Case Number: 1601371/2020
1601372/2020
1601376/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Cairns, Mrs Deacy & Mrs Richardson**

Respondent: **Newport County Council and The Governing Body of High Cross School**

Heard at: **Cardiff by video** **On: 24, 25 and 26 May 2021**

Before: **Employment Judge R Harfield**
Members **Mrs L Bishop**
Ms H Hinckin

Representation:
Claimant: Ms Annand (Counsel)
Respondent: Mr Sanders (Solicitor)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The claimants were unfairly dismissed;
2. The complaints of less favourable treatment contrary to the Part Time Workers (Prevention of Less Favourable Treatment) Regulations succeed;
3. The complaints of indirect sex discrimination succeed.

REASONS

Introduction

1. By way of claim forms presented on 16 June 2020 the claimants, who are all part time teachers at Highcross Primary School in Newport, complain of unfair dismissal, breach of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations and indirect sex discrimination. The respondent resists the claim. The matter came before EJ Harfield at a case management preliminary hearing on 5 January 2021. EJ Harfield produced a list of issues found at page [101] to [103] of the bundle.

2. We received a bundle of documents extending to 397 pages. References in this Judgment in brackets [ ] are references to page numbers in the bundle. For the claimants we received written witness statements from the claimants and from Ms Hoosain who is a full time teacher at the school as well as a NEU representative. For the respondents we received witness statements from Ms Rutledge the executive headteacher at the relevant time and Mr Mason senior HR and OD business partner. We heard oral evidence from those witnesses. We do not know why, but we did not hear from any of the governing body, who actually decided to dismiss the claimants. We had an agreed chronology and some agreed admissions relating to statistics. During the course of the hearing we also received into evidence an email dated 9 December 2020 and some further agreed admissions relating to that email. We received written closing submissions and oral submissions from both representatives. The hearing was conducted by video due to ongoing restrictions caused by the covid 19 pandemic.

Findings of fact

3. We make the following findings of fact, applying the balance of probabilities where it is necessary to resolve a dispute.

4. In 2005 it was decided that teachers should be given a minimum amount of time for Planning Preparation and Assessment (PPA). It is PPA that is at the heart of this dispute. Teachers are employed under the terms and conditions set out in the School Teachers Pay and Conditions (Wales) Document (STPCD) Paragraph 51.5 of the STPCD [161] says:

   "*All teachers who participate in the teaching of pupils are entitled to reasonable periods of Planning, Preparation and Assessment (PPA) time as part of the 1265 hours referred to in paragraph 50.5 or pro rata equivalent (as the case may be) to enable the discharge of the professional responsibilities of teaching and assessment. PPA time must be provided in units of not less than half an hour during the school's timetabled teaching week and must amount to not less than 10% of the teacher's timetabled teaching time. A teacher must not be required to carry out any other duties during the teacher's PPA time."*

Ms Cairns

5. Ms Cairns has been employed as a teacher at High Cross Primary School since 24 February 2003. She initially worked full time but following periods of maternity leave has worked different part time arrangements. At the start of the relevant time in question, in January 2019, Ms Cairns asked to reduce her hours from 4.5 days a week (92.28% full time equivalent) to 3

days a week for childcare reasons. When working 4.5 days a week Ms Cairns had been responsible for running the nursery at the school and would plan and prepare for the whole week. Within those 4.5 days she had a half day PPA time. Ms Deacy covered nursery 1 day a week, to cover Ms Cairns PPA time and the half day that Ms Cairns did not work.

6. When Ms Cairns asked to reduce her hours down to 3 days a week, the then headteacher, Carl Sherlock, offered instead to reduce her contract to 66.32% compromising 3 full days and one half morning. He told Ms Cairns that it was so that she could be in the classroom as much as possible as it would be in the best interests of the children. CS said to Ms Cairns that he wanted part time teachers to spend their time in the classroom and that pupils would gain more stability and have less disruption if teachers were consistent in their days. Ms Cairns agreed the arrangement. She would then do her PPA in the half morning for 1.5 hours on a Monday and spend 3 days teaching the nursery. Ms Deacy was working the other two days in the nursery. Ms Cairns was sent a letter [237] confirming her contract changes to working hours to 66.32% FTE produced by HR. The HR and payroll form completed by Mr Sherlock set out a working pattern which showed Ms Cairns working 1.5 hours on the Monday which was her PPA time. The form also shows it was a reduction in hours for Ms Cairns and not an increase.

7. In September 2019 Mr Sherlock decided that the other two days would instead be covered by a Level 4 Teaching Assistant employed as a Higher Level Teaching Assistant (HLTA). This was to save costs. Mr Sherlock told the claimant she would be given additional PPA time to plan for all 5 days in the week, including the two days covered by the HLTA. Ms Cairns hours were therefore increased to 72.63% of a full time equivalent. She still taught 3 full days on a Tuesday, Thursday and Friday but her PPA time was increased from 1.5 hours a week to 3 hours on a Monday morning. This was the same PPA allowance that full time teachers were receiving as Ms Cairns had to plan the same amount as a full time teacher as it was for the whole nursery for the week. Again Ms Cairns was sent a letter by HR confirming the change [241]. The accompanying form explains that it was for an increase to PPA time.

Ms Deacy

8. Ms Deacy has been employed since September 2002. Again she initially worked full time but has since worked a variety of working patterns. At the relevant time, in January 2019 Ms Deacy's hours were increased from 62.28% to 66.14%. The arrangement reached was that Ms Deacy would cover 2 days in nursery that Ms Cairns did not teach (Monday and Wednesday) and on a Tuesday she covered year 1 and year 2 PPA time.

She would have half a day, every other week on a Thursday, for her own PPA.

9. In September 2019, as already mentioned above, there were changes in the staffing of the nursery. Ms Deacy's hours did not change but she changed roles into a job share in year 4. Ms Deacy worked Monday full day with her year 4 class, Tuesday morning doing PPA cover for year 5, Tuesday afternoon in year 4, Wednesday in year 4 and had her own PPA time once a fortnight on a Thursday afternoon. Ms Deacy says that Mr Sherlock had decided how her PPA was to be structured and that he also told her he wanted part time teachers to spend time in the classroom on the basis that pupils would gain more stability and have less disruption if teachers were consistent in their roles.

Ms Richardson

10. Ms Richardson has been employed since February 2011. Again she initially worked full time but has since worked a variety of patterns. Following her first period of maternity leave she was working 2 full days a week at 60% FTE which included PPA time one morning every fortnight. In September 2017 she agreed to temporarily increase her hours to full time to cover a colleague which ended up lasting longer than anticipated. After her return to work from a second period of maternity leave in January 2019 Mr Sherlock told Ms Richardson that he could only offer her 2.5 days a week for financial reasons. This was in a PPA cover role. Ms Richardson was not happy but she initially worked the hours. She was sent a letter saying her working was 55.09% FTE [250].

11. Ms Richardson later approached her union representative for help who said she was entitled to the same contracted hours she had before she went on maternity leave. Mr Sherlock then said he would increase Ms Richardson back to 3 days a week but that he could not provide her with PPA in that time. He said he would give Ms Richardson a contract at 66% so that she could teach 3 full days a week and take her PPA time on one of the other days she was not scheduled to teach. Ms Richardson was sent a letter on 11 March 2019 [254] confirming her working time was 62.81% FTE.

12. We add here that Ms Richardson was in a pure PPA cover role, and to have taken her out of that role for her own PPA, would have involved providing PPA cover in the classroom for a PPA cover teacher. Ms Richardson says she only later found out that she was only being paid 62% and not the 66% that had been agreed with Mr Sherlock. It would appear her PPA time had been undercalculated by 40 minutes a week.

13. That is how things stood for the claimants prior to the changes at the heart of these tribunal proceedings. The claimants did their PPA at home. But all staff, including full time staff were allowed by Mr Sherlock to do their PPA at home.

September 2019 onwards

14. In September 2019 Ms Rutledge was appointed as executive head teacher, on a temporary basis, of High Cross primary and Mount Pleasant primary. High Cross primary was in a deficit budget position and Ms Rutledge became engaged in deficit recovery planning.

15. On 25 September 2019 Ms Rutledge attended a finance meeting with the school's finance business partner to explore the options for a potential restructure of the school. Ms Rutledge became involved in analysing the staffing structure. Ms Rutledge said in oral evidence that they had too many hours compared to classes in the school, so she was initially looking at a restructure. Exactly how this came to light is not clear, but Ms Rutledge confirms in her statement that at this meeting part time teachers' contracts were questioned and discussed and they apparently identified some alleged anomalies with some of the part time teachers' percentage contracts. It appeared to Ms Rutledge, that some part time teachers had been allocated their PPA in addition to, rather than during, their timetabled teaching week by Mr Sherlock. Ms Rutledge and Ms Plant in HR reached the view at the time that this did not comply with the STPCD.

