

Neutral Citation Number: [2023] EAT 4

Case No: EA-2022-000534-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 February 2023

Before:

**HIS HONOUR JUDGE JAMES TAYLER
MR NICK AZIZ
MR STEVEN TORRANCE**

Between :

**MS M GLOVER
- and -
(1) LACOSTE UK LTD
(2) MR R HARMON**

Appellant

Respondents

GUS BAKER (instructed by Ronald Fletcher Baker LLP) for the **Appellant**
NATHAN ROBERTS (instructed by Stephenson Harwood LLP) for the **Respondents**

Hearing date: 20 December 2022

JUDGMENT

SUMMARY

SEX DISCRIMINATION

The employment tribunal erred in law in holding that the determination at an appeal hearing that the claimant must work a fully flexible part-time work pattern did not involve the application of a PCP because the decision was revoked after the claimant's solicitors had sent a letter before action. The only possible determination was that the PCP was applied. The matter was remitted to a newly constituted employment tribunal to determine the remaining live issues.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Goodman, sitting with lay members, after a hearing on 24 and 25 March 2022. The judgment was sent to the parties on 28 March 2022. The employment tribunal rejected the claimant's claim of indirect sex discrimination and stated that if the complaint had been upheld it would have made an award of £1,500 for injury to feelings.
2. The first respondent is the UK retailer of a well known global fashion brand. The second respondent was an HR business partner employed by the first respondent.
3. The claimant was employed at the first respondent's shop in Nottingham as an assistant store manager. She worked full-time pursuant to her contract of employment, 39 hours per week. She worked five days a week flexibly as set out in a rota.
4. The claimant commenced maternity leave on 3 March 2020. The claimant originally intended to return to work on 1 March 2021. Because of the Covid-19 pandemic the Nottingham shop closed temporarily during the claimant's maternity leave.
5. On 9 November 2020, the claimant made a request to work three days a week. The second respondent met with the claimant to discuss her flexible working request on 8 March 2021. The request was rejected by letter dated 10 March 2021. The letter provided a right of appeal.
6. The claimant did not return to work at the end of her maternity leave. She took accrued annual leave and was then placed on furlough.
7. On 11 March 2021, the claimant appealed the decision to reject her request for flexible working. The appeal hearing was held by Adrien Hiver, Omnichannel Director, on 30 March 2021. The appeal was upheld in part by a letter dated 7 April 2021, in which the claimant was offered part-time work four days a week, to be worked flexibly on any day of the week. The arrangement was offered on a six month trial period at the completion of which, if successful, there would be a permanent amendment to the claimant's contract of employment. The letter stated "This decision is now final and there is no further right of appeal."

8. On 14 April 2021, solicitors instructed by the claimant wrote to the first respondent asking that her request be reconsidered, failing which she might have no option other than to resign and claim constructive dismissal.

9. On 23 April 2021, the first respondent wrote to the claimant and acceded to her original request in full. The claimant was still on furlough. The claimant was told that she would return to work on 25 April 2021, which she did on the basis set out in her flexible working request.

The claim

10. The claimant submitted a claim that was received by the employment tribunal on 4 May 2021, asserting a breach of the flexible working provisions of the Employment Rights Act 1996 and indirect sex discrimination. The flexible working complaint was made the subject of a deposit order and was subsequently withdrawn.

11. The day before the employment tribunal hearing the claimant applied to amend the claim form to assert PCPs that included a requirement for flexible working. The employment tribunal granted the application on the first day of the hearing. That decision was not appealed.

The decision of the employment tribunal

12. The employment tribunal rejected the claim based on the asserted requirement for full-time working. That decision has not been appealed.

13. The employment tribunal also concluded that a PCP requiring fully flexible working had not been applied to the claimant and she had not suffered disadvantage:

61. Section 19(1)(c) is whether the arrangement puts or would put the employee at the disadvantage. **The principal dispute in this case is whether the respondent applied a provision criterion or practice to the claimant at all.** The respondent submits not only that the claimant was never required to work full-time, as that requirement was abandoned at the appeal stage, but also that the claimant was never, in the event, required to work flexibly. She was put on furlough on 21 March when her maternity leave and annual leave ended, as the store was still closed, and was still on furlough when on 23 April they conceded her original request. The claimant, by contrast, argues that she was subject to detriment by reason of the original decision on 8 March, and still subject to detriment at the date of the appeal decision on 7 April, because she had been told, and believed, she had to return to work fully flexibly, on four days a week.

