EMPLOYMENT TRIBUNALS

Claimant: Mrs K Staunton

Respondent: Estee Lauder Cosmetics Ltd

Heard at: Central London Employment Tribunal
On: 22, 23, 24 and 25 November 2022

Before: Employment Judge Keogh, Ms T Shaah, Mr A Adolphus

Representation
Claimant: Miss Ellis (Lay representative)
Respondent: Mr Anderson (Counsel)

JUDGMENT

1. The claimant's claims of unfair dismissal, direct and indirect age discrimination and indirect sex discrimination are unsuccessful and are dismissed.

REASONS

Reasons having been requested orally at the hearing, the reasons for the judgment are as follows:

Introduction

1. This is a claim for unfair dismissal, direct and indirect age discrimination and indirect sex discrimination. We received a bundle of documents and witness statements from the claimant, Ms Jacquelyn Lewis and Ms Natalie Mann on her behalf, and from Mr Craig Van de Merwe, Ms Sarah-Jane Binns Nelson and Ms Beccy Davies on behalf of the respondent.

2. At the outset of the hearing we considered an application by the respondent to introduce the witness statement of Ms Davies which had been presented to the claimant around a week before the hearing, as neither Mr Van de Merwe or Ms Binns Nelson were able to attend. After hearing submissions from both parties it was decided that Ms Davies should be permitted to give evidence. In considering the application the Tribunal applied the overriding

objective. Its main concern was to ensure that the parties were on an equal footing. If the evidence were excluded there would have been significant prejudice to the respondent who would have no live witness at all. The Tribunal was concerned about the lateness of the presentation of the witness statement and whether this would have disadvantaged the claimant, but much to Miss Ellis's credit she confirmed she had been able to prepare cross examination for Ms Davies. In the circumstances there was less prejudice to the claimant. The Tribunal was also concerned that Ms Davies would have been able to see all the claimant's witness evidence before preparing her statement. However unusually in this case the claimant had herself prepared an amendment to her statement after exchange, and the Tribunal was told that the witness statement of Ms Davies was very similar in content to the evidence already produced by the respondent (which transpired to be the case). In the circumstances it was in the interests of justice to permit Ms Davies to give evidence.

3. We therefore heard oral evidence from the claimant, Ms Lewis, Ms Mann and Ms Davies.

4. It is necessary to note in this judgment that during the course of the hearing, while the claimant was under oath, an allegation was made that Miss Ellis had discussed her evidence with her. The allegation concerned a break in the claimant's evidence for the Tribunal to determine whether it had any questions for her. The parties remained in the CVP hearing room and the claimant's computer was not put on mute. The respondent's representatives could therefore see and hear what was said in the claimant's hotel room, where both the claimant and Miss Ellis were sitting together. It was alleged that while the Tribunal was out of the CVP hearing room Miss Ellis said to the claimant, 'Talk about anti-depressants, ok?' Witness statements were subsequently produced by Ms Rebecca Compson, Solicitor, and Ms Abarna Harindra, Trainee Solicitor to that effect, together with screenshots of a Whatsapp group for the representatives which confirmed that a third person had also heard this.

5. The allegation was first made when Employment Judge Keogh alone returned to the CVP room to inform the parties that one of the members was having technical difficulties and there would be a short delay. At that point it was said by Miss Ellis that they had been sitting there in silence. When the full Tribunal rejoined and Mr Anderson relayed what had been heard, Miss Ellis stated that she had asked the claimant if she had taken her anti-depressants. Mr Anderson was permitted further cross examination of the claimant on this issue. The claimant denied having spoken about her evidence to Miss Ellis.

6. On balance we did not accept what was said by the claimant about this incident. There was no reason for two solicitors (and a third person) to lie about what was heard and Miss Ellis has given a conflicting account. We found Miss Ellis did seek to prompt the claimant, and that she should not have done so. However, we did not consider that this impacted upon the remainder of the claimant's evidence. It was Miss Ellis who made the comment and not the claimant. There was no evidence that the claimant herself breached the terms given to her by the Tribunal not to discuss her evidence, and as it transpired no evidence was in the end given about anti-depressants.

