Case Number: 3324388/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Carly Bunker	**v**	London Underground Limited

Heard at: Huntingdon **On**: 2, 3, 4 March 2022

Before: Employment Judge Ord

Members: Ms R A Watts-Davies and Mr D Palmer

Appearances
For the Claimant: In person
For the Respondent: Ms Victoria Brown, Counsel

JUDGMENT

It is the unanimous decision of the Employment Tribunal that;-

1. The Claimant made a valid request for flexible working under Section 80F(2) of the Employment Rights Act 1996.

2. The Claimant's flexible working request was not dealt with in a reasonable manner contrary to Section 80G(a) of the Employment Rights Act 1996.

3. The Claimant's complaint that the Respondent failed to notify her of the decision within the decision period is well founded and succeeds.

4. The Respondent refused the Claimant's flexible working hours application on a ground or grounds other than those specified in Section 80G(1)(b) of the Employment Rights Act 1996.

5. The Claimant was the victim of indirect discrimination on the protected characteristic of sex due to the operation of the Respondent's provision, criteria or practice that they routinely turn down or refuse flexible working requests made by Operational Staff.

6. The remaining complaints brought by the Claimant are not well founded and are dismissed.

REASONS

Background

1. The Claimant has been continuously employed by the Respondent since 7 March 2012. Prior to matters complained of by her in these proceedings, she was employed as a Customer Services Supervisor but is now employed as a Customer Services Assistant.

2. The Respondent operates the London Underground system. It is part of the wider organisation Transport for London (TFL) of which it is a wholly owned subsidiary. TFL is controlled by a Board whose members are appointed by the Mayor of London. The Mayor (Sadiq Khan) is the current Chair of TFL.

3. During her period of maternity leave which began on 17 July 2018, the Claimant submitted an Application for Flexible Working to take effect from her return to work date and the end of her (additional) maternity leave period which was extended by her taking a period of accrued annual leave.

4. The Application was submitted on 31 January 2019 and was rejected on 15 March 2019. The Claimant appealed the decision on 21 March 2019 and her Appeal was rejected on 20 May 2019.

5. Thereafter the Claimant raised a Grievance as to the way her flexible working week request had been handled and alleged that she was the victim of indirect sex discrimination, on 23 May 2019. The Grievance was partially upheld on 17 June 2019.

6. On 17 September 2019, the Claimant appealed that decision, which was also partially upheld, that decision being given on 3 February 2020.

7. In the meantime, following a period of Early Conciliation with Acas which began and ended on 23 September 2019, the Claimant presented her claim form to the Tribunal on 18 October 2019 alleging a failure to properly deal with her flexible working request and sex discrimination.

8. The Respondents submitted that the Claimant's request for flexible working was properly considered and that the requirements of s.80G Employment Rights Act 1996 ("ERA") had been met and denied any discrimination.

9. On 12 February 2020, the Claimant began working as a Customer Services Assistant and at the time of the Hearing she remains so employed.

The Issues

10. A Preliminary Hearing for the purpose of Case Management was held on 19 June 2020.

11. At that Hearing the issues to be determined between the parties were clarified and were set out in an Annexe to the Case Management Orders which we set out below:

    11.1 Did the Respondent apply a provision, criterion or practice of: turning down all flexible working requests by Operational Staff for spurious reasons?

    11.2 If so, did or would the Respondent apply that PCP to men?

    11.3 Did the PCP put, or would it put, female Operational Staff at a particular disadvantage when compared with male Operational Staff who, at the relevant time, wanted flexible working to be available? The particular disadvantage relied upon is that women tend to have more child caring responsibilities such that they are less able to work inflexible hours.

    11.4 Did it put, or would it put, the Claimant at that disadvantage?

    11.5 Can the Respondent show the PCP to be a proportionate means of achieving a legitimate aim? The legitimate relied upon being business efficacy. This includes but is not limited to the balance of cost, inability to reorganise work among existing staff, inability to recruit additional staff and insufficiency of work.

    11.6 It is agreed that the Claimant was a qualifying employee and that she applied for a relevant change in her Terms and Conditions of Employment. Was that Application a qualifying Application? This is agreed, save for whether or not the Application stated that it was an Application within s.80F ERA 1996.

    11.7 Did the Respondent fail to comply with s.80G(1) namely:

        i. Did the Respondent fail to deal with the Application in a reasonable manner?
        ii. Did the Respondent fail to notify the Claimant of the decision within the decision period?
        iii. Did the Respondent refuse the Application for a ground other than those specified in s.80G(1)(b) ERA 1996?
        iv. Was the Respondent's rejection of the Application based on incorrect facts?

    11.8 If the Claimant succeeds in whole or part, to what monetary Remedy is the Claimant entitled?

12. We note that the challenge to the validity of the flexible working request as set out at 11.6 above was not pleaded as part of the Respondent's Response although it was set out in the list of issues.

13. On 10 July 2021, the Claimant sought to add a claim of victimisation based on the protected act of presenting this claim and said that she was subjected to the detriments of; delay in dealing with her Grievance Appeal, her demotion to Customer Services Assistant and a salary cut.

14. Those amendments were accepted and the Respondent submitted an amended Response on 10 July 2020 in which all claims were denied (but again the respondent not pleading that the Application was not a qualifying Application).

15. It is accepted that the question of whether the Application was a qualifying Application appears in the List of Issues which was determined at the Case Management Hearing. We deal with it in this Judgment notwithstanding the failure of the Respondent to put the matter in issue in its pleading and notwithstanding the fact that the Claimant, who was unrepresented, when the matter was raised during closing submissions (and at that stage being raised for the first time in the Hearing) said that she was unaware of this being an issue and that she did not understand the point.

The Hearing

16. The Claimant gave evidence, as did the following individuals on behalf of the Respondent:

- Roger Carpenter, at the time of the matters complained of, the Claimant's Line Manager, Area Manager (Heathrow) and the person who initially rejected the Claimant's flexible working request;
- Allan Gardner, Head of Piccadilly Line Customer Services, who heard the Claimant's Appeal against Mr Carpenter's decision;
- Naomi Smith, Head of Metropolitan Line Customer Services, who heard the Claimant's Grievance; and
- Sue Lofthouse, Head of Customer Services, City and Hammersmith and District Lines, who heard the Appeal against Miss Smith's decision.

17. Reference was made to an extensive Bundle of documents which were supplemented during the Hearing by additional documents which the Claimant had been seeking for some time and which had not (for no discernible reason that was given to us) been disclosed by the Respondent prior to this Tribunal Ordering their specific production. The documents consisted of emails which the Respondent's witnesses had sent and received internally regarding possible redeployment, or accommodation, of the Claimant at the time her flexible working request was being considered by Mr Carpenter and Mr Gardner.

18. Both parties made closing submissions in writing, to which they added orally.

19. We are grateful to both parties for the clarity of the way they presented their cases during the course of the Hearing.

The Evidence and The Facts

20. To a very substantial degree, the facts of the case are not in dispute. They are almost entirely recorded in contemporaneous documents. Where there is any factual dispute, we have identified below the areas of dispute, the Findings of Fact which we have made and the reasons for those findings.

The Respondent's Policies and Relevant Documents

21. The Respondent's relevant Policies include a document entitled "Flexible Working Guidelines". It is noted as being last updated in April 2009. It refers to the Respondent's,

> *"standard on work life balance"*

which we have not seen, but states that the Policy is,

> *"…applicable to situations where staff are able to apply to change their working hours or patterns at work to meet family caring or other similar responsibilities".*

22. The Guidelines document recites that on 6 April 2009,

> *"Employees with children under 16 (18 if disabled) have the statutory right to request flexible working"*

referring to the then relevant provision in the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations of 2009.

23. It is said that the purpose of the work life balance standard is to,

> *"wherever practical, to make provisions for flexibility for those employees who need to adjust balance between work and their life outside the workplace"*

24. According to the Guidelines, an employee wishing to,

> *"change working hours or patterns of work to meet family, caring or other similar responsibilities…"*

should first speak to their employing Manager (which we assume means Line Manager as the employer is the Respondent, not the Manager).