16. On 3 October 2019 Ms Rutledge attended a Governors' Staffing update meeting. Her note is at [279] and records "*an issue has arisen with paying addition money to staff instead of 10% PPA. Following a finance meeting with SD it was noted that if the additional payments were stopped and an HLTA was put in place to cover PPA we could potentially make savings."* Ms Rutledge was to create a new staffing structure to present to the Governors. This shows that the thinking at that time was that the claimants were being paid for additional PPA time which had been added to their timetabled teaching week and this meant they were receiving some kind of additional payment, and that if this was stopped it could save some money, together with using a HLTA to cover PPA instead of teachers working in a PPA cover role. Ms Rutledge says that she also told the Governors that the arrangements did not comply with STPCD and that it did not represent equal treatment for staff as full time teachers were effectively being treated less favourably.

17. Page [280] is another document prepared, albeit not by Ms Rutledge, and headed PPA restructure costs that has proposals on it for named part time staff. The proposal was to reduce Ms Cairns contract from 73% to 60%,

Ms Deacy from 66% to 55% and Ms Richardson from 63% to 20%. This is said to give a gross saving of £48,570 less the cost of a HLTA to produce a total saving of £23,856 a year. The proposal therefore was twofold: removing PPA time or money and more extensive cutting of the hours of the identified part time staff.

18. On 22 October 2019 a Governors extraordinary meeting was held. Page [285] is a document setting out 3 options. One option is to maintain the status quo. The second says to work "e.g. 66% in School" and add additional PPA with recruiting half a HLTA. The third option is to agree the proposal and reduce the affected staff to 60% with PPA time being allocated in that time. The perceived negatives for option one, maintaining the status quo, were said to be "1. Contracted hours aren't currently correct, 2, finances remain an issue, 3, staffing structure isn't arranged to secure value for money with a focus on improving standards, 4, PPA isn't organised appropriately to meet the needs of staff 5, equal opportunities for staff receiving PPA aren't evident and 6, this way of paying teachers contravenes teachers terms and conditions." The Governing body approved the proposals for a restructure.

19. On 5 November 2019 the claimants were called to individual meetings with Ms Rutledge. They were told they were informal discussions about a restructuring plan. No notes or minutes were taken. Ms Cairns was told that the part time teachers' PPA was costing the school £48,000. She was asked how she would feel reducing her hours by half a day on a Monday and taking her PPA in the other 3 days that the claimant worked. Ms Cairns said she would like to help the school budget but that she could not afford to lose the hours. She was then told that her contract was "illegal." Ms Cairns was told there was a proposal that she reduce her hours and a consultation process would follow. She was also told that a full restructure was likely to follow. Ms Rutledge said that in the other primary school where she was head, the nursery teaching was done entirely by a HLTA (although a qualified teacher was filing the role). It was also suggested to Ms Cairns there may later be scope for her to apply to have her hours back. She was also asked if she was interested in working full time. Ms Cairns offered to come into school on a Monday morning to do her PPA or to move her PPA time to a different day but that was not agreed. She also pointed out that she often came into school on a Monday morning during her PPA time to support nursery home visits and setting up nursery provision in the classroom.

20. Ms Deacy gives a similar account of her individual meeting. She says she was told Ms Rutledge wanted to reduce her hours from 66.14% FTE to 55%. Ms Deacy also says she was asked if she would consider working full time. Ms Deacy says she had the impression that Ms Rutledge felt part

time teachers were problematic and the preference was for full time teachers because they were considered more cost effective.

21. Ms Richardson was told that she could not be offered 3 days anymore and that the school was considering replacing the PPA cover role with a HLTA and that Ms Richardson could only be offered 1 day a week instead. She was also asked if she would consider going full time. Another two part time teachers were also spoken to.

22. On 6 November 2019 Ms Rutledge held a staff meeting to say there was a restructuring proposal and that the staff likely to be affected by the changes had been spoken to the previous day. She said that if staff had not been spoken to then they were not affected at that time, although the position may later change. Only part time teachers had been spoken to.

23. On 12 November union representatives met with Ms Rutledge and Ms Plant. Ms Hoosain was there also with Ms Mason, both from the NEU. The NEU opposed the proposals on the basis that any restructure had to include all staff and not just single out part time workers. When challenged Ms Rutledge and Ms Plant agreed to this and said they thought this might be the case. However, they also said that the part time contracts were an anomaly and not in line with STPCD. Ms Mason stated that any contract issue must be investigated separately, clarified, and sorted out and that should happen before any restructure. Again that was agreed. There was then a meeting with the affected part time staff who were told that the proposed restructure was on hold until the part time contract issue had been dealt with.

24. On 26 November 2019 individual consultation meetings took place. By this time as the restructuring had been put on hold, the proposals to reduce the claimants' hours had reduced. They were all told that their contracts would be reduced to 60% with PPA taken within those hours. Ms Plant stated that the reduction was because the contracts were irregular and paid PPA on top of teaching hours rather than within in. Ms Hoosain argued that was not correct and that all contracts were identical, including full time teachers, with only the percentage of contracted hours being different. Ms Plant continued to say the contracts were irregular and had to be brought in line with STPCD. She produced the HR/payroll forms which she said had boxes ticked saying PPA to be paid on top. The NEU pointed out they were not contractual documents and that the tick box itself indicated that PPA on top was an option open to headteachers. The NEU asked for the reasoning in writing and copies of all contracts and they were told this would be provided within 2 weeks. In her meeting, Ms Deacy said she would be happy to take her PPA in school or to work on a

Thursday afternoon as the school wished and take her PPA on a different day but it was not agreed to.

25. On 9 December 2019 the claimants were given letters dated 3 December stating that a statutory consultation process had commenced on the proposal to amend their contracts in line with Teachers Terms and Conditions where their PPA entitlement "is to be included in their working hours and not as an additional payment as is currently happening" [283]. The anticipated implementation date, after 12 weeks paid notice, was said to be 20 April 2020. The claimants were given the opportunity to respond on the consultation by 9 January 2020.

26. On 17 December 2019 Mr Addicott from the NEU emailed Ms Rutledge saying that it was the school that had imposed the working arrangement the claimants had and the contracts of employment clearly stated the working hours which the claimants had been working for a number of years. He said the proposals would be a breach of contract and breach of the part time workers regulations. He called for the contracts and pay to be maintained. It was acknowledged that the staff could be required to carry out PPA at school and also stated they were available for their full current contracted hours to carry out any teaching duties.

27. On 21 January 2020 the Governing Body's staffing committee approved the proposal to cut the claimants' contractual hours. In late January or early February 2020 the claimants received a letter dated 30 January 2020 from the chair of the Governing Body confirming the reduction in hours to 60% said to be to ensure that PPA time is taken in line with teacher's terms and conditions. The letter was said to constitute notice and that the variation would take effect from 1 September 2020. The claimants were given the right of appeal.

28. Ms Cairns said again in her appeal that she did not consider her PPA was in addition to her working hours and it was in her contracted hours and covered by the HLTA. She said she was prepared to complete her PPA in school in the normal working day and her PPA could be timetabled to any other part of her working week as the school saw fit. Ms Richardson said the same in her appeal grounds, as did Ms Deacy.

29. The appeal hearings took place on 9 March 2020. Ms Deacy was not well enough to attend but submitted a personal statement. The notes taken by Ms Hoosain record Ms Plant stating that the part time contracts were outside of the STPCD as they had PPA on top of working weeks of 60%. Ms Hoosain disputed this saying the working weeks were the percentage as stated in the contracts and with a PPA allocation within it. She said this was the same as a full time teacher having a working week of 100% on

their contact with 90% in class and 10% PPA. The Governors' notes of the same meeting [326] record Ms Plant saying that Newport City Council's recommendation was that the panel uphold the original decision bringing the contracts in line with teachers' terms and conditions. They record that after hearing the appeals Ms Rutledge was invited to join the panel to answer questions and that Ms Plant had again reiterated that the Council's recommendation was that the Governing Body uphold the original decision. After a discussion the panel decided they needed more time to reflect.

30. The Governors reconvened on 16 March 2020 [327]. Ms Rutledge and Ms Plant were again in attendance Ms Plant reiterated yet again the recommendation to uphold the original decision. The notes record that after deliberation the panel agreed to uphold the original decision in line with the advice of Ms Plant and Ms Rutledge. On 19 March 2020 the Chair of Governors wrote to say the appeals were unsuccessful. The letter gave no reasons. The change in hours were to take effect from 1 September 2020.

