Neutral Citation Number: [2022] EAT 57

Case No: EA-2020-001085-VP

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08 April 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MISS NATASHA ALLEN **Appellant**

- and –

PRIMARK STORES LIMITED **Respondent**

- -
- -

Mr Bernard Culshaw, solicitor, for the **Appellant**
Ms Rosie Kight, of counsel (instructed by Addleshaw Goddard, LLP) for the **Respondent**

Hearing date: 23 March 2022
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JUDGMENT

SUMMARY

Sex discrimination – indirect discrimination

The claimant complained of a provision, criterion or practice ("PCP") of being required to guarantee her availability to work the Thursday late shift, something she was unable to do because of her childcare responsibilities. In assessing the discriminatory impact of the PCP, the Employment Tribunal included within the pool for comparison two male employees, Z and I. Doing so, it concluded that the claimant could not show that the PCP put women at a disadvantage compared to men and there was, therefore, no discrimination such that the respondent was required to demonstrate that the PCP was justified. The claimant appealed.

Held: *allowing the appeal*

The ET had wrongly failed to address the specific PCP of which the claimant complained and had included within the pool for comparison two individuals to whom the respondent had not applied the same degree of compulsion, namely the requirement that they guarantee their availability for the late shifts in question. The ET's decision would be set aside and the matter remitted for rehearing.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This issue at the heart of this appeal is how the pool for comparison is to be identified in a claim of indirect discrimination.

2. In giving this Judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against the Judgment of the Manchester Employment Tribunal (Employment Judge Robinson sitting with lay members, Ms Fletcher and Mrs Crane, over three days in October 2020; "the ET"), dismissing the claimant's claims of indirect sex discrimination and constructive unfair dismissal. The focus of the appeal is on the ET's finding on the indirect sex discrimination claim; the challenge in relation to the constructive unfair dismissal claim being entirely contingent upon the claimant succeeding in her appeal on indirect sex discrimination.

3. The hearing of this appeal was originally due to be before a three-member panel of the Employment Appeal Tribunal but, due to administrative issues unrelated to the case, one of the lay members was unable to sit and, by the agreement of the parties, the hearing proceeded before myself, as the judge, sitting alone. Representation on the appeal has been as it was before the ET.

The Factual Background; the Claimant's Claim of Indirect Sex Discrimination and the ET's Decision and Reasoning

4. The respondent is a clothes retailer. The claimant had commenced employment with the respondent in August 2011. At the relevant time, the claimant worked as a department manager at the respondent's store in Bury, but she had taken a period of maternity leave and was looking to return to work on 1 November 2019. Given her childcaring responsibilities – the claimant had sole responsibility for her child, with only limited

support from her mother – some time before she was due to return to work, the claimant made an application under the respondent's flexible working policy for a change to her contractual hours. In particular, the claimant was concerned that she would be placed at a disadvantage from the provision, criteria or practice ("PCP") that she was required to guarantee her availability to work late shifts; that was a requirement arising from the standard terms and conditions for the respondent's department managers.

5. Although the respondent offered some accommodation for the claimant's position, that was insufficient to meet her concerns and, upon her appeal also being refused, on 24 September 2019 the claimant resigned, subsequently pursuing claims of indirect sex discrimination and constructive unfair dismissal before the ET.

6. In her ET claim, the claimant explained that, at the material time, there had been eight managers at the respondent's Bury store: six department managers, a store manager and an assistant store manager. In distinction to other staff, who had contracts stipulating the fixed shifts they were contracted to work, managerial staff were required to work one of four shifts each day over a five day period; these included a shift that ran from 10.30am to 8.30pm, known as the late shift. The requirement to be available to work the late shift was a concern for the claimant given her childcare responsibilities. Responding to her flexible working application in this regard, the store manager, Mr Davis, explained:

> "Whilst on the majority of days your reasoning that there are other managers who could cover this late shift is true, on a Thursday we do not have sufficient flexibility in the management team to accommodate this request as only 2 of the 6 current managers are able to work this shift."

An alternative was proposed but that still required the claimant to work the Thursday late shift.

