EMPLOYMENT TRIBUNALS

Claimant: Ms. M. Glover

Respondents: **(1)** Lacoste UK Ltd
(2) Mr R. Harmon

Heard at: **London Central (remote)** **On:** **24, 25 March 2022**

Before: **Employment Judge Goodman**
Mr. S. Hearn
Mr D. Schofield

Representation
Claimant: Mr. G. Airey, solicitor
Respondent: Mr. N. Roberts, counsel

JUDGMENT

The indirect sex discrimination claim does not succeed.

REASONS

1. This is a claim for indirect sex discrimination arising from a request for flexible working after returning from maternity leave.

2. In outline, the claimant was an assistant manager in the respondent's Nottingham store. She was contracted to work 39 hours per week on five days in seven. Before returning from maternity leave she applied to vary the contract to work three days a week, on Tuesday, Thursday and Friday, and to substitute Saturday for one of those three days on two weekends a month. The application was refused. She appealed. On appeal she was offered four days a week, to be worked on any day of the week. She refused the offer and instructed solicitors to write asking for reconsideration, whereupon the employer reversed their decision, and offered the hours she had first asked for. She returned to work on that basis. Shortly after being told she could have the working arrangement she had wanted initially, she presented this claim.

3. In addition to the indirect sex discrimination claim brought under the Equality Act 2010, she also brought a claim that the respondent had failed to consider

the flexible working request under the procedure set out in the Employment Rights Act 1996. In February 2022 the claimant was ordered to pay a deposit as a condition of proceeding with this claim. She elected not to pay the deposit, so that claim has gone.

The Issues

4. The issues in the sex discrimination claim were agreed at a Case Management hearing in August 2021 as follows:

> "9. Are the following provisions, criteria or practices ("PCPs"):
>
> a. Members of the management teams in the First Respondent's stores need to work full-time.
>
> b. Managers in the Nottingham store needed to work full-time.
>
> 10. If so, did the Respondents have them?
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> 11. If so, did the PCPs put women at a particular disadvantage in comparison with men because women are more likely to have childcare responsibilities than men?
>
> 12. Was the Claimant put to that disadvantage?
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> 13. If so, were the PCPs a proportionate means of achieving a legitimate aim(s)?
>
> 14. Did the claimant suffer detriment by being put to disadvantage? (Section 39 (2)(d) Equality Act 2010)"

5. There was also provision to consider remedy, whether declaration, recommendation, or award for injury to feelings.

Amendment of Claim

6. At the start of this hearing the claimant applied to amend the PCPs on which she relies to read as follows. The additional text is underlined:

> (1) Members of the management teams in their stores need to work full-time <u>and be fully flexible</u>; or
> (2) Managers in the Nottingham Store needed to work full-time <u>and be fully flexible</u>; or
> (3*)* <u>Members of the management teams in their stores need to be fully flexible</u>*;* or
> (4) <u>The Claimant's and/or the Respondent's Assistant Store Manager role is a full-time role requiring full flexibility.</u>

In other words, the claimant now argued she was disadvantaged not just by the requirement to work full-time, but also by the requirement to be available for work on any day of the week. This applied particularly at the appeal stage, when the respondent conceded part-time working, but not on fixed days of the week.

7. The application was opposed by the respondent on the basis that they had

prepared for the hearing on the pleaded case so far, both in law and in selection of witnesses – in particular the decision maker at the appeal stage was absent from this hearing. After hearing argument the tribunal adjourned to discuss this in the light of **Selkent Bus Company v Moore**, directing us to consider how substantial the amendment is, its nature and timing, the effect on time limits, and then balance hardship between the parties.

8. The application was allowed. Oral reasons were given in tribunal. In summary, the claimant should have identified flexibility as a requirement causing disadvantage much earlier, not just when the respondent, in a skeleton argument for this hearing, relied on the claimant not having been required to work full-time. It should have been apparent from the start, and also in the reasons given by the tribunal for refusing the claimant's application to strike out the response (February 2022), which identified that there appeared to have been more than one requirement, that the claimant's difficulty was not just with full-time working, but with flexible working even when part-time. There was disadvantage to the respondent in this late amendment. However, there is much to be said for the argument that the additional or modified PCP is a relabelling of matters factually clear to both parties. Although the grounds of claim clearly plead only full-time working, the response mentions flexibility of days as well as full-time working. The facts on both requirements are clear in the written notes of meetings and the letters giving decisions. The decision makers may not all be here, but the respondent's HR managers who are here give evidence of the respondent's requirements for particular working patterns, and justification for a PCP need not be (as in direct discrimination) about the mind of the decision maker, but about the facts shown which may justify the requirement – **O'Brien v DCA (2013) 1WLR 522.** The disadvantage to the respondent could be alleviated by postponement, but that in our view would cause costs and delay disproportionate to the value of the case. The witnesses present are largely able to explain why the respondent wanted flexible working. The claimant is disadvantaged by not allowing a PCP that was obvious, at least from the appeal stage, but seems not to have been spotted by her representative until yesterday. Balancing hardship, we allowed the appeal.

Evidence

9. We heard oral evidence from **Melissa Glover**, the claimant, from **Ryan Harmon**, the second respondent, a senior HR business partner who made the initial decision on the flexible working request in the absence of the claimant's line manager, and from **Federica Santini**, HR director for the respondent in the UK, who had been consulted about recruitment of part-timers.