31. Ms Cairns, in particular, tried to engage in further correspondence with Ms Plant to see if the decision could be revisited, or if there could be some mediation, or at least be given a full explanation of the reasons for the decision [299]. Ms Plant responded to state that there was no scope for compromise. She said that the reduction in hours was to regularise the position regarding additional hours and payments made which were said to be completely out of line with all other teachers pay and conditions. She said there was no other alternative as otherwise the anomalous position would continue. She also said "*The previous Head-teacher, Mr Sherlock should never have agreed to extend your contractual hours in 2019 to include your PPA time as this arrangement was completely inconsistent with terms and conditions of other teaching staff, both part-time and full- time. When the current Head teacher became aware of the anomaly, she consulted with the Council's HR advisers and was advised the position needed to be regularised and it could not be allowed to continue*." She added that the arrangement was considered to be inconsistent with the STPCD. She said Ms Cairns' PPA time should have been taken in her timetabled 3 day teaching week and again said that Mr Sherlock should not have agreed to add PPA time to the contractual hours and pay Ms Cairns an additional sum for the hours, effectively increasing her contractual hours. She said it was inconsistent with the terms and conditions of all other teaching staff employed by the Council both full time and part time and that it was contrary to the principles of PPA time and part time working in the STPCD. She said there was no option other than to regularise the issue and reduce Ms Cairns hours back to what she said was the original 0.6 FTE. Ms Plant added that it was not being done for financial reasons as they would need to pay for

additional PPA cover. She said she was sorry the claimants had been put in this position by the actions of Mr Sherlock. She said that all the respondents could do by way of mitigation was to delay the implementation for as long as possible, which is what they had done.

32. Ms Plant also said that the purpose and effect was to achieve the pro-rata principle under the PTWR where part time staff would have the equivalent pay and benefits as a full time comparator but in proportion to their reduced hours. She said that full time teachers could not have their working hours extended to cover PPA time. Ms Cairns persevered in further correspondence on 4 August 2020 [307] saying her PPA time was timetabled on a Monday morning in the school's timetabled teaching week and was compliant with the STPCD. She said that her 3.5 contractual days were her timetabled hours and her working hours.

33. The claimants' contracts were terminated on 31 August 2020 and they were re-engaged on 60% contracts from 1 September 2020. The school employed five part time teachers at the time. Four were dismissed and re-engaged. The fifth was not. She worked 80% FTE/4 days and had PPA scheduled within those 4 days. No full time teachers had their contractual hours changed.

After the dismissal and re-engagement

34. Ms Cairns after the change, still works Tuesdays, Thursday and Fridays in the nursery but no longer works a Monday morning. A HLTA works on a Monday, Wednesday and Friday morning. On the Friday morning the HLTA covers Ms Cairns' PPA time. Ms Cairns therefore was left with the same amount of allocated PPA time of one morning a week but her overall working hours and therefore pay were forcibly reduced. She still continues to plan for the nursery for the full 4 days.

35. Ms Deacy has continued in a job share. She works all day Monday, Tuesday and Wednesday and has an allocated half day a fortnight as PPA time. Her PPA time has remained consistent but her teaching hours and therefore pay have been reduced by half a day a fortnight. Ms Richardson's PPA is allocated in her 3 days a week teaching, taken as an afternoon every fortnight. Again therefore her teaching hours and pay ended up being reduced.

Potential for other hours being on offer

36. As from September 2020 some additional hours of work became available to cover abstractions on leadership time and PPA cover. On 29 June the NEU suggested that the disputes could be resolved by giving the

additional hours to the claimants [329]. Ms Plant responded to stated that these were additional hours, and not the claimants' hours that had been taken off them but that there was a day's work available to cover abstractions in the school on leadership work. She said that the hours were ringfenced for the claimants to apply. The NEU also challenged the suggestion that the claimant's contractual arrangements were "illegal" and Ms Plant commented that this was the incorrect word, and that the contracts were in breach of terms and conditions. She said to ensure consistency 10% had to be allocated within teaching hours and not be additional to it. In relation to the additional hours, Ms Plant later said that there was a need for pupils to have consistency of a teacher [328] and that it would be impractical for the role to be split between the 4 affected staff. She said should the role be advertised the affected staff would be able to apply in a ringfenced manner.

37. The vacant hours then were not advertised. Instead they were sent out to an agency to fulfil on a temporary basis and another part time member of staff, CN, obtained the hours via the agency. Ms Rutledge said in evidence that they did not want to offer a permanent contract before the restructure and contract changes.

38. In December 2020 additional hours were then offered out by the new headteacher. She said cover was needed one day a week every fortnight alternating leadership cover and year 5 PPA, as had been covered by CN. The headteacher said that there was a second day on offer each week for year 6 PPA. She said the days of the week could be changed to work alongside existing timetables and both were being brought back in house on a fixed term contract. The head said that if more than one person expressed an interest then the roles would be shared out between the spring and summer terms.

39. CN was the only person to respond to apply for the hours. In December 2020 Ms Cairns was not in work due to a serious family matter. In any event she would not have wanted to work two additional days one week and an additional day the next week as it would be close to a full time role. Ms Deacy and Ms Richardson similarly understood that applying would mean taking on an extra two days one week and an extra day the second week, that would take their hours up close to full time. For all three their childcare responsibilities meant that was not possible. They did not understand, from what they had been told, that it was possible to divide up the hours. They thought all the hours had to be worked, although there could be a termly split.

The issues to be determined

40. The case management order of 11 January 2021 identified the following issues to be decided (in relation to liability):

"Unfair dismissal

1.1 The Respondents concede the Claimants were dismissed. What was the reason or principal reason for dismissal?

1.2 Was it a potentially fair reason? The Respondent relies on "some other substantial reason" of a kind such as to justify the dismissal of an employee holding the position which the claimants held.

1.3 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimants?

Indirect sex discrimination

2.1 A "PCP" is a provision, criterion or practice. Did the Respondents have the following PCP:

2.1.1 A practice of reducing the hours of part time staff only. The respondents concede the decision to change the Claimants' contractual hours is capable of constituting a PCP

2.2 Did the Respondents apply the PCP to the Claimants?

2.3 Did the Respondents apply the PCP to both sexes?

2.4 Did the PCP put women at a particular disadvantage when compared with men on the basis that more women than men work part time? The Respondents admit that more women than men work part time and that currently all the part time teaching staff working at the school are women. Other than that no admission is made as to whether the PCP has a disproportionate impact on women compared to men. The Respondents assert that the intention and effect of the PCP is to ensure equality of treatment as between part time and full time teaching staff and therefore it should not have a disproportionate impact upon women compared to men.
2.5 Did the PCP put the claimants at that disadvantage? The Respondents concede the Claimants suffered a detriment as a consequence in the reduction of their hours and remuneration.

2.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says its aims were

2.6.1 To regularise the contractual hours of part time teaching staff at the school and bring them into line with all other part time and full time staff employed by the first respondents, regardless of their sex

2.7 The Tribunal will decide in particular

2.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;
2.7.2 Could something less discriminatory have been done instead;
2.7.3 How should the needs of the Claimants and the Respondents be balanced?

Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

3.1 Who are the comparable full time workers relied on by the Claimants? [The claimants subsequently provided a list set out at [105] of the bundle which is a list of 6 full time teachers at the school, including Ms Hoosain who was a witness in the case.]

3.2 Were the Claimants treated les favourably by their employer than the employer treats a comparable full time worker by being subject to a detriment by the act of their employer in reducing their part time hours? In determining whether there has been less favourable treatment the pro-rata principle must be applied unless it is inappropriate. This means that where a comparable full time worker receives or is entitled to receive pay or any other benefit, a part time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of her weekly hours bears to the number of weekly hours of the comparable full time worker.

3.3 Was the treatment on the ground that the Claimants were part time workers? The Claimants assert that full time staff at the school have not had their hours reduced. The Respondents admit that the reduction in contractual hours only applies to part time teachers and that the Claimants will suffer a detriment. However, they assert that the reason for the treatment is not to treat the Claimants less favourably on grounds of their part time status but to bring their terms and conditions in line with those of full time teachers and other part time teaching staff. The Respondents assert that the purpose and effect of the changes are to achieve the pro-rata principle.

3.4 Is any less favourable treatment justified on objective grounds? The Respondents assert that the need to regularise the contractual hours

of part time teaching staff at the school and bring them into line with all other part time and full time staff employed by the First Respondents was a legitimate objective. "

The legal principles

Unfair dismissal

41. Under Section 95(1)(a) of the Employment Rights Act 1996 ("ERA") an employee is dismissed by their employer where the contract under which they are employed is terminated by the employer (whether with or without notice).

42. Section 94 ERA provides an employee with the right not to be unfairly dismissed. Under Section 98(1) it is for the employer to show the reason or principal reason for the dismissal and 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 the employee holding the position which the employee held." It is that later reason the respondents seek to rely upon. It is abbreviated in this Judgment as "SOSR."

43. Under Section 94(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.

44. A refusal by an employee to accept a change in their terms and conditions of employment enforced by an employer as part of a reorganisation and resulting in the employee's dismissal can potentially amount to SOSR where the employer demonstrates that the changes were not imposed for arbitrary or capricious reasons but were in pursuit of a "sound, good business reason" (Hollister v National Farmers' Union [1979] IRLR 238).

45. The test is not whether it is a reason that the tribunal considers sound, but one which a reasonable employer would consider sound. Tribunals should not substitute their own opinion for that of the employer on the question of whether the change is advantageous to the employer's business (Scott and Co v Richardson [2005] All ER (D) 87.)

