss was unfair in all the circumstances, given the two interventions by Mr Riches in the appeal process as outlined above and given the Respondent's failure to properly consider from the outset the possibility that the Claimant could have been accommodated if another worker had agreed to or been required to work fewer hours.

115. The tribunal went on to assess whether, if those defects in the redundancy exercise were rectified, the Claimant would have been dismissed for redundancy in any event if a fair process had been applied. The tribunal reminded itself that it had to decide what the Respondent would have done if Respondent had gone about the process fairly – not what the tribunal would have done.

116. The tribunal considered that the Claimant would not have been likely to score highest on absence and time keeping even if properly scored from the outset and that there would have been a considerable chance that the ultimately successful Administrator would not have agreed to a job share – even if that had been mooted in advance of the scoring process – and there is no guarantee that the Respondent would have been able to require her to do so. Inevitably the tribunal's

decision process in this regard must be a someone crude one but the tribunal considered that the compensatory award should be reduced by 65% to reflect the Claimant's chance of being made redundant on the same date in any event if a fair process had been followed.

117. We make no finding at this hearing on the length of time for which the Claimant should be compensated which will be dealt with at the remedy hearing when the tribunal will want to know how the business has fared in more recent times.

Victimisation

118. The detriments alleged are (i) being selected for redundancy, and (ii) being dismissed.

119. The Respondent accepts that the bringing of the first claim was a protected act.

120. The tribunal asked itself whether the Claimant had established facts which, in the absence of any explanation from the Respondent, could lead the tribunal to infer that the dismissal was because she had done a protected act. In seeking to show that there was an animus against her based on her having brought the tribunal case, the Claimant relies on the lottery money request on 16 July 2020, the fan and shredder notice, the other Administrators not answering the phone on 6 February 2020; and people talking about her tribunal claim in the office on various dates. The tribunal was not satisfied that it could infer potential victimisation from those matters.

121. In any event, the tribunal went on to consider whether the Respondent could show that the selection for redundancy and / or dismissal was in no sense whatsoever because of the protected act. The tribunal concluded that the Respondent was able to discharge that burden. The Claimant was not scored as she was because of the protected act. Her arguments as to her scoring were (in large part) upheld. She was not given the lowest score. Although unfair for the reasons set out above, the tribunal did not consider that the Claimant's dismissal was an act of victimisation.

122. This matter is listed for a remedy hearing on 13 August 2021 by CVP.

123. The following case management orders must be complied with:

a. The Claimant is to supply to the Respondent an updated Schedule of Loss by 13 July 2021;

b. Any Counter Schedule of Loss to be supplied by the Respondent to the Claimant by 20 July 2021;

c. Disclosure of documents is to take place by exchange of copy documents by 20 July 2021 including from the Claimant any documents relating to her income since her dismissal (including benefits) an all documentary proof of mitigation (job searches);

d. A remedy bundle compliant with the Presidential Guidance is to be complied by the Respondent by 27 July 2021 and sent to the Claimant;

e. Any witness evidence relevant to remedy is to be exchanged by 3 August 2021;

f. The Schedules of Loss, Bundle and all parties' witness statements are to be sent to the tribunal in electronic form by 10 August 2021.

Employment Judge Allen QC

6 July 2021