10. There was a core bundle of 263 pages. Some inter partes correspondence was attached the claimant's witness statement.

11. At the start of the hearing the claimant sought permission to produce a medical report dated the previous day, 23 March 2021, from a GP, Dr Adam Connor, reporting that the claimant had suffered "substantial mental health symptoms in 2021 around March to July 2021", first presenting 14 April 2021. The wording of the short letter suggests that it is based on entries in the GP records. The Respondent objected on the basis that personal injury and medical treatment was not mentioned in the grounds of claim, nor the schedule of loss. The first that they were aware of any mental ill-health related to the flexible working

request was in the claimant's witness statement dated 7 March 2022 which referred to an episode on 17 April 2021, but not to any course of treatment. The claimant had earlier given disclosure of a photograph of a medical record of 10 February 2022, which related mental ill-health as at that date to redundancy (which had occurred in November 2021), making no mention of a flexible working request. She had not disclosed any other medical records.

12. The panel decided not to admit this report to evidence. If the claimant had suffered ill-health because of the flexible working request, she had known that from before the commencement of proceedings. She could have made a request for her medical records to the practice manager at any time under the Data Protection Act. Records requested in this way are usually disclosed without difficulty or delay - unlike getting a medical report from a GP, as writing such reports is not part of a GP's NHS contract. In the meantime, unlike the revision of the PCP, the respondent had had no notion of any personal injury until the recent exchange of witness statements; the claimant had returned to work, and remained at work for over 6 months without mention of ill health. The GP is not present. The records on which he may have based his report could be here but are not. There is no indication whether other factors contributed to any mental ill-health, or if there is any history, and the 10 February letter referred to her "usual team". Only by postponing assessment of remedy could there be a fair hearing from the respondent's point of view. No reason was given why the claimant had not notified a personal injury claim until the last minute, or provided her GP records. Having regard to the overriding objective, in particular saving expense and delay, were remedy to be postponed to a further hearing, the report was not admitted.

Conduct of the Hearing

13. Parties and witnesses were able to see and hear throughout, and those who did not have a second screen had hard copies of the statements and bundles.

14. The tribunal was provided with a chronology from each party. The parties had exchanged written skeleton arguments prior to the hearing pursuant to case management order. The claimant provided a rewritten and amended argument on closing; the respondent complained that several new authorities were being adduced at an hour's notice. The respondent made oral submissions in reply. The claimant elected not to make a final oral submission. Judgement was reserved.

Relevant Law

15. By section 19 of the Equality Act:

> (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 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.

16. Sex is a relevant protected characteristic for indirect discrimination, but not pregnancy and maternity.

17. The indirect discrimination claim arises from the claimant's request for flexible working. The statutory framework on how employers should handle such requests (not limited to people seeking altered working arrangements for childcare) is set out in section 80F- 80I of the Employment Rights Act 1996. In summary, an employee has no right to be given flexible working on request, and must explain how the requested change in contract terms would affect the employer and how that could be dealt with. An employer must consider the request in a structured way, and give reasons for refusing a request which fall into the 'business reasons' categories listed in section 80G. They are (in full) - (i) the burden of additional costs,(ii) detrimental effect on ability to meet customer demand,(iii) inability to re-organise work among existing staff,(iv) inability to recruit additional staff,(v) detrimental impact on quality,(vi) detrimental impact on performance,(vii) insufficiency of work during the periods the employee proposes to work,(viii) planned structural changes, and (ix) such other grounds as the Secretary of State may specify by regulations. An employee has a statutory right to appeal a refusal. ACAS publishes guidance on how an employer should deal with such a request, which includes having a meeting and discussing it before responding in writing.

18. Section 80 H (2) prohibits bringing a complaint to an employment tribunal in respect of an application which is then disposed of by agreement or withdrawn. This section was the reason for ordering payment of a deposit in respect of the flexible working claim, no longer pursued.

19. In **Little v Richmond Pharmacology Ltd (2014) ICR 85** a request for part-time working was refused initially, but granted, on a trial basis, when she appealed. In the interim she had resigned, and the claimant had argued that the detriment occurred when she was refused part-time working. On appeal to the Employment Appeal Tribunal, it was held that the internal appeal, which had reversed the initial decision, was part of the process, such that the provision was never in fact applied to her, and the initial refusal was no detriment. The case discussed **Buckland v University of Bournemouth**, a constructive dismissal claim, which held that a repudiatory breach of contract could not be cured by an appeal process, and stated that this was not relevant to the section 19 discrimination claim, and also **Cast v Croydon College 1998 ICR 50,** where there was a series of decisions and re-considerations of a flexible working refusal, and where the claimant had resigned some weeks after she had returned to work on the old terms. The series of adverse decisions had been held to be a course of conduct sufficient to extend the time within which she could bring a claim to the employment tribunal, not an initial decision repeated each time an appeal or request for

reconsideration failed. The EAT in **Little** upheld the ET decision that the claimant had not, on the facts, where the requirement to work her old hours had never been applied to her, shown particular disadvantage. In so doing it was observed: "It is often said that discrimination cases are particularly fact-sensitive. This case is no exception". We kept that in mind when we came to consider how the law applied to the facts of this case.