62. The respondent relies on **Little**, to the effect **that while the process was ongoing, the provision never applied**. The appeal tribunal in that case assumed in favour of the claimant that “the statutory tort was prima facie completed” when her initial application for flexible working was refused, but that reversing the decision on appeal meant that it was never applied. The claimant argues that **Little** was wrongly decided and that in the light of **Buckland** a repudiatory breach could not be cured by subsequently reversing the decision, an act of discrimination being arguably a breach of contract. **This tribunal is, however bound by the decision of the Employment Appeal Tribunal**, which in **Little** had already discussed both **Buckland** and **Cast**.

63. The claimant further relies on **Keohane**, to the effect that where there was **a real risk of an adverse outcome, that was a detriment, even if it was later reversed** (in that case the dog was eventually returned, some months after her maternity leave had ended and she had returned to work). She had suffered in anticipating that she would have to work flexibly.

64. The tribunal prefers the argument of the respondent. This case **differs from a little on the facts in Little**, in that the statutory process was completed against the claimant, but it was then reversed before she was ever required to start work on the flexible terms. **It was distressing for the claimant to anticipate that she would have to resign because she could not find or afford flexible childcare, but she was never in practice required to do it. It might be different if she had resigned, like Ms Little, but (unlike Ms Little), she had postponed a resignation until after the appeal outcome, nor did she resign**. Instead she tried again, though making it clear that she might well resign if there was no change, and fortunately this time she succeeded. Taken overall, whether the decision was taken within or without the statutory process, **she was never in fact required to work flexibly**. We could not see that it made a difference for the purpose of section 19 that the decision was altered after the internal appeal was decided, when she had not yet had to work on the employer’s proposed flexible four-day week. It had not been applied to her. At most, it was proposed that it would apply to her.

65. These facts also differ from **Cast**, where the claimant had returned to work on the terms she did not want, managing it by using up leave, while continuing to seek reconsideration, because in that case the requirement to work on her old terms *was* applied to her on her return to work.

66. If we consider the facts in **Keohane**, the dog had already been removed; of itself that was not considered a detriment; the appeal had proceeded on the basis of an implicit understanding that there was detriment, given police policy to remove dogs and not return them, in that the claimant would have no dog on return from leave, and that this was an inherent part of the employer’s decision. The appeal tribunal had accepted that “with reservations”. The set of events that implied “real risk” of loss of earnings and career loss without a dog had already started. Here, nothing

had yet happened after the flexible working request appeal, and before the claimant had to return to work the decision had been reversed. We concluded that her apprehension of detriment was not enough. It was not a “real risk” as in **Keohane**, where removal of the dog meant the process of implementing the policy that would lead to reduced earnings and career loss had already started **The policy had not yet been applied to her, she had asked for reconsideration at a point when she was still not required to work, and the policy was in the event not applied to her.**

67. The statutory wording is “applies or would apply” the PCP to persons not sharing the claimant’s protected characteristic; the reference to “would apply” is intended to cover situations where, as it happens, there is no one without the protected characteristic, but there might be – like the hypothetical comparator in direct discrimination. Where subsections (b) and (c) speak of “would put”, we understand that to mean the same set of facts, namely, that the PCP affects everyone, regardless of the protected characteristic, but as it happens there is no one without the protected characteristic. It is not understood to mean that *if carried out* it would put the claimant at disadvantage.

68. In our finding, the claimant has not passed the hurdle of section 19 (1)(c) [sic], so we need not go on to consider justification, but in case we are wrong, we went on to consider this.

14. The employment tribunal found that had the PCP been applied, it would not have been justified. That decision was not appealed.

15. The employment tribunal held that the PCP of requiring flexible working would put women at a particular disadvantage because of the difficulties this would cause with childcare:

59. However, we did consider there was particular disadvantage in the requirement to work flexibly, namely any five days in seven, or (as offered on appeal) any four days in seven, subject to four weeks’ notice. With respect to care by family members, a child’s partner may be working, and so do many grandparents. It will be unusual for other employers to be so flexible as to accommodate changes in work pattern, even at four weeks notice. As for nurseries, a large proportion of their running costs are related to staff wages, and they are required by statute to maintain a particular staff-child ratio. Unless they had a large bank of nursery nurses they would be unlikely to be able to lay on or lay off care on particular days of the week for individual children, and even with bank nurses, they would be unlikely to cover the cost of an additional nurse without other children requiring care on that particular day. We have no evidence of affordable nurseries able to provide this drop-in drop-out care, and all the nurseries we have heard of require commitment to particular patterns of use. There often waiting lists for particular days of the week. A working arrangement at the level of flexibility required by the respondent initially, or as

envisaged by Scott Collingham in his June 2021 email about changing the claimant's days when the sale footfall was low, would be very difficult without a family member able to provide backup at short notice.

60. Even a fully flexible working arrangement at four weeks notice would be difficult. It would depend on finding a nursery or childminder for those particular days at four weeks notice. The claimant did not discuss what notice of changes in nursery would require, or whether there were restrictions on particular days of the week. However, the real difficulty in what the respondent proposed for people with childcare responsibility was the requirement to fully flexible at weekends. Few nurseries open over the weekend. The claimant's evidence was that a limited number of childminders were available, but they were fully booked. We understood from evidence that the child's grandmothers both had to work at weekends, and her partner's availability on Saturdays was subject to his own employers' needs. Her partner was paid triple time for Sunday working, so we understand how the couple would be reluctant to give that up. We considered that particular disadvantage was shown in respect of the requirement to work flexibly, even with four weeks' notice, when it included weekend working. It is not always easy to find childcare at the weekend; having to do so flexibly made it very difficult indeed.

The appeal and response

16. The claimant appeals on grounds that assert:
 - 16.1. erroneous application of **Little**;
 - 16.2. application of the wrong test for "real risk" of a detriment provided for in **Keohane**;
 - 16.3. the employment tribunal took into account irrelevant factors;
 - 16.4. erroneous application of **Cast**; and
 - 16.5. if the matter is remitted remedy should be determined afresh or the determination was perverse.
17. The respondent seeks to uphold the decision on the basis of the reasons given by the employment tribunal and also asserts that the employment tribunal should not have held that group particular disadvantage was established, particularly on a basis that had not been the subject of argument at the hearing.

The law

18. Section 39 of the Equality Act 2010 (“EQA”) renders detrimental discriminatory treatment unlawful:

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

19. Indirect discrimination is defined by section 19 EQA:

19 Indirect discrimination

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

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

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

(b) it puts, or would put, persons with whom B shares the characteristic at a **particular disadvantage** when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

20. There are a number of elements in a claim of indirect discrimination. So far as is relevant to this appeal it is necessary to consider:

20.1. general application of a PCP – ss 19(1) and 19(2)(a)

20.2. particular disadvantage to the group that shares the claimant's protected

characteristic – s 19(2)(b)

20.3. disadvantage to the claimant – s 19(2)(c)

20.4. detriment to the claimant – s 39(2)(d)

21. The concepts overlap to an extent. It will generally be the application of the PCP that causes the particular disadvantage to an employee and results in the detriment. That said, the separate concepts do have to be considered and properly analysed.

22. In **Cast v Croydon College** [1998] I.C.R. 500 it was asserted that time did not start running in respect of a refusal of a request for flexible working until the claimant had resigned and claimed constructive dismissal. Auld L.J. held, at 516H to 517A, that the application of a requirement that a woman could not comply with was detrimental even if it had not yet been invoked or enforced:

In my judgment, this ground of appeal is subject to the same objection as the last. It starts by reference to the application to the applicant of a requirement, at the latest on 10 May 1993, a date at which, according to her complaint, she knew she could not comply with it. However, it denies it the quality of an act of discrimination of which she complained until she suffered its consequence on leaving her employment on 6 July 1993. It is not the suffering of such a consequence which amounts to an act of indirect discrimination against a woman; it is the application to her of a requirement, whether or not yet invoked or enforced, which is to her detriment because she cannot comply with it.

23. The inclusion of a term in a contract of employment can result in the application of a PCP even if it has not been invoked: **Meade-Hill and Another v British Council** [1995] I.C.R. 847 per Millett L.J. at 861 D-E and H:

In reaching this conclusion I reject the employers' submission that a contractual term is not "applied" to a party to the contract until it is invoked against her. In my view the inclusion of a contractual term which imposes an obligation on a party to the contract amounts to an application of a requirement or condition against that party. Counsel for the employers effectively concedes as much by accepting that, had Mrs. Meade-Hill been compelled to refuse the offer of promotion because of the mobility clause, she might have complained to an industrial tribunal of indirect discrimination contrary to section 6 of the Act of 1975. But section 6 has no application in the absence of discrimination, and where indirect discrimination is alleged that brings in section 1(1). That in turn involves giving to the word "applies" the meaning which I have indicated. ...

In my view there is no escape from the dilemma; either the inclusion of the mobility clause amounts to an application of a requirement against Mrs. Meade-Hill (in which case the requirement must be that which I have stated); or it is not, in which case an applicant for a job who is deterred from accepting an offer of employment by the presence of a mobility clause of the present kind has no redress. I would not accept the latter interpretation unless compelled to do so.

24. This case did not involve the insertion of a term into the claimant’s contract of employment, but the determination of an application for flexible working. Her contract was only to be amended if she returned to work under the new arrangement and successfully completed a six month trial period. The issues this case raises are of whether the application of the PCP occurs only when an employee seeks to work under the new arrangement or when the application for flexible working is determined, and if the latter, what constitutes the determination of the application.

25. The law concerning the meaning of the term “detriment” was helpfully summarised by Griffiths J in **Warburton v Chief Constable of Northamptonshire Police**, [2022] EAT 42, [2022] I.C.R. 925:

48. Detriment is not defined in the Act (although section 212(1) excludes it from claims which might otherwise be characterised as harassment, a refinement which has no relevance to the facts of the present appeal). However, there was agreement before me that the applicable law is in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, and particularly in the opinion of Lord Hope of Craighead at paras 33–35.

49. Detriment is a word to be interpreted “widely” in this context: Chief Constable of the **West Yorkshire Police v Khan** [2001] ICR 1065, per Lord Mackay of Clashfern at para 37 (cited in **Shamoon** at para 33).

50. The key test for present purposes is for the employment tribunal to ask itself: “Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?” It is not necessary to establish any physical or economic consequence for this question to be answered in the affirmative. The requirement that this hypothetical worker is a reasonable person means, of course, that an unjustified sense of grievance would not pass this test. All of this is established by the opinion of Lord Hope (and other cases which he cites) in **Shamoon** at para 35.

51. Although the test is framed by reference to “a reasonable worker”, it is not a wholly objective test. It is enough that such a worker would or might take such a view. This is an important distinction because it means that the answer to the question cannot be found only in the view taken by the employment tribunal itself. The tribunal might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

26. In this case, the employment tribunal relied primarily on the decision of the Employment Appeal Tribunal in **Little v Richmond Pharmacology Ltd** [2014] I.C.R. 85 in rejecting the claim.

In **Little** the EAT set out the facts as follows:

4. The claimant joined the employer on 8 March 2006 as an evening receptionist. In January 2009 she was promoted to sales executive working full-time. On 14 September 2009 she went on maternity leave prior to the birth of her second child.

5. Between January and May 2010 she applied to the employer for a flexible working arrangement on her return to work following maternity leave in August 2010. The original application was amended and finally, on 12 April, she proposed working Monday to Wednesday, 9 am to 3 pm in the office, adding that she would like remote e-mail access in order to permit her to contact clients or colleagues on Thursdays and Fridays.

6. On 17 June 2010 Ms Gowling, the claimant’s line manager, rejected the claimant’s application on the basis that it was not feasible for a sales executive to operate on a part-time basis.

7. On 9 July 2010 the claimant appealed against that refusal by letter and e-mail. The employment tribunal found that no e-mail was received by the employer and the letter was received on 14 July. Before an appeal hearing could be arranged the claimant resigned on 19 July. That same day she was asked by the employer to reconsider until an appeal hearing took place. On 22 July an appeal hearing took place before Mr Berelowitz, the operations director. The claimant attended that hearing. Her appeal was upheld to the extent that he offered a three-month trial on the terms she had suggested following her return from maternity leave in August. The claimant did not take up that offer but instead on 26 July she confirmed that her resignation of 19 July stood.

27. The EAT upheld the finding of the employment tribunal that the claimant had not been subject to disadvantage or detriment by the application of a PCP because the original adverse decision, that

had been expressly stated to be subject to appeal, had been overturned. The EAT considered a number of potentially analogous situations, such as the concept of the “disappearing dismissal” for the purposes of unfair dismissal law where an appeal is allowed. The EAT specifically stated:

We repeat, this case is particularly fact and claim sensitive.

28. The central reasoning of the EAT was as follows:

29. Before the Martin tribunal the issues had been expanded, as appears from para 3 of that tribunal’s reasons. Critically, it seems to us, the tribunal was asked, at para 3.5, to determine whether the particular disadvantage relied on by the claimant as framed at para 3.3.2 applied to her as a result of the application of the PCP alleged, that is that all sales executives work full time.

30. In answering that question the Martin tribunal concluded (para 33) that the claimant had not made out personal disadvantage on the facts because Mr Berelowitz agreed (on appeal) that the claimant could work part-time on a trial basis as she had requested. The claimant accepted that in hindsight she could have taken up the offer of the trial period and proved the employer wrong in having doubts about the efficacy of part-time working in the sales executive role. The employment tribunal further found that part-time working on a trial basis did not constitute a detriment to the claimant.

31. Thus, the question arises: was that a permissible approach by the employment tribunal? We have concluded that it was.

29. The EAT rejected a contention that the claimant had implicitly retracted her appeal when she resigned. The EAT went on to hold:

34. Secondly, consistent with the approach of the House of Lords in *West Midlands Co-operative Society Ltd v Tipton* [1986] ICR 192 and the Court of Appeal in *Taylor v OCS Group Ltd* [2006] ICR 1602 , it is the experience of the industrial members sitting on this appeal that an internal appeal process, consensually pursued, forms part and parcel of the employer’s decision-making process. Thus, on the facts of this case, Ms Gowling’s decision to reject the claimant’s request for part-time working on her return in the future was expressed to be subject to the claimant’s right of appeal. To that extent her decision was conditional. She exercised that right and succeeded on appeal (cf *Cast v Croydon College* [1998] ICR 500). The PCP, full-time working, was not to be applied to her when she completed her maternity leave. She did not suffer personal disadvantage under section 1(2)(b)(ii) nor, we would add, any detriment short of

dismissal under section 6(2)(b) of the Sex Discrimination Act 1975. Dismissal was not relied on in this indirect discrimination claim.

35. On this analysis we are satisfied that the employment tribunal's approach was not flawed in law. We are not persuaded that the strict contractual approach to curing a repudiatory breach adopted by the Court of Appeal in *Bournemouth University Higher Education Corp v Buckland* [2010] ICR 908 causes us to take a different view in the context of an indirect discrimination claim. Accordingly, the claimant's challenge to the employment tribunal's finding of no personal disadvantage fails and is rejected.

30. The claimant suggests that **Little** is authority for a general proposition of law that if a discriminatory decision is overturned on appeal the discrimination "disappears". The claimant contends that we should hold that the concept of disappearing discrimination has no place in the law and that **Little** is manifestly wrong and should not be followed: see the approach in **British Gas Trading Ltd v Lock and another** [2016] ICR 503.

31. In considering this appeal it is important to analyse what the employment tribunal understood the EAT to have decided in **Little** because it considered that it was bound by that decision. The employment tribunal considered that for the PCP of flexible working to have been applied, and for the claimant to have suffered disadvantage/detriment, she would have had to return to work and attempt to work under the flexible working arrangement decided upon at the appeal. We have concluded that the employment tribunal misinterpreted the decision in **Little**. In **Little** the EAT did not find that the PCP had not been applied to the employee and she had not been subject to disadvantage/detriment because she did not return to work, but because in the specific circumstances of that case the original decision had been provisional, was expressly stated to be subject to appeal and had been overturned on appeal. It was the determination of the appeal that would result in the application of any PCP rather than the employee returning to work and attempting to work to a new pattern.

32. **Little** is authority for the proposition that the determination of an application for flexible working constitutes the application of a PCP and can result in disadvantage/detriment. In **Little** the EAT accepted, on the particular facts of the case, that the employment tribunal had been entitled to

conclude that the decision had not been made until the appeal had been decided. Once the application is determined the PCP is applied even if the employee has not returned to work and attempted to work under the new arrangement.

33. The error the employment tribunal made in its understanding of **Little**, as a result of which it considered itself bound to hold that the flexible working PCP had not been applied and the claimant had not suffered any disadvantage/detriment because she had not attempted to work under the new arrangement, means that the appeal necessarily succeeds with the consequence that the matter will have to be remitted to the employment tribunal for redetermination.