Findings of fact

7. The respondent is a cosmetics company operating a number of brands in the UK and Ireland. The claimant was employed by the respondent from 1992. She undertook various roles but by 2001 was working as an expert consultant with the La Mer brand at the respondent's store within Harrods. The claimant consistently exceeded her targets. From 2017 she worked one day per week, usually for 8 hours on a Sunday, which was her husband's day off work and allowed them to provide full time child care for their daughter.

8. Other experts working for La Mer at Harrods worked a variety of hours over different numbers of days. Apart from the claimant, shifts were not fixed and a rota would be sent out a month in advance indicating which days individuals would work on and for what hours. The claimant's hours were always on a Sunday but the time she worked could vary.

9. In March 2020 the Covid pandemic started to affect retail businesses across the UK. The respondent put in place cost cutting measures including reducing executive pay. When the 'stay at home' order was given on 23 March 2020 the respondent's work force, including the claimant, was placed on furlough. La Mer's sales relied on overseas tourist and student customers. Sales were expected to fall by 52.3% in comparison with the previous financial year. Harrods was one of the most important 'doors', i.e. physical stores, for the respondent, accounting for 27% of store sales. The respondent eventually concluded that redundancies may be necessary.

10. The respondent started to conduct a 'Point of Sale Optimisation' process. Miss Binns-Nelson charged her area managers, including Mr Van de Merwe, with implementing a 30% reduction in full time equivalent head count at 30 doors, with consequent rota changes to ensure continuity of counter-cover (to have maximum cover for the store's busiest times) and to maximise productivity.

11. On 2 June 2020 an 'At Risk' briefing was held which was attended by the claimant. By letter dated 2 June 2020 the claimant was informed that the position she held might no longer be required and she had been provisionally selected for redundancy and was invited to a first individual consultation meeting to take place on 4 June 2020. The letter states that during the meeting the respondent would discuss the proposals further and would welcome any ideas the claimant may have for avoiding or reducing the need for redundancies. After the meeting the respondent would consider all concerns raised and any proposals the claimant wished the respondent to consider.

12. Attached to the invitation was a proposed rota. All of the roles on the proposed rota were for 20 hours or more spread over 4 or 5 days. A later email dated 10 July 2020 sent from Ms Ramsey to Ms Davies confirmed that the respondent 'initially removed 1-3 day roles and increased the amount of days covered by the hours to give [them] full flexibility and better coverage…'.

13. The claimant attended her first consultation meeting on 4 June 2020. At that meeting the claimant confirmed that she would take time to think about the proposed roles on the rota. She questioned why there was no eight hour one day role, and was told that this was due to trying to provide maximum continuity for the needs of the business and maximum counter cover under the new FTE.

14. A first group consultation meeting for Harrods was held on 10 June 2020. Ms Smith was the representative present for La Mer. During this meeting it was said that the respondent was not accepting flexible working requests at this time. Ms Davies said in her evidence that this was a miscommunication, and that flexible working requests would not be dealt with in the consultation process but would be dealt with outside of that process. In relation to La Mer specifically, a question was posed whether the proposed rota was rigid. The response was that the ideal rota had been designed based on the current business needs. This was brand specific and representatives were advised to discuss individual proposals with the consultation managers. At this point in time there was an internal list of vacancies but these were not advertised or available to be filled until a late stage in the individual consultations.

15. The claimant attended her second individual consultation meeting on 12 June 2020. During this meeting the claimant asked why she could not be kept on furlough until October. Mr Van de Merwe responded that there was a financial impact associated with the furlough scheme. It is recorded in the notes that the claimant had no preference in relation to proposed roles due to the hours she worked and not being able to commit to any proposed roles on the rota due to the cost of additional days travel. The claimant later corrected this, saying the reason was because of child care.

16. During the meeting Mr Van de Merwe also discussed the selection criteria which would be used by the respondent to give affected staff priority over their preferred roles. Staff were asked to undertake a skills assessment via a mobile app, Hirevue. The other criteria to be used were performance based and live formal warnings.

17. After the meeting Mr Van de Merwe agreed by email to seek advice from HR regarding the claimant's unique circumstances and arranged a follow up call for 16 June 2020. The claimant responded to this email thanking Mr Van de Merwe for being so compassionate to her.

18. During the call on 16 June 2020 the claimant expressed upset at having to complete a skills assessment but was told that if she did not do so she would score zero on that part of the selection matrix.

19. A second group consultation meeting was held on 17 June 2020. During the meeting a question was asked whether the hourly rates of pay would change. The response was that this would depend on the role being applied for, however if it was a change to hours only then the rate would remain the same. We accept what Ms Davies said that if an individual remained in the same role, whether in a different store or for different hours, the same hourly rate would be paid. There could be a change in rate where management moved to a non-management role.

20. On 18 June 2020 Mr Van de Merwe sent an email to the claimant with some further information. He advised that there had been no changes to the proposed La Mer Harrods rota, and those roles would be used for mapping purposes to find suitable alternative roles where possible.

21. The claimant completed her skills assessment in advance of the next consultation meeting.

22. The claimant attended her third individual consultation meeting on 29 June 2020. The claimant had scored highly in her skills assessment and her overall score in the selection matrix was the highest in her selection pool, which meant that she would have her first choice of the roles available. However it was confirmed at the meeting that she had not been selected for a role because there was no 8 hour role or like for like role available on the Harrods rota.

23. The following day Mr Van de Merwe sent an email to the claimant saying: 'Could I please ask one final time in the interests of exploring all alternatives to redundancy for you within this process, what hours/days would you consider working? Please indicate days and hours. Would you consider a reduction in hours on the same days? Or any other alternatives?' The claimant responded, 'As you know after having my daughter Sunday was the day I worked. There is no alternative for me'.

24. On 10 July 2020 the claimant raised a formal grievance. It was determined that this would be dealt with by Mr Van de Merwe in the final consultation meeting. In evidence the claimant agreed that she was content with this approach because she wanted an end to matters.

25. The claimant attended her final consultation meeting on 21 July 2020. Mr Van de Merwe went through her grievance point by point. They then discussed the consultation and proposals made. By this time the claimant had received the vacancies list but confirmed there was nothing suitable for her. Mr Van de Merwe discussed the email sent on 30 June and the claimant confirmed again that there was no alternative for her. She was notified that her employment would be terminated by reason of redundancy.

26. The claimant appealed her redundancy by letter dated 27 July 2020. In her appeal she alleged that she had been discriminated against.

27. The claimant attended an appeal hearing on 5 August 2020 chaired by Ms Binns-Nelson. During the hearing Ms Binns-Nelson discussed the points in the appeal and went on to explore options for the claimant. She asked whether the claimant could have accepted a role with another brand, to which the claimant responded she didn't want to work for another brand. The claimant asked why a five day role could not have been split into a four day and one day role so she could keep her job. Ms Binns-Nelson replied that the option would have been a job share with a three day and two day and this was not an option for the claimant. The claimant confirmed she could only do a Sunday.

28. On 6 August 2020 the claimant wrote to Ms Binns-Nelson asking her whether the respondent would consider an enhanced redundancy package.

29. The outcome to the redundancy appeal was sent by letter dated 4 September 2020. The appeal was dismissed.

30. The claimant's employment terminated on 13 October 2020.

31. As an additional point, the Tribunal notes that in 2020 the claimant started a second job working in Waitrose. This was three mornings a week from around 6am to 11am. The claimant says she would have continued this work if she had not been made redundant. We find that these hours were not suitable to be worked for the respondent. This was a local job which allowed the claimant to return home before her husband left for work at lunchtime.

Issues and law

32. The issues in this matter were set out at a preliminary hearing before EJ Burns on 30 November 2021 and were clarified at the outset of the hearing. They are as follows:

Unfair dismissal

(1) What was the reason for the dismissal? The Respondent contends that it was redundancy.

(2) Whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant for redundancy, in particular, whether it adopted objective selection criteria and applied them fairly, consulted with the employees and took such steps as were reasonable to find alternative roles for the claimant.

Direct age discrimination

(3) Whether the Respondent treated the Claimant less favourably than it treated her younger colleagues by selecting her for redundancy and dismissing her because of her age (she was 50 years old at the relevant time).

The Claimant relies on Maggie Pik Yan Yeung and Jessica Baturi by way of actual comparators as well as hypothetical comparators.

(4) lf it did, whether the Respondent can show that any less favourable treatment was a proportionate means of achieving a legitimate aim. The Respondent relies on legitimate aims of business flexibility and business viability.

lndirect age discrimination

(5) Whether the Respondent applied a provision, criterion or practice ('PCP') to select for redundancy those who earned more because of their length of service and experience;

(6) lf it did, whether that PCP put employees aged around 50 at a particular disadvantage when compared with younger employees;

(7) Whether it put the Claimant at that disadvantage;

(8) lf it did, whether the Respondent can show it to be a proportionate means of achieving a legitimate aim. The Respondent relies on legitimate aims of business flexibility and business viability.

Indirect sex discrimination

(9) Whether the Respondent applied a PCP not to retain any employees who worked less than 20 hours a week;

(10) If it did, whether that PCP put women at a disadvantage when compared with men. The Claimant asserts that the reason the PCP puts women at a disadvantage when compared to men is because women have greater child care responsibilities when compared to men.

(11) Whether it did put the Claimant at that disadvantage;

(12) If it did, whether the Respondent can show it to be a proportionate means of achieving a legitimate aim. The Respondent relies on legitimate aims of business flexibility and business viability.

33. In relation to redundancy, section 139 of the Employment Rights Act 1996 provides:

> "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-
> (b) The fact that the requirements of [the employer's 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"

34. An employer need not prove the economic justification for a reorganisation that leads to a redundancy situation (*Moon v Homeworthy Furniture (Northern) Ltd* [1977] ICR 117). A redundancy situation may arise where the same amount of work can be performed by a smaller number of employees (*Kingwell v Elizabeth Bradley Designs Ltd* EAT/0661/02).

35. Redundancy is a potentially fair reason for dismissal within the meaning of section 98(2) of the Employment Rights Act 1996. If the reason for dismissal was redundancy, the Tribunal must go on to consider whether the dismissal is fair or unfair, which depends on whether the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the claimant, taking into account all of the circumstances including the size and administrative resources of the respondent. We bear in mind the guidance given in *Williams v Compair Maxim Ltd* [1982] ICR 156 in relation to redundancy dismissals.

36. In relation to direct age discrimination, section 13 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would

treat others. In the case of age, it is a defence to show that the treatment is a proportionate means of achieving a legitimate aim.

37. Under section 136(2) of the Equality Act 2010 the initial burden of proof is on the claimant to show that there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned. If so, the burden of proof shifts to the respondent to show that it did not contravene the provision. In cases of direct discrimination, the claimant must establish more than a difference in status and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination has been committed (*Madarassy v Nomura International plc* [2007] ICR 867).

38. In relation to indirect discrimination, section 19 of the Equality Act 2010 provides:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ('PCP') which is discriminatory in relation to a protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a PCP is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to person 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,
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Conclusions

39. The Tribunal found it convenient to consider the question of discrimination first.

Direct age discrimination

40. The claimant was 50 years old at the time of her dismissal. It was not entirely clear what age group the claimant considered herself to be part of. In her Skeleton Argument she refers to colleagues between the ages of 43 and 53 who have been dismissed, and she confirmed in evidence that she considered age 43 to be within her age bracket.