20. On whether there was detriment, the claimant referred us to **MPC v Keohane (2014) ICR 1073**. In this case a police dog handler brought a claim that having had one of her dogs taken away from her when she notified pregnancy, and a further claim that not reallocating the dog to her on return, was detriment, likely to result in reduction in earnings and loss of a career as a handler. It was held that losing the bond with the dog was not a detriment, because it was not a reasonable sense of grievance. The EAT "with reservations" was content to resolve the appeal on the basis that "the implicit understanding of the parties was that given the policy of the Metropolitan Police, the detriment consequent upon PC Keohane having no second job when she returned to work was treated as an inherent part of the decision in respect of removal and non-reallocation" , such that the real risk of loss of earnings and career loss was capable of being a detriment.

21. Generally, it has been held that detriment is where: "a reasonable worker would take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" - **De Souza v AA 1986 ICR 514**, but that an "unjustified sense of grievance" does not amount to detriment - **Barclays Bank v Kapur no2 1995 IRLR 87**.

22. In **Dobson v North Cumbria Integrated Care NHS foundation trust UKEAT/0220/19**, the EAT allowed that employment tribunals could take judicial notice of women to have childcare responsibilities compared to men, and need not require statistical evidence to establish this. The tribunal was however required to analyse the particular PCP carefully to consider whether there was group disadvantage in the light of childcare disparity.

23. When deciding whether a provision is a proportionate means of achieving a legitimate aim, the tribunal must consider all four points in section 19(2), as analysed in **MacCulloch v ICI (2005) IRLR 846**. The burden of proof is with the respondent. The means chosen must correspond to a real need on the part of the undertaking, and be both appropriate and reasonably necessary with a view to achieving the objective - **Bilka-Kaufhaus GmbH v Weber von Hartz (1986) IRLR 317**. The discriminatory effects of the provision must be balanced against the objective needs of the undertaking, and the more disparate the impact, the greater the weight of the objective needs must be. Lastly, the tribunal must itself weigh up the needs, and make its own assessment, rather than relying on whether the employer's decision was within the range of reasonable responses – **Hardy and Hanson plc v Lax (2005) IRLR 720**.

Findings of Fact

24. The respondent is the retailer of a global fashion brand. The UK operation included 20 stores with around 300 staff. It is subject to overall direction from Paris.

25. The claimant worked at the Nottingham store, which was open seven days a week. She had worked there from 2012 and was well-regarded as a helpful member of staff. In April 2019 she became assistant store manager. Her contract provided for a minimum 39 hours per week from Saturday to Sunday, according to rota, and working at least one Sunday in three. Sometimes she worked until 7 pm three days a week. Her pay on appointment was £20,000 per annum.

26. The assistant store manager's job description gives the purpose of the job as ensuring the growth of profitable sales by reference to set financial targets and KPIs, leading developing and managing the team to deliver "exceptional customer experience", assisting the store manager in efficient overall running operation of the store, and being an ambassador of the brand and key corporate values. The main activities are (1) business management, assisting the store manager to analyse KPIs, communicate targets and goals to the team, and taking measures to achieve set targets on a regular basis; (2) coach and train staff, measuring follow-up progress, help store manager recruit the best people, spread company cultures and values, be responsible for induction and training of newcomers, and act with courageous management skills and assisting the store manager to treat conflicts, collective and individual; (3) customer service management, which includes ensuring proper proactive customer services and selling attitude with each team member; (4) merchandising, which includes proper sales floor standards -cleaning lighting and tidiness, analysing top sellers and maximising opportunities with these product lines, and (5) back-office – assisting planning and organisation of daily operations to improve sales and productivity, being responsible for loss prevention through attentive customer approach and annual inventory, and accurate cash handling procedures.
27. The claimant's evidence was that prior to taking maternity leave store ran with a full-time store manager assistant store manager and supervisor, and with five staff on the shop floor., 2 to 3 worked for eight hours per week each, and in other work 16 hours per week. Actual numbers varied from time to time as there was much turnover of staff. I can still manage all the assistant store manager had to open or close the shop, but if one was on annual leave, the supervisor would do this.

28. The Nottingham store was not in the main shopping area or a shopping centre and tended to have low footfall, compared to other stores. The respondent said it was low performing. The claimant disputed this on the basis that she received a bonus. We had no evidence on whether the bonus related to store performance or national performance or some other criterion, and in the absence of other information prefer the evidence of the respondent.

29. Late in 2019 the claimant notified her intention to take maternity leave. Her leave commenced on 3 March 2020 and she was due to return after leave on 1 March 2021.

30. To cover her leave, the respondent recruited an assistant store on a 12 month fixed term contract, but the new recruit did not pass probation, and was dismissed. The lockdown for the pandemic supervened, and the new recruit was not replaced.

31. The respondent's Nottingham store was closed from 21 March to 15 June 2020, then reopened for limited hours, Wednesday to Sunday each week,

from 18 June 24 August 2020. Full opening resumed for just over 2 months from 25 August until 5 November 2020. From 2 December to 12 April 2021 it was closed again.

32. On 9 November 2020 the claimant sent an email to Ryan Harmon, the HR business partner who worked with her store, making a formal statutory request for a new working pattern of 24 hours a week, working 9 am to 6 pm on Tuesdays, Thursdays and Fridays, and in addition "I can do two Saturdays a month, the two Saturdays my partner does not work". She conceded that there would be difficulty during store manager holidays or sickness, and suggested that could be met by her working from home, making herself available by phone and email for emergencies, working four days instead of three as long as the extra day was a Saturday when her partner was not working. She pointed out that during her leave the store had been running with the manager and supervisor, and that the reduction in hours could be met by giving more hours to the part-time workers to cover full timers breaks. The purpose of the request was to accommodate childcare, as nursery fees would make it "financially impossible to put my daughter into full-time nursery as it may now be working for nothing". Working three days her partner and the child's grandparents could care for her. She was agreeable to a trial period of 3 to 6 months and requested a meeting to discuss the request.

