EMPLOYMENT TRIBUNALS

Claimant: Mrs O Carpenter

Respondent: Fountain Montessori Pre-School Limited

Heard at: Watford, by CVP **On:** 27, 28 & 29 July 2022

Before: Employment Judge Maxwell
Mr D Sagar
Ms S Johnstone

Appearances
For the claimant: Mr Mellis, Counsel
For the respondent: Miss Zakrzewska, Litigation Consultant

1. These written reasons are provided pursuant to the Respondent's request.

REASONS

Preliminary

Issues

2. A list of issues had been agreed between the parties. There was a discussion at the beginning of the hearing about the matters the Tribunal would have to decide. The Respondent clarified that its legitimate aim, for the purposes of the Claimant's indirect sex discrimination claim was:

   2.1 to align the business and employees needs to meet the government regulations rather than purely the employee's needs;

   2.2 to an run efficient business.

Evidence and Documents

3. We were provided with:

   3.1 an agreed bundle of documents running to page 238;

3.2 an audio and video recording of the meeting which took place between the Claimant and Mrs Aiyetigbo on 3 July 2020;

3.3 witness statements from:

3.3.1 the Claimant;

3.3.2 Mrs Aiyetigbo, owner and director of the Respondent;

3.3.3 Ms Feleke, the Respondent's Area Manager;

3.3.4 Ms Kolah, the Respondent's administrator.

3.4 Written submissions from both the Claimant and Respondent.

Facts

4. There was a tendency on the part of both the Claimant and Mrs Aiyetigbo not to answer the specific question asked but instead to repeat their own narrative. This was an unhelpful approach. In substance, however, there was not much dispute as to the core facts. The resolution of this case was more concerned with applying the law to those facts.

5. The Claimant commenced employment with Abbey View Nursery, based in St Albans, on 5 September 2016. She was employed as a preschool nursery teacher.

6. The Claimant's terms and conditions of employment were set out in a statement dated 30 April 2019 and included:

6.1 she was employed as a Key Teacher;

6.2 she worked term time only (37 weeks per year);

6.3 her hours of work were 9 am to 3:15 pm.

7. Also in 2019, the Claimant's mother, who owned Abbey View nursery, decided to retire and agreed to sell the business to the Respondent in November 2019.

8. Mrs Aiyetigbo is owner and a director of the Respondent, which already operated two other nurseries. Her intention was to change the opening times at St Albans. Whereas previously this had been a term time only nursery business, the plan was for the provision to become year-round. The daily hours were also to be extended. To facilitate this change, Mrs Aiyetigbo wished to vary the contracts of employees at St Albans so that:

8.1 they were on the same standard terms as were in used at the Respondent's other nurseries;

8.2 their working hours were extended to include an earlier start and later finish, from 7.30am to 6pm, to be aligned with the opening hours of business.

9. The Claimant was one of three existing employees, who transferred to the Respondent. One employee, entered into a new contract directly with the Respondent. The other two, including the Claimant, transferred under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE").

10. After completing the purchase, the Respondent undertook an extensive refurbishment of the nursery premises in St Albans.

11. In March 2020, the Claimant was placed on furlough. This business, as with many others, was affected by the pandemic and closed for a time

12. A performance appraisal was carried out with Claimant in April 2020. There was a discussion about working hours. Whilst the Respondent wished to vary these, the Claimant said she wished to retain her existing work pattern but was willing to be "flexible on occasion".

13. On 14 April 2020, the Claimant wrote making a number of enquiries of the Respondent. The last of these was in the following terms:

> **Please could you confirm in writing that the Fountain Montessori Contract that you reference in the Furlough Document is my original contract.**

14. The reason this question was asked, is because the Claimant feared the Respondent wished to make change. Mrs Aiyetigbo replied the same day:

> **Your original contract with Abbey view applies for now. I will be writing you to consult in due course about a variation to that contract in light of the present circumstances we find ourselves.**

15. By May 2020, Mrs Aiyetigbo was looking at reopening the St Albans nursery. She wrote to the Claimant and asked her to come back to work. In an email of 20 May 2020, the Claimant set out why she said she could not then return. This included:

> **Health and Safety**
>
> **In line with the 95% of Teachers that do not think it is safe for schools to return without a track and trace system in place and with the daily death rates as of 19th June 2020 of 545. I personally feel extremely concerned for my safety, that of the nursery children, my children and vulnerable family members.**
>
> **Over 100 children in the UK have presented with Kawasaki disease developed whilst recovering from Covid 19. This is a very serious disease which has caused deaths in children of varying ages from 6 months, 5 year olds up to 14 year olds (as of this morning a 7 year old has died in Surrey due to corona virus). The number of key workers that have also tragically lost their lives due to greater exposure at work - Tfl have reported 42 transport staff have lost their lives in London due or to Covid 19 and NHS staff and carers stand at 175 deaths due to their contact with patients.**

> **Child Care**
>
> **As you are aware I am a single parent of 3 children in years 2, 7 and 9. The government is not reopening schools until September 2020 for the secondary school year groups (7 and 9) is only considering a fazed return of other primary school year groups not in (R, 1 and 6) as and when safe. Due to Health and Safety risks and risks associated to teaching staff and older parents.**
>
> **My Year 7 child has severe SEN which means I would not be able to leave him at home alone and have been supporting his education on a 1:1 basis during lockdown. As a single parent I have to remain at home to care for my children whilst schools are closed.**
>
> **Offering school places to key worker children is not an option I would feel safe to take up due to the reasons I have already explained.**

16. Mrs Aiyetigbo replied to the Claimant, asking to speak with her about this matter. A discussion took place by telephone on 21 May 2022. Mrs Aiyetigbo followed this up by email on 22 May 2022:

> **As discussed yesterday. Please ensure you Mention to your children's schools that you Are a key worker and have been asked to return to Work to prioritise a place so you are able to return to work.**
>
> **Details of the proposed variation to your contract will be sent to you today.**
>
> **Thanks for returning the forms.**
>
> **Your concerns about the rate of infection are noted as per the directive of the government we have put in place measures to protect our staff and families in line with the government guidance. As discussed many settings and service providers have continued to operate on during this time and learnt to manage the risks.**
>
> **The business continuity is essential to the continuity of your job and this is our priority with all the required safety measures in place.**

17. It is apparent from the email sent that Mrs Aiyetigbo told the Claimant she was proposing to vary her contract and would be sending a document in this regard.

18. The Claimant maintained her stance in an email reply also on 22 May 2022:

> **Please could I highlight the issues that are preventing me from returning to work on the 28th of May 2020 - Child Care and Health and Safety. In my email dated 20th May and further discussed during our meeting via zoom yesterday I explained to you why the key worker childcare/school option was not one that I could take up due to letters I have received explaining that they are only offering childcare services and that classes are mixed from children aged 4-11 and concerns I had with Health and Safety for my children. I also explained as a single parent of 3 children one with severe SEN - whilst primary and secondary schools are closed I am having to support my children at home with their education. I did not say that I would be contacting my children's schools re keyworker places, as I recall you suggested it and I explained why it was not a safe or a suitable**

> **option (I note that the conversation was recorded). During lock down only 1% of pupils are attending school despite the government expecting about 10% "Figures from the Department for Education show that only 1.3% were attending in during March." Parents are rightly nervous about their children's Health and Safety as am I.**
>
> **As of today The Guardian reports - The Independent Sage committee warns that 1st of June is too early for schools to reopen in England. The Independent Sage committee which is separate from the government's official advisers and is chaired by the former government chief scientist Sir David King, says new modelling of coronavirus shows the risk to children will be halved if they return to school two weeks later than ministers propose. Delaying until September would further reduce the risk. 'It is clear from the evidence we have collected that June 1st is simply too early to go back. By going ahead with this dangerous decision, the government is further risking the health of our communities and the likelihood of a second spike." Prof King said.**
>
> **Tragically today the death toll rises by another 351 bringing total lives lost to 36,393.**

19. Mrs Aiyetigbo further replied on 22 May 2022, saying if the Claimant did not attend for work she would be placed on unpaid parental leave.

20. On 23 May 2022, the Claimant asked why she had not been placed on furlough and Mrs Aiyetigbo replied:

> **We have been asked to open back on the 1/6/2020. We have put in place safety measures To do so. Our business continuity is at risk with Continuous closure being on lock down.**
>
> **We now have work for you to return and you have Expressed your opinions and I have addressed them If you feel unsafe and have childcare issues that are Personal the best option for you is to take unpaid Parental leave at this time when we will be opening up.**
>
> **It's better than sending you a p45, informing you that the nursery had to close down due to failure.**

21. In June 2020, the Respondent re-opened the St Albans Nursery, which was from that point operating from 7.30am to 6.30pm

22. On 11 June 2020, the Claimant wrote asking to be furloughed on a part-time basis and Mrs Aiyetigbo replied:

> **As stated you did not feel comfortable To start work in June you have been placed on Unpaid leave. I can't afford to furlough you.**
>
> **I must also restate that your job is at risk due To the financial situation of the numbers Being low.**
>
> **We have had to ask other staff to come into Work.**

