EMPLOYMENT TRIBUNALS

Claimant: Ms E Walker

Respondent: The London Borough of Lewisham

Heard at: London South, by CVP **On:** 2,3,4 and 5 January 2024

Before: Employment Judge Rice-Birchall
Mr Murphy
Ms Cooke

Representation
Claimant: In person
Respondent: Mr O Isaacs, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

The complaint of direct age discrimination is not well-founded and is dismissed.
The complaint of indirect age discrimination is not well-founded and is dismissed.

REASONS

Background

1. By a claim dated 23 March 2020, the claimant brought a number of claims against the respondent including claims of age, disability and sex discrimination and discrimination on the basis of part time working; health and safety detriment and trade union detriment. All of those claims, bar the age (direct and indirect) claims were dismissed by the Tribunal.

2. The claimant's age discrimination claims relate to the claimant taking flexible retirement in 2016. Since then, the claimant has submitted two applications to return to full time employment which have been refused by the respondent. It is those refusals which underlie her claims.

The issues

3. Direct age discrimination:
    a. Were the Respondent's decisions taken in 2018 and 2019 not to allow the Claimant to work full time taken because of her age and specifically the fact that she was over 55?

   b. If so, were those decisions (or any of them) a proportionate means of achieving a legitimate aim?
   c. C relies on a hypothetical comparator under the age of 55.

4. Indirect age discrimination:
   a. Did the Respondent operate a policy of not permitting an individual who had taken early retirement to return to full time working?
   b. Was that policy likely to place employees who have reached the Respondent's retirement age at a disadvantage?
   c. Has the policy placed the Claimant at a disadvantage?
   d. Can the Respondent show that the policy was a proportionate means of achieving a legitimate aim?

5. Jurisdiction:
   Have the Claimant's claims of direct or indirect age discrimination been brought outside the statutory time limit or do they concern matters that constitute a continuing act or an ongoing discriminatory set of circumstances?
   a. If any part of the claims is out of time would it be just and equitable to extend time?

6. The Claimant confirmed that in relation to the claim for indirect age discrimination the retirement age she refers to is 55. And the disadvantage she relies on is not being able to work full time.

7. The Claimant also confirmed in relation to her claim of direct age discrimination that she is not making an accusation of discrimination against any particular individual but more generally against the respondent as an organization.

Evidence

8. The Tribunal had a bundle of documents running to 518 pages. There was supplemental bundle from the claimant. Two additional documents relating to Mr Tyrell were disclosed at the outset of the hearing and included in evidence.

9. The Tribunal heard evidence from the claimant, and Mr Tyrell, a former colleague of the claimant, on behalf of the claimant and Ms Stirling of HR for the respondent.

Facts

10. The Respondent is a Local Authority.

<u>The Council's Flexible Retirement Policy</u>

11. Regulation 30(6) of the Local Government Pension Scheme Regulations 2013 (LGPSR 2013) provides...(6)An active member who has attained the age of 55 or over who reduces working hours or grade of an employment may, with the Scheme employer's consent, elect to receive immediate payment of all or part of the retirement pension to

which that member would be entitled in respect of that employment if that member were not an employee in local government service on the date of the reduction in hours or grade, adjusted by the amount shown as appropriate in actuarial guidance issued by the Secretary of State.

12. Regulation 60(1) of the LGPSR 2013 requires every Scheme employer to prepare and publish a written statement of its policy in relation to the exercise of its functions under regulation 30(6).

13. The respondent's written statement pursuant to regulation 60(1) formed part of its Early Retirement Policy. In relation to flexible early retirement the Policy stated that flexible retirement could be granted to employees over the age of 55 who were members of the Local Government Pension Scheme (LGPS). In order to be eligible for early retirement, an employee was required to reduce their pay by at least 40%, either by means of a reduction in working hours or by moving to a lower graded post. Such employees are not permitted to receive any additional payments, overtime payments or honoraria and cannot apply for promotion that would increase their pay to more than 60% of their salary prior to taking flexible retirement.