33. Mr Harmon did not reply to that email, nor to chasing emails on 5 January and 3 February. Only when ACAS emailed him on 15 February 2021 at the claimant's behest did he take action. He arranged a meeting with her for 24 February. Mr Harman explained to the tribunal that when the March 2020 Coronavirus Job Retention Scheme was modified later in the year to include flexible furlough, he began to get a vast number of emails on the subject, and believes his inbox was set up to divert anything with the word "flexible" in it, which would explain why the claimant's flexible working request was captured in this way. Having heard Mr Harmon the tribunal accepts that failing to deal with the request initially was not deliberate but oversight.

34. Normally, a meeting about a flexible working request would be with the line manager, Scott Collingham, but he was on furlough while the store was closed, so Mr Harmon did it himself. They reviewed the proposal made in writing, and the claimant repeated what she said about the impact on the management of the store. Asked what would happen if the respondent did not agree, she said she did not want to work full-time, the issues were childcare and its cost. She would also have to leave work at 5 pm as the nursery closed at 6 pm. She also wanted to maximise her time with the child, to be able to see her growing up. Asked if she would take another role if the store did not agree, she said that if she dropped to a lower position, she could only do two days a week, perhaps as supervisor or senior sales, recognising there would be a cut in pay. Mr Harman said he would speak to Scott Collingham or Robert Norris (deputy retail director), depending on furlough, and come back to her with a formal decision.

35. Mr Collingham was still on furlough, and Mr Harmon spoke to Robert Norris. Mr Harmon's evidence was that they particularly needed two managers full-time in order to be able to restart the store and re-skill the staff after so long a period when they had not been at work. The hours they would require after opening were as yet unclear. They would need management cover to be able

to open and close the store, and run it when it was open. Managers were needed for the stock take and for sales. There would be no one for handover if Scott was away. She would miss the weekly reporting of Saturday trading which had to be in by 10 am Monday, which managers usually did on Sunday. It would mean more weekend working for the store manager. Finally, there were no part-time vacancies. Mr Harmon summarised this in an email to Mr Norris in 2 March as: "you are unable to accommodate this request at the present time due to the requirements placed on an ASM as deputy of the store and the need for them to operate on a fully flexible basis to support the running of the store. As stated, the business needs for the coming months will draw even more so on the need for a highly flexible management team." He finished with a reference to the lack of part-time vacancies and asked Mr Norris to confirm, which he did. The claimant challenges that these are the reasons on which the decision was based, asserting they have been embellished since. There is no reason to think that they would not have been obvious to Mr Norris, and it was clear from the claimant's cross-examination that she did not consider them illusory, though she did think they could be overcome.

36. Mr Harmon also consulted Federica Santini, UK HR director, about recruiting part-time staff for the other days. She explained that they did not have the budget to hire more staff. This was because the company's budget for personnel costs is based on headcount, rather than hours worked; though there is some flexibility for lower paid roles, there is less flexibility for managers.. Her evidence is that lower performing stores like Nottingham have lower personnel budgets, which cannot be increased without sign off from Western Europe Board and the CFO.

37. Mr Harmon then phoned the claimant on 8 March to tell her that the outcome, followed up with a letter of 10 March. The essential part of the letter says: "unfortunately we are unable to accommodate this flexible working request – and it is formally refused. This was reviewed with the retail management team, and due to business needs from management teams to be full-time and fully flexible due to the need for full management and key holding coverage in the Nottingham store. I also confirm that currently there are no part-time vacancies install that we can suggest to you, as an alternative option".

38. She was told of her right to appeal, and she did. In an email of 11 March she said the requirement for full-time fully flexible is indirectly discriminatory against women with childcare responsibilities, both direct and indirect sex discrimination, and maternity discrimination as it was in the protected period. It was outdated to say that nobody in management could work part-time. They had not considered advertising for someone to do her role on the days she was off. Nor had anyone been asked internally to step up for the stated days. She was very upset.

39. Formally, the claimant's ordinary and additional maternity leave had ended but she took some accrued annual leave, and then on 21 March was put on furlough as the store remained closed.

40. The appeal meeting took place by video call on 30 March before the Omnichannel Director, Adrien Hiver. Ryan Harmon acted as notetaker. In fact, he recorded the meeting, without the claimant's knowledge. He says he did

this because he lacked of experience of notetaking, and did not have the chance to tell her because he joined the meeting slightly late. Reading the transcript, we see that there was in fact an opportunity to tell her. While secret recording is always reprehensible, whoever does it, as evidence there is nothing on this occasion to suggest (as tribunals must be careful to consider) that the claimant was being set up to say something without considering it; she did know that a note of some kind was being made, and she has been provided with the recording so that she can check the transcript is accurate.

41. Adrien Hiver went through her appeal points in turn. The claimant explained the childcare issues and that she needed the flexibility, she could not manage to put her daughter in childcare and balance that with full-time work. She confirmed that they could find someone part-time to fill her hours as an ASM – "there are plenty of people who want a management position out there", and commented that she had employed former retail managers as part-time staff when she worked in the Lacoste concession at House of Fraser because they could not find full-time management positions. She was not satisfied that they had considered a part-time ASM. The role could be filled by two part-time ASMs. She would make sure she did good notes and handovers. She could not get childcare availability for weekends or late evenings, such as 7pm; very few childminders took children at weekends, and those that did were fully booked. Being fully flexible was not workable, but she could work from home on Mondays to do the trade report, and could support queries on the phone.

42. On 7 April Mr Hiver wrote to the claimant reducing the requirement from 5 days to 4 (32 hours), but still requiring flexibility. He explained the original grounds of refusal – detrimental effect on quality and performance – as being that as an ASM she had to support store operations and team management, and that if she was not there full-time it would be disruptive, and recruiting someone two days "would not have been conducive to successful store operation, as the role would not be well suited to a job share in the eyes of the business". That was why it had not been advertised internally and externally. He agreed with that view, but in the interest of ensuring a fair approach, and assessing the impact of this on the actual operation of the Nottingham store, she would be required to work four days of eight hours each week, on any day, and she would be given four weeks notice of the shift requirement to allow her to plan her childcare. This was for a six-month trial period, to be reviewed throughout to ensure the arrangement worked for her and the business. If successful it would be permanent, and if not she would revert to full-time.

43. We have no notes or statement from Mr Hiver about how he came to his decision. Mr Harmon sent him the notes on the morning of 31 March, and on the afternoon of 1 April Mr Harmon sent Mr Hiver a draft letter "for your review following your feedback", which indicates an intervening discussion. He explained they had a conversation, and Mr Harmon drafted the letter because English is not Mr Hiver's first language.

44. On 7 April Mr Hiver approved the draft, and it was sent to the claimant with the notes. The draft had also been sent to Federica Santini, who approved it on 1 April. Her evidence, though we do not have precise dates or documents, is that at as of the date of the appeal meeting they had already started

discussing early termination of the lease with the landlord of the Nottingham store, as part of a policy of consolidating operations in fewer and larger stores, but discussions on the lease were ongoing and they were not able to advertise this to staff, nor did they have a date. As ACAS had been involved, she wanted to avoid confrontation, and was comfortable with a compromise of four days a week, if still fully flexible.

45. The claimant was extremely disappointed, and instructed solicitors to write to the respondent. Their letter of 14 April 2020 recites the history and complains that the initial reasons given had been altered or expanded. The claimant needed set days to arrange childcare, and the respondent could advertise internally or externally to find staff to work as assistant store manager on the other days. The solicitor concluded: “our client therefore requests reconsideration of her request and that her application is granted. Should this not be, then it may be that she has no option other than to resign and claim constructive dismissal. We hope that will not be necessary and is a sensible resolution to this request is forthcoming”.

46. The Respondent now decided to accede to the original request. The redundancy decision had still not been announced at the time of the response being filed. Faced with the threat of litigation, they decided it was more cost-effective to accede to the original demand.

47. In a letter dated 23 April, she was told: “I am delighted to confirm following a review of the appeal outcome, that the company can grant you a variation to your working arrangement”. She would work 24 hours per week, those days being Tuesday, Thursday, Friday with alternative Saturdays (two weeks in four) from 9 am to 6 pm, subject to a six-month trial period. She was currently on furlough. She was informed that the last day of furlough would be 25 April, and the store manager would be in touch about arrangements for her return.

48. When the furlough period ended on 25 April, she was to be paid for the newly contracted three-day week, but because one of the grandmothers who had been going to look after the child was ill, she postponed her return until Saturday 8 May, and used annual leave to cover the gap, plus, by agreement some unpaid leave. (As it happens, through payroll error she was paid in full for the whole of May; the overpayment was recovered over the next two months).

49. Meanwhile, after the decision, and after the end of furlough, though before she returned to work, she presented this claim to the employment tribunal on 4 May 2021.

50. From 8 May on she went to work on the agreed hours. In June there was a general review of pay grades, and her pay increased by 12.5%.

51. On 27 July 2021, shortly before the entire store was notified that they would be made redundant because of closure, she was told that the arrangement was being made permanent.

52. She ceased employment on 19 November 2021 by reason of redundancy.

53. We do not have much evidence on how an arrangement previously thought to be unworkable was in fact worked over these five and a half months. The

claimant's witness statement is entirely silent on the subject. We do have a long email sent to Ryan Harmon by Scott Collingham on 18 June 2021, six weeks in, about the claimant and the new working arrangements. He complained it was "very difficult" with the claimant only working three set days a week and not being able to work Sundays. He could not move some of her tasks to fit the days she was at work, and gave as example preparation for a sale starting Tuesday, 15 June, where she had done some preparatory work on the Friday but was not back into work after that until Thursday 17 June. In addition, sale footfall had been less than expected, so he could have reduced hours to help productivity on Thursday to Saturday, and he was "just putting her days in to fill her contract and not the needs of the business", the others (himself and the supervisor) being full-timers. He would have preferred to have her in at the beginning of the week to organise the sale. Manager tasks that required quick responses had to be actioned by his full-time or part-time supervisor, who were having to step up for him on his days off and for annual leave. The arrangement "if anything is costing us money as we can't fit her hours to tasks and I'm moving other people to spread the hours so we don't have too many on days she's in".

54. In evidence, the claimant has explained that her chosen working pattern was because her mother did not work on Tuesday, and her partner's mother did not work on Thursday and Friday, so between them they would take care of their granddaughter on those three weekdays. Her partner has to be on call for work two Saturdays of a month, and could care for his child the other two Saturdays, but which Saturdays they are is unpredictable. There was no information about family availability on Sundays, except that her partner was paid triple time for Sunday working; we do not know how often he had to work on Sunday. As for nurseries, she calculated her gross daily pay at £75 and nursery fees at £51 per day (she told Mr Harmon at the time it was £65), and would in addition need to pay a childminder if she was not able to get away from work in time to pick up at 6 pm. This made using the nursery full-time unaffordable.

Discussion and Conclusion

55. Taking the provisions of section 19 step-by-step, the first step is (a), that the PCP is applied across the board. This is not disputed. The respondent would have applied it to any manager at Nottingham who wanted to work part-time. (There is some evidence that they did have part-time managers at larger stores). They would also apply the requirement of full flexibility to all managers; there is no evidence to the contrary.

Particular disadvantage

56. The next step is (b) - that it puts or would put persons with whom B shows the characteristic at a particular disadvantage when compared with persons with whom she does not share it. We take each PCP separately.

57. We accept on the strength of **Dobson**, that women still bear more childcare responsibilities than men. In this case we were also shown 2019 ONS statistics, that it is still the case mothers are more likely to work part-time than fathers. In about half of all families where both parents are working, both parents are full-time, but in half, it is the mother working part-time.

58. On full-time working, of itself, compared to part-time working, we are not satisfied that there is particular disadvantage to people who have childcare responsibilities. There is now widespread provision nationally of nurseries open during hours that suit normal business hours. Childminders can be found who will sometimes accept childcare earlier or later than standard nursery hours. Many families adopt patchwork arrangements of relatives, childminders, nurseries and nanny shares to cover the parents' working hours, or keep down the high cost. Having to work a 39 hour week does not of itself put people with childcare responsibility at a disadvantage. On the evidence, we concluded the claimant could have afforded two days nursery care plus 3 days of care by relatives.

59. However, we did consider there was particular disadvantage in the requirement to work flexibly, namely any five days in seven, or (as offered on appeal) any four days in seven, subject to four weeks' notice. With respect to care by family members, a child's partner may be working, and so do many grandparents. It will be unusual for other employers to be so flexible as to accommodate changes in work pattern, even at four weeks notice. As for nurseries, a large proportion of their running costs are related to staff wages, and they are required by statute to maintain a particular staff-child ratio. Unless they had a large bank of nursery nurses they would be unlikely to be able to lay on or lay off care on particular days of the week for individual children, and even with bank nurses, they would be unlikely to cover the cost of an additional nurse without other children requiring care on that particular day. We have no evidence of affordable nurseries able to provide this drop-in drop-out care, and all the nurseries we have heard of require commitment to particular patterns of use. There often waiting lists for particular days of the week. A working arrangement at the level of flexibility required by the respondent initially, or as envisaged by Scott Collingham in his June 2021 email about changing the claimant's days when the sale footfall was low, would be very difficult without a family member able to provide backup at short notice.

60. Even a fully flexible working arrangement at four weeks notice would be difficult. It would depend on finding a nursery or childminder for those particular days at four weeks notice. The claimant did not discuss what notice of changes in nursery would require, or whether there were restrictions on particular days of the week. However, the real difficulty in what the respondent proposed for people with childcare responsibility was the requirement to fully flexible at weekends. Few nurseries open over the weekend. The claimant's evidence was that a limited number of childminders were available, but they were fully booked. We understood from evidence that the child's grandmothers both had to work at weekends, and her partner's availability on Saturdays was subject to his own employers' needs. Her partner was paid triple time for Sunday working, so we understand how the couple would be reluctant to give that up. We considered that particular disadvantage was shown in respect of the requirement to work flexibly, even with four weeks' notice, when it included weekend working. It is not always easy to find childcare at the weekend; having to do so flexibly made it very difficult indeed.

Was the Claimant at Disadvantage?

61. Section 19(1)(c) is whether the arrangement puts or would put the employee at the disadvantage. The principal dispute in this case is whether the respondent applied a provision criterion or practice to the claimant at all. The respondent submits not only that the claimant was never required to work full-time, as that requirement was abandoned at the appeal stage, but also that the claimant was never, in the event, required to work flexibly. She was put on furlough on 21 March when her maternity leave and annual leave ended, as the store was still closed, and was still on furlough when on 23 April they conceded her original request. The claimant, by contrast, argues that she was subject to detriment by reason of the original decision on 8 March, and still subject to detriment at the date of the appeal decision on 7 April, because she had been told, and believed, she had to return to work fully flexibly, on four days a week.

62. The respondent relies on **Little,** to the effect that while the process was ongoing, the provision never applied. The appeal tribunal in that case assumed in favour of the claimant that "the statutory tort was prima facie completed" when her initial application for flexible working was refused, but that reversing the decision on appeal meant that it was never applied. The claimant argues that **Little** was wrongly decided, and that in the light of **Buckland** a repudiatory breach could not be cured by subsequently reversing the decision, an act of discrimination being arguably a breach of contract. This tribunal is however bound by the decision of the Employment Appeal Tribunal, which in **Little** had already discussed both **Buckland** and **Cast**.