41. The claimant compares herself to Ms Baturi who was age 29 and Ms Yeung who was age 25, both of whom were not made redundant, alternatively hypothetical comparators. Ms Baturi was a spa therapist. She worked 40

hours over 5 days, a full time role. Ms Yeung was an expert. She also worked 40 hours over 5 days.

42. The first question to be considered is whether Ms Baturi and Ms Yeung are appropriate comparators. We find that they were not comparable to the claimant because they were working full time roles as compared to the claimant's one day role. We go on to consider whether the respondent would have treated a hypothetical comparator less favourably than the claimant because of age.

43. We find that there was no less favourable treatment of the claimant compared to younger employees. Even if Ms Baturi and Ms Yeung were appropriate comparators we note that, because she scored the highest in her selection pool, the claimant would have had first choice over the jobs offered to Ms Baturi and Ms Yeung if she had wanted them. We also note that an employee who was in the age bracket the claimant identifies with, Ms Coulston, was retained in a role after showing some flexibility in the hours that she would work. In any event, there is no evidence that any decisions were made based on age. If anything, according to Ms Davies, the respondent would have preferred those in the older age bracket as that reflected the average age of consumers. The selection criteria adopted by the respondent favoured those who were more experienced which, by the claimant's logic, would be older employees. Finally we note that Mr Van de Merwe did his utmost to encourage the claimant, Ms Lewis and Ms Mann to work with him to find alternative solutions and to keep them in employment. We do not find there is anything in this case from which the Tribunal could conclude that age discrimination has occurred.

44. In the circumstances the claim for direct age discrimination is dismissed.

<u>Indirect age discrimination</u>

45. The first question is whether the Respondent applied a PCP of selecting for redundancy those who earned more because of their length of service and experience. We find that there was not. The selection criteria adopted by the respondent related purely to skills, performance and disciplinary action and did not relate to pay or length of service. In any event those with greater length of service would tend to have greater experience and would therefore tend to perform better in the selection criteria. Further, the Tribunal could find no correlation in the evidence presented between levels of pay and who was retained or not or between levels of pay and age. For example, Ms Coulston's rate of pay was £12.18 per hour, which is more than Ms Manning, who was made redundant, on £12.06. Ms Manning was older than Ms Coulston at age 43. Ms Mann, who was also made redundant, earned £13.77 per hour but was younger than Ms Coulston who was retained.

46. In the circumstances the claim for indirect age discrimination must fail. We have nevertheless considered whether there was a disadvantage to the claimant had such a PCP been applied and find that there was not. As noted previously, the claimant scored the highest in her selection pool and would have had a free choice of roles had she wanted to accept any of them.

<u>Indirect sex discrimination</u>

47. The first question is whether the Respondent applied a PCP not to retain any employees who worked less than 20 hours a week. We find that there was not. There was an initial decision by the respondent to remove such roles from the rota. However during individual consultations Mr Van de Merwe demonstrated flexibility and did consider roles of less than 20 hours per week. For example, Ms Coulston was retained on a role of 10 hours per week worked over 2 days, and Ms Lewis was offered a role of 15 hours per week worked over 3 days. We find that the claimant herself was offered the possibility of reduced hours on a Sunday in the email of 30 June 2020. Nor does this evidence suggest that there was any disadvantage to the group of women who were part-time or to the claimant individually. While it is accepted by the respondent that generally it is women who are part-time because they bear the greater burden of child care, we find that there was no actual disadvantage here because of the flexible approach adopted by the respondent.

48. In the circumstances the claim for indirect sex discrimination fails.

Unfair dismissal

49. The first question is what was the reason for dismissal? The Tribunal accepts that the reason for dismissal was redundancy. It is obvious that the pandemic had a significant impact on retail businesses across the UK. The respondent was entitled to make a business decision to reduce overall costs, which included a reduction in full time equivalent hours across the business. In the case of the Harrods La Mer counter the decision was taken to reduce the FTE from 10.6 to 8.6. This amounts to a diminution in the requirement for employees to carry out work of a particular kind at that location, which is within the definition of redundancy at section 139 of the Employment Rights Act 1996. The claimant argues that there was no redundancy situation for her because there was still a requirement for a full day to be worked on a Sunday, however we accept the respondent's submission that the situation must be viewed as a whole and not in respect of the claimant's position alone. The claimant has not put forward any other reason for dismissal, save for a discriminatory reason which we have already rejected.

