EMPLOYMENT TRIBUNALS

Claimant: **Ms J Mathurin**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre**

On: **22 and 23 July 2021**

Before: **Employment Judge Burgher**
Members: **Ms J Land**
Mr M Wood

Appearances
For the Claimant: **Ms M Cornaglia (Counsel)**
For the Respondent: **Ms R Thomas (Counsel)**

JUDGMENT having been sent to the parties on 27 July 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. At the outset of the hearing the following issues were identified as the matters for determination by the Tribunal:

1.1 Did the Respondent apply a Provision, Criterion or Practice ("PCP") of paying an unsocial hours allowance for hours worked if those hours were not part of a flexible working arrangement?

1.2 The Respondent admits that it has a practice of not paying an unsocial hours payment where an employee elects to work unsocial hours as defined in the Salary Admin Handbook (6pm to 7am), whether that be by reason of a flexible working request or otherwise.

1.3 Does that PCP apply, or would it apply, to persons who do not share the Claimant's sex?

1.4 Does that PCP put females, or would it put females, at a particular disadvantage when compared with males?

a. The Claimant relies upon females being more likely to have a flexible working arrangement in place due to an increased likelihood of having caring responsibilities.

b. The Claimant claims that the particular disadvantage is being paid less for working unsocial hours.

1.5 Does that PCP put, or would it put, the Claimant at that disadvantage?

The appropriate pool for comparison was queried by the Respondent. The Claimant confirmed that the pool was either, the entire workforce of the Respondent; or alternatively the workforce who requested to work unsocial hours. The Claimant would invite the Tribunal to take judicial notice that women bear a greater burden for caring responsibilities and have a greater requirement to work flexible hours. The Claimant also relies on her evidence and statistics in support.

1.6 If so, can the Respondent show that the PCP is a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aims:

a. Providing incentive and reward for those employees working hours they would not ordinarily wish to work in order to promote recruitment and retention and provide the round the clock coverage needed to run its services.

b. Increasing the number of people to whom it can offer flexible working arrangements by not unnecessarily increasing the salary costs of individuals who do wish to work hours between 6pm and midnight to suit their needs.

1.7 If the above complaint succeeds, should the Tribunal make a declaration that the Claimant has been subjected to sex discrimination?

1.8 If the above complaint succeeds, should the Tribunal make a recommendation?

1.9 If the above complaint succeeds, what is the appropriate remedy, having regard to section 124(4) and section 124(5) of the Equality Act 2010?

Evidence

2. The Claimant gave evidence on her own behalf.

3. The Respondent called Hannah Poole, Administration Team Manager - Asset Performance and Capital Delivery and Samantha Curniffe, Senior HR Business Partner to give evidence.

4. All witnesses gave evidence under oath of affirmation and were cross-examined and questioned by the Tribunal.

5. The Tribunal was also referred to relevant pages in the bundle consisting of 320 pages.

Facts

6. The Claimant commenced employment with the Respondent on 7 December 2009. Her contract terms stated:

> *Your contractual hours of work are 35 hours per week.*
>
> *Your normal daytime working hours will be from 9am and 5pm, Monday to Friday, including a break period of one hour, although this may be varied as required by your manager in line with business needs.*
>
> *You are expected to be reasonably flexible in your working hours to accommodate fluctuations in business requirements. In addition to your contractual hours, you may be called upon to work additional hours to meet the needs of the business.*

7. The Respondent employs approximately 16,970 employees and about 18% are women. The employees are split into operational and non-operational staff. Non-operational staff have different banding purposes and there are 5 band grades. Band 1 is for administrative grades and bands 2 to 5 are support managers to general manager grades.

8. The Tribunal was referred to the terms of the Respondent's staff handbook relating to unsocial hours. The staff handbook draws a distinction between band 1 and bands 2 to 5 where regular contractual unsocial hours working is required of them and this is reflected in the level or grade of the post. Staff in bands 2 – 5 therefore are not entitled to any additional payments for unsocial hours.

9. Under the policy band 1, technical and administrative secretarial grades, are entitled to receive an additional enhancement in pay for unsocial hours worked.