25. Section 9 of the Guidance refers to *"Options Available"* and says that,

> *"all options shall be considered".*

It states that there are,

> *"currently in place arrangements for the following:*
>
> 1. *Flexi-time (which can allow for the late arrival or early finish working hours);*
> 2. *Reduced hours;*
> 3. *Job sharing;*
> 4. *Career break;*
> 5. *Staggered hours (which allows staff to start and finish their day at different times); and*
> 6. *Homeworking."*

26. In Section 4 of the Guidelines, it is said that,

> *"A request for flexible working must be in writing, setting out the pattern the employee wishes to work and how this might be accommodated. The request should be made on Form A1".*

27. Section 5 recites the procedure for considering a request, which should be given it says,

> "*…full and sympathetic consideration in line with the* [unseen by us] *work, life balance standard and (where appropriate) the applicable government legislation, but a final decision will be for the Manager, based on information from the employee as well as advice from HRS* [Human Resources] *and due concern for operational requirements and business needs."*

28. The grounds for refusal of an Application are set out in Section 6 of the Guidelines and are word for word those in s.80G(b) ERA 1996 (and previously set out in the antecedence legislation).

29. Under the Guidelines,

> *"A meeting is to be held with the applying employee within 28 days of the request and the formal response must be made, in writing, within 14 days of the meeting."*
>
> *"A meeting to discuss an appeal should be held within 14 days of receiving the written notification of appeal and should be heard by a more senior Manager than the one who dealt with the original request."*

> *"The Manager hearing the appeal must inform the employee of the outcome of the appeal in writing within 14 days after the date of the meeting."*

30. Under Section 10 of the Guidelines,

> *"Regardless of the outcome… all decisions will be documented and subject to periodic review. The Manager and the employee should sign form A2 at the end of the interview."*

31. Form A1 which was appended to those Guidelines asks an applicant to answer this question,

> *"Are you making this application under the statutory right to request a flexible working pattern?"*

32. The Respondent's Grievance Procedure is dated 1 April 2010 and states,

> *"A Grievance should be raised initially with the immediate Manager, unless it is against that Manager (and remains unresolved after informal approaches) then it should be addressed to the next level Manager."*
>
> *"The PMA must be informed of the Grievance"*

We have not been told who, or what, the "PMA" is.

> *"A meeting is to be arranged with the grieving employee as soon as possible, ideally within 7 days of the Grievance being received, but there is no time table for holding the meeting."*
>
> *"If there is a need for further investigation, the steps to be taken and the necessary time frames will be confirmed in writing to the employee (and PMA) within 7 days of the meeting. Where time scales cannot be met, delays and the reasons for them are to be confirmed in writing."*
>
> *"Any appeal (Stage 2 of the procedure) against the outcome must be made to the next level Manager within 7 calendar days of the receipt of the outcome and the appeal hearing is to be arranged (but not held) within 7 days. An appeal will normally be chaired by the Manager's Manager although the PMA may remain the same."*

33. No time scale is given in the script of the Grievance Procedure for the conduct of an appeal beyond the arrangement of a meeting, although on the flow chart forming part of the Procedure document, the written response (i.e. the outcome, reference being made to s.2.1 entitled: "Outcome – Stage 2") is to be made within 7 days of the meeting.

34. At the time the Claimant made her Flexible Working Request which is the subject of these proceedings, the form A1 had been superseded and the form which the Claimant was required to complete was headed "Transport for London, London Underground" and bore the title "Application for Flexible Working" and bore the legend "Mayor of London" at the foot of each page.

35. The document required completion of all the information required of an Application under s.80F(2) as the previous form had, but there was one omission from the previous form in that it did not ask whether the Application was made under the statutory right to request a flexible working pattern. It also asked whether the change sought was temporary or permanent.

36. Our attention was not brought to any other form which could be completed by an employee seeking a change of working arrangements under the statutory regime.

37. The Claimant gave evidence that TFL published in 2015 a document entitled "Action on Equality: TFL's commitments to 2020" in which it was stated that a job share register would be provided to help someone looking for a job share to identify other employees seeking a similar arrangement. We have not been referred to any such register being in existence either at the relevant time or now.

The Law

INDIRECT DISCRIMINATION

38. Section 19 of the Equality Act 2010 states:

> 19. Indirect discrimination
>
> (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.

39. Section 80F of the Employment Rights Act 1996 states:

80F. Statutory right to request contract variation

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if-

(a) the change relates to-

(i) the hours he is required to work;
(ii) the times when he is required to work;
(iii) where, as between his home and a place of business of his employer, he is required to work; or
(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations.

(2) An application under this section must-

(a) state that it is such an application;
(b) specify the change applied for and the date on which it is proposed the change should become effective; and
(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.

40. Section 80G of the Employment Rights Act 1996 states:

80G. Employer's duties in relation to application under section 80F

(1) An employer to whom an application under section 80F is made-

(a) shall deal with the application in a reasonable manner;
(aa) shall notify the employee of the decision on the application within the decision period; and
(b) shall only refuse the application because he considers that one or more of the following grounds applies-

(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.

(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to-

(a) the decision on the appeal; or
(b) if more than one appeal is allowed, the decision on the final appeal.

(1B) For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is-

(a) the period of three months beginning with the date on which the application is made; or
(b) such longer period as may be agreed by the employer and the employee.

(1C) An agreement to extend the decision period in a particular case may be made-

(a) before it ends; or
(b) with retrospective effect, before the end of a period of three months beginning with the day after that on which the decision period that is being extended came to an end.

41. In Singh v Pennine Care NHS Foundation Trust UKEAT/0027/16, it was stated that as long as an employer has considered correct facts, it is not for an employment Tribunal to judge the reasonableness of any refusal.

42. Section 27 of the Equality Act 2010, states:

27. Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act; or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act; and
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

43. In St Helens MBC v Derbyshire [2007] UK HL16, the test of detriment was said to be both subjective and objective, requiring the Tribunal to look at the Claimant's point of view but also whether his or her perception is reasonable in the circumstances.

44. The Flexible Working Regulations 2014 (SI2014/1398) made under the relevant part of s.80 Employment Rights Act 1996, set out in Clause 4 (Form of Application) that a Flexible Working Application must:

a. be in writing;
b. state whether the employee has previously made such an Application to the employer and, if so, when; and
c. be dated.

45. We note that no requirement exists in the Regulations made under the Act for the Application to state that it was made by reference to, or under, the Employment Rights Act 1996.

46. In Dobson v North Cumbria Integrated Care NHS Trust [UKEAT/0220/19/LA], the Tribunal was considered to have erred by not taking judicial notice of the fact that women, because of their childcare responsibilities, were less likely to be able to accommodate certain working practices [in that case requirement to work flexibly including at weekends] than men.

The Facts

47. The Claimant began employment with the Respondent on 12 March 2012.

48. She was employed as a Customer Services Advisor. In 2013 she was promoted to the role of Customer Services Supervisor (CSS). She was placed in a full time position as a "Reserve" Supervisor on the Rickmansworth group of Stations. She carried out duties filling in gaps in the roster due to illness, other absence and annual leave.

49. As a result of reorganisation in 2016, the Respondent replaced Reserved positions with “cover weeks” in the roster, with employees working on “cover”, being told of their shifts for the following week on a Thursday.

50. Any employee of the Respondent wishing to move location must apply through a “nominations” process. Such an employee will nominate the position they seek at a particular Station and will then be placed on a waiting list. The number of people on the waiting list depends on the nature and position of the post. According to the document presented to us, the shortest waiting list for CSS posts are for Monday to Friday part time p.m. shifts and part time weekend shifts. That however does not indicate that those posts become available more often, or that the waiting list for those posts moves more quickly than other posts as the availability of part time working is part of the issue in this case as we explain below.