46. There is no need for the employer to prove that the reorganisation was crucial to the survival of the business (Catamaran Cruisers Ltd v Williams and others [1994] IRLR 386). However, the employer must provide evidence to demonstrate the business reasons for the change and must show that they were not trivial. In Banerjee v City and East London Area Health Authority [1979] IRLR 147, the employer decided to make certain jobs full-time only. A part-time employee who had previously job-shared was dismissed. The employer produced no evidence at all as to why there was any benefit in making the job full-time and failed to demonstrate any advantages created by such change. The Employment Appeal Tribunal found that in that case there could be no finding of SOSR and the dismissal was unfair at the first stage.

47. When considering the fairness of a dismissal, tribunals are required to look at the full context of the business reorganisation or proposed change. No one relevant factor will be looked at to the exclusion of all others (St John of God (Care Services) Ltd v Brooks and others [1992] ICR 715). The interests of the employer and employee may conflict and be irreconcilable, such that a tribunal may accept that an employee was reasonable in their refusal to accept certain changes, but then go on to find that those changes were nonetheless reasonably imposed by the employer and that the dismissal was fair in all the circumstances. The tribunal's focus is on reasoning and the reasonableness of the employer and not on what it is reasonable or unreasonable for the employee to do Garside and Laycock Ltd v Booth [2011] IRLR 735 (EAT)).

48. In Garside the Employment Appeal Tribunal emphasised the need to determine the statutory question "in accordance with equity." It made the point that the wording may make it particularly relevant, where an employer is proposing a wage cut, to consider on who in the workforce the wage cuts fall. It used the example of an employer seeking a wage cut for some staff but not, for example, management and said that a tribunal would have to consider whether equity, with its implied sense of fair dealing in order to meet a combined challenge of reduced trading profits, would be served by dismissing those, not in management, who refuse the cut. The Employment Appeal Tribunal also emphasised the importance of the procedural aspects of a decision as well as consideration of other alternative cost cutting measures.

Part Time Workers (Prevention of Less Favourable Treatment) Regulations ("PTWR")

49. Regulation 5 sets out the definition of less favourable treatment of part-time workers:

"(*1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker –*

(a) as regards the terms of his contract; or
(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if
(a) the treatment is on the ground that the worker is a part-time worker, and
(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

50. Regulation 1(2) defines the pro rata principle:

"*Where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker."*

51. A comparable full time worker is defined as:

"*A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place –*

(a) both workers are –
(i) employed by the same employer under the same type of contract, and
(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and
(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements."

52. The PTWR do not prevent part time workers being treated more favourably than full time workers. It is an example of a piece of equality legislation that is concentrated on protecting the rights of the minority

group that the legislators have decided are in need of statutory protection. The PTWR do not give full time workers the right to complain of less favourable treatment compared to part time workers. In Brazel v Harpur Trust [2018] ICR D10, the Employment Appeal Tribunal considered a case involving a part time teacher working term time hours only who was found to be entitled to the same holiday pay as teachers working the whole year, meaning that she received a higher proportion of her wages as holiday pay than the whole year worker. The Employment Appeal Tribunal said:

"*Having considered the provisions and authorities cited to me on behalf of the Respondent, which I have set out at length, I can state my conclusion very shortly. I am unable to distil from them any support for the proposition accepted by the ET that there is a requirement to carry out an exercise in pro-rating in the case of part-time employees, so as to ensure that full-time employees are not treated less favourably, or to avoid a "windfall" for term-time only workers. Indeed, the whole purpose of the EU and domestic provisions to which I have referred in this Judgment is to ensure that part-time workers are not treated in a less favourable manner than full-time workers..."*

"In my judgment the ET, in its conclusions, overlooked the overriding principle that part-time workers are not to be treated less favourably than full-time workers. There is, as yet, no principle to the opposite effect. To impose a limitation which reads down primary legislation - those sections of the ERA which enable a week's pay to be computed - to the disadvantage of part-time workers, ostensibly to redress a potential grievance that might be brought by full-time workers is, in my judgment, to stand the logic and purpose of the Directive and the domestic statutory scheme on its head."

53. Under Regulation 8(6) PTWR it is for the employer to identify the ground for any less favourable treatment or detriment. In Hendrickson Europe Ltd v Pipe EAT 0272/02, the claimant had been dismissed because the employer wanted to reduce the number of accounting assistants down to 3 full time employees only. The claimant worked part time and was unable to commit to full time work. The Employment Appeal Tribunal held the tribunal's finding that the employer had selected the claimant for redundancy on account of her part time status was not perverse. It noted the claimant had been told that if she wanted to stay in employment she would have to become a full time worker and observed that it was difficult to see how one of the purposes of the PTWR should not be to endeavour to protect part time workers from such pressure. The Employment Appeal Tribunal also said:

"*It must be right that in interpreting the Regulations so as to give effect to their providing proper protection for part time workers like Mrs Pipe, an Employment Tribunal has to see what happened in its full context. Thus in this case "the treatment" incorporated the continued pressure on her to work full time, that she would have to work full time if she wished to remain in employment, the selection for redundancy process devised by the employers as it applied to Mrs Pipe (which meant that her dismissal became inevitable), and finally her dismissal."*

54. There are conflicting authorities on the test to be applied when considering whether treatment is 'on the ground' that the worker is a part time worker. In Sharma v Manchester City Council 2008 IRLR 336, EAT a group of part time lecturers brought proceedings relating to the use a contractual provision to reduce their hours that did not apply to full time lecturers. There were two other categories of part time lecturers on different types of part time contract that also did not have their hours reduced. The employer therefore argued that the decision to reduce hours was not solely due to part time status. The Employment Appeal Tribunal held it was sufficient that being part time was one of the reasons for the treatment. That approach was followed in Carl v University of Sheffield 2009 IRLR 616, EAT where the Employment Appeal Tribunal said that part time work must be the 'effective and predominant cause' of the less favourable treatment complained of, but need not be the only cause.

55. A different approach was, however, taken in Scotland in Gibson v Scottish Ambulance Service EATS 0052/04 and McMenemy v Capita Business Services Ltd 2007 IRLR 400, Ct Sess (Inner House) where the Employment Appeal Tribunal and the Court of Session held that part time status must be the sole reason for the less favourable treatment complained of. This was based on the wording used in clause 4 of Framework Agreement to the Part-Time Workers Directive, which says that part time workers shall not be treated less favourably than comparable workers 'solely' because they work part time.

56. In Engel v Ministry of Justice 2017 ICR 277, EAT, the Employment Appeal Tribunal in England and Wales followed the approach taken in the two Scottish cases. The conflicting authorities were noted by the Employment Appeal Tribunal in Ministry of Justice v Blackford 2018 IRLR 688, EAT. The tribunal had found that part time worker status was a 'significant, material, effective ground' for the difference in treatment, and the Employment Appeal tribunal observed that this was consistent with the approach taken in Carl v University of Sheffield. The Employment Appeal Tribunal did not resolve the conflict in authorities as the particular cross appeal before it did not raise the issue of the correct meaning of "on the ground that."

57. The PWTR do not set out a wider definition of what is meant by objective justification. We, however, accept the submission of Ms Annand that the principles that apply to objective justification under the Equality Act (addressed below in relation to the indirect discrimination claim) are likely to be relevant to assessing justification under the PTWR. We also noted that in Ministry of Justice v O'Brien [2013] ICR 449, SC the Supreme Court noted (following a reference to the European Court of Justice), that the ECJ had commented that the concept required the unequal treatment at issue to respond to a genuine need, be appropriate to achieving the objective pursued and be necessary for that purpose. It observed that the ECJ was repeating the *"familiar general principles applicable to objective justification: the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary to do so."* The Supreme Court also referred to the opinion of the Advocate General that the treatment must be justified by the existence of precise, concrete factors.

Indirect sex discrimination

58. Under Section 19 of the Equality Act 2010:

"(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 to a person 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."

59. The classic European jurisprudence test of objective justification was set out in Bilka Kaufhaus v Weber von Hartz [1987] ICR 110 ECJ. The Court held that:

- The aim behind the imposition of the PCP must correspond to a real need on the part of the undertaking (the legitimate aim);
- The means of achieving the aim must be appropriate with a view to achieving the objective in question and

- be necessary to that end (proportionality).

60. That first criterion of a legitimate aim is described in paragraph 4.28 Equality and Human Rights Commission's Code of Practice on Employment as: "[it must be] legal, should not be discriminatory in itself, and it must represent a real, objective consideration":

61. Turning to proportionality, in Chief Constable of West Yorkshire Police and another v Homer [2012] ICR 704, SC the Supreme Court reviewed the case authorities on justification noting:

- Determining proportionality involves considering:
  - Is the objective sufficiently important to justify limiting a fundamental right?
  - Is the measure rationally connected to the objective?
  - Are the means chosen no more than is necessary to accomplish the objective;
- It is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking against the discriminatory effects of the requirement;
- To be proportionate a measure has to be both an appropriate means of achieving a legitimate aim *and* reasonably necessary in order to do so;
- Some measures may simply be inappropriate to the aim in question;
- A measure may be appropriate to achieving the aim but go further than is reasonably necessary in order to do so and thus be disproportionate;
- It is the criterion itself that must be justified rather than its discriminatory effect;
- It is necessary to weigh the need identified against the seriousness of the detriment to the disadvantaged group. This involves comparing the impact of the criterion on the affected group as against the importance of the aim to the employer. On the facts of Homer that involved asking whether it was reasonably necessary in order to achieve the legitimate aims of the scheme concerned to deny the financial benefits associated with being employed at a higher grade to people in Mr Homer's position. To some extent that involves considering whether there were non-discriminatory alternatives available;
- Alternatives are not about making an individual exception for a particular claimant; any exception has to be made for everyone who is adversely affected by the rule.