7. On the claimant's appeal, a similar explanation was provided:

> "… 4 out of 6 Department Managers would not be flexible to cover all late nights if your application had been successful …"

8. In her claim before the ET, it was the claimant's case that "*the requirement for department managers to guarantee availability to work late shifts amounted to a provision, criterion or practice*"; she argued (relevantly) that this:

> "… put women (a) who were department managers at that workplace or (b) who were department managers in the wider workforce … at a particular disadvantage compared to men. The particular disadvantage was the difficulty or practical impossibility of working evenings while having child care responsibilities."

The claimant further contended that she had been put to that disadvantage and that the PCP imposed had not been a proportionate means of achieving a legitimate aim.

9. In its response to the claim, the respondent accepted that it applied a policy of requiring department managers to work varying shifts, including late shifts, and that this had amounted to a PCP. It denied, however, that this placed women at a substantial disadvantage and contended that, in any event, such treatment was a proportionate means of achieving its legitimate aims.

10. At a case management preliminary hearing on 27 February 2020, the issues that were raised by the indirect discrimination claim were agreed as follows:

> "(1) The claimant says the respondent applies a provision, criterion or practice (PCP) requiring department managers to guarantee availability to work late shifts. Was that PCP applied?
>
> (2) If yes, does the application of the PCP put women at a substantial disadvantage compared with men? The claimant says it does because women
>
> (a) who were Department Managers at that workplace or
>
> (b) who were Department Managers in the wider workforce
>
> …
>
> were at a particular disadvantage compared to men. The particular disadvantage was the difficulty or practical impossibility of work evenings whilst having childcare responsibilities.

> (3) Did it put the claimant at this disadvantage? The claimant says it does because she was unable to comply with the requirement.
>
> (4) If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent says the legitimate aim was to ensure there was always an appropriate level of management cover throughout its store during operational and trading hours to: (i) Supervise junior members of staff; (ii) Manage and assist with the delivery of customer service; (iii) Assist meeting and monitoring targets; (iv) Close down stores safely and securely; (v) Ensure health and safety are adhered to; (vi) Ensure safety standards are adhered to."

11. At the outset of the full merits hearing, the claimant clarified that, given the accommodation that the respondent would have allowed, her complaint related to the more specific PCP of being required to guarantee her availability to work the Thursday late shift. Although the respondent had been prepared to agree that her working hours would not include late shifts on other days, she would still be required to be available to work Thursdays from 10.30am to 8.30pm. While it was unclear how many Thursday late shifts the claimant would in fact have worked, her difficulty was that her childcare responsibilities meant that she could not guarantee her availability to work those shifts.

12. During the oral hearing of the appeal, the parties took me to parts of the witness statement of the store manager, Mr Davis, in the ET proceedings, which provided a somewhat fuller explanation of the position. Having explained that at least two managers need to cover any shift, and that trainee managers can only cover a shift under the supervision of a department manager, Mr Davis stated:

> "55 Having looked into the Store structure and the management team's shift arrangements, it was clear that only [the claimant] and one other Department Manager, Adam … could do the Thursday late shift. …
>
> 56 Adam and Julie could continue doing the Thursday Late Shift but Adam was the only Department Manager that could do it. This meant that granting [the claimant's] request would leave the Store without cover whenever Adam could not work or wanted to go on holiday. …
>
> 59 … I considered various shift patterns and managed to come up with an alternative for [the claimant] which went as far as possible to give her what she wanted. In doing so, I was able to provide [the claimant] with the fixed shift

> times she wanted for all of her shifts apart from a Late Shift on Thursdays as I had no cover for Adam. In doing so, I planned for Adam to work the shifts and then [the claimant] to cover as and when needed. My proposed alternative did not require [the claimant] to work every Thursday Late Shift, only that she "would need to be available to work" it if it was absolutely necessary and there was no alternative cover …"

13. In its Judgment, the ET recorded that the PCP in issue was "*the requirement for [the claimant] to work on the late shift on a Thursday evening ...*" (ET paragraph 4). As Mr Culshaw emphasised, however, the claimant's case was put on the rather more specific basis, that the requirement was to "*guarantee availability to work*" those shifts, thus implying an element of compulsion.

