EMPLOYMENT TRIBUNALS

Claimant:
Mrs E Meacham

Respondent:
Pembrokeshire County Council

Heard at:	**Wales CVP**	**On: Monday 13th June 2022, Tuesday 14th June 2022 and Wednesday 15th June 2022**
Before:	**Employment Judge A Frazer** **Tribunal Member W Morgan** **Tribunal Member C Stephenson**	

Representation:
Claimant:
In person

Respondent:
Mr C Evans of Counsel

JUDGMENT AND REASONS

JUDGMENT

1. The Claimant's claim for indirect sex discrimination and constructive dismissal are well founded and shall succeed.

2. The Claimant's claim for associative indirect disability discrimination is not well founded and shall be dismissed.

REASONS

Introduction

1. This is a claim brought by the Claimant for constructive unfair dismissal, indirect discrimination by association of her disabled child and indirect sex discrimination. An EC notification was made on 13th September 2021. An EC certificate was issued on 16th September 2021.The claim was presented on 4th October 2021.

The Issues

2. The issues are set out in the case management order of EJ Moore dated 4th February 2022. I went through the issues with the parties at the start of the hearing and they agreed them save that disability was no longer an issue as it was conceded by the Respondent.

    a. Whether the Respondent accepted that they applied to the Claimant the identified PCP namely the requirement to work full time (37 hours) contracted hours?

    b. Whether the PCP puts women at one or more particular disadvantages with men in that responsibility for childcare falls disproportionately on women and if not, set out the reasons why not, having regard to **Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] UKEAT 0220/19./2206**.

    c. Whether the Respondent put the Claimant at a disadvantage at the relevant time and

    d. The legitimate aim relied upon and the means by which that aim was achieved in the Claimant's case.

3. At paragraph 9 of the case management order it had been stated that the Respondent may provide an amended response addressing a number of points The Respondent did not provide an amended response and I accepted that on the wording of the direction, this was not mandatory. I asked Counsel for the Respondent to clarify what the legitimate aim was for the Respondent and he stated that there were a number of legitimate aims which he listed as follows:

    - Continuity of service for the service users.
    - The requirement to work after school hours to facilitate meetings with key stake holders namely teachers
    - Economic consequences namely the duplicated costs of training and supervision
    - The outstanding hours requested to be filled were so minimal that there was no reasonable prospect of creating a role to cover those.

The Hearing

4. It was agreed with the parties that the timetable was set out to deal with liability only. We received witness statements and heard oral evidence on oath from the Claimant, Emma Meacham, and from James White, Leonie Rayner and Luci Bowers for the Respondent.

5. During the hearing of the evidence some preliminary points arose that required us as a panel to determine how we proceeded. Firstly, there was the issue of the disclosure of some handwritten notes that the Claimant had taken during the appeal hearing. The Claimant made mention of these but they were not in the bundle and Mr Evans made the point that they were disclosable. The Claimant clarified that they were not verbatim notes of the meeting but rather notes that she made for her own purposes. We determined that on the basis of the evidence that we had heard from Mr White they would be unlikely to assist us. Mr Evans indicated that if they were referred to again they may become relevant and disclosable but at that point he would not press the point. Secondly, when Ms Rayner gave evidence Counsel asked some supplemental questions. Ms Rayner then gave evidence orally about the Additional Learning Needs transformation process which was being rolled out by the Welsh Government and how this affected the training and delivery needs of the Respondent. The evidence was that this in turn generated a requirement to attend training events by members of staff in the team which would often go beyond 2pm.

6. We intervened as the evidence that was being given was detailed and we felt that this ought to have been put in a witness statement prior to the commencement of the hearing. The Claimant indicated that she felt anxious as this was not evidence that she had been aware of before. We retired to discuss whether the Respondent ought to be allowed to give previously undisclosed evidence in this way in some considerable detail and we determined that the fairness of the situation dictated that it should not. We indicated that the Respondent was represented and ought reasonably to have known that everything ought to have been included in a witness statement before the date of the hearing and that the process was for parties to exchange so that no-one was taken by surprise. This ensured that the opposing parties were able to prepare their cross-examination accordingly. We determined that the appropriate course of action would have been to apply for an adjournment if it appeared that there was a need to file additional evidence. In any event we determined that what we needed to know is why and how the decisions were made in relation to this particular employee at the relevant time relevant to the issues in the case and we would continue to hear evidence on that point.

7. We heard closing submissions on the morning of the third day. Mr Evans for the Respondent had submitted a skeleton argument. He had suggested that we read it at the start of the hearing but we determined to read it after the evidence had finished. We retired after closing submissions to consider whether or not there was time to promulgate a decision orally that day. Given

that the Claimant would have to leave at 1500 we decided that we would not have sufficient time to deliberate and give our decision within the allocated timeframe as it was then 1145. We explained to the parties that we wanted the time to give the decision careful consideration and would therefore be reserving our decision.

The Law

Constructive Dismissal

1. Under s.95(1)(c) Employment Rights Act 1996 'an employee terminates the contract under which he is employed (with or without notice) in circumstances where he is entitled to terminate it without notice by reason of the employer's conduct.'

2. In **Western Excavating v Sharp [1978] QB 762** it was held that in order for there to be a constructive dismissal there must first be a fundamental breach of contract; the employee must resign in response to the breach and the employee must not delay too long in accepting the breach or he or she may be taken to have waived the breach (affirmed the contract).

3. The Claimant relies on the implied term of trust and confidence, breach of which is always fundamental (**Malik v BCCI [1997] UKHL 23**). The formulation is that an employer must not 'without reasonable and proper cause conduct himself in a manner calculated or likely to destroy or seriously injure the relationship of trust and confidence'.

Indirect Sex Discrimination

s.19 Equality Act 2010

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared 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—

- *age;*
- *disability;*
- *gender reassignment;*
- *marriage and civil partnership;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

Burden of Proof Provision s.136 Equality Act 2010

(1)This section applies to any proceedings relating to a contravention of this Act.

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3)But subsection (2) does not apply if A shows that A did not contravene the provision.

4. In **Essop and Others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice [2017] UKSC 27** at paragraphs 24 to 29 Lady Justice Hale provided a summary of the key points of indirect discrimination law as six 'salient features which are set out below.

23. It is instructive to go through the various iterations of the indirect discrimination concept because it is inconceivable that the later versions were seeking to cut it down or to restrict it in ways which the earlier ones did not. The whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment. All the iterations share certain salient features relevant to the issues before us.

24. The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But

sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

26. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them "context factors"). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in Homer v Chief Constable of West Yorkshire [2012] UKSC 15; [2012] ICR 704 , where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. ***Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory.*** *The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test*

requirement would be a proxy for race or age). [Employment Judge's emphasis in bold].

28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop , a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result.

5. In **Clarke and another v Eley (IMI) Keyoch Ltd [1983] 165** the EAT held that for the purposes of indirect sex discrimination the relevant point in time for assessment is when the Claimant alleges that she suffered a detriment (or 'particular disadvantage').

6. In **Meade-Hill and another v British Council [1995] ICR 847** the Court of Appeal considered whether or not an employee was entitled to commence proceedings for indirect discrimination in circumstances where the clause was not actually invoked by the employer. This depended on the construction of the word 'applies'. In the Court of Appeal's view the inclusion of a contractual term that imposes an obligation on a party to the contract amounts to an application of a requirement or condition against that party. On that basis the mobility clause was applied at the time the contract was made and the employee did not have to wait until it was invoked to challenge it.

7. In **Allonby v Accrington and Rossendale College and others [2001] ICR 1189 CA** per Lord Sedley at paragraph 18: '*once the impugned requirement*

or condition has been defined there is likely to be only one pool which serves to test its effect. I would prefer to characterise the identification of the pool as a matter neither of discretion nor of fact−finding but of logic. This was the approach adopted by this court in Barry v Midland Bank plc [1999] ICR 319, 344, and endorsed by Lord Slynn on further appeal [1999] ICR 859, 863. Logic may on occasion be capable of producing more than one outcome, especially if two or more conditions or requirements are in issue. But the choice of pool is not at large.'

8. In **Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] ICR 1699** the claimant was a nurse with three children who was employed to work two fixed days a week. The Respondent had applied a PCP to work flexibly including at weekends. The tribunal found that there was no evidence that had been adduced that women as a group were thereby disadvantaged, all members of her team were able to comply with the requirement and that it had been a legitimate aim for the Respondent to provide a safe and efficient service and it was proportionate to do so by requiring a flexible working practice by all members of the team. The EAT held that the correct pool was all community nurses in the Trust required to work flexibly and that the tribunal ought to have taken judicial notice of the fact that women bore the greater burden of childcare reponsibilties than men and that could limit their ability to work certain hours, a matter noted by courts at all levels over many years and that the tribunal had erred by not taking this into account. EAT held:

> *50. However, taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the child care disparity and the particular PCP in question. The child care disparity means that women are more likely to find it difficult to work certain hours (e g nights) or changeable hours (where the changes are dictated by the employer) than men because of child care responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking judicial notice of the child care disparity. However, if the PCP as to flexible working requires working any period of eight hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with child care responsibilities, then it would be open to the tribunal to conclude that the group disadvantage is not made out. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an "indisputable fact" (of which judicial notice may be taken) to a "disputable gloss" (which may not be apt for judicial notice): see R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's Services and Skills (Secretary of State for Education intervening) [2018] 1 WLR 1471 at para 108. Taking judicial*

notice of the child care disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage.

51. We therefore reject Ms Darwin's contention that taking judicial notice of the child care disparity should invariably result in the group disadvantage being made out with the question for the tribunal simply being one of justification. Such a blanket approach could give rise to unfairness and illogical outcomes. Where, for example, an arrangement is, on analysis, generally favourable to those with child care responsibilities, it would be incongruous to treat that arrangement as nevertheless giving rise to group disadvantage falling to be justified.

52. In the present case, the PCP was to work flexibly, including at weekends. It is apparent from the tribunal's findings that the "flexibility" expected here was that community nurses would work on other days as and when required by the trust: see e g paras 28, 32 and 39 of the judgment. This was not, therefore, an arrangement whereby the nurses had any flexibility to choose working hours or days within certain parameters. As such, this is one of those cases where the relationship between the child care disparity and the PCP in question is likely to result in group disadvantage being made out. Indeed, it can be said that the PCP was one that was inherently more likely to produce a detrimental effect, which disproportionately affected women: see Ministry of Defence v DeBique [2010] IRLR 471 at para 146 . ***1720***

Justification

9. In **Homer v Chief Constable of West Yorkshire Police [2012] IRLR 600** the Supreme Court commented that to be 'proportionate' a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

10. The Tribunal must carry out a balancing exercise to evaluate whether the employer's legitimate business needs are sufficient to outweigh the discriminatory impact on the workforce generally and the claimant in particular, and ask whether the employer's aims could reasonably be achieved by less discriminatory methods – **Allonby v Accrington and Rossendale College and others [2001] IRLR 364 CA.**

11. In **MacCullock v ICI [2008] IRLR 846** EAT set out four principles which regard to justification (later approved in Lockwood v DWP):

    1. *The burden is on R to establish justification.*

    2. *The tribunal must be satisfied that the measures must 'correspond to a real need ,,,and are appropriate with a view to achieving the objectives pursued and are necessary to that end. The reference to 'necessary'*

means 'reasonably necessary' : see Rainey v Greater Glasgow Health Board [1987] IRLR 26.

3. *The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact the more cogent must be the justification for it.*

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

Indirect Associative Disability Discrimination

12. We were directed to the case of **Follows v Nationwide Building Society [2021] 3 WLUK 847** in which another employment tribunal upheld a claim of indirect (associative) disability discrimination on grounds of disability. In that case the claimant was a homeworker for three days a week and the purpose for her working from home was to look after her disabled mother. The respondent required all workers of the claimant's post to work from the office. In that case the Tribunal upheld a claim of indirect discrimination on grounds of disability by association by relying on **Chez** (below). Tribunal cases are not binding on other tribunals.

13. In **Chez [2015] IRLR 746** a resident complained that in an area (in Bulgaria) predominantly populated by Roma there was a practice of placing electricity meters high up where they could not be read. It was said that this was associative direct discrimination on the basis that she was also affected by association as someone who lived in a Roma area.

14. At paragraph 99 of its judgment the **Follows** tribunal had regard to the reasoning in **Chez** that the Directive is intended to benefit those who are associated with a 'protected class who suffer less favourable treatment or a particular disadvantage on one of those grounds'. The panel concluded that s.19 had to be read consistently with that judgment such that 'a relevant characteristic of B's' must be read so as to apply to employees who are associated a person with a relevant characteristic, that the provisions of s.19(2)(a) to (c) are applicable to an associated person.

Submissions

Respondent's Submissions

15. On behalf of the Respondent Mr Evans submitted that the Claimant applied for a full-time job in the knowledge that she could never honour those hours. Her evidence was that she had no childcare to cover the pandemic. Before she started the role she put in an application. Given that the role was

advertised as full time it was submitted that it was entirely appropriate for Ms Rayner to have asked her questions: she apologised for any offence caused under cross-examination but it does not make the questions inappropriate. The relevant PCP was the requirement for inclusion support workers to work a full contract (37 hours). It was submitted that the appropriate pool in this case was the inclusion support team. On her evidence even if she were able to work three days she would not have been able to fulfil the requirements of the hours as she was unavailable between 3.30 and 5pm.

16. Mr Evans referred to Lady Justice Hale's second 'salient feature' in **Essop** (supra) in that there was a need for her to show that there was a causal link between the PCP and the disadvantage. It was submitted that the Claimant was not put at a disadvantage by the application of the PCP but by the circumstances created by the pandemic. The Claimant did not in fact ever work the required number of hours, so there was a question mark as to whether the PCP was ever applied to the Claimant. [*Employment Judge Frazer drew Counsel's attention to authority of Meade Hill (supra) which upheld a broad construction of 'apply' and Counsel submitted that even if the Tribunal were to find that there was an 'application' there was still the need to establish a causal link between the PCP and the disadvantage, in circumstances where there was more than one cause for the disadvantage.]* The principal cause of the disadvantage was unrelated to the requirement to work full time. As for group disadvantage, in **Dobson** (supra) at paragraph 50 the EAT held that a tribunal had a duty to consider the childcare disparity but that this did not mean that it established group disadvantage. In this case given that there was flexitime available this would create a facility for the Claimant and women working full time to pick children up.

17. Mr Evans submitted that it was unlikely that **Chez** could be applied to the Equality Act 2010 to create a species of indirect discrimination on grounds of disability by association. That claim concerned the Race Directive, the provision of goods and services and was one of direct discrimination. The Court did say in passing that there could be potential for a finding of indirect discrimination by association on the facts of that particular case. The holding of the ECJ in **Coleman v Attridge Law and another [2008] ICR 128 ECJ** preceded the Equality Act 2010 which supports direct discrimination by association. Legally there were also complications posed by the requirement for knowledge of disability. Under the Equality Act 2010 for the purposes of s.19 the person bringing the claim must have the protected characteristic. It would be wrong to import the principle of **Chez** - which was not on point – to a case post Brexit day. At paragraph 17 of **Dobson** there is a recording of the first instance tribunal's finding that there was no protection afforded by the Equality Act 2010 to a claim for indirect discrimination by association. The EAT did not interfere with that finding.

18. The Respondent had shown objective justification. This was a hands-on role that required an ability to make provision to the service users, who were vulnerable and had particular needs. There was a legislative drive which required the Respondent to ensure adequate provision. There was a requirement for in person meetings and meetings outside of school hours. It

was necessary to prioritise headteachers, specialists and parents above the availability of the support worker. The Respondent had already provided a proportionate response by offering the Claimant a temporary arrangement. They were unable to accommodate this after September and there was no other less discriminatory way of dealing with the situation. The team was stretched and other members of the team were taking on the Claimant's role. It would not have been proportionate for the Respondent to incur the cost of training a job share. The role required continuity and consistency and the Claimant had not engaged in doing one-to-ones with individuals.

19. The limited communication between the Claimant and the Respondent in August and September indicated that the Claimant had 'jumped the gun' and resigned too soon. It is difficult to say that there was a breach of trust and confidence when the parties had always agreed that this was a full-time contract. In accordance with **Shaw v CCL Ltd [2008] IRLR 284** the EAT held that discriminatory conduct could amount to a fundamental breach of contract entitling a claimant to resign. There was no such discriminatory conduct in this case.

Claimant's Submissions

20. The Claimant submitted that she was pressurised into looking for childcare by Miss Rayner. At the appeal stage the Claimant had informed the Respondent that her daughter was unable to attend after school clubs. Mr White had agreed that he had a conversation during which the Claimant had said that she had received medical advice about this. The Respondent did not request a specific letter from her medical advisors. The evidence was required on that day and the Claimant would not have been able to provide that.

21. The Claimant submitted that she offered Ms Rayner a lot of suggestions which were not recorded. Ms Rayner stated that the only potential scenario would be a three day a week job share which was then declined.

22. The Claimant submitted that she was given an ultimatum to be back full time by September. The Claimant wanted to work full-time but that was not possible. She submitted that she felt that the questioning about her family situation at the start of her employment was discriminatory and intrusive. She stated that her privacy had been breached. Under cross-examination Mr White had accepted that women could be at a disadvantage because of childcare yet the Respondent gave the Claimant an ultimatum to return to work full-time in September. It failed to communicate with her. Given the situation the Claimant submitted that she had no option but to resign. She also submitted that the Respondent made no real attempt to enquire about her wellbeing or refer her to occupational health when she became ill.

23. Owing to the particular job the Claimant submitted that there was no scope for working hours outside of 0830 and 1700 so flexi time would have been unworkable. None of the team had a full caseload. She had had one to one meetings. Most of the meetings held were remote. Training was also remote. No sessions were missed. In accordance with **Fellows** (above) the Claimant

highlighted that the tribunal had said that employers should be alive to risks not only with employees but when dealing with carers of disabled children.

Findings of Fact

24. The Claimant attended an interview for the post of inclusion support worker with the Respondent on 4th March 2021. She was already an employee of the Respondent and has continuity to bring her unfair dismissal claim because she started employment with the Council on 9th January 2018. The advert for the position is at page 2 of the bundle.

25. The Claimant has two children who are of primary school age: a son and a daughter. Prior to applying for the role in the Inclusion Support Team she relied on some after school care for both children. Prior to applying for a post in the Inclusion Team the Claimant had been on a contract of 17 hours with some uncontracted overtime hours.

26. The post of inclusion support worker was advertised as an open-ended position and the Respondent expressed that it required 37 hours per week term time only. The Claimant was the highest scoring candidate in the interview process. At the time of her application the Claimant's evidence was that she intended to work full time and at the interview the Respondent informed her that it was a full-time role. We accepted her evidence.

27. Leonie Rayner was the Claimant's line manager and is the Inclusion Support Team Co-ordinator. She telephoned the Claimant on around 8th March to offer her the job. The Claimant had provided some lived experience in relation to her own children's needs when she was asked some questions at the interview. During that phone conversation there was a discussion between Miss Rayner and the Claimant regarding her childcare arrangements. The Claimant's evidence was that she felt the enquiry about her childcare arrangements was intrusive at that stage. Under cross-examination Miss Rayner apologised if she had caused any offence to the Claimant but her evidence was that she had not intended to do so. The intention on the part of Miss Rayner had been to check any difficulties with the Claimant's availability.

28. A few days after being offered the job the Claimant explained to Miss Rayner that her children had no wrap around childcare owing to limitations on services caused by the pandemic. Miss Rayner agreed to look into things and then emailed the Claimant to say that she could request reduced hours under the flexible working policy until such a time as she was able to secure childcare that would allow her to be available for the full-time hours that the role required (see p.6 bundle). It was stated further that the role was full-time and that while everyone was working from home at that point in time the following term would look different with schools set to re-open fully and easements of lockdown continuing.

29. On 24th March 2021 the Claimant made a formal request to reduce her hours to 25 hours a week in line with the Respondent's flexing working policy. That

day at 1652 the Claimant emailed Miss Rayner to request that her contracted hours were reduced to 25 hours per week in line with the flexible working scheme so that she was working 9am to 2pm Monday to Friday with a view to reassessing things at the end of the summer term.

30. On 29th March 2021 Miss Rayner contacted Luci Bowers with a change of circumstances form and the email request from the Claimant dated 24th March. It stated 'Gareth and I have agreed for Emma to reduce her hours for an interim period with a review in July 2021'.

31. At page 8 there is a letter from Miss Bowers which is headed 'internal appointment' and which confirmed the Claimant's appointment to the post of inclusion support worker on '25 hours per week ('to be reviewed July 2021'). The statutory statement of particulars of employment are at page 10. Under 'hours of work' the Claimant's hours were '25 hours' and it stated that her pro rata salary was based on 39 weeks a year being 38 weeks term time, 3 inset days and 2 directed days.

32. There was an intention which was set out in the Claimant's one to ones in May and June that the reduced hours would be reviewed for September 2021 in July before the end of term.

33. The Claimant's issue with childcare as concerned her daughter was that she was clinically extremely vulnerable and was unable to mix bubbles. Her daughter's consultant had advised against her mixing bubbles. It was advised that after the shielding had lifted she should not attend clubs if she could not follow the government's advice and stay two metres away from other people. The Claimant's daughter was not able to observe the two-metre guidance. She had therefore been advised not to send her to after school clubs as her safety could not be guaranteed. The Claimant had looked for provision for her son but there was nothing available after 5pm. In addition the advice given was that her son could not be in clubs where bubbles were mixing in case he put her daughter at risk.

34. The Claimant's evidence, which we accepted, was that she had had a number of discussions with Miss Rayner leading up to the review in July about possible ways to resolve her childcare arrangements so that she could take up her full-time hours. It was suggested by Miss Rayner that she could use a childminder or Cub's Corner. Miss Rayner's evidence was that the conversations were solely in relation to the Claimant's son not having available provision until the potential re-opening which was then unknown. We find that the Claimant did explain the difficulties particularly with regard to her daughter during those discussions as the risk to her daughter was the primary reason for why looking for suitable provision proved so difficult.

35. We accept the Claimant's evidence that she made various suggestions to Cathy Evans and Miss Rayner in the lead up to the review about how she could arrange her working pattern so as to accommodate her need to care for her children. She had offered five days mornings or afternoons and either three or two days. She also considered extending her hours slightly to 3pm.

She offered staying in the office until 3pm and then working between 3 and 5 from home. We also accept her evidence that the suggestions that she made were 'shut down'. We found that this was likely given the resolute stance of both Ms Rayner and Mr White that the job was a full-time role. We accept that the only other possibility that was offered to her was of working on a job share, which was ultimately rejected too.

36. We also accept that flexi time was discussed with the Claimant but from a practicable point of view this we accept that this would not have worked for her as she would not have been able to make hours up. She had discussed this with Miss Rayner and it was concluded that it was not a viable solution.

37. The Claimant had a review about her hours in July with Miss Rayner. This was an informal meeting that took place in a small room. The Claimant felt as though she was given an ultimatum to work full-time at this meeting. Under cross-examination Miss Rayner stated that it was not an ultimatum but a statement of fact that was given to the Claimant that she would be required to work full-time in September. We find that it was put to the Claimant that since schools were returning to fully operational hours from September she would be required to work full-time. The Claimant said that the information she had was that the schools her children attended had not released their plans for the next school year but that from the conversations that she had had with her son's headteacher there was no likelihood of a return to normal until December.

38. We find that there was no consultation about the different ways in which the Claimant could continue do the work on a reduced hours basis. This is reflected in the wording of the letter that was sent to the Claimant after this meeting on 16th July. The third paragraph of this letter states:

> *'As we discussed this morning, unfortunately we would not be able to keep you on in post beyond this date [01/09/21] unless you're able to fulfil the requirements of the role and work full time. You are coming to the end of your probationary period and it was made clear by myself and Gareth at recruitment that this is a Full time position. We have managed to be flexible with you around a change of circs for an initial period, BUT due to the needs of the service and my duty to meet those service requirements in the longer term, this was only agreed until after 1st September, when we will need you to be available fulltime as per the job description and as discussed in the Pre-employment stage.'*

39. On 28th July 2022 the Claimant emailed Miss Rayner to ask her about the possibility of job sharing to overcome her childcare difficulties. On 4th August Miss Rayner then wrote to the Claimant to say that her request had not been agreed and the following reasons were given:

> *'As you know the job requirement was for a full-time post holder and these service needs remain the same. Unfortunately the request for creating a job share was declined as it would lead to an increase in training, supervision needs and costs. Due to the scope of the services*

offered by the team, all post holders are given training on an ongoing basis, and the costs of this would be doubled if a job share were to be offered. The demand for supervision and management support requirements would likewise be increased in a way that would impact negatively on the service as a whole.

The second reason for declining this request is concerns around inconsistencies in service delivery to families and schools, particularly in terms of consistency for families having a single point of contact (identified and researched element of the tme functions of key working).

40. The Claimant was given a right of appeal within seven days to the Head of Service. She emailed James White, Deputy Chief Education Officer, on 4th August 2021. In this appeal letter she stated that she felt that she was being indirectly discriminated against as a woman due to her caring responsibilities as a mother. She also stated that she felt she was being discriminated against as a mother of a child with a disability. The Claimant stated that she had been advised not to send her child to after school clubs.

41. The appeal meeting took place on 13th August 2021 via TEAMs. Miss Rayner was also present. At that hearing the Claimant told Mr White that her daughter could not access childcare provision because of her needs and that she had been advised that it would be unsafe. Mr White asked for the Claimant to provide evidence and she emailed through a generic letter that related to shielding but was not specifically about the Claimant's daughter.

42. Mr White rejected the Claimant's appeal that day and his letter is at p.31. In response to the letter provided he stated that this was a generic letter and that there was nothing within that letter which meant that the Claimant's daughter could not attend after school care. In respect of the Claimant's son he said that it was likely that the provision would re-open if not at the beginning of September then very shortly afterwards and he was happy for the Claimant's current working arrangement to continue for two weeks at the beginning of September. He added that in the event it did not re-open there would be an expectation on the Claimant to make other arrangements. His view was that if the Respondent advertised for the hours that the Claimant did not wish to work the prospects of recruiting someone would be very low. Under cross-examination he explained that this was because for most people the effect on benefits would not be worth it. The expectation for the Claimant to return full time on 1st September was restated in this letter.

43. The Claimant became unwell after receiving the appeal and was signed off by her GP for anxiety for a month. She was signed off again for anxiety from 23rd September to 10th October 2021.

44. The Claimant resigned on 12th September 2021. She stated:

Dear Gareth/ Leonie,

Please accept this email as my resignation of post. Unfortunately due to the ongoing needs of my family, childcare and my mental health I am unable to continue in my post on a full time basis.

I have applied for flexible working and/or job share but as this request was declined it has unfortunately left me with no alternative but to leave my position.

I have enjoyed my time working in the team and learning the role of an inclusion support worker, I am sad to be leaving but I feel I have no other choice. I have not made this decision lightly but as this has now affected my mental health and I have no alternative childcare provisions I feel this is the only option I have.

I believe I am required to give 4 weeks notice so my intended last day of employment is 10th October but please let me know if this is incorrect.

Kind regards,
Emma Meacham.

Conclusions

1. Indirect Sex Discrimination

Whether the Respondent accepted that they applied to the Claimant the identified PCP namely the requirement to work full time (37 hours) contracted hours?

45. We accepted that the Respondent did apply to the Claimant a provision, criterion or practice in this case, namely the requirement to work full time (37 hours). The job advert expressed that the role would be full-time. The Claimant's contracted hours were 25 hours a week but on a temporary basis and subject to review. We found that the Respondent required the Claimant to return to work full-time following the review meeting in July and that was an 'all or nothing' proposition. On our assessment of the evidence that requirement was the application of the PCP. The Claimant had indeed asked as a follow up to the outcome of the review how much notice she would need to give and Miss Rayner informed her that she would need to know by 31st July that the Claimant was able to work full-time from 1st September 2021. The Claimant then applied for a job share under the policy but this was rejected by Miss Rayner and by Mr White on appeal. We found that Mr White offered a 14 day period of grace in September for the Claimant to accommodate her son's provision but the expectation was that after this time she would have to make alternative arrangements. It did not change the reality however that the Respondent had clearly communicated its intention to the Claimant to require her to work full-time from 1st September. It had applied this as a requirement to her.

Whether the PCP puts women at one or more particular disadvantages with men in that responsibility for childcare falls disproportionately on women and if not, set out the reasons why not, having regard to Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] UKEAT 0220/19./2206.

46. Mr Evans stated that the pool for comparison here was the inclusion support team which comprised a team of four, all female full-time with two working term time only. That pool comprises is a small team only made up of four women and it is potentially not sufficiently representative to test the allegation being made (see paragraph 32 of **Dobson**, **Grundy v British Airways plc [2008] IRLR 74** (CA) at [27] applied). Therefore, a more suitable pool would be across the Council more generally in accordance with the approach in **Dobson**.

47. The point for us is whether in this case the 'childcare disparity' applies such that we take judicial notice of the requirement to work full-time hours creating a group disadvantage for women owing to their childcare responsibilities. We have had regard to the definition of the 'childcare disparity' at paragraph 46 of **Dobson** which is repeated here:

> '46. Two points emerge from these authorities:
> a. First, the fact that women bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. We refer to this fact as "the childcare disparity";
> b. Whilst the childcare disparity is not a matter directed by statute to be taken into account, it is one that has been noticed by Courts at all levels for many years. As such, it falls into the category of matters that, according to **Phipson** , a tribunal *must* take into account if relevant.'

48. We consider that we can take judicial notice that the requirement to work full-time creates a group disadvantage for women. Traditionally this has been the case and the authorities have addressed it: see **London Underground v Edwards (no 2) [1999] ICR 494; Home Office v Holmes [1984] IRLR 299 EAT**. We have no hesitation in finding that there was a group disadvantage in this case.

Whether the Respondent put the Claimant at a disadvantage at the relevant time

49. Having heard the evidence we find that the Claimant wanted to work full-time but was unable to secure wrap around childcare provision for her children so as to enable her to do so. The evidence was that the pandemic had affected the availability of childcare after hours provision and that this did not return to normal until this year. Her daughter was unable to come out of her bubble and there were some difficulties with arranging childcare for her son until after 1700. She provided medical advice given about her daughter's access to childcare at this time. This was not provided to the appeal panel at the time but she articulated what she had been advised to both her Miss Rayner in their conversations leading up to the review and to Mr White in the appeal. The Claimant was the primary carer and because of her caring responsibilities she was in fact put at a disadvantage. It is not accepted that the cause of the

individual disadvantage was the pandemic or the particular needs of the Claimant's children, particularly those of her daughter. She was the primary carer of the children and the responsibility of arranging her work and childcare fell on her shoulders. We find that there was a causal link between the PCP and the disadvantage which was that she was unable to work full time because of the requirement to care for her children.

The legitimate aim relied upon and the means by which that aim was achieved in the Claimant's case.

50. The Respondent asserts that there were a number of legitimate aims which are listed as follows:

    - Continuity of service for the service users.
    - The requirement to work after school hours to facilitate meetings with key stake holders namely teachers
    - Economic consequences namely the duplicated costs of training and supervision
    - The outstanding hours requested to be filled were so minimal that there was no reasonable prospect of creating a role to cover those.

51. The Respondent's evidence was that the situation for the team up until July was that people (including the Claimant) were working remotely but that in September there was an expectation of people working physically. The Claimant agreed save that she had also doing some visits and 121s prior to July. The visits are noted in her appraisals. There is also a note of the Claimant handing over work to others after she left at 2pm. We find that the Claimant's evidence that the case work was split between the team more likely on balance.

52. We had regard to the reasons given by the Respondent for requiring the postholder to work full-time but it was noted that these were not given much attention in the witness statements. We also noted that the legitimate aims were only provided at the hearing. There were some reasons given in the letter in respect of the rejection of the job share proposal and in the appeal outcome.

53. Mr White's evidence was that the Claimant's lesser working hours could have been accommodated but that this would have compromised the service. Miss Rayner's evidence was that because the Claimant was on temporary hours the Respondent had not yet allocated any families to her. She stated that this key worker aspect required continuity as between the worker and the families concerned. Under cross-examination it was put to her that there would need to be alternative arrangements if a member of staff went off on the long holiday or went off sick. The response was that the allocation of the key worker would then be in consultation with the family having regard to that family's specific needs.

54. There was evidence that on three occasions the Claimant had been able to work past 2pm on notice and that she had been able to attend multi-agency

meetings and had joined Teams meetings remotely. Miss Rayner stated that from September there was an expectation of increased workload and that there could be meetings at shorter notice. She said that for experts, it was always necessary to be more flexible so that the support worker could attend meetings with them at shorter notice. Our view on this was that it would be more likely than not that meetings with busy professionals would be arranged with some notice. The Claimant had said that with notice she could attend meetings and indeed had done already whilst in post.