62. According to Pill LJ in Hardys and Hansons plc v Lax [2005] EWCA Civ 846, the 'reasonably necessary' test is much stricter than the 'range of reasonable responses' test applicable in unfair dismissal law, but "[t]he employer does not have to demonstrate that no other proposal is possible. Rather, the tribunal has to make its own judgement, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the PCP is reasonably necessary.

63. In Cobb and others v Secretary of State for Employment and Manpower Services Commission [1989] IRLR 363, it was said:

"*A respondent is entitled to take a broad and rational view provided that it is based on logic and is in the view of the Tribunal a tenable view. He is under no obligation to prove that there was no other possible way of achieving his objective, however expensive and administratively complicated. If an alternative or alternative criteria are thought to be reasonably then the method will no doubt be put forward by the applicant, opportunity will be given to examine it, and if the Tribunal finds that the respondent ought reasonably to have considered and adopted it, then in carrying out the balancing exercise the Tribunal might find that the defence is not provided. The Tribunal might find that the detriment suffers is too high a price to pay to achieve the object sought."*

64. The Supreme Court confirmed in Ministry of Justice v O'Brien [2013] UKSC 6 that an employer is not prevented from relying on the defence because it did not have a valid objective justification for the policy at the time it was implemented or by advancing a different and better justification. However, it was said, greater respect is likely to be given for a justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted. It can be more difficult for an employer to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at the time. We also noted the burden of proof requirements in section 136 of the Equality Act.

Discussion and Conclusions

PTWR

65. In our deliberations we considered first the complaint under the PTWR.

Full time comparators

66. The comparable full time workers in this case are the full time teachers working at High Cross Primary School. Their details are set out at [105] in the bundle and include Ms Hoosain who we heard evidence from. We were satisfied that the full time teachers, including Ms Hoosain, were appropriate comparators.

Less favourable treatment

67. The claimants were treated less favourably by their employer than the respondents treated a comparable full time worker by being subject to a detriment by the act of their employer in reducing their contractual hours of work. The respondents admit that the reduction in hours only applied to part time teachers and that the claimants suffered a detriment. None of the full time teachers had their contractual hours forcibly reduced through dismissal and re-engagement. It was to the claimants' detriment as the reduction in their hours of work happened against their will, resulted in their dismissal and re-engagement on lesser terms and resulted in them being paid less (the claimants also speak of the personal impact upon them).

Was the treatment on the ground that the claimants were part time workers?

68. We had to consider the conflict in legal authorities here and whether the test we had to apply was whether the less favourable treatment was (a) solely because of part time status, or (b) whether part time status was an effective and predominant cause of the treatment. We preferred the authorities that adopt the latter test.

69. The wording in regulation 5 of the PTWR ("on the ground that") reflects the wording of the discrimination legislation which preceded the Equality Act 2010 and which was in force when the PTWR were made. For example, the Sex Discrimination Act 1975 used the expression "on the ground of her sex." We consider that as similar wording is used in discrimination complaints, the equivalent similar wider interpretation of "on the ground that" should apply for a complaint under regulation 5 PTWR. The authorities which adopt the test of "sole reason" based their conclusions largely on wording from the European framework agreement. However, EU law provides minimum guarantees. It does not prevent a member state from conferring a wider right.

70. We therefore asked ourselves whether an effective and predominant cause of the reduction in the claimants' contractual hours was their part time status.

71. Our conclusion was that the respondents forced through a reduction to the claimants' contractual hours (by dismissal and re-engagement when the claimants would not consent to the variation) for a variety of linked reasons. In particular:

(a) The respondents thought that the former headteacher, Mr Sherlock, had acted improperly in relation to the claimants' PPA time. They thought he had given the claimants PPA time and money on top of their existing contractual hours to avoid having to arrange PPA cover for them in the classroom and that this was improper. The Tribunal considers that thought process was mistaken and misguided, but we accept that is what the respondents, and in particular Ms Rutledge and Ms Plant, genuinely thought at the time;

(b) We consider it is likely that as part of this thought process they thought potentially the claimants were receiving money they were not entitled to in the sense that they thought the claimants may not have been working at a designated time doing their PPA and were just receiving some kind of financial "add on" for convenience sake. The documents do talk, for example, about the issue being with paying *additional money* to staff instead of 10% PPA, or paying an additional sum to the claimants and "effectively" increasing their contractual hours. This connotes a sense of not believing they were true additional contractual working (and worked) hours (despite the claimants being issued with letters confirming the contractual variations to their contractual hours of work with the percentage FTE figure that included the PPA time);

(c) They thought that the arrangement breached the STPCD on the basis that they thought the PPA time had to be taken in the teacher's timetabled teaching week, and they thought that was not occurring. At least by the time of closing submissions in this case the respondents accepted that there was no breach. However, we do accept that the respondents thought there was a breach at the time, albeit it was a mistaken and misguided view (the time has to be taken in the school's timetabled teaching week – not the individual teacher's);

(d) They thought that the arrangement was inconsistent with the terms and conditions of full time teachers and other part time teaching staff (there was one other part time teacher at the school who they considered was compliant). In particular, they thought that it was inconsistent because it was not possible to give full time teachers PPA time on top of a full time teaching week. It would mean PPA time being given in the weekends or evenings to full time teachers and would offend the requirement in the STPCD that it had to be in the school's timetabled teaching week. They

saw the claimants as receiving a time and money benefit that they did not consider full time teachers could receive;

(e) They thought this was contrary to principles in the STPCD and the PTWR about the way part time working entitlements worked and the pro-rata principle. They thought that full time teachers were being treated less favourably than this group of part time teachers. Again this was a misguided notion, but we accept it is what was believed at the time. We considered that a wish not to do something that could upset the full time teaching staff was of particular importance to Ms Rutledge;

(f) We considered that saving costs was also a factor too. The school was in a budget deficit and Ms Rutledge was engaged in budget deficit planning. Cutting the claimants' hours to 60% FTE with PPA time taken within those hours was identified as one of the ways money could be saved. Other options that were perceived to cost more were rejected;

(g) They did not consider that other alternatives mooted by the claimants/ the NEU were acceptable that would have avoided dismissal and re-engagement on lesser hours, such as confirming that the contractual hours (that included the PPA time) were the claimants' timetabled teaching hours or working hours that the PPA sat within, or moving the claimants' PPA time to another day within the timetabled teachings hours. In the Tribunal's judgement the alternatives were not considered acceptable because the respondents took the view it would then be ratifying and maintaining what they saw as treating the claimants more favourably than full time teachers and also because it did not achieve the PPA time cost saving/need for hours reduction they had identified at the start of the budget deficit planning process. Whilst we accept that the restructure was placed on hold whilst the contractual dispute was dealt with. We did not accept that saving cost/ saving hours then completely fell away as a consideration for the respondents. It flies in the face of the original proposals targeting cutting the PPA time (as well as originally part time teachers' wider hours) as a cost saving measure.

72. The respondents appeared at times to be suggesting that they forcibly cut the claimants' contracts because they were directed to do so by the NEU. If that is indeed part of the respondents' case, then we rejected it. The NEU were clearly telling the respondents that from their perspective there was no problem with the claimants' contracts. They saw them as compliant with the STPCD and consistent with the contracts of full time teachers. They identified that even if the respondents thought there was a problem in that regard there were other, lesser ways of addressing it. It therefore seems inherently implausible that they would be directing the respondents to force the claimants to accept lesser contractual hours. We

considered it likely that in reality what the NEU was saying was firstly that if there was to be a restructure it needed to include all teaching staff within it, and not just be focussed on the part time teachers. Secondly, if notwithstanding what the NEU were saying, the respondents still considered there was a contractual issue with this group of part time workers then they needed to address and resolve before undertaking the wider restructure. The decisions how to proceed then rested with the respondents not the NEU.