14. In its consideration of the claimant's claim, the ET asked itself: "*Who were the staff affected?*", answering this question as follows:

> "We find it would be the Departmental Managers and Trainee Managers whose contracts confirmed that they had "no fixed hours of work and whose working hours would be such as may be requisite for the proper discharge of their duties and would normally be worked over five days" – that is a quote from the contract of all the departmental managers." (ET paragraph 7)

15. In identifying the pool for comparison, the ET concluded this would be comprised of the department managers and trainee managers "*who potentially have to work the Thursday [late] shifts, however convenient or inconvenient to them it was*" (ET paragraph 10). In defining that pool, the ET focused on the respondent's Bury store, where, in addition to the claimant, there were five other department managers: Piotr, Adam, Zee, Imran, and Julie (albeit that Julie was in fact a trainee manager). The ET excluded Piotr from the pool "*because he had his own flexible working arrangement which was appropriate to his specific circumstances*" (ET paragraph 10). It found, however, that the department managers "*who had historically worked on Thursdays*" were Adam, Zee, Imran, Julie and the claimant, observing:

> "Adam and Julie had no issues working Thursdays. Zee and Imran had childcare issues. Imran took his son to football on Thursdays and therefore

> was rota'd in for only a few Thursdays, mainly in the school holidays, and from the evidence we have seen he did four over a period of 51 weeks. Similarly, Zee had childcare responsibilities because his wife worked in retail also, and he did 16 Thursday shifts over 51 weeks but complained … that he was frustrated at doing to many. Adam did 26 and Julie did 30 Thursday lates." (ET paragraph 11)

16. As I have already recorded, in rejecting the claimant's flexible working appeal, the respondent had explained that, if it had been accepted, "*4 out of 6 Department Managers would not be flexible to cover late nights*"; in addition to the claimant, that was a reference to Piotr, Zee and Imran. As the ET noted, Piotr had previously obtained the respondent's agreement for his own flexible working arrangement. It found, however, that the arrangements for Zee and Imran "*were informal*", albeit that it recorded that the evidence of the respondent's store manager, Mr Davis, had been as follows:

> "Mr Davies *[sic]* told us that he could not change the late shift arrangements. He had inherited his staff's shift patterns from a previous store manager. When he looked into the situation after the application by [the claimant] to change her shifts, he felt the working pattern for Zee and Imran, namely not to work the late shift on Thursdays, had become so entrenched that they had become implied terms in their contracts." (ET paragraph 15)

17. That said, the ET accepted that, "*when asked, and when the store required (perhaps in an emergency or when Adam and Julie could not work), those two men did work on a Thursday.*" (ET paragraph 16)

18. Applying the law to the facts it had thus found, the ET reasoned as follows:

(1) The relevant protected characteristic was the claimant's sex.

(2) Focusing on the pool for comparison, the pool "*should consist of the group which the PCP affects (or would affect) either positively or negatively while excluding workers who were not affected by it, either positively or negatively*." (ET paragraph 19 (7)). In seeking to "*identify the pool*", the ET explained the questions it felt it had to answer as follows:

> "(1) Was there a correlation between the pool identified and the discrimination. The pool must suitably test the discrimination, in other words illuminate the whole situation for us.
>
> (2) What is the pool? The pool must include all the people who want the benefit i.e. not to work on a Thursday late and/or not suffer the disadvantage of those working late on Thursday. One cannot bring into the pool those employees who have no interest in the advantage or disadvantage, and the example in this case is Piotr."

(3) The ET discounted any suggestion of what it characterised as either a wider or narrower pool:

> "… such as Departmental Managers across the whole of the UK, or indeed those managers at Oldham and Bury (there had been a suggestion that the claimant could move to the Oldham store and another manager at Oldham move back to Bury where he had previously worked. That was not appropriate as that employee had only just been promoted and moved to Oldham in the recent past). We also discounted a pool narrower than the one we have established i.e. the one not including Zee and Imran because we identified, as we must, the relevant workforce which is affected or potentially affected by the application of the PCP, and the context and circumstances in which it is sought to be applied. The discrimination the claimant claims is the fact that she was being asked to work Thursdays [on late shifts] when her childcare arrangements did not allow that. We must therefore identify a pool which suitably tests the discrimination claimed, and the pool that we have identified does exactly that." (ET paragraph 22)