50. If the reason for dismissal was redundancy the Tribunal must go on to consider whether the dismissal was fair or unfair.

51. The Tribunal is satisfied that the respondent adopted objective selection criteria and applied them fairly. The selection criteria were skills, performance and discipline based. The claimant in fact scored the highest in her selection pool.

52. The Tribunal is satisfied that the respondent adopted a fair selection pool of experts, excluding management. We accept the respondent's evidence that there was a separate redundancy exercise conducted for management. While this led to two members of management ultimately being offered expert roles, we accept the respondent's position that as the highest scorer in the expert pool had the claimant wanted either such role she would have had priority over the managers. Both were full time roles which would not have been suitable for the claimant.

53. In respect of consultation, the respondent consulted at both group and individual level. The claimant was invited to four separate consultation meetings and had additional telephone calls with Mr Van de Merwe to discuss her individual position. She was offered a right of appeal and an appeal hearing gave an additional layer of scrutiny to the process. The claimant criticises Mr Van de Merwe's approach to consultation on the basis that he was rigid and ignored her suggestion that she should keep her role. We find that Mr Van de Merwe's approach was in fact flexible. The claimant initially thanked him for his compassion towards her. He made numerous suggestions for alterations which might be accommodated in the new rota including reducing the claimant's hours on a Sunday which would have fit the 6 hours included in the rota. This approach was also evident in the offers made to other employees including Ms Lewis, Ms Mann and Ms Coulston. In the circumstances the Tribunal concludes that a fair consultation process was adopted.

54. The claimant's main criticism relates to suitable alternative employment. She argued that:

    (i) She ought to have been furloughed until October when her daughter would have started school and she could have taken on longer hours;

    (ii) Her role still existed and therefore should have been given to her;

    (iii) A full time position could have been split into multiple part time roles including her Sunday 8 hour role.

55. The Tribunal is satisfied with Ms Davies' explanation that furlough was not intended to be used to retain staff who would otherwise have been selected for redundancy. This would have been tantamount to fraud.

56. The claimant suggested in submissions that she could have taken on longer hours from September 2020 when her daughter started school. The Tribunal does not accept that this was ever raised as a suggestion by the claimant. She did ask to be placed on furlough until October but it does not appear in any of the notes of meetings that she suggested she could have taken on longer hours thereafter. This was also not anywhere in her written evidence. To the contrary, the notes of meetings and other correspondence clearly record that she considered there to be no alternative to retaining her 8 hour Sunday role.

57. The Tribunal is satisfied that the claimant's role no longer existed. Firstly, the respondent did not require anyone to work 8 hours on a Sunday as the store was only open for 6 hours. Secondly, the respondent required flexibility and continuity of cover throughout the week which meant that there was no longer any single role for Sunday cover. The Tribunal finds that it was reasonable for the respondent to make this business decision.

58. Despite this, in any event the claimant was offered reduced hours on a Sunday. The claimant now says she would have worked reduced hours. The claimant in her evidence initially said that she thought she had a discussion about reducing her hours on a Sunday but later accepted she had not said she would work reduced hours. The Tribunal notes again her

response to the email of 30 June 2020 which was that there was no alternative for her.

59. The Tribunal accepts the respondent's position that retaining the claimant's 8 hour role on a Sunday would have been effectively ring-fencing her role and removing her from the selection pool, which would have been unfair to others.