73. We then considered to what extent the claimants' part time status played a part in the reasoning set within its wider context and a full picture of what constituted the less favourable treatment. We were mindful of the guidance in Hendrickson Europe Ltd of the need to see what happened in its full context. We were also mindful of the need to concentrate on what was operating in the minds of the decision makers at the respondents. Part time status has to provide more than just the occasion for the result complained of. We concluded that the claimants' part time status was a predominant and effective cause for the following reasons:

(a) In Sharma one of the reasons why the employees' hours were cut was because they had a particular type of part time contract. Other types of part time contract did not have that arrangement, nor did the full time contracts. The Employment Appeal Tribunal in its decision emphasised that it was the employer in that case who had given the contractual term in question to the particular group of part time workers in the first instance. They held it would make a nonsense of the protection afforded to part time workers in the PTWR if the employer could successfully argue that differentiating between that group and full time workers, on the basis of terms exclusively attributed to the particular part time group, was not discriminating against them on the basis they were part time. It was said that where the reason for the distinction is the existence of the very term which is alleged to be the source of the less favourable treatment, and that term is exclusive to the group of part timers, there will be unlawful discrimination unless the treatment can be justified.

That observation has a particular resonance with this case. Whilst the respondents later concluded that they did not like or agree with it, Mr Sherlock as headteacher at the time made the decision to offer the claimants, due to their status as part time teachers, a contractual arrangement in which they would take their PPA time outside of their classroom teaching time, but within the school's timetabled teaching week. We were satisfied he principally did this to keep them, as part time teachers, teaching in the classroom as much as possible. It was a contractual arrangement that was agreed and became the claimants' contractual terms. He notified the Council on their set forms. They sent

the letters confirming the contractual change to the claimants. (To later suggest that the Council did not know, is therefore bizarre.)

It was an arrangement that Mr Sherlock did offer and could offer the claimants because they were part time. As part time teachers they therefore had available time in the school's timetabled teaching week to have separate PPA time allocated to them and Mr Sherlock, again because they were part time teachers, saw a benefit to doing that. As in Sharma, just because there was another part time teacher in the school who did not have the arrangement in question, does not mean what happened to the claimants was not because of their part time status. Moreover, the contractual term that Mr Sherlock gave to the claimants, and which the respondents later disagreed with and targeted for change, was inherently because they were part time workers. Ms Rutledge's actions were likewise because of the claimants' part time status. The whole reason why she and the respondents in general were focusing upon the claimants PPA time was because of the particular nature of their part time contracts. It was also because of how they were perceived to differ with, and cause alleged unfairness to, full time teachers which is again inherently about, and because of, their particular part time contracts and their part time status.

Fundamentally, the main driver for what happened to the claimants was the perceived anomaly in their contractual arrangements. As in Sharma, it would make a mockery of the purpose of the PTWR if the respondents could argue that the reason for the treatment is a contractual one and not part time status when it is the very nature of their status as part time workers and the particular nature of the part time contract in question that caused the issue;

(b) We also considered that the respondents' actions were because of the claimants' part time status in additional ways. In particular, we considered part of what underlay the less favourable treatment of the claimants was an undervaluing of them as part time workers, and in contrast, a greater value placed on full time teachers. We considered that Ms Rutledge viewed part time teachers as administratively inconvenient and more costly. We say this because:

(i) Ms Rutledge told the claimants in their initial meetings words to the effect that their PPA time was costing £48,000 and was costing too much. She also asked whether they would consider full time working. We did not accept her explanation in that regard that she was just seeking to understand their career aspirations. The meetings with the claimants had a very specific purpose, and it was not about that;

(ii) We also reached this view because the whole process started with an initial deliberate decision to ringfence the restructuring proposal focusing on the part time teachers only, by reducing their hours in general and by cutting their hours by the equivalent of their PPA time. Ms Rutledge said that they had too many hours at the school. It that was the case then they did not look at the hours across the board but targeted the part time teachers. She also confirmed in evidence that when challenged by the NEU that they could not focus a restructure on part time staff, that they had suspected that was the case all along. The Tribunal considered in effect the respondents were chancing their arm to see if they could get away with focusing the restructuring on the part time workers, and whether they would be challenged upon it. We accept the respondents did then pause the restructure process and looked first at the PPA issue. But what happened is not reflective of any sense of valuing part time teachers equally.

(iii) We also considered that the drive to correct the perceived PPA anomaly was particularly driven in turn by a strong sense held by Ms Rutledge and Ms Plant that the arrangement was unfair and less favourable treatment of full time teachers in the school. That belief was held so strongly it was to the extent they saw the only solution being as cutting the claimants hours rather than remedying it (if indeed it even needed remedying) in a different way. They saw the claimants as getting some kind of benefit that full time teachers could not access and that the only solution to ensure consistency was to remove it. Again we saw that as being indicative of the greater value placed upon full time staff (who incidentally had never in fact complained about the arrangement in question) that they would strive to regularise this perceived less favourable treatment of full time staff by ultimately cutting the claimants' hours and pay by the substantial step of going through the whole dismissal and re-engagement process.

(iv) That those involved had that innate sense of pursuing what they saw as a notional disservice to full time teachers, and valuing less part time teachers, was likewise in our view also demonstrated by the efforts made at the time by the respondents to utilise the pro-rata principle in the STPCD and the PTWR in such a misguided way to try to justify what they were doing. As it was put by the EAT in Brazel, the concept does not exist to ensure that full time employees are not treated less favourably that part time employees.

(v) We were also troubled by the whole sense given, particularly at the start of the process, of a lack of a belief that the claimants' PPA time was true additional contractual working (and worked) hours and a view that they were receiving money improperly. All teachers had been allowed by

Mr Sherlock to do their PPA time at home. Yet there was no sense given to us that this kind of suspicion and scrutiny was being focused in equivalent terms on the full time teachers.

(c) Furthermore, we considered that a secondary factor at play in why the respondents did not pursue other alternatives to cutting the claimants' hours lay in the fact that they wanted to cut costs and reduce teaching hours and again that inherently that fell back to the initial intent to target the part time teachers for cuts.

74. To the extent that the respondents appear to suggest that the treatment happened because of a need to regulate historic problems with PPA in the past, we also rejected that explanation. Historical errors would have no bearing on the situation as it stood at the time. There was an issue with Ms Richardson's hours and pay not being correct. But that would be no reason to change a whole group of workers' contracts.

Is the less favourable treatment justified on objective grounds?

Legitimate aim

75. At least by the time of closing submissions in this case the respondent had conceded that the PPA arrangements in place for the claimants did not in fact infringe the STPCD. The PPA time was within the school's timetabled teaching week.

76. The respondent relies on a stated legitimate aim of there still being a need to regularise the contractual hours of the part time teaching staff at the school and bring them into line with all other part time and full time staff employed by the first respondent. In his closing comments Mr Sanders put it as a need to ensure consistency across the school.

77. To put it in its wider context, the respondents' argument is that an arrangement of protected teaching hours, with 10% paid PPA hours on top is an arrangement that a full time teacher could not have. For a full time teacher the arrangement would breach the STPCD because inevitably the paid PPA time would then have to fall within the evenings of weekends which is not permitted. There is also one part time teacher in the school whose contract was not forcibly changed because her part time arrangement of 4 days a week already had PPA time built into it. It is said Mr Sherlock should not have reached the arrangements with the claimants because he was giving them a benefit that he could not give to a full time teacher and therefore he was treating full time teachers less favourably. It is said that the appropriate resolution to this perceived irregularity was to reduce the claimants down to their teaching hours, with PPA time to be

taken within that. It is said alternative solutions to the perceived anomaly were not looked at or appropriate to take because to do so would be to regularise or endorse the step Mr Sherlock had taken.

78. The respondents accept they had no actual complaints from full time teachers. However, they assert that it is possible that full time teachers might bring complaints/raise grievances. The respondents also accept that there was no obvious legal mechanism for a notional disgruntled full time teacher to bring legal proceedings. They are not covered by the PTWR.

79. We were not satisfied on the evidence before us at that the respondents held a legitimate aim. We were acutely mindful that it is not the Tribunal's role to step into the shoes of the respondents and decide what a legitimate aim should be. We were likewise mindful of the need to respect the margin of appreciation given to respondents for such business led decisions. We would also accept that a desire by an employer to treat staff consistently, even if not required by equality legislation, could in theory be capable of being a legitimate aim. Albeit that it is not a legislative requirement may also reasonably affect the degree of importance such an aim is credited with.

80. We struggled to see how reducing the claimant's contracted hours such that their PPA time would be taken within their allocated classroom teaching hours, in order to achieve that desired consistency in treatment, actually represented a real need on the part of the respondents. As is now admitted, Mr Sherlock's arrangement was not an unlawful one. It was an agreed, binding contractual arrangement with the claimants. That a different headteacher came along and did not like or agree with the arrangement Mr Sherlock had put in place, or thought that it led to notional inconsistency in treatment between some part time staff and full time staff, does not mean the arrangement's removal represented a real need on the part of the respondents.

81. What is the actual disadvantage to full time teachers or comparative advantage to the part time teachers working the particular arrangement? Both a full time teacher and a part time teacher working under the arrangement have protected paid PPA time where they are not in their classroom teaching that is in the school's timetabled teaching week. A part time teacher is not gaining proportionally more paid PPA time. As Ms Annand observes a full time teacher's timetabled teaching time is made up of 90% teaching and 10% PPA. Ms Deacy's timetabled teaching time, for example, was made up of 60% teaching and 6% PPA. The proportions are the same. (Ms Cairns had more PPA time but that was a specific allocation because of her wider planning responsibilities. The same could

apply to a full time teacher as 10% PPA time is a minimum allocation not a set figure). The arrangement in question was, in the Tribunal's view, in line with full time teachers and the other part time teacher.