23. On 28 June 2020, Mrs Aiyetigbo invited the Claimant to a Zoom meeting to discuss her return to work and a proposed contractual variation. On 29 June

2020, the Claimant said she could do the 30th. She asked for details in advance of the points to be discussed. Mrs Aiyetigbo replied (attaching a draft contract):

> **Hi Olivia**
>
> **Sure, we would like to amend your vary your existing contract to bring it in line with our business goals and those of your other colleagues, we discussed this previously, The main changes are to extend your start time to 7.30am and to extend your working to all year round no longer term time, this will mean you will have 5.6 weeks holiday including when the nursery is closed for two weeks in December.**
>
> **The business reasons are we have increased numbers of parents looking for full time care, many of the term time children have moved on now.**
>
> **The rate of pay will remain the same and the overall hours could remain the same or be extended to 40 hours a week.**
>
> **See attached details of the contract to review before tomorrow.**

24. A discussion to take place on 30 June 2020. The Claimant said she could not return to work on the basis proposed, in particular the extended hours conflicted with her own childcare responsibilities.

25. By email written later on 30 June 2020, Mrs Aiyetigbo sent the text of a letter dated (prematurely) 1 July 2020:

> **Re: Proposed Variation To Contract As you are aware, we have been consulting with you since May 2020 regarding changes to your terms and conditions of employment.**
>
> **The changes that we have identified as necessary are: As per the contract attached, - change to working hours and change from term time to full time In our meetings we have identified the substantial business reasons that make these changes a necessity to the future viability of the business, namely:**
>
> **New children and parents are all looking for longer hours and full time, less children on the term time attendance. Covid has impacted this further with job losses and reduced attendance.**
>
> **In our consultation meetings to date, you have indicated that you are not prepared to accept the proposed changes. The logistical problems of having employees working to different terms and conditions would adversely impact the future economic viability of the business. The Company has carefully considered its position and we maintain that the above changes are essential to the needs of the business. I therefore invite you to attend a formal meeting to be held on 1/7/2020 at 12pm at zoom or telephone call your preference.**
>
> **The purpose of this meeting is to discuss with you our concern that due to the above it appears that we will not be in a position to continue your employment with the Company. You are therefore advised that this meeting may result in the termination of your employment on the grounds of Some Other Substantial Reason, namely, the variation of your contract**

> **of employment, with the offer of re-engagement (with no loss to your continuity of service) on the new terms and conditions of employment.**

26. The Claimant replied, also on 30 June 2020:

> **I don't accept we have had meaningful conversation re change of contract. Having taken legal advice I am extremely confused why this is not a redundancy, you are making my job role redundant. Contrary to Acas guidance I do not have time to find anyone suitable to support me for a meeting tomorrow as you have requested and would like to adjourn our meeting to next week.**

27. At the Claimant's request, the meeting was postponed to 3 July 2020. We were provided with a recording of meeting and a, broadly, accurate transcript. The Claimant was quite guarded in the course of this conversation. She had taken advice and wished to make a number of points. These included her right to remain on her existing terms and conditions, pursuant to TUPE and her inability to work extended hours or outside term time. The Claimant did not respond to any of the suggestions made to her at this time. Mrs Aiyetigbo was rather more open in her approach. Asked to explain why she had not allowed the Claimant to continue on furlough, Mrs Aiyetigbo said the nursery was now open, there was work for the her to do and in her absence, someone else had been brought in to do that work. As such there were no grounds for furlough. In connection with the proposed change to the Claimant's terms and conditions, Mrs Aiyetigbo explained the nursery was now operating from 7.30 am to 6:30 pm and all year round as opposed to term time only. This made it difficult for her to accommodate the Claimant's hours of 9am to 3.15pm because it would mean finding cover both before and after (7:30 am to 9 am and 3.15pm to 6pm). She said this was not something the Respondent could manage at the present time. Mrs Aiyetigbo was open to the possibility of a compromise being agreed. Mrs Aiyetigbo asked the Claimant, repeatedly, whether she might be open to working reduced hours, pitting forward a suggestion of 2 ½ days per week. Another proposal was for the Claimant to work in a supplementary role, perhaps using her artistic skills, for part of the day. Mrs Aiyetigbo also volunteered, having spoken on the need to make the business viable, the possibility that when the position was more buoyant, suggesting "January" as when this point might be reached, the Claimant's existing term time only hours could then be accommodated. The Claimant did not respond to any of these proposals. Mrs Aiyetigbo asked the Claimant to think about what they had discussed and suggested they speak again. The Claimant appeared to prefer an email exchange.