> *4.3 UNSOCIAL HOURS*
>
> *Where regular contractual unsocial hours working is required of Managers, Operational Managers, Support Managers or Operational staff, this is reflected in the level or grade of the post, and no additional payments are made.*
> *For Technical, Administrative, Secretarial grades and Administrator Bands A to C , an additional enhancement may be paid. If the unsocial hours worked are part of the contractual working shift, an unsocial hours enhancement is applied; as in paragraph 4.4. below. If extra time is worked <u>in addition</u> to the shift, the extra time is treated as overtime.*

10. Under the policy band 1 staff required to work unsocial hours (6pm to 7am) are entitled to an enhancement of one third addition to their hourly rate of pay for the unsocial hours worked.

11. The Claimant stated that despite her written contract terms, she initially worked from 6am to 1pm because this suited the needs of the business and the work she was doing at that time. However, the Claimant did not complain of or seek to claim any unsocial hours payment, of one hour, for the time between 6am and 7am pursuant to the Respondent's policy.

12. We accept the Respondent's evidence that the unsocial hours enhancement is only paid to band 1 employees who are required to work occasional unsocial hours and there is no business requirement for such employees to regularly work unsocial hours.

13. The Tribunal was referred to statistical data relating to the number of staff. For band 1 staff approximately 60% are women and 40% are men. However, the large majority of band 2 – 5 operational staff are men with a ratio of approximately 80:20 men to women.

14. The Tribunal was also referred to a random sample of 100 applicants for flexible working within the Respondent. The sample was compiled by the Respondent. The Tribunal did not necessarily find the sample helpful to either parties case. No reasons for the flexible working requests by applicants in the sample was given and we were unable to conclude from it that unsocial hours is a reasonable option to be considered by women generally as part of a flexible working request or otherwise.

15. The Tribunal was able to see that unsocial hours were not applied for by any women at all. Indeed, none of the applicants in the random sample, men or women, applied to work unsocial hours as part of their request. The majority of the applications were to compress working hours from five days to 4 days or reduce hours within the current contractual hours.

16. The Tribunal was also referred to fact sheets from Unison and IDS in evidence. Using these reports we find that unsocial hours enhancements are paid across the transport sector and health sectors in order to to reward and incentivise staff working when others are not. Premium payments are used to compensate staff working unsocial hours. We find that the enhancement is paid to get employees to work unsocial hours where they would not normally want to work such hours. The corollary of this is if the enhancement was not justified for those reasons, there would be no justification for any pay difference for unsocial hours at all. Women who are unable to work unsocial hours could then reasonably argue that they were being indirectly discriminated against by reason of the pay enhancement for hours that they would be unable to do.

17. The Claimant commenced a period of maternity leave in July 2013 and returned to work in June 2014. She made a flexible working request which she discussed with her then line manager, Mr De Witte, and was able to agree a change in her working hours as follows

Monday – 9:30am to 16:30pm

Tuesday to Wednesday – 6:00am to 13:00pm

Thursday – 14:30pm to 21:30pm

Friday – 6:00am to 13:00pm (working from home)

These hours were later changed to accommodate a 20 minute break as follows

Monday – 9:30am to 16:50pm

Tuesday to Wednesday – 6:00am to 13:20pm

Thursday – 14:30pm to 21:50pm

Friday – 6:00am to 13:20pm (working from home)

18. These changes to hours accommodated the Claimant's personal circumstances and the shift pattern of her and her partner who also worked for the Respondent. In 2016 the Claimant made an enquiry in respect of enhanced payment for unsocial hours on the Thursday evenings. On 21 December 2016, Mr De Witte, the Claimant's then line manager, informed her that no enhancement would be paid. His email of 21 December 2016 is as follows:

From: De Witte Stefaan
Sent: 21 December 2016 11:45
To: Mathurin Joanne
Subject: RE: unsocial hours meeting

Jo

Our discussion on 20 December 2016 regarding the payment of the unsocial allowance refers.

I can confirm that the allowance is not payable to yourself between the hours of 18:00 to 21:00 on a Thursday. The reason for this decision is that you requested for flexible working hours on a Thursday (13:30 to 21:00), following return from maternity leave in 2014.

Should you be required to work unsocial hours on a Thursday that fall outside 18:00 to 21:00 you are eligible for the allowance.