82. The perceived disadvantage the respondent identifies is a hypothetical one that if a full time teaching wanted to do their PPA and be paid for it on top of their full time teaching hours they would not be allowed to as it would infringe the STPCD. It ignores the fact, however, that such a full time teacher has hit the ceiling on teaching hours that a part time teacher has not. That ceiling on teaching hours, and also the protected nature of keeping PPA time separate, are presumably there to actually protect full time teachers working conditions.

83. Furthermore, there had been no complaints from full time teachers. There is no evidence, for example, that the unions were expressing concerns about the arrangements (indeed the NEU were supportive of the claimants, including Ms Hoosain who was herself a full time teacher at the school). There was no evidence that a full time teacher had asked for PPA time to be allocated and paid on top of their full time teaching hours and had been refused. The Tribunal was struck by the fact that this was a notional, hypothetical sense of perceived comparative disadvantage to full time teachers as opposed to being one that had actually occurred and was causing difficulties for the respondents. Moreover, a full time teacher would not be able to bring a complaint under the PTWR and the respondents were unable to identify a likely legal basis on which a full time teacher could bring legal proceedings to challenge the arrangement. In short, it is difficult to see in this context how a hypothetical, notional sense that a full time teacher could in theory be disgruntled with the arrangements, represented a real business need on the part of the respondents to find a way to achieve perceived parity in treatment. It is a genuine need demonstrated by the existence of precise, concrete factors.

84. We were however appreciative of the margin of appreciation given to respondents in terms of establishing a legitimate aim and in case our conclusion in that regard is wrong, we went on to consider the question of proportionality in any event.

Proportionality

85. Here we did not consider that the respondents had adequately demonstrated that the treatment in question was a proportionate means of achieving their claimed legitimate aim. The impact on the affected group of part time workers was seriously detrimental. It, against their wishes, resulted in their dismissal and re-engagement on lesser terms with less hours and less pay. As against that, we were not satisfied that the

notional potential, perceived detrimental treatment (but not actually unlawful discrimination) of full time teachers in comparison that had not actually arisen as a complaint was, even if a legitimate aim, an objective that was sufficient important to justify limiting the affected teachers' rights in that way. A forced reduction in the affected part time teachers' contracts was not reasonably necessary to achieve the stated aim.

86. Furthermore there were other means available to achieve the objective. The respondent could have set the affected teachers timetabled teaching weeks at the higher figure. As Ms Annand says, for example, Ms Cairns could have been given a timetabled teaching week of 3.5 days including PPA (her Monday morning PPA time was shown on her contractual hours allocation in any event, on the form sent to HR). It would have achieved the parity the respondents say they were seeking in terms of PPA being allocated in timetabled teaching time. It would have been at no additional cost as Ms Cairns was already being paid for those hours as they were already her contractual hours. Alternatively, the respondents could have swapped the affected teachers' PPA time to a day that was already a timetabled teaching day. For example, Ms Cairns, who taught on a Tuesday, Thursday and Friday and did her PPA on a Monday morning, could have done her PPA on a Tuesday morning, and have taught on a Monday morning, Tuesday afternoon and then all day Thursday and Friday. Ms Rutledge accepted in evidence that this was possible, with some jiggling.

87. The respondents say this was not an appropriate means because it would be validating the steps Mr Sherlock took. They state the only appropriate course of action to achieve parity was to put the affected group of teachers back to the position it is said Mr Sherlock should have placed them in all along (i.e. their classroom teaching hours to include PPA which meant in turn reducing their contracts).

88. We did not agree. It is now accepted by the respondent that Mr Sherlock's actions did not breach the STPCD. He was the headteacher. The allocation of resources in his school was his responsibility and at his discretion. He decided that for educational continuity reasons he generally wanted part time teachers to maximise their time with children in the classroom, and therefore wanted to allocate paid PPA time for part time teachers elsewhere within the school week. If it did not breach the STPCD then that was Mr Sherlock's discretionary decision to make. A class could otherwise, just to take one simple example, find itself with 3 or 4 teachers in a week. Two part time teachers working on a job share, who then both leave the class in that week for PPA time would be covered by one or two PPA cover staff members. Mr Sherlock's alternative of giving PPA time on top to the teachers on the job share would reduce the teachers with the

class back down to two. It has to be inherently less disruptive to continuity of care and education. Moreover, under the respondents' system a part time teacher who is undertaking only PPA cover duties, would have to be taken out of those PPA classroom cover duties for their own PPA time, leaving the class with another PPA cover teacher. The same scenario does not in theory arise with a full time teacher (unless of course they have other commitments). The class would have the one full time teacher, other than one period of time in the week with a PPA cover teacher or assistant.

89. Fundamentally these were discretionary choices for Mr Sherlock to make as headteacher weighing up his resources, budget, educational requirements, educational preferences and other relevant factors. But the Tribunal did not consider it was an arrangement that was improper. It was an option open to Mr Sherlock on the allocation of resources that he was able to take. That he could not do the same for a full time teacher did not inherently make it improper. The claimants' part time status gave him that timetabling option that he could use to mitigate the fact that having part time teachers could lead to a class being taught by more teachers. But it did not breach the STPCD or the PTWR nor was it inherently unlawful. It did not disadvantage part time workers being, unlike full time workers, the protected class under the PTWR. The pro-rata principle does not extend to protect full time workers as against perceived disadvantage compared to part time workers. There was also no evidence the arrangement was hidden from the local authority who did not challenge it at the time. Their forms were filled in and the claimant's sent updated letters about their contractual arrangements.

90. The Tribunal also did not see how, if indeed Mr Sherlock was against the notion of HLTAs providing PPA cover, it was relevant to these proceedings. But in any event, again it strikes the Tribunal that it is something he as headteacher was entitled to have an opinion about and to weigh into the equation when making decisions. That Ms Rutledge had a different opinion on these things does not mean that Mr Sherlock did something improper. It is two different headteachers having a different conceptual view on matters. However, in turn that difference in view did not give Ms Rutledge the absolute or inherent right to impose her differing perspective on PPA arrangements, bearing in mind that Mr Sherlock's arrangements became the agreed contractual position that she inherited as headteacher.

91. So in short, if the strive for perceived parity in treatment was a legitimate aim, and one of sufficient importance in context that action was actually needed (both of which our primary judgement has been against), it could have been achieved by lesser measures. For example, the affected part

time teachers' timetabled teaching hours could have been extended to cover the PPA time or the PPA days could have been swapped to what were already timetabled teaching days. That would not have amounted to, in the Tribunal's judgment, the respondents ratifying an improper earlier step by Mr Sherlock.

92. The claimants' complaints under the PTWR are therefore well founded and are upheld.

Indirect sex discrimination

PCP

93. The respondents accept that the decision to change the claimants' contractual hours is capable of being a PCP. It is also a practice that was applied to the claimants. As it happens there were no male part time teachers at the school (or indeed male teachers at the school at all). However, the Tribunal accepts that if there were male part time teachers at the school the PCP would have been applied to them too.

Group disadvantage

94. To test whether the PCP put or would put women at a particular disadvantage when compared with men, (because more women than men work part time for childcare reasons) cannot be done by looking at the school in question as there were no male teachers.

95. The Tribunal therefore had to assess whether there is wider evidence (including potentially that which it is appropriate to take judicial notice of) on which we could conclude that the PCP would place women at a particular disadvantage.

96. The first set of agreed admissions are that 75% of teachers in Wales are female. In England in 2016 part time teachers made up 23.2% of the workforce. Also in England in 2016 27.8% of women teachers worked part time compared to 9% of men. The English figures are set out because we are told that the Welsh equivalent figures are not publicly available. It is said by the claimants (and we accept) that the Welsh figures are likely to be similar and indeed Mr Sanders candidly accepted it would be the case within the Newport City Council area.

97. The Tribunal was therefore satisfied that the statistical evidence available, in conjunction with what is known about the likely equivalent picture in Wales, and the Tribunal's own inherent societal understanding of the greater proportional likelihood of women seeking part time work for

childcare reasons compared to men, means we can be satisfied it is likely that pattern is reflected in the working arrangements of primary school teachers in Wales. That conclusion is also supported by the fact the three claimants' themselves work part time due to childcare responsibilities and we accept they are likely to be reflective of many of the part time female teachers in Wales who work part time. In short, we accept that the PCP of changing the contractual hours for a group of part time teachers would put women at a particular disadvantage compared to men as it is likely that the majority of part time teachers are women (for childcare reasons) and who would then disproportionality have their contractual hours and pay detrimentally reduced. We took the respondents to this analysis in closing submissions and the respondents did not seek to persuade us otherwise.