51. Some of the posts have waiting lists of 150 persons or more. The full time CSS posts are all (save for Wembley Park which has a waiting list of 86 people) at least 100 people long and in one case (Euston Square) the waiting list is over 240. Any nominating employee goes to the back of the waiting list, irrespective of the reason for their nomination.

52. The exception to that is the “hardship move” process to which the Claimant referred us (although we have not had our attention drawn to any documents dealing with this process).

53. Under the hardship move process, the Claimant told us (and no challenge was made to her evidence, nor was any contrary evidence submitted) an employee must prove to a committee of Area Managers and Trade Union Representatives that they are in “exceptional hardship” in their current role. If that is established, the employee may be placed at the top of the waiting list (but a vacancy must still arise before the employee can be accommodated in that role, irrespective of the degree of hardship they are suffering and, we find as a fact, irrespective of any discriminatory impact of such a policy, no such consideration being given to that matter as far as we have been told).

54. The Claimant’s unchallenged evidence was that throughout her employment with the Respondent, she had not heard of, met nor worked with anyone who had succeeded in a hardship move and no evidence to the contrary was produced by the Respondents.

55. The Claimant’s evidence that the waiting lists moved slowly and were *“years long”*, was also unchallenged. On the information provided by the Respondent, there are 2,274 rostered and ”cover week” positions within the Respondent for Operational Staff, of which 39 are part time CSS roles.

56. The Claimant’s unchallenged evidence was that no job share register existed within the Respondent and indeed, when Miss Smith was asked under cross examination if the Respondent had a job share process, she

replied, *"not as far as I am aware",* but *"some people do manage to get a job share".* No further evidence of that issue was forthcoming.

57. There operates within the Respondent's Operational Staff, a form of message board called "Yamma". During her period of maternity leave the Claimant did not have access to this. Yamma is apparently used by some Operational Staff to identify to others that they are seeking a job share arrangement.

58. According to Mr Carpenter it is up to an employee to find someone who is willing to enter any job share arrangement and reach agreement with them, then the employees must apply to the manager involved to see if the employees *"can do it".* He admitted never having dealt with such a request and he *"assumed"* that he would be handled by Operations Resourcing, but he did not know.

59. In December 2019, there was a post on Yamma which suggested that TFL were not accepting applications for job share. Mr Carpenter had no comment on this but said that while people could apply for flexible working, or through the extreme hardship process, the Respondent *"can't invent roles"*.

60. Mr Carpenter also said that the last flexible working request he had handled was eight or nine years previously, that was in relation to an Administrative as opposed to an Operational role.

61. In 2014, the Claimant was pregnant and advised her Managers of this in the Autumn of that year. She began her maternity leave in March 2015 and gave birth to a daughter in April of that year. She was due to return from maternity leave on 21 February 2016.

62. At this time the Respondent was going through a reorganisation called "Fit for the Future Stations" (FFFS). The Claimant says that she was not made aware of most of the processes in place for location and role moves, therefore after contacting Human Resources she made a Flexible Working Request which was handled by Mr Kelly. Although the Claimant makes a number of complaints in her witness statement about the way that Application was handled, none of which were challenged, they form no part of these proceedings.

63. The outcome of that Application was a part time role based at Hammersmith, but the Claimant then moved roles into a night time position from 18 September 2016 in order, she said, to secure regular and reliable childcare.

64. The Claimant continued in that role until July 2018 when she began another period of maternity leave. That period of leave was due to end on 15 April 2019 after the Claimant was to take accrued annual leave and was planning to return to work on 25 May 2019.

65. By this time Mr Carpenter was her Line Manager and the Claimant's grade was CSS 2.

66. The Claimant's first child was referred, in December 2018, for possible Autism and sleep disorder. She was repeatedly banging her head in the night. The Claimant was therefore concerned that she could not return to a night time role and the claimant therefore made a second Flexible Working Request.

67. The Claimant applied for Flexible Working using the approved form and submitted her Application on 31 January 2019, almost four months before her anticipated return to duties.

68. At no time during the process was it suggested to the Claimant that she had not applied on the proper form for Flexible Working or that the statutory provisions did not apply.

69. In the form which the Claimant completed, she asked to work any two late shift (3pm – 11pm) on any week day, either "locally" (i.e. based at Heathrow) or in Zones 1 or 2, or in any Special Requirements Team.

70. The Claimant considered that the proposal would have a positive effect on the business, allowing her to cover holiday and other absences without the need to pay overtime rates, and stated that the business had been able to cover her shifts while she was on maternity leave. She also confirmed that she wanted a permanent change to her working arrangements, that a short period of leave would not resolve the issue and that she had not made a previous Application for Flexible Working within the last 12 months, all in answer to specific questions on the relevant application form.

71. This was all of the information the Respondent sought on its Application Form.

72. The Claimant's request was discussed at a meeting with Mr Carpenter on 15 February 2019. The Claimant explained the need behind her request and that she would be willing to move her base location if that would assist her Application. She also said she would be willing to *"move down a grade"* if that enabled her to get the shift pattern she was seeking.

73. The Claimant was willing to work any two days, other than a Saturday, they did not need to be fixed days, but she could not accommodate night shifts. She preferred 3pm to 11pm shifts.

74. After discussion about accrued holiday the Claimant's return to work was agreed to be 29 June 2019. The Claimant subsequently complained that she had been required to take holiday up to that date.

75. Mr Carpenter told us that he considered whether the Claimant's request could be accommodated at Heathrow, including on a shift cover basis, he concluded that it could not.

76. On 15 March 2019, Mr Carpenter wrote to the Claimant saying that her request could not be accommodated at Heathrow because:

    76.1 Her position would then have to be covered on a weekly basis. He said that whilst that had been the case during her maternity leave, a permanent change would mean a continuing ongoing cost which he could not accommodate.

    76.2 Moving to a *"random"* two other days *"might"* mean there were weeks when no work was available.

    76.3 Moving the Claimant from her current position would place an additional burden on the other two night shift supervisors and then on staff on cover weeks, who would then lose the opportunity for Friday and Saturday rest days.

77. Mr Carpenter said that he would ask the other Area Managers if they could accommodate an additional employee for two shifts per week and would also contact the Resourcing Team.

78. Mr Carpenter told us that the Resourcing Team confirmed there were, in his words,

    > *"no vacancies which required only two shifts per week whether on a fixed or flexible basis"*,

    although we have not been directed to any documents showing that reply, nor what vacancies did exist at the time. There was no suggestion that a vacancy list for CSS or CSA posts was shown to the Claimant.

79. On 21 March 2019, Mr Carpenter emailed the Claimant to say that he had 15 responses from Area Managers,

    > *"all of them are saying unfortunately they cannot accommodate your request on their area"*,

    and said that the remaining replies would possibly not be received until the end of the following week.

80. He suggested that the Claimant should explore job sharing opportunities and the possibilities on Yamma which would,

    > *"have to be at a location that you could move to full time".*

81. The Claimant did not have access to Yamma whilst she was on maternity leave and then on holiday, which Mr Carpenter knew. Mr Carpenter did not make any attempts to see if job share requests were current on Yamma.

82. In fact, however, notwithstanding his email of 21 March 2019 to the Claimant, Mr Carpenter had received a reply 6 days earlier, on 15 March 2019 (the very day he sent out the relevant enquiry) from Kevin Casey, Area Manager at Oxford Circus. Mr Casey said that he did not have a vacancy but,

> *"LSQ* [Leicester Square] *could always do with extra late turn staff, so in that sense I could accommodate, but there is no rostered position for it, if that makes sense."*

83. Mr Casey went on to say that he was about to be on leave for three weeks, until 7 April 2019, but,

> *"if you get no joy I am happy to have a chat about it".*

The Claimant was not due to return to work until 29 June 2019, so there was ample time to follow this up.