Kind Regards
Stefaan De Witte
Track Maintenance Manager

19. The Claimant's employment transferred to the Respondent and the Claimant joined Ms Poole's team in 2019. Following that there was a restructure of support services which was known as 'Transformation'. As part of Transformation it was agreed that the support level was day support. Whilst there were limited occasions when administrators were required to work in the evenings or at night, the general rule was that administrators did not cover night notetaking and it was agreed by the business that they would not do so. Therefore administrators were expected to carry out the majority of their work in the day. However, exceptionally when administrators were required to work in the evenings or at night to meet the business need they would be paid an unsocial hours allowance. This happened for the Claimant who worked on

2 August 2018 between 8pm and 3am and she was paid an unsocial hours enhancement for those hours.

20. The Respondent stated that it would be difficult to manage work if unsocial hours enhancements were paid to those who request to work unsocial hours as part of a flexible working request. It asserted that if unsocial hours enhancements were paid to any member of staff who requested to work unsocial hours, when there was no contractual requirement or business need, this could lead to increasing requests to work unsocial hours; there would be a reduced ability to provide supervision and support from the team leader in collaboration with other service users; unsocial hours would be detrimental to the team working and the business. It was further stated that the request to work unsocial hours would lead management to have to start turning down flexible working requests and this could result in disparity in pay between members of staff who can work unsocial hours and are allowed to do so compared to members of staff who would like the enhancement but are unable to do so because of caring responsibilities. Such staff would be disadvantaged by not being able to qualify for a generic enhancement and the Respondent asserted that having a generic enhancement would not be able to be justified.

21. In 2019, the Claimant submitted a flexible working request. This was ultimately refused for business reasons. This refusal is not a matter for the Tribunal to consider. However, the Tribunal note that the basis for the Claimant's flexible work request was to move away from the unsocial hours that she was working on Thursday evening without enhancement, which formed part of her longstanding previous flexible working arrangement. The Claimant's reasons for her updated request was that she wanted to work Thursday morning so she could care for parents in the afternoon and rest in the evening and spend time with her daughter. She stated that if she unable to change would like to stick to the current hours she was working.

Law

22. Section 19 Equality Act 2010 (EqA) provides :

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

23. The principles relating to indirect discrimination were helpfully reviewed by the President of the EAT in Dobson v North Cumbria Integrated Care NHS Foundation Trust and Or UKEAT/0220/19 and the Tribunal considered this. In respect of particular disadvantage the Tribunal rejected the Claimant's claim on the basis that she had not

provided any evidence. In the EAT it was confirmed that whilst the burden of proof requirements under s136 EqA apply to a claim of indirect discrimination, a prima facie case can be established by statistical evidence or by the fact that the particular disadvantage may be one in respect of which judicial notice may be taken (paragraphs 34 and 35).

24. Dobson addressed judicial notice at paragraphs 41 and 42 where it was held:

> a. There are two broad categories of matters of which judicial notice may be taken: (i) facts that "are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry"; and (ii) other matters that "may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources".
>
> b. The Court must take judicial notice of matters directed by statute and of matters that have been "so noticed by the well-established practice or precedents of the courts":
>
> c. However, beyond that, the Court has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence;
>
> d. The party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry.

25. In respect of the appropriate pool for comparison the Tribunal followed the interpretation in the case of Essop v. Home Office (UK Border Agency) [2017] ICR 640. Lady Hale stated:

> There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition."
>
> 41. Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006 , at para 4.18, advises that:
>
> "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively."
>
> In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"—ie the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison (Emphasis added)."

26. In respect of justification, the Tribunal considered the case of MacCulloch v ICI [2008] IRLR 846 (and approved by CA in Lockwood v DWP [2013] EWCA Civ 1195):

> "(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].
>
> (2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must correspond to a real need are appropriate

with a view to achieving the objectives pursued and are necessary to that end (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to necessary means reasonably necessary : see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30 31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardy & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19] [34], Thomas LJ at [54] [55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no range of reasonable response test in this context: Hardy & Hansons plc v Lax [2005] IRLR 726, CA."