98. The respondents say in their written closing submissions that the intention of the PCP was to ensure equality of treatment between part time and full time teaching staff and therefore it should not have a disproportionate impact on women as compared with men. However, what the respondents intended is not what is in issue in an indirect discrimination claim at this stage in the analysis. As the Supreme Court said in Essop and others v the Home Office [2017] UKSC 27 indirect discrimination is about dealing with hidden barriers which are not always easy to anticipate or to spot.

Individual disadvantage

99. We further accept that the PCP individually put the claimants at that particular disadvantage. They had their contractual hours and pay detrimentally reduced.

Objective justification

100. The respondents assert that the PCP is justified as being a proportionate means of achieving a legitimate aim. They rely on the same claimed legitimate aim as for the PTWR claim and the same arguments about proportionality.

101. The respective arguments and evidence have already been analysed for the PTWR claim. On the facts of this case there is no material difference between the "treatment" for the PTWR claim and the "PCP" for the indirect sex discrimination claim. In reality they both have at their heart the practice of reducing the hours of a group of part time teachers so that PPA time is allocated within their existing timetabled teaching week.

102. The Tribunal therefore concluded that it has not been shown that the PCP was a proportionate means of achieving a legitimate aim. The claimants' indirect sex discrimination claims are well founded and are upheld.

Unfair dismissal

103. We reminded ourselves that we have to take a different approach to the unfair dismissal claim in contrast to the PTWR and the indirect sex discrimination claim. The test is not whether the respondent had a reason for dismissal that we consider sound but whether it is one which a reasonable employer would consider sound.

104. The reason the claimants were dismissed was because they would not consent to the variation of their contracts to reduce their contractual hours so that they took their PPA time in their timetabled classroom teaching time. The principal reason for the respondents' stance, and hence their perceived need to dismiss, was they considered the PPA arrangement was anomalous and needed to be regularised (which the claimants would not consent to), and that dismissal then became the only appropriate means to regularise it. They assert that amounted to a substantial reason of a kind such as to justify the dismissal of employees holding the position which the claimants held.

105. We did not, however, consider that the respondent had established this was a *substantial* reason of a kind such as to justify the *dismissal* of the employees holding the position which the claimants held i.e., part time teachers working under the particular PPA arrangement in question that the respondents took issue with. We did not consider that the respondents' views that the PPA arrangements were anomalous and required regularising and that dismissal became the appropriate means to regularise it was within the range of what a reasonable employer in the circumstances would deem a substantial, sound good business reason that justified dismissal of the claimants' group (with offer of re-engagement on lesser terms.)

106. This is an employer that had access to in house HR advice and legal advice. We did not hear from Ms Plant, but Mr Mason (who was not directly involved in this case at the time it happened) told us of his experience in HR matters and accepted in cross examination that it seemed the PPA arrangements put in place by Mr Sherlock may not contravene the STPCD. In our judgement any reasonable employer, applying their minds objectively, and listening to what the claimants and the NEU were saying would have conducted a proper assessment of the STPCD and have appreciated that the arrangement was compliant. The respondents were repeatedly asked for their detailed evaluation of what

the specific problem was, but they never supplied it. The STPCD is clear that the PPA time has to be in the school's timetabled teaching week *not the* individual teacher's timetabled teaching week. The explanation of the Governing Body for their dismissal decision was incredibly short and at appeal stage there was no explanation given at all. In truth, whilst it would appear they were sympathetic to the individual situations of the claimants, it also simply appeared that they were following what they were recommended to do by Ms Rutledge and Ms Plant without any objective analysis or being properly informed. We considered it likely that Ms Rutledge and Ms Plant had formed their own feedback loop where they reaffirmed their own views as to the correctness of the position, without any fresh objective or critical analysis being undertaken.

107. Any reasonable employer would also have appreciated that there was no inconsistency in treatment between the allocation of PPA time to these claimants and their full time teachers and other part time teachers; they received the same proportions of paid teaching time and paid PPA time. Any reasonable employer would also have appreciated that the pro-rata principle and the PTWR did not serve to protect the interests of full time workers.

108. Any reasonable employer would therefore have taken a step back after the above analysis and appreciated that the concern expressed for the potential disadvantage of full time teachers was a notional, hypothetical one, about which no complaints had been received and which was explicable by the fact that the claimants as part time workers had not hit the threshold on the working week that full time teachers would hit and that Mr Sherlock had been seeking to keep part time teachers in the classroom and minimise disruption for pupils. Any reasonable employer would have also objectively stopped and considered (a) whether this was actually therefore a situation that really needed any action, (b), if so, whether it was situation that justified dismissal, and (c) whether there were lesser alternative ways to address the anomaly if indeed something did need to be done. In the Tribunal's judgement, what was therefore outside the range of reasonable responses in these circumstances was to take the view that the situation amounted to a substantial, sound good business reason that justified dismissal of the claimants' group as opposed to taking no action or one of the identified alternatives. To identify dismissal as being the only solution was outside the reasonable range given the limited, explicable nature of the perceived disadvantage to full time teachers and the fact that a reasonable employer would have appreciated that Mr Sherlock's actions did not breach the STPCD or the PTWR.

109. Alternatively, if we are wrong in that the respondents have demonstrated a substantial reason of a kind such as to justify the dismissal of the

employees holding the position which the claimants held, we would find the dismissals unfair under section 94(4). The respondent acted outside the range of reasonable responses in the circumstances, including equity and the substantial merits, in treating it as a sufficient reason for dismissing the claimants. For the reasons already given there were evaluation processes that the respondents should reasonably have undertaken to have appreciated what the true position on the alleged anomaly was and other alternatives open to the respondents, put to the respondents prior to the dismissal that would have regularised the concerns the respondents held. Viewed another way, these factors therefore alternatively took the decision to dismiss outside the range of what a reasonable employer in the situation would have done under section 94(4).

110. Whilst accepting that the respondents did on the face of it go through a consultation process, with an appeal stage, and giving the claimants a lengthy notice period before the dismissal and re-engagement occurred, the Tribunal was also concerned with some procedural aspects in this case. Despite the fact it was the Governing Body who actually decided to dismiss the claimants we did not hear evidence from any of the Governors involved about their decision making. As we have already said, on the evidence before us we consider it likely that the Governors very much depended on what they were told by Ms Rutledge and Ms Plant. We consider it likely that Ms Rutledge and Ms Plant had a single, mistaken mindset that the claimants PPA arrangements were in breach of the STPCD and discriminated against full time teachers. We consider it likely that they were vocal in disseminating that message to the Governors and that the Governors trusted, accepted and followed their views as presented to them by the headteacher and the Council's HR team. We consider it likely that this meant that full consideration was not given by the Governors to the claimants and the union's submissions that there was no breach of the STPCD, nothing inappropriate had happened, and that in any event there were other ways of regularising things. In that sense, we therefore did not consider that the decision making was truly open minded and the process (which then impacted on the decision making) was outside that which a reasonable employer would have undertaken. That the Governors were operating in such a way in our judgement is supported by the fact the claimants were not given reasons for the decision making beyond being told that it was to ensure that their PPA time was taken in line with teachers' terms and conditions.

111. We were also troubled by the influence that Ms Rutledge and, in particular Ms Plant, exerted over the Governing Body, in the sense of it in itself being outside a fair and appropriate process that a reasonable employer would adopt. In Ramphal v Department for Transport

UKEAT/0352/14/DA, albeit in the context of a misconduct dismissal, the EAT reiterated that HR advice should be limited to matters of law and procedure and to ensure that all necessary matters have been addressed and achieve clarity. It was further reiterated that a decision should be taken by the responsible person without having been lobbied by other parties as to the findings that should be made. The Tribunal considered that these observations were relevant to the process followed in the dismissal and re-engagement context of this case. The Tribunal was concerned about the degree to which the Governing Body were lobbied by Ms Rutledge and Ms Plant. We were also concerned about Ms Plant's conduct in apparently going beyond advising the Governing Body as to matters of law and procedure. On at least 3 occasions she is recorded as saying to the Governors that the Council's recommendation was that they endorse Ms Rutledge's proposal in this case.

112. We would add that procedurally we did also consider that a reasonable employer in the situation would have provided the claimants with fuller reasons for their decision making both at dismissal and at appeal stage. These were of course long serving staff members who the respondents were seeking to maintain a working relationship with through the process of re-engagement. The unfair dismissal complaints are therefore well founded and are upheld.

Remedy

113. The case will be relisted for a 1 day remedy hearing. The parties should file non availability dates within 7 days for the period September 2021 through to end of March 2022. The parties should write in within 14 days to confirm if they have been able to agree directions in terms of preparation for the remedy hearing that will avoid the need for a case management preliminary hearing. This is a case in which the primary remedy sought in the unfair dismissal claims is reinstatement. In order to ensure the remedy hearing is an effective hearing, the parties are asked to note sections 112 through to 117 of ERA 1996 in relation to the issues the Tribunal has to decide in respect of the unfair dismissal claim, the order of consideration and the likely need for the Tribunal to hear evidence.

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Employment Judge R Harfield
Dated: 23 July 2021

JUDGMENT SENT TO THE PARTIES ON 27 July 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche