



EMPLOYMENT TRIBUNALS

Claimant: Ms K King

Respondent: British Transport Police

Heard at: London Central

On: 21, 22 and 23 September
2022
18 November (in chambers)

Before: Employment Judge H Grewal
Mr I McLaughlin & Mr D Schofield

Representation

Claimant: In person

Respondent: Ms S Cowen, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1 The complaint of less favourable treatment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is well-founded;
- 2 The complaint of indirect sex discrimination under the Equality Act 2010 is well-founded;
- 3 The complaint of direct sex discrimination under the Equality Act 2010 is not well-founded.

REASONS

1 In a claim presented on 6 July 2021 the Claimant complained of less favourable treatment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and sex discrimination. She commenced Early Conciliation ("EC") on 1 May 2021 and the EC certificate was granted on 12 June 2021.

The Issues

2 The issues to be determined were clarified and agreed at a preliminary hearing on 17 February 2022 and reconfirmed at the start of the hearing. They are as follows.

Part-Time worker discrimination

2.1 Whether in refusing the Claimant's application to work for six months after Compulsory Retirement Age ("CRA") the Respondent treated her less favourably than it treated comparable full-time workers on the ground that she was a part-time worker;

2.2 If it did, whether the treatment was justified on objective grounds.

Direct sex discrimination

2.3 Whether in refusing the Claimant's application to work for six months after CRA the Respondent on the grounds of sex treated her less favourably than it treated or would have treated men in similar circumstances.

Indirect sex discrimination

2.4 Whether the Respondent applied a provision, criterion or practice ("PCP") that in order to be allowed to work beyond CRA an Inspector had to work full-time;

2.5 If it did, whether that PCP put women at a particular disadvantage when compared with men and whether it put the Claimant at that disadvantage;

2.6 If it did, whether the Respondent has shown it to be a proportionate means of achieving a legitimate aim.

The Law

3 Regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the 2000 Regulations") provides,

"(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker –

- (a) as regards the terms of his contract, or*
- (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.*

(2) *The right conferred by paragraph (1) applies only if –*

- (a) *the treatment is on the ground that the worker is a part-time worker, and*
- (b) *the treatment is not justified on objective grounds.”*

Regulation 2(4) provides

“A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place –

(a) both workers are –

*(i) employed by the same employer under the same type of contract, and
(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and*

(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.”

Where a worker presents a complaint to the employment tribunal, it is for the employer to identify the ground for the less favourable treatment – regulation 8(6) of the 2000 Regulations.

5 The part-time worker status does not have to be the sole cause of the less favourable treatment, but it must be the effective and predominant cause of it – Sharma v Manchester City Council [2008] ICR 623 and Carl v University of Sheffield [2009] ICR 1286.

6 In O'Brien v Ministry of Justice [2013] UKSC 6 the Supreme Court, at paragraph 44 of its judgment, set out the guidance given by the CJEU in that case on what is meant by “objective grounds” in paragraphs 64 to 66 of its judgment –

“64 ...the concept ‘objective grounds’ ... must be understood as not permitting a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. On the contrary, that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose ...

66. It must be recalled that budgetary considerations cannot justify discrimination.”

The opinion of Advocate-General Kokott at paragraph 62 of the CJEU decision was,

“The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective

pursued."

In considering whether the Ministry of Justice had established justification on objective grounds, the Supreme Court said,

"However, in this as in any other human rights context, the court is likely to treat with greater respect a justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted ... it is difficult for the Ministry to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at that time."

7 Section 13(1) of the Equality Act 2010 ("EA 2010") provides,

"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."

Section 19 EA 2010 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."*

Sex is a protected characteristic and a relevant protected characteristic for the purposes of section 19(1). On a comparison of cases for the purposes of section 13 or 19 there must be no material differences between the circumstances relating to each case.

8 In **British Airways plc v Starmer [2005] IRLR 862** the EAT held that the Employment Tribunal did not err in finding that in rejecting the claimant pilot's application to change from full-time working to working 50% of the time, and requiring her to work at 75% of full-time, the employers had applied a "provision, criterion or practice" within the meaning of the predecessor of section 19(2)(a) EA 2010.

9 In **Ishola v Transport for London [2020] EWCA Civ 112** Simler LJ said,

"In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicting how similar cases are generally treated or how a similar case would be treated if it

occurred again. It seems to me that “practice” here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or “practice” to have been applied to anyone else in fact. Something may be a practice or done “in practice” if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees.”

10 The effect of section 23(1) EA 2010 is that the “pool” of individuals upon whom the effect of the provision, criterion or practice is evaluated must be populated by persons whose circumstances are the same, or not materially different from the claimant. The EHRC Statutory Code of Practice, at paragraph 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 and negatively, while excluding workers who are not affected by it, either positively or negatively.”

11 In **Bilka Kaufhaus GmbH v Weber von Hartz C-170/84 [1986] IRLR 317** the ECJ held that a discriminatory condition was justified,

“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.”

In **Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601** Lady Hale summarised the position as follows,

“To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.”

12 In **Heskett v Secretary of State for Justice [2020] EWCA Civ 1487** the Court of Appeal held that there was an established principle that the saving or avoidance of costs would not, without more, amount to the achieving of a ‘legitimate aim’ for the purpose of the defence of justification in a discrimination claim; but that principle only bit where the aim was ‘solely’ to avoid costs. An employer’s need to reduce its expenditure, and specifically its staff costs, in order to balance its books could constitute a legitimate aim for the purposes of a justification defence. If it was permissible for an employer to rely, as a legitimate aim, on a real need to reduce or constrain staffing costs, it still had to show that the measures complained of represented a proportionate means of achieving that aim, having regard to their disparate impact on the group in question.

The Evidence

13 The Claimant gave evidence in support of her claim. The following witnesses gave evidence on behalf of the Respondent – Chief Inspector Hodgkiss (Commander, West Midlands), Superintendent Sue Peters (Sub-Divisional Commander, Midlands), Chief Superintendent Martin Fry (Divisional Commander, London and the South East of England), Marie Baker (nee Stacey) (People Business Partner), and Arthur

Churchill (People Business Partner). Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

14 The Respondent is the national police force for the railways and is responsible for providing policing services to rail operators, staff and passengers throughout England, Scotland and Wales. It has three main geographical divisions – B Division which covers London and parts of the South East, D Division which covers Scotland and C Division which covers the parts of England and Wales that are between the other two divisions. The C Division comprises the following sub-divisions/sectors – Midlands, Pennines and Wales and Western.

15 The Claimant was born on 16 April 1961. She was a member of the West Midlands Police Force from 16 October 1979 to 16 October 2009 when she retired as a Police Inspector.

16 After retirement the Claimant applied to work part-time (0.5/20 hours a week) with the Respondent. She commenced employment with the Respondent as a Police Inspector on 15 February 2010 and was posted to the Force Control Room in Birmingham. She was contracted to work 20 hours a week, but was required to work 40 hours a week for the first three months.

17 In January 2016 following a restructure of the Control Room the Claimant was posted to a Duty Officer/Inspector role based at Birmingham New Street. The role of Duty Officer involves the supervision and management of operational incidents on a 24/7 basis. There has to be a Duty Officer on all shifts. There were three different shifts – early, late and night. The Claimant was posted to that role as a part-time (0.5) Inspector. From January 2016 to November 2020 there was another Duty Inspector, C Fellows, who also worked part-time (0.5).

18 The Respondent has adopted the Home Office Forces' Compulsory Retirement Age ("CRA") which applies to all police officers. The CRA for most officer ranks is 60. The Respondent's Retirement and Re-engagement ("R and R") Policy and Procedure states that the Human Resources Business Centre ("HRBC") will write to officers within six weeks of their 59th birthday giving them formal notification of compulsory retirement on their 60th birthday and of their right to apply to continue in post after their compulsory retirement date. It states that the Respondent will consider all applications but is not obliged to agree to any request.

19 The procedure for making and processing the application is set out in the R and R Policy and Procedure. It provides that any application to continue working beyond CRA must be made at least three months before the officer's CRA and that any application made after three months will not be considered. The application must be submitted to the officer's line manager who must meet the applicant within ten working days of receiving the application to discuss the request. The applicant has a right to bring a companion to the meeting. It continues,

"The line manager must gather sufficient information at the meeting to ensure full consideration of the request. Items which need to be considered are:

Workforce Planning

- *Is the officer carrying out a specialist role?*
- *Is there a continuing need for the post to be assigned to a police officer?*
- *Would there be any short-term or long-term difficulties filling the post with another officer?*
- *Are there vacancies at the same or nearby locations which are proving difficult to fill and which, on an exceptional basis, this officer could fulfil?*

Financial impact on BTP

- *Would retaining this officer in service be financially viable and beneficial to BTP?*

Performance, attendance and discipline record

- *Considered objectively, does the officer have any adverse performance, attendance or discipline issues? If so, have these been confirmed previously in PDRs or other records?*

Medical Assessment

- *Is the role appropriate for the officer's level of mental and/or physical fitness?*
- *Where appropriate, is the officer capable of being deployed to operational policing duties?"*

It then states that after the meeting the line manager must consult with the HR Advisor and complete Part 2 of the form with his/her recommendation and forward it to the Divisional Commander/Head of Department. The Divisional Commander has to review the application and complete Part 3 of the form and endorse the application as approved or rejected. If the Divisional Commander does not approve the application, he/she must give reasons. The form is then to be returned to the line manager who must write to the applicant with the final decision. The letter must also state that the applicant has a right to appeal the decision.

20 The grounds of appeal may be failure to follow process, inconsistent or inappropriate decision, bias or discrimination during the process and any extenuating circumstances not previously considered or new evidence coming to light. The procedure provides that at the appeal the Chair must gather sufficient information to determine whether to uphold or dismiss the appeal. The Chair may adjourn the hearing to investigate the grounds of appeal with the line manager, Divisional Commander/Head of Department or others.

21 The Respondent does not have any policies in respect of Equal Opportunities or part-time working.

22 On 19 March 2018 Inspector S Lawman, a Duty Officer in the Pennines sector, applied to continue working for 12 months after his CRA on 3 March 2019. The application was initially considered by the Pennine Workforce Planning and the decision made at that time was that it could not be supported. It was reconsidered on by the Workforce Planning team on 26 July 2018 and was fully supported. The reasons given by his line manager for recommending that his application be approved were that Inspector Lawman was an asset to the Force in his role as Duty Officer and,

"The current situation in respect of vacancy gaps in both the Inspector and Chief Inspector ranks; there are a high number of Officers in Temporary roles lacking operational experience and indeed formal qualifications; it is key to retain experienced Officers in the Inspector ranks where there are opportunities to do so. The Promotion to Inspector Boards are likely to take place towards the year end or in the earlier part of next year and again there is a clear case for retaining experienced Officers until positions are filled."

The recommendation was approved by the Area Commander/Head of Department. Inspector Lawman's employment was extended to 3 March 2020. Inspector Lawman worked full-time and is male.

23 On 1 October 2018 Inspector J Archer, Duty Officer in Reading in the Wales and Western sub-division, applied to continue working for 12 months after his CRA on 10 May 2019. His line manager recommended that his application be approved for the following reason,

"The western sub-division in particular has no-one qualified or working towards their Inspector promotion exam. This leaves us in a vulnerable position when considering how we would fill up such a vital position as Duty officer because in this role they provide a leadership and decision making function 24/7."

It was supported by the Superintendent for the same reason. Inspector Archer's employment was extended until 3 March 2020. Inspector Archer was full-time Inspector and is male.

24 On 6 December 2018 Inspector A applied to continue working for 12 months after his CRA on 29 December 2019. The information relating to the station and Division of all anonymised Inspectors was redacted. All the anonymised Inspectors worked full-time and are male. His application was supported by his line manager. He did not cite any Workforce Planning reasons for supporting it. The application appeared not to have been reviewed by a Superintendent/Head of Department. His employment was extended to 29 December 2020.

25 On 1 April 2019 Inspector S Lawman applied to continue working for a further 12 months after 3 March 2020. His line manager recommended approval of his application. The only reason given for the recommendation was,

"There is currently a lack of experience in the duty officers and PI Lawman gives great knowledge and guidance to his colleagues. PI Lawman has demonstrated over many years that he is a valuable asset to BTP."

The recommendation was approved by Chief Superintendent Gregory. Inspector Lawman's appointment was extended for a further 12 months to 3 March 2021.

26 On 18 October 2019 Inspector C applied to continue working for 12 months after his CRA in August 2020. His application was supported by his line manager and Chief Superintendent. No workforce planning factors were given for supporting his application. His employment was extended to August 2021.

27 In November 2019 Inspector D applied to continue working for 12 months after his

CRA on 5 May 2020. His application was supported by his line manager and approved by the Superintendent. His employment was extended to 5 May 2021.

28 On 31 December 2019 Inspector H applied to continue working for 12 months after his CRA on 5 December 2020. His application was approved and his employment was extended to 5 December 2021.

29 On 27 January 2020 Inspector A applied to continue working for 12 months after his CRA on 29 December 2020. In supporting his application his line manager said,

"He is currently OIC at [redacted] which is experiencing a shortage of officers. This will hopefully be resolved by the end of the year but [Inspector A's] awareness and input would be highly beneficial."

His application was approved and his employment was extended to 29 December 2021.

30 On 24 March 2020 Chief Supt. Gregory (Divisional Commander of C Division) requested special permission from HR to retain for six months the services of three officers in his Division who were due to retire imminently. One of them was Inspector J Archer who was due to retire on 10 May 2020. The permission was granted and Inspector Archer's employment was extended to 10 November 2020.

31 On 3 July 2020 Inspector B applied to continue working for 12 months after his CRA on 28 July 2021. The application was approved and his employment was extended to 28 July 2022.

32 On 1 May 2020 HRBC notified the Claimant that she would reach her CRA on 16 April 2021. She was advised that she had the right not to be retired and to continue to work and that if she wished to apply she must do so no later than 16 January 2021 using the request form which was enclosed with the letter.

33 On 22 September 2020 Inspector Archer, who was due to retire on 10 November 2020, applied to continue working part-time (20 hours a week) for six months. In his application he said,

"I would like BTP to consider that I am applying to work part-time (20 hours per week pro rata) as a Duty Officer in order to fulfil an arising part-time vacancy which has traditionally been hard to fill. I understand that, currently, there are plans to fill the part time vacancy with a full time vacancy which would create a situation whereby the DO Cadre would be over establishment. I believe that in 6 months' time the second part-time officer will also be retiring."

The "arising part-time vacancy" was a reference to the vacancy that was going to be created by the departure of Inspector Fellows in November 2020. The reference to the second part-time officer was a reference to the Claimant. It is clear from what Inspector Archer said that someone had told him in advance of the vacancy that was due to arise and of the Claimant's retirement date. It is very likely that he was encouraged to apply for the role. The part of the form dealing with a recommendation from his line manager was not filled in. His application was approved by Supt. Oram on the day that it was made. Inspector Archer's employment was extended to work part-time from November 2020 to the end of April 2021.

34 When Inspector Archer started in the part-time role he worked in a different location from the Claimant and they never met each other. The Claimant's working pattern was to work 40 hours in one week and then not to work the following week (one week on, one week off). Inspector Archer worked 40 hours a week in the weeks when the Claimant was off.

35 On 14 September 2020 Inspector Lawman applied, for the third time, to continue working for 12 months after his retirement date of 3 March 2021. His line manager recommended that the application be approved. It was not approved by Supt. Oram. The reasons that he gave for not approving it were,

"PI Lawman has been extended in the role as a divisional duty officer on two previous occasions. Whilst the duty officer role is one that requires professional competence and sound judgment it is a role that newly promoted Inspectors are routinely promoted into. There are a number of Police Sergeants across BTP qualified by exam to the rank of Inspector and I assess that the post of duty officer in the North of England will be much sought after either on promotion or on HGD. [Higher Grade Duties denotes someone acting up in a role].

...

There is a general planned reduction in the establishment of dedicated duty officers on C-Division and there are sufficient qualified officers who are likely to be available to fill the role from March 2021."

36 Inspector Lawman appealed the decision to refuse the extension. The appeal was heard by Chief Supt. Fry on 7 December 2020. He was accompanied by A Churchill, People Business Partner. On 14 September Chief Supt. Fry sent Inspector Lawman the outcome of the appeal. He allowed the appeal and granted an extension for six months from 3 March 2021. His reasons for doing so were as follows,

"The Duty officer cadre has two vacancies that C Division hope to be filled from the forthcoming Inspector promotion panel in January 2021. Any successful candidates will be posted from February 2021 onwards subject to sufficient numbers of officers being promoted which at this time is uncertain. Uppermost in my mind is to ensure that there is no impact on the delivery of the Duty Officer responsibilities between now and into 2021 and at this time it is unclear whether the two current vacancies will be filled next year or whether C Division will have to maintain the cadre with officers on HGD."

He felt that six months was a reasonable time for the promotion boards and postings to be concluded and for C Division to assess the impact, if any, on the Duty Officer cadre.

37 On 2 November 2020 Detective Inspector G applied to continue working for 12 months after his CRA on 16 June 2021. His application was approved.

38 On 5 January 2021 Inspector F applied to continue working for 12 months after his CRA on 27 June 2021. His application was approved.

39 On 15 January 2021 HRBP sent an email to the Claimant asking her whether she

was going to retire on 16 April 2021 or was going to seek an extension. She was asked to complete an attached form if she wanted to apply for an extension. On 22 January 2021 the Claimant applied to continue working for six months after 16 April 2021. Although the application was made late (less than three months before retirement) it was still considered. Lauren Edwards in HR advised Chief Inspector Hodgkiss, the Claimant's line manager, that it would be beneficial to wait until "*the boards posting panel for confirmed remaining vacancies*" as the rationale of another DO's CRA appeal being allowed was "*due to no clear resolution on any short or long difficulties filling the roles and this not being concluded until postings panels. [sic]*" That was a reference to Inspector Lawman's appeal. That was not an accurate reflection of the reason for allowing the appeal. Inspector Lawman's application had been originally refused because of the impending promotion boards. It had been allowed on appeal until September 2021 on the basis that that was the amount of time it would take for the promotion boards postings to be concluded.

40 The promotion board assessments for those seeking promotion to Inspector were taking place in January 2021 (as was referred to in Inspector Lawman's appeal).

41 On 1 February 2021 Chief Inspector Hodgkiss telephoned the Claimant to discuss her application. CI Hodgkiss told the Claimant that he would prefer to wait until he knew the outcome of the promotion board before he made his decision on her application. He said that if he were to make a decision before then, it would be to refuse her application as her felt that allowing it would be detrimental to the newly promoted Inspectors. In those circumstances, the Claimant agreed to wait until the outcome of the promotion board. CI Hodgkiss' evidence was that his rationale for deferring it was that if there were not enough Inspectors promoted, it might be that there was no one capable of filling the role on a permanent basis. In those circumstances he would be more likely to support the Claimant's application. The Claimant queried whether the decision would be based on her part-time status and CI Hodgkiss assured her that it would not. Had he applied the same logic to the Claimant's application that Chief Supt Fry had to Inspector Lawman's appeal, he could have extended the Claimant's CRA to September 2021.

42 On 4 February 2021 Inspector D applied for the second time to continue working for 12 months after his retirement date of 5 May 2021. His application was approved.

43 The promotion board postings were known on 1 March 2021. There were 37 newly appointed Inspectors and 25 vacancies for Inspectors. Those who pass the board go through a posting process led by senior officers and HR against the available vacancies. Those who do not succeed in finding a suitable Inspector vacancy are held in a "promotion pool" for 12 months and are offered Inspector vacancies as and when they arise. If officers are not promoted within 12 months they have to go through another promotion board. 12 of the newly promoted Inspectors were put in the pool.

44 On 2 March 2021 CI Hodgkiss set out his recommendation on the Claimant's application form and spoke to her and told her what his recommendation was. Prior to doing that, he did not check to see where the newly promoted Inspectors in the pool were based. Had he done so, he would have seen that only one of them was in C Division and he was based in Manchester. It was, therefore, very unlikely that any of the Inspectors in the pool would fill a vacancy created by the departure of the Claimant. He recommended that the Claimant's application should not be approved. His reasoning was as follows,

"The posting panel is very relevant to Karen's request because it feeds force duty officer capability. Historically, over the last few years we have been lacking in suitable cover of this role leading to higher grade duties widespread across C Division plus extensions of other duty officers due to retire. The situation has now changed as a result of the recent board process which saw a record number of candidates pass totaling 37 officers. There are not currently enough spare Inspector vacancies with only 25 officers posted to Inspector roles leaving 12 officers awaiting postings. To extend Karen would be detrimental to other officers development regardless of the experience Karen has."

45 On 2 March 2021 HR informed CI Hodgkiss that a consultation relating to a restructure of the Control Room in Birmingham had been launched and that it was likely to lead to an inspector role disappearing and that the person in that role (P Ryan) would need to be relocated to another role. The consultation was likely to take some time. Supt. Peters' evidence was that she did not anticipate that P Ryan would be able to start a new role until July 2021.

46 On 4 March 2021 Supt. Peters sought information from HR about the establishment of Duty Officers in Midlands. The response was there were three full-time Duty Officers and two part-time (0.5) Duty Officers – the Claimant and Inspector Archer who was retiring at the end of April 2021.

47 On 9 March 2021 Supt. Peters met with Chief Supt. A Gregory (Divisional Commander of C Division) and Marie Stacey (as she then was) from HR to discuss the Claimant's application. Supt. Peters made a brief note of the discussion. There was a discussion about the possible redeployment of P Ryan. Supt. Peters noted that the consultation would finish in May and P Ryan would be "*in place*" on 12 July. She also noted that the Claimant worked 20 hours and that it was $\frac{1}{2}$ post. They discussed the recent promotion board results. She noted "*dignified exit*".

48 ON 9 March 2021 Inspector C applied for the second time to continue working for 12 months after his retirement date of 31 August 2021. The application was approved.

49 On 21 March 2021 Supt. Peters completed the second section in the Claimant's application form. She approved the extension of the Claimant's employment to 4 May 2021. Her rationale for doing that was set out as follows,

"The other party to the job share flexible roster that PI King works with will no longer be in BTP (retirement).

It is neither efficient nor sustainable to continue with a 0.5 role beyond 4 May.

As CI Hodgkiss states – a vacancy in the DO roster will be an opportunity for development of a colleague and it would not be right to hamper this going forwards.

I must consider that A division will very soon be undergoing a restructure – in consultation at present – to reduce 1 x Inspector post from their establishment. This will affect the Birmingham region in terms of an Inspector entitled to redeployment."

50 On 22 March HRBP wrote to the Claimant that her application to extend beyond 16 April 2021 had been authorised only in part by Supt. Peters and that her new date of retirement was 4 May 2021. She was not advised of her right of appeal.

51 Supt. Peters had arranged to speak to the Claimant on 26 March to inform her of her decision. She had not expected it to be communicated to the Claimant before that date. Supt. Peters spoke with the Claimant by telephone on 26 March. She went through the rationale that she had set out on the Claimant's form. Most of the discussion centered round the Claimant's part-time status and how that could be accommodated. The Claimant explained that she was not a "job share/flexible" worker and that she had always worked part-time for the Respondent. She said that when she left the Control Room she had been told that the Duty Officer role was one of the very few that could accommodate working 20 hours a week. Supt. Peters asked the Claimant what her solution would be when accommodating a part-time Inspector role. The Claimant said that a possibility would be that she could cover others when they were on annual leave. She said that she found it difficult to answer that question without having knowledge about vacancies, etc but she felt that it could be done. She said that she had always been flexible and had changed her duties to accommodate the roster, and Supt. Peters said that Nicky Moffatt, the rosters supervisor, had confirmed that. The Claimant said that she felt that the decision was based on her being part-time and she knew of other male Inspectors who had been granted an extension. Supt. Peters said that her being part-time was only part of the reason for not supporting her application and that the other reasons were the general development of other inspectors and the redeployment of an inspector who was being displaced. She said that she should have probably left the "job share/part-time" issue out of it but she had wanted to be transparent.

52 On 1 April 2021 the Claimant appealed against Supt Peters' decision on three grounds – bias against part-time officers (particularly female officers) and incorrect information being used to justify a negative decision/being treated less favourably, inconsistency in the decision making process and the CRA process not being followed within the legislation. In support of the first ground the Claimant said that she was aware that recently and presently a number of full-time inspectors (including those whose role was that of Duty Inspector) had been granted CRA extensions, and that some of them were in their second and third CRA extension period. She said that Supt. Peters had made it clear to her that it was not viable for a part-time officer to continue in the Duty Officer role and she had not been able to find any other role that could accommodate a part-time officer either. That, in her view, made it clear that the rationale given by CI Hodgkiss for not supporting her application was not the primary reason. In support of the second ground the Claimant said that the rationale given by CI Hodgkiss was at odds with that given by Supt. Peters. During the telephone conversation Supt. Peters had said that her being part-time was not the reason for her not approving the extension. When the Claimant had asked her why it had been discussed in such detail in the conversation and given as the primary reason by her on the form, Supt. Peters had reiterated that she simply could not find anywhere to place her despite wide ranging discussions with Chief Supt. Gregory and others.

53 On 2 April 2021 CI Hodgkiss made a general welfare telephone call to the Claimant. The Claimant mentioned her conversation with Supt. Peters and said that her being part-time had been discussed. CI Hodgkiss asked her whether she would consider working full-time for a period of three months. The Claimant asked him

whether that would be possible and he said that he could not guarantee anything. The Claimant said that it was something that she would consider if it was open to her.

54 On 1 April Ms Stacey contacted Arthur Churchill, who worked in HR in another division, and asked him whether he and Chief Supt. Martin Fry could hear the Claimant's appeal. They were both available to hear the appeal and the appeal hearing was fixed for 19 April 2021. In order to prepare for the appeal, Mr Churchill asked Ms Stacey to make certain inquiries. On 13 April Ms Stacey made inquiries about the number of Inspectors in the promotion pool and their locations. The response was that there was only one person in the pool who was on C Division.

55 The appeal hearing took place on 19 April 2021. The Claimant expanded upon the points that she had made in her written grounds of appeal.

56 Following the appeal, Mr Churchill made further inquiries of Ms Stacey. She confirmed that the one Inspector from C Division in the pool was based in Manchester and it was not viable that he would apply for the vacancy that would be created by the Claimant and Inspector Archer retiring. She said that she believed that Inspector Ryan would be displaced from July. She also confirmed that there were no other Inspector vacancies in West Midlands and that the Claimant and Inspector Archer were the only inspectors working part-time in C Division. Mr Churchill's response to Ms Stacey was that as it was unlikely that anyone from the pool would take up the Claimant's position and Inspector Ryan would not be available until July, it was likely that they would have to offer the Duty Officer role as HGD (acting up) on a temporary basis. He continued,

"So we would be letting a female 0.5 FTE go and replacing with a HGD for at least 3 months or longer (till July or later Pam transition).

Question – for Martin to ask Sue P and Allan G but what's your view? Karen is granted an ext – the other 50% is advertised to see what you get internally; outcome A no takers – so you're 50% down; would C Div then be willing to advertise it as a whole vac; so will be 0.5 over est for a period of time. Not assessed the impact on rotas or anything – potential impact on Finance but would C churn sufficient to cover it."

Ms Stacey agreed that it was something to raise with Chief Supt. Gregory. She also confirmed that no other female Inspector on C Division had applied for a CRA extension. On 20 April Ms Stacey also told Mr Churchill that Inspector Archer had already left.

57 On 21 April Mr Churchill supplied all the above information to Chief Supt Fry and shared the views that he had expressed to Ms Stacey with him. On the same day he asked Ms Stacey to test the water with CI Hodgkiss on the theoretical options. Ms Stacey responded,

"Other option would be I presume if she was willing to offer to do full time for a short period? Not suggesting we would force the issue though just if she wished to?

I have called Chris given they have only 3 posts now on Midlands I think he would struggle to have a 0.5 gap so presume it would be more likely they would need to go 0.5 over short term (finance permitting)

In terms of acting, they were ready to put out HGD and have 2 qualified candidates that could cover if needed.”

58 On 26 April Chief Supt. Fry and Mr Churchill spoke with Supt. Peters to discuss her rationale for her decision. More information had been obtained since Supt. Peters made her decision which had made it clear that it was unlikely that there would be any Inspector available to fill the role for at least three months. Chief Supt Fry did not make any inquiries to see whether C Division had made any attempts to find someone internally who might be interested in covering the role part-time. He did not discuss with her the options and questions that had been flagged up by Mr Chruchill in his email to him. Chief Supt Fry's evidence to the Tribunal was that the new information that had come to light did not change the fact that there would still be a 0.5 vacancy and the fact that the Claimant worked 0.5. He also said that had Inspector Archer applied for an extension and appealed as a 0.5 Duty Officer the rationale of Supt. Peters and his conclusion would have been the same.

59 On 27 April Chief Supt. Fry sent the Claimant his decision. He dismissed her appeal. His response to the points made in her first ground of appeal (bias against part-time officers) was as follows,

“I am aware that there have been retirement extensions to C Division Duty Officers as there has not been sufficient cover in the past or a pool of officers waiting to be promoted to fill the vacancies...”

I have spoken to Supt Peters who clarified her rationale for declining the retirement extension centred on the lack of sustainability of not filling 0.5 duty officer role in a critical operational post. In addition, a full-time vacancy would allow the post to be used as development opportunity for other officers. Further consideration was given to the fact that there will be a displaced inspector from Contact Management who will need to have a substantive post and who is based in Birmingham, so this was upper most in Supt Peter’s decision.

The decision to decline your extension is permissible under the Recruitment and Engagement Policy based on workforce planning considerations, in particular would there be any short- or long-term difficulties in filling the post with another officer. In this case it would be potentially difficult to fill 0.5 of vacancy in a critical role... However, the key point in my view is a displaced inspector will need to be found a post in Birmingham and with your retirement and the current 0.5 vacancy this will allow this to be filled. Therefore, there are no issues with the Duty Officer post being filled and C Division can cover the interim gap by using the post as a development opportunity for other officers. After consideration I do not feel that there has been any bias towards you due to being part-time. The fact is this is the first time that a part time Duty Officer has applied for an extension and a business rationale has been applied to the decision as I have outlined above in terms of the ability to fill the post.”

Chief Supt. Fry did not think that there had been any inconsistency between the rationales given by CI Hodgkiss and Supt. Peters. CI Hodgkiss' decision was based on the fact that there were 12 persons in the promotion pool awaiting appointment to Inspector vacancies. Supt. Peters had outlined three reasons in her rationale – they were based on the prevailing circumstances and took into consideration additional information that CI Hodgkiss did not consider as he was only considering the issues with the promotion board. His evidence to the Tribunal was that had the Claimant

worked full-time her application might well have been approved, although it might have been for a shorter period.

60 On 28 April 2021 a Police Sergeant at Birmingham New Street was appointed to undertake Higher Grade Duties as a Duty Officer to cover the Claimant's position. The Claimant retired on 4 May 2021.

61 P Ryan, the displaced Inspector, accepted a temporary HGD role as Chief Inspector elsewhere and did not fill the DO vacancy created by the departure of the Claimant and Inspector Archer. In August 2021 there were discussions between HR in C Division about advertising the vacancy. As at the date of the hearing on 22 September 2022 that role was still being filled by officer carrying out HGD (acting up into the role).

62 As at 31 March 2021 there were 2,304 male officers and 631 female officers working for British Transport Police. 39 of the male officers worked part-time and 77 of the female officers worked part-time. 1.69% of the male officers worked part-time and 12.2% of the female officers worked part-time. There were 192 Inspectors – 161 were men and 31 were women.

63 In response to a Freedom of Information request from the Claimant dated March 2021 the Respondent stated that between 2019 and 2021 15 Inspector rank applications had been submitted to continue working beyond CRA. 14 of them were from male inspectors and 1 was from a female inspector. Only one application was unsuccessful and that was from the female officer. In March 2021 33 police sergeants were performing Inspector duties on HGD (acting up); 8 of them were in C Division.

64 On 7 June 2021 Inspector E applied to continue working for 12 months after his retirement date of 16 June 2022. His application was approved.

65 On 2 September 2021 Inspector H applied for the second time to continue working for 12 months after his retirement date of 5 December 2021. His application was approved.

Conclusions

Part-time worker – less favourable treatment

66 It was not in dispute that the Claimant was a part-time worker (she worked 50% of the time worked by a full-time officer employed by the Respondent). It was equally not in dispute that failing to extend the Claimant's employment for six months after her CRA amounted to a "detriment" under the 2000 Regulations. At the time when the Claimant applied for that extension, she was a Duty Officer working in the C Division. We considered first whether Inspectors Lawman and Archer were comparable full-time workers in respect of the complaint made by the Claimant. They were full-time Duty Officers working in the C Division who had also applied to extend their employment beyond their CRAs. The Claimant and Inspectors Lawman and Archer were employed by the same employer under the same contract and they were engaged in the same work (they were all Duty Officers). All three of them worked or were based at the "same establishment" – C Division. It was argued on behalf of the

Respondent that the comparable full-time worker in this case would have to be a full-time Duty Officer who worked or was based in Birmingham. The term "establishment" is not defined in the 2000 Regulations, but having regard to the less favourable treatment complained of in this case and the way in which the Respondent was structured and organised, we considered that interpreting "establishment" to mean a particular city was too narrow and restrictive. It is noteworthy that the Respondent's case was that Inspector Archer (who did not work in Birmingham) was the person who shared the roster with the Claimant. It is difficult to see how it could then be said that they were working at different establishments. We considered that Duty Officers working in the same Division worked at the same establishment. We, therefore, concluded that Inspectors Lawman and Archer were comparable full-time workers.

67 It is clear that the Claimant was treated less favourably than Inspectors Lawman and Archer, each of whose employment was extended on three occasions beyond their CRA. We then considered whether the Claimant was treated less favourably than them on the ground that she was a part-time worker. In doing so, we considered whether the fact that she worked part-time was the effective and predominant cause of her extension being refused. In determining that issue we looked at Supt. Peters' reasons for refusing the Claimant's application and Chief Supt. Fry's reasons for rejecting her appeal. If Chief Supt. Fry had allowed the Claimant's appeal, he could have extended her employment to a specific date, as he did in the case of Inspector Lawman.

68 The primary reason given by Supt. Peters for refusing to extend the Claimant's employment beyond 4 May 2021 was that it was "neither efficient nor sustainable to continue with a 0.5 role" beyond that date. It was her primary reason not only because it was the first reason given, but also because the language used makes it clear that the Claimant's employment would not have been extended beyond that date even if the other two reasons given had not been there. At the time that Supt. Peters made her decision she knew that the earliest that Inspector Ryan might arrive would be July 2021, and if that been her primary reason she could have extended the Claimant's employment until July 2021. There was also no indication that there was an Inspector in the promotion pool who would be looking to fill the role within the next three months. Even when it became clear to Supt. Peters in April 2021 that it was very unlikely that anyone from the promotion pool would be interested in the vacancy created by the Claimant retiring, she did not change her mind. That suggests that that was not the predominant reason. We were satisfied that the predominant and effective reason for Supt Peters refusing to extend the Claimant's employment beyond 4 May 2021 was the fact that she worked part-time.

69 By the time Chief Supt. Fry came to make his decision on 27 April 2021 he had further information as a result of the inquiries that Mr Churchill had made. It was clear at that stage that there was no real possibility of any of the Inspectors in the promotion pool applying for the Claimant's vacancy and that if her employment was not extended the Duty Officer role would have to be covered by Sergeants acting up to the Inspector role. The only reason that remained for not extending it until July 2021 initially and to be reviewed at that stage was the fact that the Claimant was a part-time worker. Chief Supt Fry's evidence was that the new information that had come to light did not change the fact that the Claimant was 0.5 and it would leave a 0.5 vacancy. He also said that had the Claimant worked full-time her extension might well have been approved until July 2021. We concluded that the Claimant's part-time worker status (the fact that she worked 20 hours a week) as a Duty Officer was the effective and predominant reason for not extending her retirement beyond 4 May

2021.

70 We then considered whether the less favourable treatment of the Claimant on the grounds of her part-time worker status was objectively justified. In the Respondent's pleaded case it did not set out any particular justification for the less favourable treatment. In the narrative it set out the reasons given by Supt Peters for rejecting the Claimant's application and by Chief Supt Fry for rejecting her appeal. In a section headed "The law" in its response, it said,

"the reasons that the Respondent was unable to extend the Claimant's application for an extension were all sound business reasons, principally the lack of a vacant position which the Claimant would be able to take on – in circumstances where the Respondent was utilising its scarce public resources to fill all critical resources in the most efficient way possible"

In its closing submissions the Respondent relied on the following objectives to justify the unequal treatment effective workforce planning, appropriate levels of operational resilience in critical roles and providing development opportunities for newly promoted officers. In considering those objectives we bear in mind the guidance given by the CJEU in O'Brien v Ministry of Justice (see paragraph 6 above).

71 We considered firstly the objective of providing development opportunities for newly promoted officers and effective workforce planning to the extent that it relates to that. It is difficult to see how that could justify the unequal treatment when (a) no one initially made any inquiries as to whether any of the twelve inspectors in the promotion pool were likely to apply for the vacancy that would be created by the Claimant retiring and (b) when such inquiries were made it was clear that none of them would be filling that vacancy and it would have to be advertised as HGD. It was, therefore, clear to the Respondent before the determination of the Claimant's appeal that extension of her employment would not deprive any of the newly promoted inspectors of development opportunities and that they would need to recruit or appoint someone on HGD to carry out her role. It provides no justification for treating her less favourably because of her part-time status.

72 One of the matters relied upon to support the objective of effective workforce planning was the possible arrival of the displaced Inspector in July 2021. That does not justify extending the Claimant's employment only until 4 May 2021. It could have been extended until July 2021 and then reviewed depending on what happened with the displaced Inspector.

73 The main argument relied upon in support of the objective of effective workforce planning and appropriate levels of operational resilience in critical roles was that it was neither efficient nor sustainable for the Claimant to continue working part-time (20 hours) a week after the retirement of Inspector Archer. That has to be seen in the following context. The Claimant had been recruited to work part-time (20 hours a week) in February 2010 and she had worked part-time for nearly eleven years. She had worked five of those years as a Duty Officer. There were no issues with her performance, attendance and disciplinary record. She was an experienced Duty Officer. Prior to the retirement of Inspector Fellows the Respondent had managed to find someone who was prepared to fill the 0.5 Duty Officer role – a full time inspector who applied to extend his retirement date by six months in a part-time role. The Claimant had the same rights under the Respondent's Retirement and Re-engagement Policy as full-time Inspectors. She had made it clear from the start of the

process that she was concerned that her part-time status would be a factor in the determination of her application. There was no evidence of anyone having made any attempt to see whether there was someone who would be interested in temporarily filling a 0.5 Duty Officer role after the retirement of Inspector Archer as they had done when Inspector Fellows retired. That could have been an existing Inspector or a Sergeant on HGD. Mr Churchill had suggested advertising the 0.5 role internally. That was never done. There was no evidence that the options suggested by Mr Churchill, to avoid treating the Claimant less favourably, were discussed by Chief Supt. Fry with Supt. Peters. Mr Churchill was very conscious of the fact that they would be letting a female 0.5 FTE go and replacing her with a HGD for at least three months or longer. There was no precise and clear evidence about what the effect of C Division being 0.5 under establishment for six months would have been. The only evidence was a short general statement from Supt. Peters that other Duty Officers would have had to work longer or more shifts. However, we also took note of the fact that in September 2020 Supt Oram, in refusing Inspector Lawman's application, had said that there was a general planned reduction in the establishment of dedicated Duty Officers in C Division. Nor was there any clear and precise evidence what the effect of C Division being 0.5 over establishment for six months would be. When Inspector Fellow retired, the Respondent was prepared to do that if it did not find a 0.5 Duty Officer to take over his role. Neither of these two options were properly assessed. As Mr Churchill said in his email,

"so will be 0.5 over establishment for a period of time. Or run 50% light. Not assessed the impact on rotas or anything – nor impact on Finance but C div would probably have sufficient churn to cover it."

We also took into account that budgetary considerations alone cannot justify discrimination.

74 Having considered all the above we were not satisfied that the unequal treatment responded to a genuine need, was appropriate for achieving the objectives of effective workforce planning and appropriate levels of operational resilience in critical roles and was necessary for that purpose. It is difficult for the Respondent to justify the proportionality of the means chosen to carry out their aims when they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform their choice at the time. We, therefore, concluded that the less favourable treatment of the Claimant on the ground of her part-time status was not objectively justified.

Direct sex discrimination

75 The appropriate comparator for the direct sex discrimination complaint would be a male Duty Officer who worked part-time (0.5) and whose application was approved. We have concluded that the effective and predominant cause of the Claimant's application being refused was that she worked part-time. There was no actual comparator. When Inspector Archer's CRA was extended he was working full-time. There was no evidence from which we could infer that a male 0.5 Duty Officer would have been treated more favourably than the Claimant was. We concluded that a male part-time Duty Officer's application would have been refused for the same reason.

Indirect sex discrimination

76 We considered first of all whether the Respondent applied a provision, criterion or practice (“PCP”) that in order to be allowed to work beyond CRA an Inspector had to work full-time. We accept that the Respondent’s Retirement and Re-engagement policy does not state that only full-time officers will be allowed to work beyond CRA or that part-time officers are not entitled to apply to work beyond CRA. The policy makes it clear that while the Respondent will consider all applications, it is not obliged to agree to any request. The issue for us was whether the Respondent in practice applied such a PCP. In determining that issue, we applied the principle set out by Simler LJ in Ishola for London v Transport (see paragraph 9 above). We considered whether the refusal of the Claimant’s application carried with it an indication that it would be done again in future if a hypothetical or similar case arose again.

77 The evidence before us was that between March 2018 and June 2021 there were 18 applications from 11 Inspectors to work beyond their CRA. 10 of those Inspectors worked full-time and only 1 (the Claimant) worked part-time. Many of the full-time Inspectors made two applications, and one made three applications. The only application that was not approved was that of the part-time Inspector. The 17 applications made by full-time Inspectors were approved. Chief Supt. Fry said in the outcome of the Claimant’s appeal that it was the first time a part-time Duty Officer had applied for a CRA extension and that there had been a business rationale for refusing it. He also said that if Inspector Archer had applied for an extension when he was working part-time it would have been refused. In a period of over three years, the Respondent approved all the applications made by full-time Inspectors and refused the only one made by a part-time Inspector. The evidence of Chief Supt. Fry indicated that an application made by another part-time Inspector in similar circumstances would also be refused. We concluded on the basis of the evidence before us that the refusal of the Claimant’s application was not a one-off act but indicative of a PCP applied by the Respondent.

78 We then considered whether that PCP put women at a particular disadvantage when compared with men. The evidence was that in March 2021 there were 192 Inspectors and that 161 (84%) were men and 31 (16%) were women. The ratio of men to women at that level is slightly higher than the ratio for all officers. We did not have evidence about how many of the Inspectors worked full-time and how many worked part-time. We did, however, that evidence in respect of all the Respondent’s officers – 1.69% of the male officers worked part-time and 12.2% of the female officers worked part-time. There is no reason to think that the position at Inspector rank would be significantly different. The evidence that we had about the Inspectors who applied to work beyond CRA supports that view. The proportion of women officers working part-time is considerably greater than the proportion of male officers doing so. The same will apply in the case of Inspectors. We concluded that the PCP put women at a particular disadvantage when compared with men. It put the Claimant at that disadvantage.

79 We then considered whether the Respondent had shown that the PCP was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon by the Respondent were the same as its objective justifications for the less favourable treatment on the grounds of part-time status. We accept that they are legitimate aims. However, for the reasons that we have given for rejecting them as objective justification for the unequal treatment of part-time workers, we concluded that the PCP was not a proportionate means of achieving the legitimate aims. There will be cases where it will be possible to achieve the legitimate aims without applying

a PCP that discriminates against women and part-time workers. Each case needs to be looked at on its own merits in the same way that the cases of full-time Inspectors are considered. As the legitimate aims can be achieved in alternative way, the application of a discriminatory PCP cannot be a proportionate means of achieving those legitimate aims.

Employment Judge Grewal

Date: 15/12/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

15/12/2022

FOR THE TRIBUNAL OFFICE