14. The Policy also stated that these new working arrangements were then fixed for a minimum period of two years, which meant that, apart from the general pay award and any incremental progression, no additional payments could be made to the employee. The Policy also provided that if at the end of the two year period a change in the employee's working hours/grade was desired, prior agreement to the change had to be obtained from the Corporate Retirement Panel.

15. The Policy is silent as to whether an employee can, having elected for flexible retirement and having reduced their hours in order to qualify, reverse the reduction in hours and go back to full time working. However, the clearly adopted policy is that that would happen only in exceptional circumstances, the examples given being Covid and Grenfell, and that an employee would have to put forward a very strong business case in order to be able to do so. It is worthy of note that an employee who had elected to downgrade their seniority would be able to work full time, as the overall requirement is a reduction in earnings which is usually, but not always, achieved by a reduction in hours.

16. In reality, the claimant is the only person who has sought to increase her hours after reducing her hours in order to qualify to take flexible retirement. Most commonly, and without exception save for the claimant, those who apply for flexible retirement do so because they are looking to run down and reduce commitment towards retirement. The benefit of being able to continue to work at a reduced level (either in terms of hours or seniority or both) whilst being able to take both a lump sum and some pension outweighs the loss of any career progression or ability to return easily to full time working because they are seeking to start a gradual path towards retirement without being forced to choose between work or retirement. That is what the name, flexible retirement, suggests. This is very much a benefit available to employees who have reached the age of 55 who meet the criteria, subject to approval by the respondent.

17. The flexible retirement policy was developed as the respondent was mindful that losing a large number of experienced and skilled older workers was likely to be detrimental for services and functions. The respondent wanted to employ more younger people who are underrepresented (the average age of employees is increasing). The Policy provides an opportunity to manage older staff leaving the organisation whilst also retaining and transferring their knowledge, which contributes to succession planning. It supports retention of knowledge within the respondent, whilst allowing skills and knowledge to be transferred, and facilitates career development and progression for employees by opening opportunities as older colleagues retire flexibly.

The claimant's employment

18. The claimant began her employment with the respondent on 1st June 1998 and was employed in a variety of roles.

19. From 2 April 2012 the claimant was seconded to a role as a full time health and safety officer within UNISON. With effect from 1 July 2013 the claimant was Branch Officer of Unison.

20. In 2015, during the claimant's secondment to trade union duties, the respondent's Benefits Investigation Team transferred to the DWP and the claimant's substantive role as a Benefits Investigation Officer therefore ceased to exist.

21. In 2016, whilst still seconded to a role as a Unison Branch Officer, the claimant applied for and was granted early retirement under the respondent's Flexible Retirement Policy.

22. By a letter dated 18 May 2016 the respondent informed the claimant that if she wished to apply for flexible retirement she would be required to reduce her pay by at least 40% in accordance with the respondent's flexible retirement scheme. This could be achieved by a reduction in seniority or a reduction in hours.

23. Significantly, the claimant, although she made the application for flexible retirement herself, felt that she had been forced into flexible retirement because of cuts which needed to be made in the funding for Unison roles. The claimant understood that, because of a reduction in funding, the number of secondments would be reduced. Her application reflects this in that it states that flexible retirement was the only option available to her because of funding cuts.

24. The claimant's line manager supported the claimant's application and gave the following reasons for doing so: "..If I do not support this application then there is the possibility that Eileen may simply resign and take her pension. I cannot afford to lose her expertise with regards to health and safety issues." In his evidence to the respondent in the context of the claimant's grievance, he denied putting the claimant into a position in which the claimant says she had no choice but to apply for flexible retirement.

25. The Tribunal could find no evidence, other than the oral evidence of the claimant, which suggested that the claimant was in any way forced, or even encouraged, to take flexible retirement because of the cuts. In any event, the Tribunal is satisfied that, being a Branch Officer, the claimant would have known where to seek advice and sufficient information to be fully informed about the impact of flexible retirement and its consequences. Her own application supports the view that she was aware of the requirements of that scheme, as it states that she would plan to work 21 hours per week over five days which would reduce travel time and allow her to look after her autistic son.

26. The claimant applied for flexible retirement on 1 June 2016. Her application was approved by the Respondent on 1 July 2016. The claimant reduced her hours of work from 35 to 21 hours a week with effect from 1st August 2016. She took a significant lump sum.

The claimant's 2018 application to work full time

27. On 25 July 2018 a Flexible Retirement Panel turned down an application by the claimant to work full-time in her Branch Officer role. Little more is known about the application that that. The only evidence available to the Tribunal was a timeline in the Bundle. It is understood that the application was dealt with orally and both those who dealt with it had left the respondent and could not recall it.

28. The claimant made the application at this time because the policy states that any new working arrangements will be fixed for a minimum period of two years. There is provision for changes to be made following the two year period with the agreement of the corporate retirement panel.

29. Ms Stirling did not know why the application was turned down, as she was not there, but she felt it was a reasonable assumption that it was turned down because there were no exceptional circumstances to justify full time work following the claimant having taken Flexible retirement. The Tribunal considers that that is a reasonable assumption.

Claimant's failure to be re-elected as a Branch Officer

30. On 1 April 2019, at Unison's AGM, the claimant was not re-elected as a Branch Officer.

31. The claimant met with HR and others to discuss the consequences of her failure to be re-elected. It was acknowledged that there was no established contingency plan in place for the claimant's situation (as she had no substantive role to return to) and that a referral would need to be made to the Redundancy/Flexible Retirement Panel to consider her potential redundancy.

32. On 30 April 2019 the post of Commercial Team Leader in the Environmental Services Division was offered to the claimant on a three-month, fixed-term, part-time basis (3 days a week) and was accepted by

her. The job was the same grade as the claimant's previous roles with the Council.

33. On 30 April 2019, a follow-up meeting took place which was attended by HR. The claimant again expressed her wish to work full-time, saying that she believed that being part-time would diminish her prospects of being redeployed.

34. On 2 May 2019, the claimant's case was presented to the Redundancy/Flexible Retirement Panel. As the claimant was potentially redundant, the Panel's approval was sought for the payment of redundancy pay. She also presented a request by the claimant to become a full-time employee. The Panel deferred a decision on the claimant's application to work full-time as it was necessary for the claimant to complete an appropriate application form in order for her request to work full-time to be considered.

35. Notice of redundancy should have been issued to the claimant at this point but was not issued until later when Ms Stirling became involved.

Claimant's employment in role of Commercial Team Leader and deferred application for full time work

36. On 7 May 2019, the claimant began working as a Commercial Team Leader.

37. On 17 May 2019, HR wrote to the claimant summarising the discussions that had taken place with respect to the claimant's employment about her concerns about her working relationships and the claimant's application to return to full-time hours.

38. Around 26 June 2019 the claimant submitted a formal application to return to full-time hours following taking flexible retirement. The form specifically states "Please use the following questions to support your return to full time work". It is likely that this form was created by HR for the claimant to complete.

39. On 25 September 2019, Ms Stirling sent a letter by email to the claimant confirming her position with regards to redundancy and redeployment. The letter gave the claimant formal notice of redundancy, stating that she was entitled to12 weeks' contractual notice pay and an extended six month redeployment period as she was considered to have a disability. That notice should have been served following the panel decision in May 2019.

40. On 1 October 2019, Ms Stirling had a discussion with Mr Nigel Tyrell, then Director of Environmental Services, in which it was agreed that he would explore any options for the claimant's permanent redeployment.

41. In November 2019 HR made enquiries with the claimant's manager as to whether the Commercial Team Leader post (which was vacant on a full time basis) could be split or made part of a job share.

42. The claimant's application to return to full-time hours following taking flexible retirement was due to be considered by the Flexible Retirement Panel on 28 November 2019. The Panel rejected the Claimant's application to work full-time.

43. Around 28 November 2019 the Commercial Team Leader post was advertised by the respondent as a full-time role. The claimant therefore made enquiries with regards to the outcome of her application to return to full-time hours following taking flexible retirement.

44. On 5 December 2019, Ms Carol Yorrick, HR Operations Manager and a member of the Panel, sent a letter to the claimant confirming the Panel's decision not to allow her application to work full-time. In her letter Ms Yorrick said that the respondent's Flexible Retirement Policy has been implemented to ease employees into retirement and did not allow employees to work hours that would result in them earning more than 40% of their-retirement pay.(The reference to 40% of pay was a typographical error: the letter should have said 60%). She added that allowing the claimant to work full-time would not be consistent with the respondent's practice of not permitting earnings to exceed 60% of the pre-retirement pay. Ms Yorrick went onto state that HR would work with Environmental Services to explore the option of the claimant being redeployed into the Commercial Services Team Leader post on a permanent basis on her existing terms and conditions, namely on a part time basis.

45. Subsequently Mr Tyrell confirmed that the claimant could be redeployed into the Commercial Services Team Leader post on a permanent part-time basis and recruitment for the full-time post therefore ceased.

46. On or around 10 December 2019 the claimant submitted a formal grievance raising a number of complaints including of age discrimination. In her grievance, the claimant alleged that the full-time Commercial Services Team Leader post had been withdrawn to prevent her applying for it.

47. On 23 December 2019, Ms Yorrick wrote to the claimant explaining that the full-time Team Leader position had not been withdrawn to prevent the claimant from applying for it but rather to facilitate her being redeployed into it, so that she could continue working on a part-time basis in light of the Panel's decision. For the avoidance of doubt, the Tribunal accepts Ms Stirling's evidence that it was withdrawn because the part time role had been offered to the claimant.

48. By a letter dated 7 January 2020, Ms Yorrick confirmed that the claimant was being offered redeployment into the Commercial Services Team Leader post on a permanent part-time basis. By an email dated 11 January 2020 the claimant confirmed that she would accept the post but said she was doing so "under duress "as she wished to pursue her grievance, which included a grievance about the hours she was permitted to work.

49. With effect from 1 April 2020 the respondent agreed to the claimant's hours of work (as well as the hours of many others) being increased to 35 hours a week on an exceptional and temporary basis to support the respondent in its response to the Covid-19 pandemic.

50. A letter dated 20 April 2020 was sent to the claimant confirming the temporary increase in her hours on an exceptional basis in light of Covid 19 and her being in a critical service.

51. A further letter dated 17 July 2020 was sent to the claimant confirming the extension to the temporary increase in her hours up to the end of August 2020.

52. A grievance outcome was sent to the claimant on 28 July 2021. In that outcome it says: I found no evidence that there is any discrimination against those over 55 in having a policy that enables them to apply for and receive their full pension benefits and lump sum and at the same time reduce their working hours. Flexible retirement provides benefits that can only be advantageous to that particular age group. Although Lewisham Council adopted a flexible retirement scheme, the pension benefits are those of the LGPS and is run and administered by the LGPS.

Law

53. Section 39(2) Equality Act 2010 ("EqA 2010") provides an employer (A) must not discriminate against an employee (B)…(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; (d) subjecting B to any other detriment.

    <u>Direct Age Discrimination</u>

54. Direct Discrimination is defined by section 13 of Equality Act 2010 ("EqA) which provides:

    "A person (A) discriminates against another (B) if, because of a protected characteristic, AS treats B less favourably than A treats or would treat others."

55. Section 23(1) EqA 2010 provides there should be no material difference in circumstances between the claimant and any comparator or hypothetical comparator (save for the protected characteristic).

56. Relevant in deciding whether discrimination is established is the burden of proof. s.136 EqA 2010 provides:-
    (1) This section applies to any proceedings relating to a contravention of this Act.
    (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
    (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
..."

57. In **Igen v Wong**, in relation to a predecessor provision to section 136 EqA, the Court of Appeal held that it is for the claimant who complains of discrimination to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination. In deciding whether the claimant has proved such facts, it is important to remember that the outcome, at this first stage of the analysis by the Tribunal, will usually depend on the inferences which it is proper to draw from the primary facts found by the Tribunal. The Tribunal is looking for primary facts to consider which inferences of secondary fact might be drawn. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourable on the ground of [here] race, it is then for the respondent to prove that it did not commit that act. That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but, further, that it is adequate to discharge the burden of proof, on the balance of probabilities, that race was not a ground for the treatment in question.

58. **Hewage v Grampion Health Board** [2012] UKSC 37 expressly endorsed the two-stage test which had been laid down in **Igen v Wong** [2005] EWCA Civ 142, namely:-
    a. The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant; and
    b. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.'

59. In **Madarassy v Nomura plc** [2007] IRLR 246, the Court of Appeal held that a simple difference in status and a difference in treatment was not sufficient to shift the burden of proof. It was incumbent on the claimant to establish "something more." Unreasonableness or unfair treatment is also not sufficient to shift the burden of proof. (see **Bahl v Law Society** [2003] IRLR 640).

60. Further, if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the

burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see **Laing v Manchester City Council** [2006] ICR 1519*)*.

Indirect Age Discrimination

61. Section19(1) EqA provides that "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." A provision, criterion or practice ("PCP") is discriminatory if:-
    (a) A applies, or would apply, it to persons with whom B does not share the characteristic; (s19(2)(a) EqA 2010)
    (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; (s19(2)(b) EqA 2010)
    (c) It puts or would put, B at that disadvantage; and (s19(2)(c) EqA 2010)
    (d) A cannot show it to be a proportionate means of achieving a legitimate aim. (s19(2)(d) EqA 2010).

62. As per **Ishola v Transport for London** [2020] EWCA Civ 112, a PCP connotes a sense of continuum in the sense of how things generally are **or** will be done.

63. It must be established both that the PCP puts or would put the relevant group to a particular disadvantage, and that the claimant herself suffered that disadvantage.

64. Statistical evidence, while helpful, is not necessary to establish group disadvantage. The aim of the legislation is to deal with the discriminatory impact of facially neutral requirements. The claimant must show more than the fact that she is treated differently. She must show that a PCP gives rise to a group disadvantage. The EHRC Employment Code endorses the pool approach as a method of establishing a particular disadvantage under s19(2)(b) EqA. In **Essop v Home office (UK Border Agency) and Another** [2017] CR 640, the Supreme Court suggested that the pool should consist of the group which the PCP affects (or would affect) either positively or negatively, while excluding workers who are not affected by it either positively or negatively. Thereafter the ET would need to compare how the requirement or condition affected two discrete groups within that pool – those who shared the relevant protected characteristic with those who do not share that protected characteristic.

65. However, there must be some evidential basis to find or infer there is an actual or hypothetical group that would be disadvantaged by the application of the PCP which is "intrinsically liable to disadvantage a group with [the

claimant's] shared protected characteristic" - see **Gray v Mulberry Co (Design) Ltd** [2020] ICR 715.

66. The Claimant must also establish that she has been disadvantaged.

67. The burden of proof in respect of the first three limbs of indirect discrimination fall on the Claimant. In **Dziedziak v Future Electronics Ltd** EAT/0271/11 Mr Justice Langstaff, stated: *'In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification'.*

68. The Tribunal was referred to **Louis v Network Homes Limited** 2023 EAT 76 which states as follows: "In any event, even if I were wrong about both of those issues, I have come to the conclusion that I agree with the approach taken by the President in **Cowie v Scottish Fire and Rescue Service** [2022] IRLR 913. There is no disadvantage in not being given an advantage. A detriment, disadvantage or unfavourable treatment all refer to circumstances where a negative event occurs. In terms, this failure to be given an advantage cannot fall into that category. This is an advantage being given to a particular group that meet certain criteria. That advantage, it seems to me, cannot be converted to a disadvantage because it is not an opportunity given to those who do not meet that criteria."

69. As to justification, a legitimate aim must correspond with a real need: **Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority (2012) UKSC 15** at paras 19 – 20. As to proportionality, the Tribunal must balance the discriminatory effect of the requirement or condition against the legitimate aim in question: **Hardy & Hansons Plc v Lax (2005) EWCA Civ 846**

Conclusions

Direct age discrimination

70. The claimant's age group is 55 and over and she compares her treatment with people in the age group under 55.

71. The respondent did make decisions in 2018 and 2019 not to allow the claimant to work full time following her request to do so.

72. The first question is whether that is less favourable treatment. The use of the term “les favourable” denotes that the treatment must be less favourable than that afforded to someone else. The Tribunal must decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s.

73. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated. In this case, the claimant has not named anyone in particular who she says was treated better than she was and so she relies on a hypothetical comparator under the age of 55. However, no employee under 55 would have access to the respondent’s flexible retirement scheme as it is a requirement that, to be able to apply for flexible retirement, an employee must be 55 years old. On that basis alone, the claimant’s direct discrimination claim fails. There is no relevant comparator.

74. Further, however, even if the claimant did not fail at that hurdle, the Tribunal is satisfied that the claimant’s treatment, namely the refusal to allow her to revert to full time hours, was not because of her age but was because of the fact she had elected, or chosen, to take flexible retirement. The respondent’s employees who are older than 55 are allowed to work full time. The only reason the claimant’s request was turned down was because she had applied for, and been granted, flexible retirement, and, under that policy, the respondent would only consider a return to full time work in exceptional circumstances, such as Covid. If she was not flexibly retired, then she would have been able to work full time. Hence the reason for her treatment was not her age but her status as flexibly retired.

75. It is important to note that the claimant was not forced to take flexible retirement but applied for it, and was granted it. Although she says she was put under pressure to take it, she chose to make the application. The Tribunal does not accept, from the evidence before it, that the claimant was put under pressure to take flexible retirement, certainly not to the extent that she had no choice in the matter. The flexible retirement scheme is a voluntary scheme which depends on the claimant making the application. In particular, the claimant took out a large lump sum. That is consistent with Mr Colins’ view that the claimant needed the money and less consistent with the claimant’s case that she applied for it only to protect her job (in which case she may have left the lump sum intact or taken a lower figure). Whilst it is true that the policy does not expressly state that employees can only revert to full time working once they are flexibly retired in exceptional circumstances, the Tribunal finds that this is implicit from the nature of the flexible retirement scheme. It’s aims would not be supported by permitting employees to return to full time work.

76. Finally and for completeness, the Tribunal is satisfied that the claimant’s treatment in not being allowed to return to work full time having taken flexible retirement is a proportionate means of achieving a legitimate aim. The respondent says that its aims were intergenerational fairness, maximising performance and efficiency and succession planning.

77. The treatment, of not permitting the claimant to return to full time working, was an appropriate and reasonably necessary way to achieve those aims and is entirely consistent with them. The rationale is that more experienced, older members of staff will reduce their hours (or seniority) which facilitates the retention of knowledge within the organisation whilst allowing their skills and knowledge to be transferred to others, also aiding career development for employees. It also supports part time working opportunities for those over 55 who may be seeking to reduce their hours or commitment.

78. It is not possible to see how allowing employees other than in exceptional cases to return to work full time would permit the aims to be achieved.

79. In this case the needs of the claimant and the respondent are appropriately balanced: the claimant has a choice whether or not to take flexible retirement or to continue in full time work if she so desires. Flexible retirement is not mandatory.

80. Accordingly, the claim of direct discrimination fails and is dismissed.

Indirect age discrimination

81. The respondent did not have a policy of not permitting an individual who had taken early retirement to return to full time working.

82. First, employees who took a step down from a senior position could still work full time and achieve the earnings reduction criteria set by the respondent. Ms Stirling gave evidence of one such example.

83. Second, the respondent allowed full time working for flexibly retired employees in exceptional circumstances. The two examples before the Tribunal were during Covid, when the claimant herself reverted to full time working for a period of time, and following the Grenfell disaster. The claimant acknowledged this and said that she felt her circumstances were exceptional, though the respondent took a different view.

84. It was accepted by the respondent that those who are granted flexible retirement (on the basis of them voluntarily agreeing to reduce their hours (or seniority)) are not entitled to terminate that voluntary agreement voluntarily. That was not the PCP put forward by the claimant or agreed in the list of issues. The Tribunal considers that the claim fails on the basis that the PCP is not made out.

85. Nonetheless, other than during COVID, the claimant was not permitted to return to work full time having flexibly retired applying the terms of the flexible retirement policy and we go on to consider, for completeness, the additional points on that basis.

86. The very concept of indirect discrimination is premised on the assumption that a PCP applies to persons with whom the claimant does not share the protected characteristic, but adversely affects a particular group, in this case those over 55.

87. The PCP in this case is contained in the flexible retirement policy and is applicable only to those who have taken flexible retirement. It cannot therefore be applied to those under 55, which is the age threshold for flexible retirement, who do not share the claimant's characteristic of being over 55. Again, the claim falls at this hurdle. It is impossible to create a hypothetical comparator pool because the policy simply would not apply to a pool of those under 55. The pool should not include those who are not affected.

88. In any event, the Tribunal does not consider that that policy was likely to place employees who have reached the respondent's retirement age at a disadvantage, on the basis that it only applies to those who have elected. to take flexible retirement, which they could chose not to do. The ability to request flexible retirement is a benefit or advantage, enabling employees who meet the criteria to reduce their work commitment and start to draw on their pension. Those who reach retirement age do not have to take flexible retirement. Those employees, also over 55, are able to work full time should they chose, and make a flexible working request. However, if they wish to work full time or apply to work flexibly under the provisions of the Employment Rights Act 1996 they should not apply for flexible retirement which would not be appropriate for them.

89. There is no evidence therefore of disparate impact. The policy doesn't apply to under 55 year olds and those over 55 who have not taken flexible retirement would be permitted to work full time. Everyone who took flexible retirement is subject to the same pre-conditions. If the disadvantage is suffered by everyone in the group then the claim is bound to fail. As they are all over 55, there is no comparator group, as stated previously.

90. Further the policy has not placed the claimant at a disadvantage as she could have worked full time had she not decided to take flexible retirement. But having applied for, and been granted, flexible retirement, she is precluded, other than in exceptional circumstances, such as Covid, from working full time for the respondent (unless of course she were to work at a lower grade so that her salary would still be only 60% of her previous earnings).

91. The case of **Louis** referred to above is also relevant. In this case a benefit has been conferred on the claimant subject to certain pre-conditions, one of which is that there must be a 40% reduction in salary and that any change to working terms and conditions after that must be approved by the respondent's panel. Relying on **Cowie** this cannot give rise to indirect discrimination because entitlements cannot give rise to a disadvantage,. Attempts to afford beneficial treatment cannot give rise to unfavourable or disadvantageous treatment. In this case, the claimant was being afforded the benefit of flexible retirement. That cannot give rise to a disadvantage because the pre-conditions of that benefit do not suit the claimant. This is neatly summarized by a passage in **Louis** which is relevant here: "This is an advantage being given to a particular group that meet certain criteria. That advantage, it seems to me, cannot be converted to a disadvantage because it is not an opportunity given to those who do not meet that criteria."

92. For the reasons set out above, the Tribunal in any event considers that the policy is a proportionate means of achieving a legitimate aim.

Jurisdiction

93. As the claimant's claims fail, the tribunal has not proceeded to consider whether the claim is time barred in respect of the first refusal on 25 July 2018.

_____
Employment Judge Rice-Birchall
Date: 5 January 2024

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/