55. We heard some evidence that there was a need for postholders to attend ongoing training in the post owing to the need for them to keep up to date. This was being rolled out at the behest of the Welsh government.

56. We accept there was a recovery program but we also take judicial notice of the fact that the recovery for most of the country to include workplaces and families was not an overnight occurrence. It would have been possible for some of the working arrangements for – for example remote working – to have continued after September so as to allow certain duties to have been conducted remotely. Attendance at meetings could have been via Teams.

57. We found that there was no evidence of a real attempt on the part of the Respondent to be creative and sit down with the Claimant to look for solutions to the problem in terms of arrangements for working hours and/or remote working. We find that the Claimant's solutions were not properly considered. She advanced some solutions leading up to the review but these were not discussed as possibilities at her review and not countenanced in the outcome letter following the review. We do not find that the process was fair or open-minded. The Respondent had effectively reached a view that there was no possibility of the role being carried out to accommodate the Claimant's childcare needs without having undertaken full consultation.

58. We also found that the appeal against the job share decision was a short process which also did not look at solutions. The Claimant provided what she had on the day which was a generic letter about shielding. The response was that there was nothing in the letter which meant that the Claimant's daughter could not attend after school care. Mr White had regard to the letter from the Claimant's advisors that specifically addressed her situation and said that if he had seen this he may have reached a different decision.

59. We find in this case that the discriminatory impact on the Claimant was significant. The situation affected her mental wellbeing and she ultimately resigned.

60. We had regard to the legitimate aims which were only advanced at the start of the hearing. We did not consider that the continuity of worker for service users was reasonably necessary since the Claimant worked term time only and there was a handover process. There would also have been different workers during term time owing to people going off sick. We consider that this was more of an aspirational aim.

61. In terms of the requirement to work after school hours to facilitate meetings with key stakeholders namely teachers, again there was no evidence as to how this could be arranged in some other way and we take into account that the Claimant had showed some flexibility around being present for meetings on notice around her hours. We also noted that she had suggested other ways of working to Miss Rayner that might have accommodated meetings such as working from home between 3 and 5. We found it likely that – like other professionals – teachers would require some notice themselves for meetings.

62. In terms of the economic consequences of the duplicated costs of training and supervision this was not born out by any evidence and in any event the Respondent as a public authority would be required to assimilate any additional costs in order to outweigh the potential discriminatory impact of its decision.

63. In relation to the aim that the job share role would be so minimal that there was no reasonable possibility of creating a role to cover these, we find that there was some weight to this aim. However the Respondent cannot establish that the requirement to work full time was reasonably necessary to achieve this aim when it had not given proper consideration to other arrangements that may have been put in place for the Claimant so as to avoid the discriminatory impact.

64. One solution that may have been open to the Respondent was to continue the Claimant's temporary hours until such time as the restrictions lifted so that she could find suitable childcare. This would have been a proportionate response in the light of the need for flexibility and would have suited the Claimant's desire to work full-time ultimately but with childcare arrangements in place.

65. Therefore we do not find that there was any objective justification and on that basis we uphold the Claimant's claim for indirect sex discrimination.

Constructive Dismissal

66. We find that the Respondent did commit a fundamental breach of contract in that there was no adequate consultation about the proposed requirement to work full time from September and because it imposed on her a requirement that was discriminatory. The Claimant resigned in response. Therefore she was constructively dismissed.

Indirect (Associative) Disability Discrimination

67. We concluded that s.19 of the Equality Act 2010 does not apply to associate indirect discrimination. The wording of the section requires the person discriminated against to be the person who is subject to the provision criterion or practice. The second and third requirements at s.19(2)(b) and (c) are also worded so as to apply only to the person who has the characteristic in question. We take Counsel's point that had there been an intention for the Act to cover cases of indirect associative disability discrimination following

Coleman v Attridge Law and another [2008] ICR 128 ECJ this would have been allowed for in the drafting of the legislation. We cannot by a parity of reasoning apply **Chez** because of this and despite the *obiter dicta* by the ECJ that there could be indirect associative discrimination we found that it would be too much of a judicial leap to import a direct discrimination concept of that nature into the domestic law of indirect discrimination when there has not been a reasoned decision on this point. In addition we have had regard to s.6 of the **European Union (Withdrawal) Act 2018** which holds that a tribunal is not bound by any principles laid down, or any decisions made, on or after (IP completion day) by the European Court. At s.1A(6) 'IP completion day' has the same meaning as in the European Union (Withdrawal Agreement) Act 2020 which states the date at s.39(1) as being 31st December 2020. We find therefore that we are not bound by the decision in **Follows**.

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Employment Judge A Frazer
Dated: 11th July 2022

JUDGMENT REASONS SENT TO THE PARTIES ON 18 July 2022

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS Mr N Roche