28. There was then a further email exchange. On 6 July 2020:

    28.1 the Claimant wrote:

> **I have given your proposals a great deal of thought over the weekend. Ultimately you would now require me to work during holidays, whereas I have worked term time only for the last 14 years. You are also proposing a significant change to my hours which would result in a dramatic drop in my pay by reducing my days from 5 down to 2 / 3 a week; this I simply could not afford.**

It is clear to me that you have made a decision to no longer employ staff on a term time basis and as such, my role is redundant. I am unable to accept the alternative arrangements proposed; for the reasons I set out above this is not a suitable offer of alternative employment for me.

I therefore look forward to hearing from you regarding any other way in which you believe compulsory redundancy can be avoided and with details of the notice and statutory redundancy payments which are due to me if it cannot

28.2 Mrs Aiyetigbo replied:

I hope you are well, The increased work over the holidays will increase your salary and the hours could be worked at the same as you currently do if they extend to the times the nursery is open 7.30-6.30pm rather than 9-3 pm.

29. On 7 July 2020, the Claimant wrote:

Re- your email of the 6th of July, you are wanting to change my contract, work hours and days making my current contract and job redundant in the full knowledge that I cannot work to the changes you want to make. There is little point in another phone call just to repeat this information.

30. By a letter of a letter of 7 July 2020, the Claimant was given notice of dismissal but with the offer of re-employment on terms which were attached:

As you are aware, we have been consulting with you since May 2020 regarding changes to your terms and conditions of employment.

The changes that we have identified as necessary to the Company are: The main changes are to extend your start time to 7.30am and to extend your working to all year round no longer term time, this will mean you will have 5.6 weeks holiday including when the nursery is closed for two weeks in December.

The rate of pay will remain the same and the overall hours could remain the same or be extended to 40 hours a week.

In our meetings we have identified the substantial business reasons that make these changes a necessity to the future viability of the business, namely:

The business reasons are we have increased numbers of parents looking for full time care, many of the term time children have moved on now. This has been escalated due to the Covid pandemic.

In our consultation meetings to date, you have indicated that you are not prepared to accept the proposed changes. The logistical problems of having employees working to different terms and conditions would adversely impact the future economic viability of the business. The Company has carefully considered its position and we maintain that the above changes are essential to the needs of the business and for this reason you were invited to attend a formal meeting, which was held on 3/7/2020 at 12pm. You were given the opportunity of being accompanied

by a work colleague of your choice, an accredited Trade Union official, which you declined.

At this meeting you continued to state that you were not prepared to accept the proposed changes and I further explained the importance of implementing these changes.

It is with regret therefore that I serve you 8 weeks' notice that your existing contract with Fountain Montessori Pre-school Limited will terminate with effect from 31/08/2020, on the grounds of Some Other Substantial Reason, namely the variation of your contract of employment. I would however like to make you an offer of re-engagement whereby your employment will continue the varied terms and conditions of employment. If you accept this offer of re-engagement, the new Terms and Conditions of Employment will become effective from 1/9/2020 and I enclose two copies of these terms.

31. The Claimant exercised her right of appeal against this decision. Save that the outcome included her notice period be extended from 8 to 12 weeks, the appeal was otherwise unsuccessful.

Law

TUPE

32. So far as material, regulation 4 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** provides

> **4.— Effect of relevant transfer on contracts of employment**
>
> **(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.**
>
> **(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—**
>
> > **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee;**
>
> **[…]**
>
> **(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.**
>
> **(5) Paragraph (4) does not prevent a variation of the contract of employment if—**

> **(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or**
>
> **(b) the terms of that contract permit the employer to make such a variation.**
>
> **(5A) In paragraph (5), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act2).**

Unfair Dismissal

33. The dismissal of an employee for a transfer related reason will be unfair, save unless an ETO reason can be shown; see regulation 7(1):

> **Dismissal of employee because of relevant transfer**
>
> **7.—(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—**
>
> > **(a)the transfer itself; or**
> >
> > **(b)a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.**
>
> **[…]**

34. Regulations 4 & 7 are intending to protect transferring employees from dismissal or a change in their contractual terms and conditions. A dismissal in such circumstances may be automatically unfair and any purported variation, void.

35. On well established principles, the reason for dismissal is found by looking into the mind of the dismissal decision-maker. Per Cairns LJ **in Abernethy v Mott [1974] ICR 323 NIRC**, this is:

> **a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

36. In connection with whether the reason for dismissal was a transfer, the proximity of the termination to the transfer date may be a relevant consideration; see **P Bork International A/S (in liquidation) v Foreningen af Arbejdsledere i Danmark and ors 1989 IRLR 41 ECJ**. There is, however, no rule that the mere passage of time prevents the dismissal being by reason of the transfer. Although as the point at which employment transferred becomes more distant, it may become more likely that subsequent events were the effective cause.