63. The claimant further relies on **Keohane**, to the effect that where there was a real risk of an adverse outcome, that was a detriment, even if it was later reversed (in that case the dog was eventually returned, some months after her maternity leave had ended and she had returned to work). She had suffered in anticipating that she would have to work flexibly.

64. The tribunal prefers the argument of the respondent. This case differs from a little on the facts in **Little,** in that the statutory process was completed against the claimant, but it was then reversed before she was ever required to start work on the flexible terms. It was distressing for the claimant to anticipate that she would have to resign because she could not find or afford flexible childcare, but she was never in practice required to do it. It might be different if she had resigned, like Ms Little, but (unlike Ms Little), she had postponed a resignation until after the appeal outcome, nor did she resign. Instead she tried again, though making it clear that she might well resign if there was no change, and fortunately this time she succeeded. Taken overall, whether the decision was taken within or without the statutory process, she was never in fact required to work flexibly. We could not see that it made a difference for the purpose of section 19 that the decision was altered after the internal appeal was decided, when she had not yet had to work on the employer's proposed flexible four-day week. It had not been applied to her. At most, it was proposed that it would apply to her.

65. These facts also differ from **Cast**, where the claimant had returned to work on the terms she did not want, managing it by using up leave, while continuing to seek reconsideration, because in that case the requirement to work on her old terms *was* applied to her on her return to work.

66. If we consider the facts in **Keohane**, the dog had already been removed; of itself that was not considered a detriment; the appeal had proceeded on the basis of an implicit understanding that there was detriment, given police policy to remove dogs and not return them, in that the claimant would have no dog on return from leave, and that this was an inherent part of the employer's decision. The appeal tribunal had accepted that "with reservations". The set of events that implied "real risk" of loss of earnings and career loss without a dog had already started. Here, nothing had yet happened after the flexible working request appeal, and before the claimant had to return to work the decision had been reversed. We concluded that her apprehension of detriment was not enough. It was not a "real risk" as in **Keohane**, where removal of the dog meant the process of implementing the policy that would lead to reduced earnings and career loss had already started The policy had not yet been applied to her, she had asked for reconsideration at a point when she was still not required to work, and the policy was in the event not applied to her.

67. The statutory wording is "applies or would apply" the PCP to persons not sharing the claimant's protected characteristic; the reference to "would apply" is intended to cover situations where, as it happens, there is no one without the protected characteristic, but there might be – like the hypothetical comparator in direct discrimination. Where subsections (b) and (c) speak of "would put", we understand that to mean the same set of facts, namely, that the PCP affects everyone, regardless of the protected characteristic, but as it happens there is no one without the protected characteristic. It is not understood to mean that *if carried out* it would put the claimant at disadvantage.

68. In our finding, the claimant has not passed the hurdle of section 19 (1) (c), so we need not go on to consider justification, but in case we are wrong, we went on to consider this.

Justification

69. The legitimate aim advanced by the respondent, and not disputed by the claimant, was "operational needs" which from the evidence was unpacked to mean proper management of the store, staying within budget, and fair allocation of work. In our finding these are legitimate aims of a retail business.

70. We consider whether the insistence on flexible working was a proportionate response to these needs. When cross-examined the claimant maintained that her assistant store manager role could be covered by the existing full-time supervisor and part-time supervisor. There had been a period of some months when she worked on her own with the help of the supervisors. They had managed without it during her maternity leave, and they managed with her on a part-time non-flexible basis after her return from maternity leave.

71. On examining her tasks as assistant store manager we concluded that the respondent did require an assistant store manager five days a week, working flexibly with the store manager also working five days over seven. It was true that either of the supervisors could be asked to open the shop or close it, as they also held keys besides the store manager and assistant store manager. They also cooperated with staff supervision and discipline, being the "eyes and ears" of the assistant store manager and store manager when they were not on the shop floor. In our finding, this cannot altogether substitute for the

overall responsibility for coaching, leading and disciplining shopfloor staff, which would fall on the store manager when the claimant was away, and there might be days at a time when neither of them was in. The claimant was not proposing that they were to act up as assistant store manager, because she argued in evidence that the respondent would save on her wages when she was not working - the full-time supervisor was paid £2,000 per annum less than the assistant store manager. The claimant held that sales preparation could be done by her working late or coming in early on her days. The actual sales days were set centrally and could not be adjusted by the store to suit local rotas. It was a difficulty identified by Scott Collingham in his June email that he could not alter her days to suit the sale footfall. The weekly reports were done by printing off the week's sales figures after the store closed on Saturday evening, and then worked on by whichever manager was on duty the Sunday for submission by 10 am Monday morning. The claimant argued she could have had the reports printed off by someone and emailed to her on Saturday evening or Sunday and that she could then work from home, the task taking 1 to 2 hours, so that it was done in time for Monday morning. She was not sure if the figures could leave the premises, and we have no evidence, but we assumed there was homeworking during the pandemic of financial information so this of itself would not have been a bar. Nevertheless, it may have caused some anxiety and uncertainty in the respondent's operation.

72. The main difficulty of only having a part-time assistant store manager was lack of flexibility of cover for the store manager. It required him to work all Sundays in the month, and 2 to 3 Saturdays in the month. This work-life balance was unsustainable long-term, in our view. There was also a difficulty if the store manager was off sick or on leave. It could be met on a day-to-day basis by cover from managers from other Midlands stores, as the claimant said had happened when she was an assistant store manager on her own, but again it can only be sustained on a temporary basis, not permanently. Our conclusion was that having a part-time assistant store manager meant that management was spread too thinly over the seven day week, and was not going to meet the need to manage staff or the store profitably.