Submissions and conclusions

27. The PCP identified by the Claimant is the PCP of paying an unsocial hours allowance for hours worked if those hours were not part of a flexible working arrangement. The Respondent admits that it has a practice of not paying unsocial hours payment where an employee elects to work unsocial hours, whether that be by reason of a flexible working request or otherwise. The Claimant submits that the PCP identified by the Respondent is wider than that identified by the Claimant and therefore inevitably includes it.

28. The Claimant also contends that the PCP identified puts females at a particular disadvantage compared to men. The particular disadvantage relied upon by the Claimant, in view of the greater likelihood of women having caring responsibilities, is being paid less for working unsocial hours.

29. The Claimant's case is that:

29.1 The appropriate pool for comparison is either (a) the entire workforce (per Essop v Home Office (UK Border Agency) [2017] UKSC 27) or (b) those workers who request to work unsocial hours (per Hacking and Paterson and anor v Wilson EATS 0054/09);

29.2 Women are placed at a particular disadvantage by the Respondent's PCP because they are:

(i) predominantly employed in band 1 in Technical, Administrative, Secretarial roles whereas men are predominantly employed in bands 2 -5 in Managers, Operational Manager, Support Managers or Operational Staff roles. In view of the Respondent's handbook the salary of Administrative staff does not automatically include an enhancement for unsocial hours work, whereas the salary of Managerial staff does. It is therefore contended that men who request to work unsocial hours are more likely than women to already receive an enhancement as part of their salaries. Women who request to work unsocial

hours are more likely than men to have to request an enhancement and therefore be refused an enhancement as a result of the Respondent's PCP.

(ii) more likely to require flexible working arrangements in respect of any working hours (including evening hours), due to the increased likelihood of women disproportionately shouldering caring responsibilities (childcare and other caring responsibilities).

The Claimant relies on statistical evidence provided at and as well as on publicly available Statistics from the Office of National Statistics.

The Claimant relies on London Underground Ltd v Edwards (No 2) [1998] IRLR 364, [1999] ICR 494, CA and case law on judicial notice and particular disadvantage in the context of cases dealing with flexible working requests on the part of women.

29.3 The Claimant herself was placed at such disadvantage because she was not paid unsocial hours enhancements for her Thursday hours, when she had to tend to childcare and other caring responsibilities;

29.4 The Respondent relies on three possible legitimate aims in respect of justification, namely:

(i) "to incentivise and reward employees who are required to work unsocial hours … if the Respondent did not make additional payments for unsocial shifts, it would struggle to recruit and/or retain the employees that it needs to provide the round the clock coverage that it needs to run its services";

(ii) the risk that paying unsocial hours would "make it harder for such managers to agree those arrangements" / practical hurdles and

(iii) paying unsocial hours would involve increased salary costs such that paying unsocial hours "may be unfeasible".

29.5 The Claimant submits that the PCP under challenge is not connected to legitimate aim (i), that alleged legitimate aim (ii) amounts to a generalisation and falls foul of the dicta in Lord Chancellor and Secretary of State for Justice v McCloud and Sargeant v London Fire and Emergency Planning Authority [2018] EWCA Civ 2844 and that alleged legitimate aim (iii) cannot be relied upon solely, as it is a cost-based only justification (per Heskett v Secretary of State for Justice [2020] EWCA Civ 1487, [2021] IRLR 132).

30. When assessing the appropriate pool for comparison the Tribunal concluded that the Band 1 employees was apt and not the Respondent's entire workforce. We had no evidence concerning the details of bands 2 – 5 to consider for comparison, in particular, what their terms and conditions were said to be, what hours they were required to work (whether 35 hours a week or otherwise), what days they were working or whether there was an implicit enhancement in salary as suggested by the Claimant and if so the level of any enhancement. By seeking to refer to the whole workforce the Claimant would be referring to different terms, responsibilities and obligations which we have not been evidenced. Band 1 employees therefore form the basis of our

assessment concerning any alleged disparity in not being paid an enhancement for unsocial hours worked as part of a flexible working request.

31. The particular disadvantage contended is the PCP of paying an unsocial hours allowance for hours not part of a flexible working arrangement. The Respondent admits the practice not paying unsocial hours where the employee elects to work such hours whether the by reason flexible working request or otherwise.