84. Mr Casey's reply, however, was completely ignored by Mr Carpenter. He did not tell the Claimant about it, nor did he report it to Mr Gardner when Mr Gardner conducted the Appeal against Mr Carpenter's decision. The Grievance Officers who subsequently heard the Claimant's Grievance and Appeal were not made aware of it and we were told by the Claimant (and this was not challenged) that she did not receive copies of the emails in question as part of a later date Subject Access Request. Nor were they provided as part of disclosure in these proceedings. They were only produced during the course of the Hearing after this Tribunal made an Order for their specific disclosure on the first day of the Hearing.

85. When asked about this, following the production of documents, Mr Carpenter said he,

> *"did not follow it up because it would have been a cost to the business".*

He confirmed he did not show the reply to his Manager or to anyone, but denied that he had withheld the document. He did not refer to it anywhere in his written evidence. He could not explain how that answer was consistent with his email to the Claimant of 21 March 2019, that all Area Managers who had replied could not accommodate the Claimant's request.

86. Mr Carpenter accepted in questions from the Tribunal that he had no authority to override what Mr Casey wanted, or how Mr Casey ran his part of the business and that he had decided - based on Mr Casey's response - that Mr Casey had no ability to incur the relevant cost. He made no enquiry about this at all, however.

87. It transpires that Mr Carpenter was, at the time and perhaps still is, a member of the Hardship Move Committee. He did not raise the possibility

of an Application under that to the Committee as part of his discussions with the Claimant and gave no explanation why.

88. On 21 March 2019, the Claimant appealed Mr Carpenter's decision to Mr Gardner, Head of Piccadilly Line and Services and thus Mr Carpenter's Manager. Mr Carpenter understood that the Claimant was ideally seeking full shifts on two days per week, not night shifts or weekends. Part time CSS roles working four hours per day were not of interest as travelling daily for that length of shift (the Claimant lives in Brighton) was not sustainable.

89. The Claimant confirmed to Mr Gardner that she would be happy with a job share working two days one week and three days the next. She asked if she could fill a full time vacancy on a part time basis, but Mr Gardner's reply was that there were no current vacancies and that there were long waiting lists for the roles.

90. Mr Gardner agreed to explore all the options and said that he contacted all the CSS 1s who worked Monday to Friday to see if they would job share. It was not clear to us whether this was limited to the Piccadilly Line or whether it applied across the whole of the Respondent's network.

91. A Customer Services Assistant at Leytonstone was asking for a job share and Mr Gardner forwarded an email about this to the Claimant on 3 May 2019, but she said she was unwilling to step down to that grade until all the avenues at her grade had been explored.

92. On 20 May 2019, Mr Gardner sent his decision to the Claimant. She had agreed to an extension of time to 17 May 2019 for his response. Mr Gardner said that he did not consider that the Claimant's Application was a Flexible Working Request, but was in fact a request to move to a different position. Notwithstanding this he said that he had considered it,

> *"in the context of flexible working request".*

93. Mr Gardner said that a CSS role was a,

> *"full time position working a full roster which requires working a number of different shifts over both day and night".*

Whereas Night Tube,

> *"operates only two days per week and night tube staff have been recruited specifically to work the Night Tube shift patterns"*.

94. In fact the Claimant had not been so recruited. She had accepted a position on the night tube as an outcome of her previous flexible working request.

95. During the Appeal and throughout the process, the Respondent's view was that the Night Tube was a,

> *"separate limb of the business"*

This approach was repeated before us. We were told that this was as a result of agreements with the relevant Trade Unions, but we have not been directed to any such agreement. It is right to say that in any event the Night Tube is not a separate business. It is part of the Respondent's undertaking and the obligations which the Respondent has in respect of Flexible Working Applications and effort to accommodate it are not restricted to any *"limb"* of the Respondent's business.

96. Mr Gardner said that moving the Claimant from the Night Tube to the hours she sought,

> *"would mean creating a new part time position"*,

which would mean that for two days per week a full time staff member would be,

> *"spare"*

and that the Claimant would be,

> *"over establishment",*

or that her cost would have to remain at Heathrow with Mr Carpenter unable to recruit into the position she had vacated.

97. The only part time CSS roles worked four hour shifts daily covering morning or evening peaks. The prospect of the Claimant working two shifts one day and one on another did not seem to occur to Mr Gardner. In any event, the Claimant's unchallenged evidence was that these positions have lengthy waiting lists and the Respondent had already confirmed that the Claimant did not have any ability to take priority over other people on the waiting lists.

98. Mr Gardner's conclusion was that the *"only way"* her request could be accommodated would be if an area was willing to take the Claimant over budget establishment and allocate duties at short notice. He said he had approached all Lines and none could accommodate that, although again we have not seen any relevant documents.

99. Mr Gardner said that,

> *"much of the work of the Special Requirements Team was covering events and engineering works at weekends",*

so the Claimant could not do that. He said he was willing to explore vacancies at lower grades if the Claimant wished.

100. In fact we have seen the Special Requirements Team rosters for the period March, April and May 2019. The CSS 1s on that Team do not work night shifts and the rosters show a majority of work being carried out on Mondays through to Fridays and very little work after 11pm. Mr Gardner was unable to comment further when this was put to him.

101. As a result of the way the Claimant felt her Application had been handled, she raised a Grievance on 23 May 2019. She alleged indirect sex discrimination and unreasonable handling of her Flexible Working Request. She expressed the view that Flexible Working Requests were turned down on spurious reasons and were dealt with in a manner that negatively impacted on women in particular, the time scales were not adhered to and that no consideration was given to the primary role in childcare which women have.

102. Mr Gardner was asked by the claimant in cross-examination about timescales for completing consideration of applications for flexible working and for dealing with grievances and the relevant ACAS guidelines. His answer (which we consider to be entirely reasonable, particularly given the identity of the Respondent) was that he assumed that all the respondent's policies would comply with ACAS and the law.

103. The Claimant's Grievance was against both Mr Carpenter and Mr Gardner. Under the Respondent's Grievance Policy, the Grievance should therefore be to the next level Manager. Accordingly, the Claimant sent her Grievance to Mr Brian Woodhead, Customer Services Director.

104. Emails between representatives of the Respondent's Human Resources Department (Margaret Sphika-Hurley, who was present at the Appeal before Mr Gardner, and Nicola O'Callaghan, HR Business Partner) and Mr Woodhead's PA (Alexandria Barrow) included a comment from Ms Sphika-Hurley that she considered the Claimant,

> *"still wants to pursue Flexible Working but through another process, in effect giving her two bites of the cherry",*

notwithstanding the allegation of indirect sex discrimination the Claimant had raised. Ms Sphika-Hurley opined that the Grievance should not be accepted and said that she had asked for a legal opinion on the matter.

105. The Claimant had received no response by 5 June 2019, so she emailed Ms Sphika-Hurley asking what she should do, as a result of which she was told that the matter had been passed to Ms Smith. Ms Smith is Head of Customer Services for the Metropolitan Line and is at the same level of seniority as Mr Gardner. When the Claimant questioned this, she was told that the Respondent had decided that it was,

"not necessary for this to be considered by a more senior Manager"

No reason for this decision was given, nor was any reason given for the Respondent failing to acknowledge the Grievance within the 7 days required by its own Guidelines, nor was it clear who had made that decision.

106. At the Grievance Meeting with Ms Smith on 17 June 2019, Ms Smith was asked by the Claimant's Trade Union Representative, Mr Randall, why the Grievance Procedure was not being followed. To which Ms Smith replied only that she was not involved in all the correspondence.

107. During the Hearing before us, it was suggested that a requirement for Mr Woodhead to hear Grievances against those he managed was unrealistic and would involve him in too much work. We were not told how many Grievances of this type Mr Woodhead would have to deal with, whether other Managers at an equally senior level were available to hear the Grievance, or whether this was routinely done by the Respondent's Senior Managers. We are forced to the conclusion that, given it was suggested that requiring Mr Woodhead to hear Grievances against those he managed was unrealistic, Grievances are routinely dealt with by people at the same level as those against whom the Grievance is brought, notwithstanding the terms of the Respondent's own Policy.