73. We do not accept that the fact that the respondent did not replace the claimant during her maternity leave means that they could manage without when she returned to work. The store was closed for much of her leave. When it was open hours were mostly reduced. There was considerable uncertainty among retail traders as to whether customers would return to shops from online shopping. Nor do we accept the fact that the respondent managed to accommodate her restricted hours from May to November 2021 as evidence that they did not need store manager to work five days a week flexibly. If they were contemplating store closure at some stage, and were faced with litigation, it was reasonable to make a pragmatic decision to manage as best they could on what was available, rather than have to set to and recruit a new assistant store manager who would then have to be trained up, for what might be a very limited period.

74. We considered next the claimant's proposal that the existing supervisors could be invited to act up as assistant store manager to cover the four days she was not working, namely all Sundays, Mondays and Wednesdays, and 2 to 3 Saturdays a month. They could be paid pro rata for the time they were

acting up. Alternatively, the respondent could advertise externally for this fixed day cover, on the basis that there was a pool of women with family responsibilities and managerial experience looking for part-time work. The firm evidence of Federica Santini was that she could not advertise for additional part-time staff because the respondent that it works from headcount, regardless of hours worked, and not from full-time equivalent workforce. The UK operation was unable to change this without a direction from head office abroad. There were additional administrative costs of part-time workers, namely recruitment and payroll. There was no room for this in the budget. Larger stores managed with some part-time assistant store managers, but where the personnel budget was set low, particularly in those which were poorly performing, like Nottingham, additional store managers could not be recruited.

75. We did not understand why the respondent was limited to headcount, rather than counting full-time equivalents. Speculatively, there might be additional cost if an overlap was required for handover, and some small cost in recruitment; additional payroll administration was likely to be negligible. Arguably, there is more flexibility available with two part-timers to cover sickness and annual leave them with one full-timer. We can understand that finding someone to work all Sundays might be challenging, but not impossible, as there are people who prefer to work weekends. These were not factors explained by respondent, which simply asserted that they could not recruit part-time, not that it was impracticable, or unlikely to succeed. In an age when many women of childbearing age have demonstrated to employers that job sharing arrangements are workable at management levels it is hard to understand why an employer should insist on one full-time manager working fully flexibly rather than two working on set days. In the absence of evidence on why this could not be done we considered the respondent had not justified a requirement to work fully flexibly when many employers would have met that by recruiting a part-time assistant store manager to work the days that the claimant did not, whether internally or externally. The rigid and unexplained policy obstructed the accommodation of the claimant's request, and was disproportionate to the aim of running the store profitably, requiring the claimant to work flexibly when an alternative was available.

76. So had we been able to conclude that the claimant was put to disadvantage by a requirement to work flexibly, the respondent would not have justified it.

Remedy

77. Having found that the indirect discrimination claim does not succeed, we do not need to assess remedy. As this was a hearing to consider all the issues, including remedy, it is useful if we set out our findings on the evidence. The claimant was very upset by the decision, particularly on appeal. We can understand this, particularly when a mother returning to work from maternity leave on any terms experiences emotional turmoil and may be less than usually robust. Her evidence is that she became so stressed after the appeal decision that she began to have arguments with her partner about money, and was nearly hit by a car on 17 April. She went to see the doctor on or about 19 April. She says the doctor prescribed some medication. She does not say that she took it, or for how long. She says she went to a talking

therapy, but not when. She does not describe any ongoing treatment or symptoms. She was able to work from her return on all 8 May, apart from taking a day off sick in May 2021 with suspected Covid. She reported that she was in good health on her return to work. In our finding, her distress lasted the two weeks from 7 to 23 April 2021 and our award would have been £1,500, at the lower end of the lower **Vento** band, as an episode that was not trivial, but short lived, as in our finding stress will have been alleviated by the good news. The facts were not similar to the three cases with higher awards proposed by the claimant.

78. There was a claim for personal injury which is rejected on the basis that insufficient evidence has been put forward.

79. There was a claim for aggravated damages. As reviewed in **HM Land Registry v McGlue UK EAT0435/11**, these are appropriate where there has been high-handed, malicious, insulting or oppressive behaviour, or the respondent has demonstrated prejudice, animosity or spite, or where subsequent conduct has been unnecessarily offensive or there's been a failure to apologise, aggravating an existing sense of injustice. In this case it is argued that in an email from the respondent's solicitor to the claimant solicitor, questions about the adequacy of disclosure in the light of some late disclosed documents were so insulting to the claimant as to aggravate her existing sense of injustice. Having reviewed the email both in isolation and in the context of the chain, this not support any allegation of offence. The late disclosed documents (a call log without commentary, and an entry in the GP records of 10 February 2022 referring to the redundancy) did call for explanation, and the queries are mildly and rationally explained, and were necessary at a stage when witness statements were being prepared, as it might be necessary to ask the witnesses to comment on them. The claimant's solicitor responded within the hour claiming aggravated damages. The correspondence does not reach the threshold of unnecessary offence. We would not have made this award.

Employment Judge - Goodman

Date_28th March 2022

JUDGMENT SENT TO THE PARTIES ON

29/03/2022..

FOR THE TRIBUNAL OFFICE