32. The Claimant has not advanced any evidence for the Tribunal to be able to conclude that it is more difficult for women to work between 6pm and 7am than men or that they would be more likely to be able to do so without caring responsibilities. The Tribunal accept that women bear the brunt of caring responsibilities (whether childcare, adult care or both) and that they have a greater need to work flexible hours. The Tribunal note that the availability of alternative care providers, such as day centres and schools, to facilitate flexible work, is greater during social hours. There is no evidential basis for us to conclude that women generally seek to work unsocial hours as part of flexible working requests and the Tribunal does not take judicial notice of this. We therefore do not conclude that more women than men are disadvantaged by not being paid an enhancement for working unsocial hours as part of a flexible working request, when there is no business requirement for such work. This is the focus of this case.

33. The Claimant was working unsocial hours, as part of her initial flexible working request. When objectively assessed, we do not conclude that there is a particular disadvantage to the Claimant. She requested to work unsocial hours as a beneficial adjustment to her initial contractual hours. The Claimant was not requested or pressured to work unsocial hours. We do not conclude that the PCP would put women at the particular disadvantage when compared with men.

34. On the evidence before us we would not have concluded that the PCP actually put the Claimant at a particular disadvantage. The Claimant had worked the hours pursuant to her flexible working request and worked those hours without any issue regarding enhanced payment from 2014 to 2016. The Claimant was clearly informed in 2016 that she would not receive any unsocial hours allowance for Thursday evenings. That state of affairs continued through to 2019. We conclude that the offer of flexible working, involving unsocial hours was a benefit that may not have been offer to her at all at the time if there were added costs involved to the Respondent.

35. Further, the Claimant submitted another flexible working request in 2019, seeking amongst other things, not to work Thursday evening unsocial hours. That request was refused and we conclude that refusal was the catalyst for this claim. Specifically, there was no grievance relating to failure to pay enhancement for unsocial hours and it was when her appeal against the refusal of her updated flexible working request was given that she submitted this claim.

36. Therefore the Claimant has not established that there was a particular disadvantage to women in relation to the Respondent's non-payment of an unsocial hours allowance to employees who have not been requested to work unsocial hours (6pm to 7am). There was no evidence to establish that women, as carers, are at a

particular disadvantage by needing the flexibility to work unsocial hours of 6pm to 7am when compared to men.

37. Although not necessary to do so, we considered justification. The Tribunal conclude, on the evidence before us, in particular the documents in the UNISON fact sheet and the IDS research that there is sufficient evidence to justify an enhancement in pay for staff required to work unsocial hours. The need to make a premium payment on top of basic pay to incentivise staff is because of the accepted difficulty in getting staff to work unsocial hours in order for the Respondent to be able to provide a 24 hour service. The general position is that it is unusual for unsocial hours to be voluntarily requested.

38. On the evidence before us we would have concluded that the Respondent has established that there was a proportionate means of achieving a legitimate aim. We accept that the legitimate aim was to seek to have a mechanism to incentivise staff to work unsocial hours when staff generally reluctant to do so so that it could run a 24 hours service. Not paying the enhancement as part of voluntary requests was a proportionate means of achieving the aim because if it was paid to anyone who requested to work unsocial hours, regardless of business need this would undermine the initial justification in having an enhancement the first place. This in turn could enable members of staff who are unable to work unsocial hours to reasonably complain that they are being paid less for the same work. We accept that the Respondent would be in the invidious position of seeking to differentiate between staff and do not accept the Claimant's contention that affording the Respondent discretion in this regard would address the underlying problems of potential discrimination and ensuing effective management of the workforce.

39. Therefore had it been necessary to do so, the Tribunal would have concluded that the non-payment of an unsocial hours allowance to the Claimant was justified in this matter. The unsocial hours allowance is paid to incentivise staff to work unsocial hours, to ensure continuity of the 24 hour service. Fewer staff wish to, or are able to, work unsocial hours. The payment of an unsocial hours allowance to staff who request to work those hours, following a flexible working request or otherwise (regardless of business need) would undermine the justification for an unsocial hours allowance in the first place and amount to indirect sex discrimination for women who are unable to request to work unsocial hours.

40. Therefore, the Claimant's claim under section 19 of the Equality Act 2010 for indirect sex discrimination fails and is dismissed.

Employment Judge Burgher
Date: 16 September 2021