34. If **Little** was authority for the proposition that the employment tribunal derived from it, that a PCP requiring flexible working is only applied, and can only cause disadvantage/detriment, once an attempt is made to work to the new pattern, we would have had to consider whether it was manifestly wrong. Such a rule of law would have the perverse consequence that the more discriminatory a PCP is the less likely it would be found to have been applied to an employee. If an employee was unable to comply with a PCP it would be surprising were it to be the case that the employee's inability to attempt a return to work, because of the impossibility of complying with the PCP, meant that the PCP had not been applied and so the claim must fail. We do not consider that **Little** is authority for that proposition.

35. In **Little** the EAT expressly stated that the decision was limited to its specific facts. While we have some doubt as to the approach adopted in **Little**, that the application was not determined until the appeal had been decided, we have concluded that it is not necessary in this case for us to determine whether **Little** was manifestly wrongly decided. The members of the EAT may have wished to encourage internal processes that allow erroneous decisions to be corrected, although even if an initial decision is found to be discriminatory, but is later rescinded, that is likely to significantly limit any compensation awarded. In any event, **Little** is a decision about a final decision to apply the PCP not having been taken until the appeal was determined, on the particular facts of the case that included the original decision being expressly stated to be subject to appeal, rather than a discriminatory

decision disappearing because of a successful appeal.

36. In the context of a claim of direct discrimination the suggestion of vanishing discrimination where an employee who had been dismissed was reinstated after an appeal was firmly rejected by HHJ Eady QC in **Jakkhu v Network Rail Infrastructure Ltd** UKEAT/0276/18/LA:

That, however, was to view what had happened through the prism of the case law on “dismissal”; to focus on the reinstatement of the Claimant and what that meant for the continuity of his employment rather than on the actual act of which he was complaining, which was the initial dismissal itself. More specifically, the Claimant did not need to demonstrate that this remained a dismissal; he was entitled to complain of this - the failure to offer to retract the notice - as an act of detriment.

37. We also consider that, contrary to the view of the employment tribunal, there is a significant distinguishing feature between this case and **Little** in that the decision to agree to the claimant’s request did not come at the appeal stage but only after a letter before action had been sent. On any view that constituted the reversal of a previous decision, rather than being the final step in a decision being made, as was held to be the case when the appeal was determined in **Little**.

38. Accordingly, the matter must be remitted to the employment tribunal. We consider that there is only one possible answer to the question of whether the PCP of requiring flexible working was applied. In this case the PCP was applied at the stage of the determination of the appeal. The original determination was not the subject of this appeal and so it is not necessary for us to decide on the facts of this case whether that amounted to the application of a PCP. The question of whether the claimant was subject to disadvantage/detriment by the application of the flexible working PCP on the determination of her appeal shall be remitted to the employment tribunal as we consider it will require further consideration and is not only susceptible to one answer. Having regard to the authorities we have set out as to what constitutes detriment, it is hard to see on what basis it could be held that there was no disadvantage and detriment to the claimant when the appeal was determined against her and she felt she had to consider resigning from her employment with the respondent. However, that is a matter for the employment tribunal to determine on the facts. The specific nature of any disadvantage/detriment suffered will be relevant to assessing injury to feelings.

39. We consider that the determination that group disadvantage was made out is unsafe as it was based on the employment tribunal taking judicial notice of the difficulties that would be caused in respect of nursery places. The respondent had not had an opportunity to make submissions on this specific issue. We reject the submission that group disadvantage could not be made out because the claimant did not lead evidence on this issue. It was a matter in respect of which the claimant could potentially rely on the employment tribunal taking judicial notice of difficulty in obtaining childcare provided that the respondent had a proper opportunity to make submissions on the specific childcare issues relied upon. That issue will have to be remitted.

40. We also consider that the determination of the appropriate award for injury to feelings is unsafe. Without ascertaining the specific nature of any disadvantage/detriment suffered by the claimant it is not possible properly to assess injury to feeling. That matter will also be for determination on remission.

41. Finally, as the second respondent did not make the appeal decision, that is to be the subject of the remission, he is not a proper named respondent and shall be dismissed from the claim.

42. The matter will be remitted to a newly constituted employment tribunal as the error of law was fundamental to the decision and all live remaining issues concerning the appeal decision will need to be redetermined.