37. A transfer-related dismissal or contractual variation may be lawful where the employer shows this was for an "economic, technical or organisational reason entailing changes in the workforce".

38. Guidance on ETO reasons was provided in **Berriman v Delabole Slate Ltd 1985 ICR 546 CA**, per Lord Justice Browne-Wilkinson:

> **Then, in order to come within regulation 8(2) , it has to be shown that that reason is an economic, technical or organisational reason entailing changes in the workforce. The reason itself (i.e. to produce standardisation in pay) does not involve any change either in the number or the functions of the workforce. The most that can be said is that such organisational reason may (not must) lead to the dismissal of those employees who do not fall into line coupled with the filling of the vacancies thereby caused by new employees prepared to accept the conditions of service. In our judgment that is not enough. First, the phrase "economic, technical or organisational reason entailing changes in the workforce" in our judgment requires that the change in the workforce is part of the economic, technical or organisational reason. The employers' plan must be to achieve changes in the workforce. It must be an objective of the plan, not just a possible consequence of it.**
>
> **Secondly, we do not think that the dismissal of one employee followed by the engagement of another in his place constitutes a change in the "workforce." To our minds, the word "workforce" connotes the whole body of employees as an entity: it corresponds to the "strength" or the "establishment." Changes in the identity of the individuals who make up the workforce do not constitute changes in the workforce itself so long as the overall numbers and functions of the employees looked at as a whole remain unchanged.**

Redundancy

39. Whether a person is dismissed for the reason of redundancy is governed by section 139(1) of the **Employment Rights Act 1996** ("ERA"):

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—**
>
> **(a) the fact that his employer has ceased or intends to cease—**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
>
> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(b) the fact that the requirements of that business—**
>
> **(i) for employees to carry out work of a particular kind, or**
>
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.**

Indirect Discrimination

40. A useful starting point for understanding indirect discrimination was provided by Lady Hale in **Chief Constable of West Yorkshire Police and another v Homer [2012] ICR 704 SC**:

> **17. […] The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic. […]**

41. Insofar as material, EqA10 section 19 provides:

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

42. The Claimant must show the PCP, group and individual disadvantage and in that event, by operation of EqA section 136, the burden the shifts to the Respondent to justify the PCP; see **Dziedziak v Future Electronics Ltd EAT 0271/11**, per Langstaff J.

43. The conventional approach to establishing, for the purposes of section 19(2)(b), whether those who share the claimant's protected characteristic were at a particular disadvantage compared with those who do not share that characteristic, is to identify a relevant pool of employees, or potential employees, and to look for evidence of disparate impact as between those who do or do not have the particular characteristic. The continuing relevance of this approach was confirmed by Lady Hale in **Essop and others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice [2017] ICR 640**:

> **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.**

44. The pool for comparison should include all of those affected by the PCP, per Lady Hale in **Essop**:

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

45. Where indirect discrimination is alleged with respect to a recruitment exercise, the relevant pool might be all those likely to apply for such a post. Where, however, the PCP is applied to existing employees, then it may be appropriate to look at relevant sections of the workforce; see **London Underground v Edwards (No.2) [1998] IRLR 364 CA**: per Potter LJ:

> **23. The first or preliminary matter to be considered by the tribunal is the identification of the appropriate pool within which the exercise of comparison is to be performed. Selection of the wrong pool will invalidate the exercise, see for instance Edwards No. 1 [1995] I.C.R. 574 and University of Manchester v. Jones [1993] I.C.R. 474 , and cf. the judgment of Stephenson L.J. in Perera v. Civil Service Commission (No. 2) [1983] I.C.R. 428 , 437 in the context of racial discrimination. The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied. In this case, the pool was all those members of the employer's workforce, namely train operators, to whom the new rostering arrangements were to be applied (see paragraph 3 above). It did not include all the employer's employees. Nor did the pool extend to include the wider field of potential new applicants to the employer for a job as a train operator. That is because the discrimination complained of was the requirement for existing employees to enter into a new contract embodying the rostering arrangement; it was not a complaint brought by an applicant from outside complaining about the terms of the job applied for. There has been no**

> **dispute between the parties to this appeal on that score. However, Mr. Bean has placed emphasis on the restricted nature of the pool when asserting that the industrial tribunal were not entitled to look outside it in any respect. Thus he submitted they should not have taken into account, as they apparently did, their own knowledge and experience, or the broad national "statistic" that the ratio of single parents having care of a child is some 10:1 as between women and men.**
>
> **24. In my view Mr. Bean was incorrect in that last respect. An industrial tribunal does not sit in blinkers. Its members are selected in order to have a degree of knowledge and expertise in the industrial field generally. The high preponderance of single mothers having care of a child is a matter of common knowledge. Even if the "statistic," i.e., the precise ratio referred to, is less well known, it was in any event apparently discussed at the hearing before the industrial tribunal without doubt or reservation on either side. It thus seems clear to me that, when considering as a basis for their decision the reliability of the figures with which they were presented, the industrial tribunal were entitled to take the view that the percentage difference represented a minimum rather than a maximum so far as discriminatory effect was concerned.**
>
> **25. Equally, I consider that the industrial tribunal was entitled to have regard to the large discrepancy in numbers between male and female operators making up the pool for its consideration. Not one of the male component of just over 2,000 men was unable to comply with the rostering arrangements. On the other hand, one woman could not comply out of the female component of only 21. It seems to me that the comparatively small size of the female component indicated, again without the need for specific evidence, both that it was either difficult or unattractive for women to work as train operators in any event and that the figure of 95.2 per cent. of women unable to comply was likely to be a minimum rather than a maximum figure. Further, if for any reason, fortuitous error was present or comprehensive evidence lacking, an unallowed for increase of no more than one in the women unable to comply would produce an effective figure of some 10 per cent. as against the nil figure in respect of men; on the other hand, one male employee unable to comply would scarcely alter the proportional difference at all. Again, I consider Mr. Allen is right to point out in relation to Mrs. Quinlan that, albeit the industrial tribunal lacked the evidence to find as a fact that she could not comply, the reference to her indicates that they had her uncertain position in mind when assessing the firmness of the figure of only 4.8 per cent. as the basis for a finding of prima facie discrimination.**

46. Where group disadvantage is established, the Claimant must also show that they suffered the relevant disadvantage. If this is done, then the burden shifts to the Respondent. EqA section 19(2)(d) affords a defence to what would otherwise be discrimination, in that it permits the employer to justify measures which have a discriminatory affect. The ECJ in **Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317** addressed the question of objective justification for a pay policy which adversely affected part-time workers:

> **45 […]**
>
> > **2. Under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground**

> **that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.**

47. The Court of Appeal in **R (Elias) v Secretary of State for Defence [2006] IRLR 934 CA** at paragraph 151, adopted the same formulation; per Mummery LJ:

> **151.[…] As held by the Court of Justice in Bilka Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317 at paragraphs 36 and 37 the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. It is not sufficient that the Secretary of State could reasonably consider the means chosen as suitable for attaining the aim.**

48. Accordingly, when considering whether the employer has shown that which is required to justify an otherwise discriminatory measure pursuant to EqA section 19(2)(d), the following must be established:

48.1 the measure corresponds to a real need on the part of the employer;

48.2 the measure is appropriate with a view to achieving the employer's objective;

48.3 the measure is necessary to that end.

49. Per Balcombe LJ in **Hampson v Department of Education and Science [1989] ICR 179 CA**. justification in this context requires an objective balance to be stuck:

> **34. However, I do derive considerable assistance from the judgment of Lord Justice Stephenson. At p.423 he referred to:**
>
> > **'... the comments, which I regard as sound, made by Lord McDonald, giving the judgment of the Employment Appeal Tribunal in Scotland in the cases of Singh v Rowntree MacKintosh Ltd [1979] IRLR 199 upon the judgment of the Appeal Tribunal given by Phillips J in Steel v Union of Post Office Workers [1977] IRLR 288 to which my Lords have referred.**
> >
> > **What Phillips J there said is valuable as rejecting justification by convenience and requiring the party applying the discriminatory condition to prove it to be justifiable in all the circumstances on balancing its discriminatory effect against the discriminator's need for it. But that need is what is reasonably needed by the party who applies the condition; ...'**
>
> **In my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.**

50. The required balancing exercise will include a consideration of:

50.1 the nature and extent of the discriminatory impact of the PCP;

50.2 the more serious the impact, the more cogent must be the justification;

50.3 the reasonable needs of the business;

50.4 whether the employer's aim could have been achieved less discriminatory means.