108. During the Grievance Meeting, the Claimant again explained the position regarding her daughter and explained why she felt that her Flexible Working Request had not been properly managed or dealt with.

109. The Claimant said that because of the primary childcare responsibilities which women held, what she considered a disregard of Flexible Working Requests and a lack of transparency, communication and support, all put women at a disadvantage.

110. The Claimant referred to previous difficulties with her 2015 Flexible Working Application and said that because she had, in the absence of any other solution, taken a position on the Night Tube, this was now being held against her.

111. Ms Smith advised that it would probably take longer than 11 days to revert with an outcome.

112. On 25 June 2019, Ms Smith advised the Claimant that she could return to Heathrow on her chosen shift pattern pending resolution, but by this time the Claimant had already indicated that she did not wish to return to Heathrow (because of the way she felt she had been dealt with by Mr Carpenter) and Ms Smith then said that the Claimant could work based at Knightsbridge. Therefore, she returned to work on that basis.

113. On 9 August 2019, to protect her position, her Flexible Working Request having been concluded on 20 May 2019, the Claimant began the Early Conciliation process with Acas.

114. On 15 August 2019, Ms Smith wrote to the Claimant apologising for the delay and attributing this to her own workload, the availability of,

> *"some of the individuals you named"* and *"the complexity of some of the legal issues raised"*

She said she was about to begin two weeks' annual leave and her predicted response time was 13 September 2019. Her reply in fact came by letter of 10 September 2019.

115. Two parts of the Claimant's Grievance were upheld. First, it was agreed that it was unfair to suggest she should advertise for a person on Yamma whilst she was on maternity leave and secondly that when she made her request for flexible working in 2016, she was given an unsupportive reception by Mr Kelly when the Claimant attended a meeting with her then baby daughter. The remainder of the Grievance was not upheld.

116. Miss Smith said she could not understand what provision, criteria or practice the Claimant was relying on in relation to a complaint of indirect sex discrimination (but she had not asked the Claimant to precisely state the PCP). She recited that it had been agreed with the Trade Unions that the Night Shift was a,

> *"separate limb of the business"* with employees working part time roles on Friday and Saturday nights. Further, as she said in evidence that, *"because full time workers work on a roster basis working 35 hours per week, there are no part time rosters except certain positions which meet local needs"*

117. Miss Smith said in evidence that whilst she appreciated women are more likely than men to have childcare responsibilities, the process for Flexible Working Requests and the approach taken operates the same for both men and women.

118. The Claimant was offered a position working as CSS 1 working 3pm to 11pm on a Saturday and Sunday which was vacant. She was told there were no other vacant positions at that grade and none available for job share or part time work.

119. We note that Miss Smith took the inappropriate suggestion of using the Yamma as a,

> *"learning point for Area Managers not to use the suggestion again"*

120. Miss Smith was unaware throughout this process that Mr Carpenter, whom she described as having given reasonable effort to seek available options

for the Claimant, had received the email from Mr Casey on 15 March 2019. When she was asked about this during her evidence, she said that *"in hind sight"* Mr Carpenter *"could have followed it up"*. However, she *"surmised"* that the roster was fully populated so she did not think the outcome would have been any different.

121. At no time has any information regarding this been sought from Mr Casey so far as we have been made aware.

122. The Claimant appealed against Miss Smith's decision and the Appeal was submitted on 17 September 2019 to Mr Woodhouse (Miss Smith's Manager) in accordance with the Respondent's Policy. Once again, the matter was not dealt with by Mr Woodhouse and Ms Lofthouse was appointed to hear the Grievance Appeal. She holds the same position as both Mr Gardner and Mr Smith (Head of Customer Services) on a different Line. She referred to being a *"Band 5 Manager"* but she holds the same position, Head of Customer Services, as both Mr Gardner and Miss Smith.

123. On the same day as the Claimant submitted her Appeal, 17 September 2019, she made her Subject Access Request to the Respondent's Data Protection Officer.

124. On 16 October 2019, the Claimant was invited to a Grievance Appeal meeting to be held on 22 October 2019. The invitation letter set out the 7 bases of Appeal as they were understood by Miss Lofthouse. Points 1 to 4 related to the Claimant's Grievance regarding the conduct of the flexible working process. Miss Lofthouse said she would not consider them as that process was concluded. She made this decision notwithstanding the fact that two of the 4 points referred to Mr Gardner's conduct of the Appeal process, therefore in the Claimant's view he could not have concluded them.

125. The remaining points were that the Claimant:

    125.1 did not agree with Miss Smith's decision that part time work could not be accommodated due to it being detrimental to others, nor why a part time job share was not possible;

    125.2 did not consider Miss Smith's response to how her annual leave was handled on her return from maternity leave to be correct; and

    125.3 did not agree with her decision that Mr Carpenter and Mr Gardner had handled the Flexible Working Request appropriately.

126. On 18 October 2019, the Claimant submitted her complaint to the Employment Tribunal.

127. Because the Claimant's Trade Union Representative was ill, the Claimant attended the Grievance Appeal meeting alone.

128. At that meeting, the Claimant was told that points relating to the Flexible Working Request would not be discussed, but the Claimant said that she could not discuss the issues around indirect discrimination without discussing those matters.

129. As regards annual leave, the Claimant considered that Miss Smith had not looked at the Claimant being required to take annual leave not yet accrued on her return to work whilst the Flexible Working process was continuing, as the notes of Mr Gardner's meeting confirmed. Miss Lofthouse said that it was not clear that Miss Smith had considered those notes when considering the Grievance.

130. The Claimant referred to the Special Requirements Team work, 80% of which took place between 7am and 11pm. Mr Gardner had said it related to weekend and night work. The Claimant also said there was an unwillingness to offer any form of trial period.

131. The Claimant further referenced the failure to respond in time; the Acas Guidelines stating that Flexible Working Requests should be completed within 3 months. Hers was made on 31 January 2019, and whilst she agreed an extension to 17 May 2019, she did not receive an answer until 21 May 2019. Miss Smith said this was not detrimental, but the Claimant said this was indicative of an attitude to such requests.

132. The Claimant also said that there had been a recruitment campaign for Supervisors and yet no steps had been taken to accommodate her request for part time work at that level.

133. The Claimant said she did not accept or understand why it should be thought that allowing her request would have a detrimental impact on anyone else.

134. The Claimant said she would be willing to job share and again repeated that she could not access the system to see whether any such vacancies existed. No offer to assist with that was made.

135. There was then considerable delay. After the meeting on 22 October 2019, Miss Lofthouse said on 28 October 2019 that she hoped to provide an outcome by 28 November 2019. On 5 December 2019 she said that she had completed her investigations and she would be able to share a full response *"very soon"*.

136. It was not until 4 February 2020 that the response was received without any explanation for the period of further delay, save that there had been hope that discussions through Acas would resolve the problem.

137. The Claimant's Grievance regarding annual leave was upheld, the Claimant's leave was reinstated. Her Grievance regarding delaying dealing with her Flexible Working Request was also upheld.

138. Miss Lofthouse did not uphold the complaint that Mr Gardner's conclusion that Special Requirements Team work was unsuitable because she said that there were no Supervisor vacancies for the shift patterns requested.

139. Miss Lofthouse did not uphold the allegation that there was a blanket ban against flexible working, saying that Transport for London tried to accommodate flexible working wherever possible (although we note reference to Transport for London and not the Respondent). This is of note because the Claimant was provided with a document (which formed part of the bundle before us) purporting to show the level of flexible / part time working within the Respondent but which in fact related to the wider business of transport for London, of which the Respondent is one part. No effort had been made (as far as we were told) to collate (if they did not exist) or present the correct statistics to us or the Claimant.

140. The difficulty as Miss Lofthouse saw it was the majority of CSS roles require employees to work *"the full range of shifts"* including night and weekend work and that any problems which the Claimant faced related to the fact that there were no vacancies which matched her own requirements.