(4) Looking at the pool it had thus identified (i.e. the department managers at the Bury store, other than Piotr), the ET found that, of the proportion of men and women in that pool who were disadvantaged by the requirement to work a late shift on a Thursday because they had childcare responsibilities, two were men (Zee and Imran) and one was a woman (the claimant); it therefore concluded:

> "women were not at a particular disadvantage and therefore group disadvantage is not made out." (ET paragraph 23)

(5) The ET further observed that the respondent had offered an alternative to the claimant, taking into account its reasonable need to staff the Thursday late shift:

> "Just as Zee and Imran had been asked to carry out that shift, despite childcare responsibilities, so the claimant would have been, if she had agreed to the respondent's proposal." (ET paragraph 23)

(6) In the circumstances, the ET found that no claim of indirect sex discrimination had been made out:

> "Females were not placed at a disadvantage compared to males in the pool. There is no requirement for the respondent to justify the imposition of the PCP." (ET paragraph 23)

19. As for the claimant's complaint of constructive unfair dismissal, the ET noted that, "*If we had found the respondent guilty of indirect discrimination which could not be justified the claimant would have succeeded in her constructive unfair dismissal claim*". That part of the claim had, however, been dismissed and the ET found there was no other basis on which the claimant had established the requisite fundamental breach of contract.

The Appeal and the Parties' Submissions

20. The claimant pursues two grounds of appeal: (1) that, given its findings of fact, the ET erred in its identification of the correct pool for comparison; alternatively (2) the ET failed to provide adequate explanation for why an alternative, wider pool was rejected.

21. In his oral submissions, Mr Culshaw first addressed ground (2), observing that it had been part of the claimant's case below that, as the requirement to be available to work late shifts (including Thursdays) was within the respondent's standard terms and conditions for department managers across the United Kingdom, the discriminatory impact was properly to be considered across that wider pool. There had, however, been no proper engagement with that aspect of the case in the ET's reasoning and no explanation of its decision to discount this wider pool. Mr Culshaw conceded, however, that if the ET had adequately explained the logical basis for its selection of a pool on a store-only basis then ground (2) would fall away: if an ET provided a logical explanation for its selection of the pool for comparison, it was not required to go further and explain why it had not then selected a different pool.

22. For the respondent it was submitted that the ET's decision was adequately explained. In particular, it was evident from the reasons provided why the ET selected the pool that it did; the alternative pool postulated by the claimant was no more suitable than the logical pool the ET had identified. In particular, once the claimant's case had been focused on the requirement to guarantee availability for Thursday late shifts (a requirement that arose from the particular circumstances of the respondent's Bury store), there was an obvious logic to the ET's consideration of the discriminatory impact at the local store level.

23. As for ground (1), it was the claimant's contention that the ET had wrongly included Zee and Imran in the pool for comparison given it had found as a fact that the claimant was required to work late Thursdays, whereas Zee and Imran only did so on a voluntary basis. The ET had defined the relevant pool as extending to those "*who potentially <u>have to</u> work the Thursday [late] shifts,*" (ET paragraph 10; emphasis added) but it had failed to have regard to this requirement in its analysis. It was, moreover, not an answer for the respondent to rely on the ET's reference, at paragraph 16, to the fact that "*when asked, and when the store required … [Zee and Imran] did work on a Thursday.*"; that was not a contractual requirement imposed on the two men in question, as was apparent from the fact that the store manager understood their working pattern – not being required to work the late shift on Thursdays – amounted to an implied term (ET paragraph 15). The position of Zee and Imran was further made clear by the respondent's position on the claimant's application for flexible working, treating them as in an analogous position to Piotr as department managers who "*would not be flexible to cover all late nights*".