51. The meaning of 'necessary' in this context was considered by the Court of Appeal in **Hardys and Hansons plc v Lax [2005] IRLR 727**, per Pill LJ:

> **32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word 'necessary 'used in Bilka is to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably 'reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants 'submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.**
>
> **33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in Allonby and in Cadman, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**

52. The employer seeking to establish justification should produce cogent evidence in that regard rather than merely making assertions. Note, however, the

observations of Elias P in **Homer v Chief Constable of West Yorkshire Police [2009] IRLR 262 EAT**:

> **48. We also have reservations about other aspects of this part of the decision. We think there is force in the appellant's submission that it is unjustified to put any real weight on the fact that there is no evidence in the short period subsequent to the changes having been made to demonstrate an improvement in the quality of recruits. An employer might be reasonably justified in making changes which he genuinely and on proper grounds considers will improve the standard of his workforce and these may well be capable of justification, notwithstanding that with the benefit of hindsight the improvements which he reasonably anticipated were not realised. It is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions. Moreover, the timescale is in any case too short to reach any satisfactory conclusion on the point.**

53. Justification needs to be shown at the time when the measure was applied to the employee; **Cross v British Airways plc [2005] IRLR 423 EAT**.

Conclusion

Unfair Dismissal

54. As set out above, our finding is that from the very beginning, Mrs Aiyetigbo intended to vary the contracts of existing employees, to the Respondent's standard terms, including extended working hours. This would better fit with the opening times of the business going forward. Had such a variation been imposed immediately following the transfer, it would have been because of the transfer and void save unless an ETO reason could be shown. Similarly, a dismissal at this time followed by an offer of re-engagement on the new contractual terms, would have been because of or related to the transfer and automatically unfair, again subject to an ETO defence.

55. The Respondent did not, however, seek to effect such change at the moment of transfer but instead delayed the implementation of this. Shortly, thereafter Covid and lockdown intervened. When in May 2020, the Respondent reopened the nursery, it did so with extended hours. The Respondent argued this change was brought about by Covid and demand from parents. Our conclusion is whilst these factors may appear at the surface they do not represent the substance of the reason for change. The Respondent had always intended to harmonise contractual terms, including a provision for extended working time. It was a question of when not if. The reopening after lockdown was merely a convenient point to do this. Similarly, the demand from parents for childcare covering an extended period of the day and outside of turn time, resulted from the Respondent then offering it.

56. As part of this process, the Respondent sought to persuade the Claimant to agree the variation of her terms and conditions. Mrs Aiyetigbo wished to have all employees on the Respondent's standard terms, including extended working hours.

57. Unfortunately, as set out above, the Claimant did not agree to the proposed change. Nor could any compromise or halfway house be found.

58. On 7 July 2020, the Claimant was given notice of dismissal and an offer of re-employment on new terms.

59. In these circumstances, the Claimant was dismissed because of her refusal to agree new terms the Respondent had intended to introduce following the TUPE transfer. Whilst a period of just over six months had passed between the transfer and the Claimant's dismissal, it is quite clear the reason was the transfer or a transfer-related reason. What happened in July 2020 was the putting into effect of a plan the Respondent had when it acquired the business, to change the terms and conditions of employees, including with respect to working hours. The reason for dismissal was not a supervening event, such as a change in parental demand, as contended for by the Respondent.

60. Given the reason for dismissal falls within regulation 7, we have gone on to consider whether it was an economic, technical or organisational reason entailing changes in the workforce. Miss Zakrzewska submitted, in the alternative that if the Claimant was dismissed in "an attempt to harmonise terms and conditions" then this was for "an economic, technical, or organisational reason entailing a change in the workforce". She did not, however, explain how or why this was so. She did not point to any economic, technical or organisational factor and then say how this required a change in the workforce. Her submission on this point was not supported by any further argument.

61. We reminded ourselves of the guidance provided in **Berriman v Delabole Slate**. There was no evidence of any change in the workforce at this time (save for the Claimant's dismissal), the strength and establishment of which was not varied. The overall numbers and functions remained the same. Whilst it may have been convenient and efficient for the Respondent to seek to vary the Claimant's work pattern to better fit the new operating hours, we are not satisfied this amounts to an ETO reason. Mr Mellis made this point in his closing submissions and Miss Zakrzewska did not tell us he was wrong.

62. In those circumstances, the Claimant having been dismissed because of the transfer or for a transfer-related reason and this not being for an ETO reason, the Claimant's dismissal was automatically unfair.

63. Given the Claimant has succeeded in automatic unfair dismissal claim, we do not need to consider her ordinary unfair dismissal claim.

64. Redundancy was a claim pursued in the alternative and that is dismissed as we have not found a redundancy dismissal.

Indirect Sex Discrimination

65. The Respondent agreed that at the material time it applied the PCP contended for, namely "the extension of working hours across the year".