60. In respect of job sharing, the claimant and her witnesses all said that there was an agreement among the experts to each reduce their work by a day and for the claimant to retain her role working 8 hours on a Sunday, but that this was rejected. This point was raised in Ms Lewis' consultation with Mr Van de Merwe, who confirmed that not everyone was happy to agree to this. The Tribunal accepts that the experts did have such a discussion and that this was raised and rejected by management. We do not have live evidence from Mr Van de Merwe as to who had disagreed with the proposal. However, we find that it was not unreasonable for management to reject this from the perspective of business flexibility. The hours available was not the issue, two experts having resigned. The issue was that flexibility was required across the week. Mr Van de Merwe did discuss with each individual what flexibility they were able to offer, to the extent that he offered reduced hours and days to Ms Mann, Ms Lewis and Ms Coulston among others. This does not in any event assist the claimant, as a suggestion was made to her that she might retain a Sunday role, albeit at reduced hours. The Tribunal accepts the respondent's position that the claimant became completely intransigent about what she was prepared to do.

61. In all the circumstances the Tribunal accepts that the respondent was entitled to treat redundancy as a sufficient reason to dismiss the claimant and that dismissal was within a range of reasonable responses open to the respondent. The claim for unfair dismissal is therefore dismissed.

RECONSIDERATION

An application for reconsideration was made orally and in writing at the hearing. This was considered by Employment Judge Keogh and refused as having no reasonable prospects of success for the following reasons:

1. The first point raised in the application was that the respondent did treat the claimant less favourably than it treated younger lower paid staff.

2. This is addressed in the judgment. The individuals relied upon by the claimant were not appropriate comparators. Even if they were, there was no less favourable treatment of the claimant, who had first choice of the two jobs offered to the comparators but who did not want a full time role. Nor was there sufficient evidence to show any less favourable treatment because of age. *Madarassy* applies – it is not sufficient to show just a difference in age and a difference in treatment.

3. The next point raised was that the respondent failed to apply its own policies that provided guidance on the use of alternative unpaid absences related to health pandemics.

4. The Tribunal found that there was a redundancy situation in this case. The alternatives mentioned in the policy clearly related to short term closures of the business, whereby individuals might take days as paid holiday, unpaid holiday, or lieu days. This cannot have been intended to apply to a global pandemic such as Covid which led to long term closures of the business and very significant financial loss. It would not have been reasonable to expect the respondent to apply this policy in the circumstances.

5. The next point was that the respondent did not engage in meaningful consultations with the claimant in a manner that is acceptable in the eyes of the law.

6. The judgment of the Tribunal details the extensive consultation which was held. It is not incumbent on a respondent to share with employees that there may be a redundancy exercise before a firm decision is taken and plans put in place to implement a consultation. Nothing arises from the fact that information was not shared with the claimant before issuing the proposed rota on 2 June 2020 as there were substantial consultations after this date. The rota was a proposal only – it was open to change and was in fact changed during the course of the individual consultations.

7. The next point was that redundancy focuses on the closure of a business or a diminished requirement of services and goods whereas the respondent's exercise was purely due to financial uncertainties.

8. It is financial uncertainties which frequently lead to redundancy exercises taking place. The judgment details why a requirement for employees to carry out work of a particular kind at the claimant's location was diminished or expected to diminish, which falls squarely within the definition of redundancy in s139 of the Employment Rights Act 1996. Nothing turns on the staff not being permitted back to work when lockdown was lifted in June. It was reasonable for the respondent to conclude its consultations.

9. The next two points were taken together and relate to the issue of experts agreeing together to reduce their work by a day except for the claimant so that they could each keep their jobs.

10. The question for the Tribunal in considering the fact that the experts had met and agreed to drop a day each and retain the claimant in her role is not whether this would have been feasible, but whether it was unreasonable for the respondent to take a different approach based on its own assessment of its business needs. The Tribunal has found that it was not unreasonable for the respondent to negotiate individually with employees and see what flexibility they could offer, bearing in mind the way in which the new rota was structured. That structure was a business decision and it cannot be said to be outside the range of reasonable responses open to the respondent.