24. The claimant's case had been put on the basis of a PCP of being required to guarantee availability to work Thursday late shifts and the pool for comparison thus ought to have been limited to those who were – or who the respondent considered were – contractually obliged to work the Thursday late shift. Even if there had been a contractual requirement on Zee and

Imran to work the Thursday late shift, as that had not been the understanding of the respondent (or, at least, the relevant store manager), their circumstances were materially different to those of the claimant (to whom such a contractual requirement was still imposed) and they should have been excluded from the pool. Indeed, on the ET's findings of fact, the position of these two men was akin to that of Piotr, such that they too should have been excluded from the pool for comparison.

25. For the respondent, however, it was contended that the ET had correctly identified the pool for comparison. The ET had not found as a fact that Zee and Imran were not contractually required to work a Thursday late shift, merely that that had been the store manager's belief at the time he was considering the claimant's flexible working request. Indeed, the ET had found that Zee and Imran had worked Thursdays "*when asked, and when the Store required*" (ET paragraph 16), in the same way it had found that the claimant would be "*asked to work late on some Thursdays*" (ET paragraph 9). There was no suggestion in the ET's findings that Zee and Imran would have been able to refuse to work such shifts if and when they were asked in the future (indeed, the ET had recorded Zee's frustration at having covered so many Thursday late shifts; ET paragraph 11); as such, this was not providing voluntary cover. Zee and Imran were thus correctly included within the pool for comparison, being equally disadvantaged as the claimant in that they were prevented from working Thursday late shifts because of childcare responsibilities.

26. Accepting in oral submissions that it was apparent that the store manager had not seen Zee and Imran as providing cover for the Thursday late shifts (see the passage cited from paragraph 59 of Mr Davis's witness statement, set out at paragraph 12 above), the ET had correctly identified a pool that would "*illuminate the whole situation*". Applying a narrower pool, and excluding Zee and Imran on the basis of an informal arrangement in place not to work Thursdays due to childcare responsibilities, would not realistically test the allegation but

would have removed from the pool two employees who faced the same challenge as the claimant but who happened to be male; it would, further have left only two other deputy managers (Adam and Julie) and would have taken no account of the Thursday late shifts when they were not available, when the claimant, Zee or Imran would have been required to work (in the sense that they would have been asked to cover the shift). The ET thus did not err in finding that on occasions Zee and Imran were required to work some Thursday late shifts, and were then affected or potentially affected by the requirement in the same way as the claimant.

The Legal Framework

27. Indirect discrimination is defined by section 19 **Equality Act 2010** ("the EqA") in the following terms:

> (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.
>
> (3) The relevant protected characteristics are—
>
> …
>
> sex;
>
> …

28. By section 23 **EqA**, it is further provided that:

> (1) On a comparison of cases for the purposes of section … 19 there must be no material difference between the circumstances relating to each case.
> …

29. The pool of those upon whom the effect of the PCP is evaluated must thus be populated by persons who – apart from the protected characteristic in issue – are in circumstances that are the same or not materially different. As Lady Hale explained in **Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice** [2017] UKSC 27; [2017] ICR 640, SC:

> "41. … 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 s.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."

30. In addressing the arguments in **Naeem**, Lady Hale drew on guidance provided by Sedley LJ in the earlier equal pay case **Grundy v British Airways plc** [2007] EWCA Civ 1020 and the indirect discrimination claim in **Allonby v Accrington and Rossendale College** [2001] EWCA Civ 529. At paragraph 27 **Grundy** it was said that the pool chosen should be that which suitably tests the particular discrimination complained of; in **Allonby**, it was observed that identifying the pool was not a matter of discretion or of fact-finding but of logic.

31. In **Dobson v North Cumbria Integrated Care NHS Foundation Trust** [2021] ICR 1699, EAT, Choudhury P concluded that:

> "22. … the starting point for identifying the pool is to identify the PCP. Once that PCP is identified then the identification of the pool itself will not be a question of discretion or of fact-finding but of logic."

32. As was made clear in **Allonby**, it is for a claimant to identify the PCP which she seeks to impugn; indeed, as Sedley LJ observed:

> "12. … If the [claimant] can realistically identify a [PCP] capable of supporting her case … it is nothing to the point that her employer can with equal cogency derive from the facts a different and unobjectionable requirement or condition."