141. Miss Lofthouse was satisfied that full and proper reasons for the rejection of the Flexible Working Request had been given.

142. A solution was proposed whereby the Special Requirements Team in the South West Zone would accept the Claimant working two days per week, 7am to 11pm allocated according to business needs. It was said that they anticipated vacancies arising in the future which the Claimant would then be *"slotted into"*.

143. The Claimant was told that she could retain her Supervisor Licence and nominate a CSS position in the future. The Claimant accepted the position which was offered (at the level of Customer Services Assistant) as she felt she had no choice. The role was two grades below her previous role and involved a significant reduction in pay.

144. Since April 2020, the Claimant has worked two shifts per week consistently in that role. Her unchallenged evidence was that throughout that period she has always had meaningful work to do and had not taken shifts from anyone else.

145. The Claimant has only been sent for CSA refresher training. Her Customer Services Supervisor Licence has been removed from the Respondent's database and will expire on 22 April 2022. As at the date of the Hearing she had no response to her request for refresher training at Customer Services Supervisor level.

146. The Claimant's unchallenged evidence was that CSS 2 positions had been recruited by the Respondent. The advertisement for those posts refers to

full time positions only and does not indicate that any part time working would be considered.

147. It is against that factual background that the Claimant brings her claim.

Conclusions

148. Applying the facts found to the relevant Law, we have reached the following conclusions.

149. The Claimant submitted her flexible working request on 31 January 2019, seeking two late shifts (3pm to 11pm) Monday to Friday.

150. The reason for this flexible working request related to her older child who was diagnosed as potentially autistic and who was suffering from problems during the night (including repeatedly banging her head against a wall) which meant that the Claimant, as the child's mother, did not consider it reasonable to be away from home over night.

151. During her flexible working meeting, she was willing to consider weekend working, stating that Sundays would be easier than Saturdays and that Saturdays were harder, but that her main aim was to be at home overnight with her daughter.

152. The Claimant was further flexible. When her application was refused she said that she was willing to work Monday to Friday between 9am and 11pm, but ideally between 11am and 7pm.

153. The initial application was made, as it should be, to the Claimant's Line Manager. The Claimant had made one previous flexible working request following the birth of her first child following which she was due to return from maternity leave in February 2016. As a result, she was offered a part time role based at Hammersmith, but the Claimant ultimately moved roles into a night time position from 18 September 2016 to secure regular and reliable childcare.

154. This involved working on the night tube. The Claimant was not told at the time that this was somehow considered to be a *"separate limb"* of the Respondent's business, or that in doing so she was being placed in any way in a separate, distinct or differently managed unit of the Respondent's business.

155. At the time the Claimant made the relevant application for flexible working, she remained working the night tube, working at Heathrow.

156. The Claimant began a period of maternity leave in July 2018, which would end in April 2019, whereafter the Claimant was intending to take accrued annual leave and planning to return to work on 25 May 2019.

157. The Claimant this time was graded as a CSS 2 (Customer Services Supervisor) and her Line Manager was Mr Carpenter.

158. The Claimant applied for flexible working using the approved (and required) form for such an application within the Respondent business.

159. There is an important point about this form. Previously, when the Claimant made her application for flexible working in 2015, the form she had to complete contained two specific questions, first whether the adjustment to working hours sought was temporary or permanent and secondly whether it was being made under the relevant Flexible Working Regulations.

160. Those two questions were omitted from the form which the claimant had to complete in relation to her current application. At no time has anyone explained to us when, how or why the form was altered.

161. We have considered, therefore, whether the removal of the questions was deliberate or inadvertent. In particular we note with some concern that the line of defence that the application was not an application under the statute was neither part of the original response, nor the amended response which was submitted after the case management hearing (which was held more than 20 months before the final hearing before us) at which the line of argument was first raised (and thus when it appeared in the provisional list of issues).

162. Additionally, once the matter became clear, we would have expected that the respondent would have taken some steps to rectify the position and warn employees seeking flexible working. That is particularly so when this form appears to be one for use throughout Transport for London and carries the stated authority of the Mayor of London.

163. At the conclusion of the hearing Counsel for the respondent volunteered that the form “might require amending” yet the respondent has pursued this line of argument for 20 months in this case (and we do not know whether it is or has been pursued in others) and no such amendment has been made in that time.

164. We have considered carefully the relevant policy documents and guidance / advice which is available to employees of the Respondent when making or considering an application for flexible working.

165. At no stage does the Respondent identify to any applying employee that they must confirm to the Respondent that this flexible working request is made by reference to the relevant Flexible Working Regulations if they are seeking the protection of are making an application under the statute. There is, we repeat, no provision on the form approved not only by the Respondent business but also Transport for London of which it is part, and which form bears the legend of the Mayor of London, to enable an employee to identify that the application is made under the statute although the policies refer to a statutory right to seek flexible working.

166. The fact that the form as it currently stands has – when redrafted – removed that notification, places employees seeking flexible working (if the effect is to – as the Respondent now alleges – render the application a qualifying application within Section 80 of the Employment Rights Act 1996) to effectively deny the applying employee the protection which the law affords them.

167. This particular issue has vexed the Tribunal. We have been reluctant to conclude that this was a calculated and deliberate act by the Respondent, but have determined that in fact it is not necessary for us to go that far. The form is to be used in accordance with the Respondent's flexible working policy, that policy refers to the statutory rights to flexible working, the then relevant statutory provisions. We therefore conclude that an application using the form itself, being part of the respondent's flexible working policy, designed to meet the statutory rights of the employee applying, must be deemed to be an application under s80F .

168. We also reflect on the evidence of one of the Respondent's witnesses, Mr Gardener. Mr Gardener said that he (and therefore by extrapolation any employee of the Respondent) was entitled to assume that the Respondent's policies complied with ACAS and the Law.

169. We have reflected carefully upon the fact that the Respondent in its pleadings (including an amended pleading which was made after the Case Management Hearing which took place on 19 June 2020 and after the Claimant's application (successful) to add a claim of victimisation) did not raise this as a pleaded issue at all.

170. We note that the matter was included in the List of Issues at that Case Management Hearing, but we also reflect upon the fact that the Claimant when she was asked about this point at the end of the hearing before us, did not understand the point being pursued and said that she had made a flexible working request which the Respondent had dealt with in accordance with the relevant legislation.

171. Against that background we have concluded that the Claimant's application was a valid request for flexible working under Section 80F of the Employment Rights Act 1996.

172. Under that statute an application must state that it is "such an application". If that is taken to mean that it must specifically refer to s.80F of the Employment Rights Act 1996, the Act generally, or any other statutory provision, then we consider that the employee is entitled to rely upon the policies of the employer under which the application is made. Here those policies state that the statutory right exists and directs the claimant to the respondent's own flexible working procedures.

173. The Respondent's "Flexible Working Guidelines" cite that employees with children under 16 (18 if disabled) <u>have the statutory right to request flexible working</u> (our emphasis) and referred to the then relevant provision of the

Flexible Working (Eligibility Complaints and Remedies) (Amendment) Regulations 2009.

174. The Claimant was therefore entitled to assume (just as Mr Gardener was entitled to assume that the Respondent's policies and procedures would comply with the law) that she was making an application in the same way as she had on one earlier occasion.

175. Indeed the claimant's application was made in the manner prescribed by the employer circumstances where the policy under which the application is to be made specifically refers to the statutory right to request flexible working. Whilst the form itself does not include the question previously present as to whether the employee is making the application under the statutory provision (and gives no pointer to the need to say that it is) it is a form created under the policy which refers to the statute and that, we conclude, is enough to make it compliant with the requirements of section 80F.

176. Indeed, throughout the entire internal processes of application/appeal and grievance/appeal; indeed throughout the hearing before us, the Respondent has presented their case on the basis that they have complied with the requirements of s.80G of the Employment Rights Act 1996 and the employer's duty in relation to an application under s.80F. The form on which the employee is required to make an application for flexible working does not give them an opportunity (as it previously did) to identify that the application was made under the statutory provision and nothing in the Respondent's Guidelines or advice to employees points them to this "trap", if such it is.