11. The next point relates to the claimant's request to remain on furlough.

12. It is accepted that the claimant was entitled to make a request to remain on furlough. However the Tribunal accepted the evidence of Ms Davies that it would have been inappropriate to allow the same in circumstances where the claimant would otherwise be selected for redundancy.

13. The next point was that the respondent issued a new rota and Mr Van de Merwe informed the claimant on 18 June there would be no changes to the rota.

14. This is a misreading of the email in question, which states that there had been no changes to the rota and this would be used for mapping suitable alternative employment. It did not mean that there would be no changes to the rota and in fact Mr Van de Merwe did make changes to it (for example in relation to Ms Coulston) and offered to make further changes, including considering a reduction of hours on a Sunday for the claimant.

15. The next point was that Mr Van de Merwe's witness statement is incorrect when he says that he incorporated the 30/4 role after the second consultation meeting.

16. This was not raised in evidence or submissions by the claimant and is a new point. Having considered it, nothing arises from the timing of the role offered to Ms Coulston. It is clear from correspondence that Mr Van de Merwe continued to attempt to negotiate different hours with other members of staff, including the claimant, but all offers made were rejected.

17. The next point was that a PCP was introduced and provided to Beccy Davies by Rebecca Ramsey. This refers to the email which states, 'As a brand we within the consultations we proposed to increase all 1 day positions to a minimum of 2 days 10 hours'.

18. This was stated to be a proposal, not a rigid policy. In any event there has been no application to amend the PCPs relied on in this matter.

19. The next point was that a transparent and fair consultation process was not observed and Ms Davies confirmed this by accepting the HR1 forms in her name was likely completed by another member of her team.

20. Ms Davies' evidence was in fact that she had completed the forms herself, using information provided by her team. Nothing arises from this point relevant to the issues.

21. The next point was an allegation of abuse of process relating to the introduction of late witness evidence and the way in which the bundle was produced.

22. These procedural issues were dealt with at the outset of the hearing and have no bearing on the evidence heard or judgment produced.

23. The next point was that there was no offer for the claimant to work less hours on a Sunday, as evidenced by the communication from Ms Ramsey to Ms Davies.

24. As already discussed the email from Ms Ramsey to Ms Davies enunciated proposals, not fixed policies. The Tribunal found as a fact that there was an offer by Mr Van de Merwe to the claimant to work fewer hours on the same day, as communicated in his email of 30 June 2020, which was rejected. The later internal email to Ms Davies has no bearing on this negotiation,

which the Tribunal found to be a genuine attempt to keep the claimant in work.

25. The final point was that *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699 is a similar case and should be applied.

26. This is a case in which a community nurse with three children was employed by a Trust to work two fixed days per week as part of a team of ten community nurses. Following a review of the trust's flexible working arrangements she was required to work flexibly, including the occasional weekend. She could not accept the new arrangements because of her caring responsibilities and was dismissed. The Tribunal found that the PCP being applied was the respondent's requirement for its community nurses to work flexibly, including at weekends, and that no evidence had been adduced of a disadvantage to the women of the team as a group compared to men. An appeal to the EAT was allowed on the basis that the appropriate pool for comparison was all the respondent's community nurses, not just the small team. Further the Tribunal should have taken judicial notice that women bore the greater child care responsibilities and that could limit their ability to work certain hours. The Tribunal had erred in not taking account of it and treating the claimant's case as unsupported by evidence.

27. This case can be distinguished from the present case, where the alleged PCP was that the Respondent applied a PCP not to retain any employees who worked less than 20 hours a week. That was simply not made out on the facts. The Tribunal did take judicial notice of the fact that women bore the greater child care responsibilities, however on the facts there was no group disadvantage as individual arrangements were put in place, and there was no individual disadvantage to the claimant because an offer was made for her to work reduced hours on a Sunday.

Employment Judge Keogh

Date 29 November 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

29/11/2022

FOR THE TRIBUNAL OFFICE