33. Having regard to the PCP thus identified, it is then for the ET to determine the appropriate pool; where the form of discrimination in issue is indirect, the claimant has no "right" to choose her comparators, see per Keene LJ at paragraph 17 **Cheshire & Wirral Partnership NHS Trust v Abbott** [2006] EWCA Civ 523; [2006] ICR 1267, CA. The ET's determination must be logically defensible, although this does not necessarily mean that only one pool is permissible; the identification of the correct pool has been characterised as "*a mixed question of fact and law*", see paragraph 8, **Hacking & Paterson v Wilson** UKEATS/0054/09. Indeed, in determining the appropriate pool in a particular case, there may be – depending on the PCP in issue – a range of logical options open to the ET; as Cox J opined in **Ministry of Defence v DeBique** [2010] IRLR 471, EAT:

> "147. In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them."

And, as Sedley LJ observed in **Grundy**:

> "31. … Provided it tests the allegation in a suitable pool, the tribunal cannot be said to have erred in law even if a different pool, with a different outcome, could equally legitimately have been chosen."

Discussion and Conclusions

34. As was common ground before me, it was the claimant's complaint that the respondent had applied a PCP requiring that department managers guarantee availability to work Thursday late shifts. Although her case had originally been put on the basis of a wider requirement of guaranteed availability for late shifts in general, by the full merits hearing this had been more specifically defined by reference to the requirement in relation to

Thursdays. That was because the respondent had been prepared to agree to accommodate the claimant's request not to work late shifts on other days, an accommodation that had been determined not at a national level but by the store manager at the respondent's Bury store. On one view, as the respondent submits, there was, therefore, a logical basis for the ET to consider the question of discriminatory impact at the store level. On the other hand, the requirement that department managers guarantee availability to work the late shift on Thursdays was not specific to the Bury store; it was an aspect of the more general contractual requirement imposed on department managers under the respondent's UK-wide standard terms.

35. Provided the ET's choice of pool in this context had a logical basis – that is to say, it allowed the allegation of discrimination in issue to be tested – there was no requirement upon it to consider a different pool. By extension, as Mr Culshaw accepted, if the basis for the choice made by the ET was adequately explained, it was not obliged to address in detail the possible alternative bases by which any discriminatory impact might otherwise have been assessed. Ground (2) of the appeal is thus contingent upon ground (1): if the store-specific pool suitably tested the particular discrimination of which the claimant complained, the ET would not have erred by failing to provide a more detailed account of why it did not adopt a broader, UK-wide, perspective.

36. In explaining why it had adopted the approach that it had, the ET correctly identified that the pool for comparison should not include those who could have no interest in the advantage or disadvantage in issue. On that basis, the ET excluded Piotr from consideration: he had been granted a flexible working arrangement such that he never worked Thursday late shifts. The ET did not, however, similarly exclude Zee and Imran, considering that they were part of the "*relevant workforce which is affected or potentially affected by the application of the PCP, and the context and circumstances in which it is*

sought to be applied" (ET paragraph 22). The ET further explained its approach setting out what it understood to be the discrimination claimed by the claimant – "*the fact that she was being asked to work [late shifts on] Thursdays when her childcare arrangements did not allow that*" – and finding that the pool it had thus selected (comprising the claimant, Zee, Imran, Adam and Julie) "*suitably tests the discrimination claimed*" (also ET paragraph 22).

37. The difficulty with the ET's approach is, however, that it thus re-defined the complaint being made by the claimant; the PCP she had identified was not simply that she was "*being asked to work*" Thursday late shifts but that she was being required to guarantee her availability to work those shifts.

38. In argument, Ms Kight suggested that the ET had been entitled to characterise any requirement that was being made of the claimant as in the nature of a request - akin to that which might be made of Zee and Imran - to provide cover for the Thursday late shift when the store required. As the respondent urges, not only had the ET found that Zee and Imran worked the Thursday late shift "*when asked, and when the store required (perhaps in an emergency or when Adam and Julie could not work)*" (ET, paragraph 16), it had recorded that this was not something that had necessarily been welcomed by the employees in question, noting that Zee (at least) was "*frustrated*" at the number of shifts he had had to cover (ET, paragraph 11). That, the respondent submits, was essentially the same requirement (with the same degree of compulsion) as was being made of the claimant; the ET had therefore rightly included Zee and Imran in the pool for comparison, as co-workers at the store who would equally be affected by the PCP in question.