66. The first contentious question is, therefore, whether this PCP put women at a particular disadvantage men.

67. The Claimant produced no statistical evidence or analysis in connection with the question of whether the PCP applied put women at a particular disadvantage.

68. She relies simply on the proposition that as a greater proportion of women than men have childcare responsibilities, the requirement to work from 7.30am to 9am and from 3.15pm to 6pm, year-round, is one that fewer women than men can comply with.

69. Whilst in some cases it is appropriate for the Tribunal to take judicial notice of the fact that more women than men have childcare responsibilities, such a consideration will not in every case establish group disadvantage.

70. The relevant pool for comparison is the Respondent's nursery teachers to whom this PCP was applied. The Claimant is the only nursery teacher who is said not to have been able to comply with this PCP.

71. We do not have any evidence upon which to make a comparison in this case. The only male employee specifically identified was a chef. The Respondent's unchallenged evidence is that its workforce is overwhelmingly, 95%, made up of women. We have not been told of any male nursery teacher employed by the Respondent.

72. On the Claimant's behalf, no questions were asked of the Respondent's witnesses, with a view to establishing the makeup of the workforce by reference to their sex or ability to comply with this PCP. Nor does it appear that questions seeking information of this sort were put by the Claimant to the Respondent before the hearing began. The evidence before us does not enable and meaningful group comparison.

73. The background facts do not appear, immediately, to lend themselves to the proposition that the working pattern the Respondent sought to apply by its PCP was one that put women at a particular disadvantage when compared to men.

74. The Respondent operates the same business model at three nurseries. The vast majority of its employees are women. The evidence of Mrs Ayietigbo included:

> **9. The nursery is made up of 95% female employees, many of the staff have children and a few staff are single parents. […]**
>
> **[…]**
>
> **11. We are company of mainly female workers, supporting parents to receive childcare, over 60% of us have children and around 30% are single parents - the issue with returning to work, sex, childcare and or covid were not unique to Mrs Carpenter it was an issue every single employee myself included had to make decisions about.**

75. Even if we were to adopt the approach of considering the pool for comparison as comprising all nursery teachers who might have applied for employment with the Respondent, that would not appear to assist the Claimant. Were this a predominantly male workforce, then that might tend to support an inference that the working pattern applied was putting women at a disadvantage and operating as a barrier to entry. The position in this case, however, is the opposite.

76. Necessarily, those who seek employment in the business of providing childcare, whether male or female, are likely to comprise those who either do not have their own children to care for or those who have made arrangements in that regard. You cannot offer to care for the children of others if you are at the very same time as you are caring for your own children. Once again, the makeup of the Respondent's workforce does not suggest this PCP is operating as a barrier to women become employed.

77. In the circumstances, we are not satisfied any group disadvantage has been shown. Accordingly, the Claimant's indirect discrimination claim must fail.

78. Our decision should not, however, be understood as involving any general proposition that sex discrimination against women cannot take place in a workplace which comprises mainly women. The position is simply that in this particular case, on the evidence put before us, the requisite disadvantage was not shown.

79. Whilst it is not strictly necessary, given our conclusion on group disadvantage, we have gone on to consider the question of whether the Respondent could have shown that its PCP amounted to proportionate means of achieving a legitimate aim.

80. The Respondent's aim is a legitimate one. Most or all businesses seek to be efficient and a better alignment as between employee working patterns and operating hours will tend to assist with this.

81. We would also have been satisfied the PCP amounted to proportionate means. As with many other businesses this was a difficult period and Mrs Aiyetigbo was concerned to ensure the nursery remained financially viable. The Claimant's existing work pattern did not fit easily into the Respondent's operating hours. The nursery was a relatively small operation, at the time, and needed flexibility from its staff in order to maintain sufficient cover. The Respondent was open to the possibility of agreeing a different working pattern or role for the Claimant. The Claimant would not consider any alternative. Whilst much criticism was made with respect to consultation and the speed of this process, it is quite clear: the Claimant was unwilling to adjust her position; there would seem to have been little merit in prolonging the consultation; it was the Claimant who drew the consultation to close, by declining a further discussion with Mrs Aiyetigbo. There was no less discriminatory alternative to the Respondent's proposal, as the Claimant was not open to any middle way. In the circumstances, had it been necessary, we would have been satisfied the Respondent's application of the PCP of an extension of working hours was proportionate means of achieving its legitimate aims of efficiency and aligning the needs business and employees to meet government regulations or put more simply, aligning staff working hours with business opening hours to ensure the correct pupil ratio was maintained.

Employment Judge Maxwell

Date: 6 September 2022

Sent to the parties on:

26/09/2022
…….
For the Tribunal Office:

J Moossavi
……..……..