177. We have additionally considered whether, in the event that we were wrong about this, the policy criterion or practice of requiring an employee to apply on the relevant form would amount to an act of indirect discrimination.

178. There was no dispute to the evidence before us that female employees were more likely than males to seek changes to their working conditions or terms to reflect their continued primary role of having childcare responsibilities.

179. To operate a system, therefore, which is said to lie outside the statutory provisions and to make no provision within the organisation for a request to be made within s.80F (which is the effect of the contention which the Respondent makes that the application is not within s.80F) would have a disproportionate impact upon women (who would then, unwittingly, be denied the protection of the statutory provisions for flexible working) and – again if the Respondent's argument is correct – would result in the Claimant suffering that detriment.

180. Accordingly, if we had found that the Claimant's application did not fall within s.80F we would have found that the procedure operated by the Respondent in relation to flexible working requests, was indirectly

discriminatory against women because, by virtue of the structure and procedure and required documents which the Respondent operated.

181. We should also add that the fact that this limb of defence was not pleaded by the Respondent, yet somehow appeared in an "agreed" List of Issues at a Preliminary Hearing, and further that when the matter was put to her at the Final Hearing the Claimant did not understand what the point was, nor was she aware of it, all of this in circumstances where no evidence was called about this alleged non-compliance, nor was there any explanation as to how and why (and with what forms of communication, guidance or advice) the form was changed to remove the apparently essential question from the application, does not, we consider, reflect well upon the way the Respondent has handled this matter and has handled and continues to handle other applications under their flexible working procedures.

182. When this was raised in closing submissions and the Respondent's Counsel confirmed that it was an argument still being pursued, she said that, *"the form may need to be changed"*. But this has been an argument which the Respondent has put forward for, at the time of the Hearing, 20 months or more (we do not know nor have we been told whether or not it has been pursued in other cases) and yet the process remains as it is.

183. Turning now to the manner in which the Claimant's flexible working request was dealt with, as required by s.80G(a) of the Employment Rights Act 1996. We consider that in one compelling aspect it was not.

184. The application was dealt with first by Mr Carpenter. He was unable, he said, to accommodate the request at Heathrow because the Claimant's then position (weekend night tube) would have to be *"covered on a weekly basis",* that moving to a *"random"* two other days *"might"* mean there were weeks when no work was available and moving the Claimant from her current position would place an additional burden on the other two night shift Supervisors and staff on "cover weeks" who would then lose the opportunity for Friday and Saturday rest days. No effort was made, however, to address these possible hurdles. Mr Carpenter simply egarded them as insurmountable.

185. Mr Carpenter did not consider whether or not there were people waiting for positions on the night tube who would wish to fill the shifts which the Claimant was, prior to her maternity leave, carrying out.

186. Nor did he appear to consider whether moving such a person into the night tube position would create a vacancy which could be filled (at least in part) by the Claimant.

187. Mr Carpenter's sole focus when he gave his evidence was that there was no space in *"the roster"*.

188. That would always be the case when somebody was applying for flexible working unless the Respondent were under staffed with outstanding

vacancies which they have told us is not the case – particularly so when there are long waiting lists for people seeking to adjust their working location or hours through the *"nominations"* process.

189. That limited thinking is not, we consider, a reasonable way of considering a flexible working request.

190. Further, Mr Carpenter misled the Claimant. He said that he would ask other Area Managers if they could accommodate an additional employee for two shifts per week and he received a reply on 15 March 2019 (the very day on which the enquiry was sent out) from the Area Manager at Oxford Circus who said there was not a vacancy but that Leicester Square,

> *"could always do with extra late turn staff, so in that sense I could accommodate it, but there is no rostered position for it if that makes sense"*

and added,

> *"If you get no joy I am happy to have a chat about it"*

(Mr Casey being about to leave on three weeks' holiday).

191. Given that the Claimant was not due to return to work until 29 July 2019, there was ample time to follow this up.

192. What Mr Carpenter did, however, was tell the Claimant on 21 March 2020 – six days after Mr Casey had replied – that having had responses from 15 Area Managers,

> *"all of them are saying, unfortunately, they cannot accommodate your request on their area"*

193. This was simply untrue. Mr Casey had said no such thing and was offering the opportunity for discussion and consideration to see whether he could accommodate.

194. Mr Carpenter accepted that it was no part of his role to determine how Mr Casey operated his part of the business. That was for Mr Casey and his superior Managers, and Mr Carpenter's assumption, seemingly endorsed and accepted by Mr Gardener, that Mr Casey was offering to do something which he would not be allowed to do, simply does not bear scrutiny. There was no valid reason whatsoever why Mr Carpenter should not have explored the matter with Mr Casey and had he done so it may have been the case the Claimant would have been spared all of the difficulties which she has encountered since. His email to the claimant stating that all managers had said they could not accommodate the claimant was simply untrue and it was withheld from Mr Gardener, from the grievance officer and the grievance appeal officer despite it being clearly relevant to the claimant's position. Indeed it was not disclosed to the claimant during

these proceedings notwithstanding the claimant requesting, specifically, the request and answers be disclosed. Our conclusion – there can be no other – is that this was deliberately withheld from the claimant and was done so because it clearly demonstrated Mr Carpenters approach to the claimant's application. It appears to us that he thought the whole thing was just too much trouble.

195. That clearly is not the reasonable management of, or consideration of, a flexible working request. It cannot be reasonable to mislead an applicant for flexible working, nor can it be reasonable to ignore a possibility of accommodation of the flexible working request which has been made.

196. Although the stated reasons as given by Mr Carpenter, and then Mr Gardener for refusing the flexible working request fit within the requirements of s.80G(1)(b), we have concluded that the real reason the application was refused was because Mr Carpenter's thinking (repeated by Mr Gardener) was limited to the simple question of whether there was a gap in the roster for the arrangements which the Claimant was seeking. That was the reason for Mr Carpenter's refusal, he repeated in evidence before us that there was no space in the roster and / or that this would be *"outside the roster"* and that CSS positions are *"rostered full time"*, without any further consideration. That narrow approach to the issue of flexible working corroborates our conclusion that the one document which suggested that his thinking may be incorrect was hidden and withheld, all the way up to and including the commencement of the hearing before us.

197. Given the size and administrative resources of the Respondent and given the fact that there is no job share application process operated by the Respondent, further enquiry ought to have been made, to see whether there were candidates for job share and / or whether there were other opportunities within the wider Respondent business. All Mr Carpenter did was to identify the absence of a space in the roster and that further clouded his thinking regarding Mr Casey's reply where he took it upon himself to assume that Mr Casey asking for something, or pursuing a possible line of enquiry which he could not follow because Mr Casey would then be placing himself *"over budget"*.

198. Cumulatively we do not consider that the refusal of the Claimant's flexible working hours application was on a ground within s.80G(1)(b), but rather it was refused purely and simply because there was no space in the roster. No further enquiry was made even in respect of a potential solution through Mr Casey.

199. The Respondent has accepted that the Claimant was not notified of the decision within the decision period. This relates to the Appeal before Mr Gardener.

200. As well as effectively repeating the errors which Mr Carpenter made, Mr Gardener came to the rather odd conclusion that the Claimant's

application was not a flexible working request but was a request to move to a different position.

201. Suggesting that moving the Claimant from the night tube would *"mean creating a new part time position"* so that someone else would be *"spare"* and that the Claimant would be *"over establishment"* repeats the narrow, tramline thinking that Mr Carpenter followed. He reached the conclusion that the *"only way"* the Claimant's request could be accommodated would be if someone took the Claimant over budget establishment and allocate duties at short notice and that whilst he had approached all lines, none could accommodate that.

202. He also said that the Special Requirements Team covered events and engineering works at weekends so that the Claimant would not be able to do that work. That was manifestly not the case.