39. There is a degree of ambiguity in the ET's use of words such as "*asked*" and "*required"* in this case. Thus it spoke in terms of the claimant being "*asked to work late on some Thursdays*" and of Zee and Imran working those shifts "*when asked, and when the store*

required". On one reading that might – as the respondent urges – imply that any "requirement" was the same for all three. On the other hand, the ET did not go on to find that the PCP of which the claimant complained was not in fact being applied to her: a finding that she might be "*asked*" to work Thursday late shifts would not be incompatible with the claimant's case that she was being required to guarantee her availability for those shifts.

40. The ET was careful to explain that it had included within the pool for comparison those who were *"affected or potentially affected by the application of the PCP, and the context and circumstances in which it is sought to be applied".* The "*context and circumstances*" in this case, however, included the distinction that the respondent had itself drawn between Piotr, Zee and Imran and the other department managers. As had been made clear in the response to the claimant's request for flexible working arrangements, Piotr, Zee and Imran were not treated as available to cover the Thursday late shift, something Mr Davis had seen as akin to a contractual variation for each of them. Whilst, therefore, Zee and Imran might have been prepared (however reluctantly) to work Thursday late shifts "*when asked, and when the store required*", it was not the respondent's position that they were required to guarantee their availability to do so. Indeed, to suggest that the claimant was being treated in the same way as Zee and Imran would be entirely contrary to the respondent's position in its response to her flexible working request and to the explanation provided by Mr Davis in his witness statement. The claimant would need to be available to work Thursday late shifts because there would otherwise be "*no cover for Adam*". That statement would make no sense if the same requirement of availability applied to Zee and Imran (that is to say, if they would suffer the same disadvantage as the claimant in this regard).

41. Although the ET found that the arrangements for Zee and Imran "*were informal*", it did not reject the evidence of the respondent's store manager, Mr Davis (which was, after all, entirely consistent with the respondent's response to the claimant's request for flexible working). Thus having regard to the context and circumstances in which the respondent was seeking to apply the PCP, there was a material difference between the position of the claimant and that of Zee and Imran: the claimant was required to guarantee her availability to cover some of the Thursday late shifts (even if the precise number could not be specified) whereas, although Zee and Imran might in fact work some Thursday late shifts, they were not subject to the same requirement of availability. That was a distinction that was not lost on the respondent and it was a material difference that was relevant to the ET's determination of whether the PCP of which the claimant was complaining was also being applied to Zee and Imran.

42. Given the issue raised by the PCP complained of in this case, it was insufficient for the ET to consider whether the individuals in question might be "*asked*" to work the late shifts, without going on to determine whether there was an element of compulsion in the making of such a request. That is not a point of merely academic interest: for an employee who is having to balance work and caring responsibilities, the question whether they are required to guarantee their availability (the PCP of which the claimant complained) or whether they might sometimes simply be asked to help out, is likely to be of considerable importance. By thus failing to properly engage with the particular PCP in issue, the ET allowed itself to include within the pool for comparison two individuals to whom the disadvantage to which the PCP gave rise did not apply.

43. For the respondent it is objected that excluding Zee and Imran from the comparator group in this case would leave a pool of only three, which would itself be artificial. There may be some force in that observation but that would suggest that the store-based pool chosen

by the ET did not, after all, have the logical basis claimed. Certainly, it seems to me that the ET's failure to properly address the PCP in issue in this case renders its choice of pool (not merely the inhabitants of that pool) unsafe. I do not say that the ET was bound to adopt a broader, UK-wide, pool instead, but the error in the ET's approach to its task means that there is no obvious logic to the pool that it did select. This is, therefore, a case where the ET's conclusions must be set aside in their entirety.

Disposal

44. For the reasons provided, I allow the appeal on both grounds and direct that the ET's Judgment will be set aside and this matter remitted for re-hearing. The terms of the remission will be set out in my Order, allowing for any further representations to be made by the parties on this question.

45. Subject to any further submissions on disposal, allow the appeal, set aside ET decision and remit.