203. The Special Requirements Team rosters did not show night shift working and showed a majority of work being carried out on Mondays through Fridays and very little work after 11pm. When this was put to Mr Gardener he could not, or chose not to, reply. His silence, we conclude, demonstrated his acceptance of the falsity of his statement to the claimant.

204. Mr Gardener was therefore reaching his conclusions on incorrect "facts" (indeed on facts, we are forced to assume, of his own assumption or invention).

205. First of all, his understanding of the work of the Special Requirements Team was erroneous and secondly, he was not aware (because Mr Carpenter had not disclosed it) of the reply from Mr Casey.

206. It is accepted by the Respondent that the outcome was not provided by Mr Gardener in accordance with the time scales within the Flexible Working Provisions. The time scales allow for an extension if agreed. An extension was agreed until 17 May 2019. No outcome was received on that day, it was sent on 20 May 2019. The Respondent's submission was that missing this deadline *"by one working day"* amounted to

> *"reasonable handling in the context of how much was done to accommodate the Claimant"*.

207. But it is a fact that the response was outside of the time limit as extended by agreement, but it is correct to say that it was by three days (1 working day).

208. The Claimant alleged that the Respondent routinely turned down or refused flexible working requests made by Operational Staff.

209. The Respondent has failed to provide any information regarding the number of flexible working requests made by Operational Staff within its

undertaking, how many are accommodated and the roles to which those applications apply.

210. The provision of information regarding Transport for London, disclosed originally as information relating to the Respondent and not the wider business of Transport for London, was misleading and no information was put forward to indicate the number of flexible working requests made within London Underground, the roles to which they apply, and the number of successful or unsuccessful applications.

211. We are therefore forced to reach conclusions on the basis of the information which is before us.

212. We are particularly influenced by the approach taken by both Mr Carpenter and Mr Gardener in this regard. Their approach throughout was that the roster had no space in it and therefore the request could not be accommodated.

213. Although, Mr Carpenter's refusal to pursue the possibility that Mr Casey could accommodate the Claimant is clear evidence of that form of thinking. As far as Mr Carpenter was concerned, Mr Casey did not have room in his roster and that was the end of it. No further inquiry was required, even though Mr Casey was holding out the possibility of accommodating the Claimant.

214. We are bound to say that the later suggestion that Mr Casey might have been expecting the cost of the Claimant working at Leicester Square to be carried by Mr Carpenter at Heathrow, was in our view, no more than a creative after thought designed to attempt to explain why Mr Carpenter acted as he did and / or to suggest that discussions with Mr Casey were bound to have borne no fruit.

215. Absent a gap in the roster (none would ever be available because of the waiting lists on the nominations process) the Claimant's application was, because of the way it was handled and because of the consideration given to it, bound to fail. The Respondent would only look to see if there were gaps in the roster. Anything else was not within its thinking or contemplation. That was true both at the initial stage before Mr Carpenter and on Appeal before Mr Gardener.

216. In relation to the additional claims of victimisation, based on the protected act of presenting this claim, the Claimant says that she suffered detriments because there was a delay in dealing with her Grievance Appeal, she was demoted to Customer Services Assistant and she has received a salary cut.

217. In relation to her demotion and salary cut, the Claimant accepted the role which she currently occupies knowing its status and its salary. She did so as a means of resolving the dispute between her and the employer.

218. The role was offered relating to certain conditions which the Claimant says may not have been met, but that forms no part of her case before us.

219. Given that the Claimant accepted the offer of the role, and salary, which she now occupies and receives, we do not accept that she has suffered detriment.

220. If we are wrong about that, however, and the claimant could reasonably consider that she suffered detriment when accepting this role there is no evidence from which we could conclude that the offer made to her was made (absent any other non-discriminatory reason) because she had carried out the protected act of bringing these proceedings. There is no evidence before us from which we could conclude that that was the case.

221. The delay in dealing with the Claimant's Grievance Appeal was considerable.

222. The Appeal Hearing took place on 22 October 2019, six days later Mr Lofthouse was hoping to provide an outcome by 28 November 2019 and on 5 December 2019 she said that she completed her investigations and would be able to share a full response *"very soon"*.

223. In fact the response was not received until 4 February 2020 (without explanation for the period of further delay) although we are told that at the time it was hoped that the matter could be resolved through negotiation and discussion and therefore there was a delay in producing the report.

224. We are not satisfied that that delay has caused the Claimant any detriment (none being identified other than the actual fact of delay) nor that the reason for delay related to the presentation of these proceedings. The Claimant has not established any facts from which we could reach that conclusion.

Summary

225. Turning therefore to the List of Issues:

225.1 The Respondent applied a provision, criterion or practice of turning down all flexible working requests by Operational Staff for spurious reasons.

225.2 The real reason for turning down the flexible working request was because the Respondent only looked at the roster and whether there were any gaps in it. Even when an opportunity arose for discussion to accommodate the Claimant's request as advanced by Mr Casey, that was

simply ignored because of an assumption that it would be outside the roster.

225.3 We categorise that, on the basis of the PCP contended for, as a *"spurious reason"*. It defeats the entire object of a flexible working request in many cases. Some creative thought is often required to accommodate a flexible working request but none whatsoever was applied here.

225.4 The Respondent would apply that PCP to men.

225.5 It does put female Operational Staff to a particular disadvantage when compared to men because women do continue to have more childcare responsibilities so that they are less able to work in flexible hours.

225.6 The Claimant was put at a disadvantage.

226. The Respondent relies on the legitimate aim of business efficacy or efficiency, including but not limited to the balance of cost, inability to organise work amongst existing staff, inability to recruit additional staff and insufficiency of work.

227. We have heard very little evidence in support of this legitimate aim.

228. As regards the balance of cost, we have seen no figures or calculations which show this to be a significant consideration. The Claimant pointed out throughout her evidence that paying her would be considerably cheaper than paying someone else overtime rates. No consideration was given to this as far as we can see. The ability to reorganise work amongst existing staff was not even considered; there is no evidence of any inability to recruit additional staff (particularly bearing in mind the number of people waiting for various posts through the nominations system) and there was no evidence before us of any insufficiency of work.

229. We have already concluded that the application was a valid one within the statute. Had we concluded to the contrary, we would have found that the Respondent operated a provision, criterion or practice of requiring an employee to apply for flexible working within a system which denied them the statutory protection. Given that more women than men, as it was accepted, would apply for flexible working due to their continued position as having primary responsibility for child care, this provision - by excluding the protection of the statutory regime - would disproportionately affect women compared to men and the claimant (if the respondent's line of defence is correct) has suffered that detriment as she has, on the respondent's case lost the statutory protection.

230. The Respondent failed to comply with s.80G(1) ERA 1996 in two regards,

230.1 In relation to the time scales, it is accepted that the outcome of the Claimant's Appeal against the refusal of her flexible working request was delivered outside the agreed extension to the time scale (albeit by only three days, one working day); and

230.2 The Respondent's rejection of the application was based on incorrect facts. No account whatsoever was taken of Mr Casey's email and indeed Mr Carpenter misled the Claimant when he told her that the Area Managers had all said,

"unfortunately they cannot accommodate your request on their area".

That was manifestly not the case.

231. Because that reply from Mr Casey was withheld from Mr Gardener when he conducted his appeal and from both Ms Smith and Miss Lofthouse when they conducted the Hearing of the Grievance and the Grievance Appeal, they were working with incorrect facts.

232. The subsequent evolution of Mr Carpenter's evidence, echoed by others now (but not at the time) of a suggestion that Mr Carpenter did not pursue Mr Casey's offer because he (Mr Carpenter) considered that Mr Casey was operating outside of the remit of the budget is, we have found, no more than a belated attempt to excuse the failure to advise the Claimant of this opportunity and to explore it.

233. The Claimant's complaints of victimisation are not well founded for the reasons we have stated. Those claims are dismissed.

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Employment Judge Ord
27 July 2022

Sent to the parties on: .8 August 2022...

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For the Tribunal Office