Case Number: 2500233/2022

EMPLOYMENT TRIBUNALS

Claimant **Mrs H Forrest**

Respondent **Commissioner For Her Majesty's Revenue and Customs**

HELD at Newcastle CFCTC **ON: 20-22 November 2023**

BEFORE **Employment Judge Langridge**
Members **Mrs A Tarn**
Mr M Gallagher

REPRESENTATION:

Claimant **Mr A Subramaniam, Welfare Rights Advisor**
Respondent **Mr T Wilkinson, Counsel**

JUDGMENT having been sent to the parties on 27 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction

Background

1. This case was listed for hearing over four days but was completed in three days with time for an oral judgment to be given.

2. The claimant made several discrimination claims in her application to the Tribunal. Originally she claimed unlawful discrimination based on age, disability and sex. The basis for these claims was that she was unable to work a new shift pattern requiring some evening and weekend working due to her caring responsibilities for young grandchildren, and as the principal carer for her disabled husband. She alleged that the respondent's refusal to agree a special working arrangement constituted unlawful discrimination. She claimed indirect

sex discrimination, indirect disability discrimination relating to her husband's health conditions, and indirect age discrimination. In the latter case the claimant relied on the age group 50-64, stating that "25% of women in the UK aged 50-64 have caring responsibilities for older or disabled loved ones".

3. In its Response the respondent disputed the claims. It explained that a new working arrangement had been agreed through collective bargaining in March 2021, after which it began to implement changes to employees' contracts. It denied discrimination on any grounds and pointed out that the claimant had identified no PCP which placed her at a particular disadvantage. The respondent relied in the alternative on the fact that its treatment of the claimant was a proportionate means of achieving a legitimate aim in meeting the needs of its customers. The respondent also took issue with whether the claimant's claims had been brought within the statutory 3 month time limit.

4. The claimant attended a telephone preliminary hearing on 12 August 2022 before Judge Johnson, accompanied by her daughter. The Judge noted that both the claimant and her daughter may have misunderstood the statutory provisions under the Equality Act 2010 ('the Act'). He said the Tribunal could not run her case for her, and she must do that herself. He explained the difference between direct discrimination under section 13 of the Act and indirect discrimination under section 19. He made the claimant aware that any indirect disability discrimination claim must be based on the claimant's own disability and not her husband's. As a result, the claimant amended this part of the claim to be one of direct discrimination. She was made aware of the need to establish less favourable treatment than a comparator, and that the reason for this treatment had to be shown to be her husband's disability. Other general guidance about the legal basis for her claims was provided to the claimant at this hearing and in the orders and notes which followed. The claimant was also ordered to provide specific Further Information about all her claims, which she did by 22 September 2022.

5. A further preliminary hearing took place on 24 November 2022, when the claimant was represented by Mr Subramanian. Judge Aspden made further orders and set out an extensive case summary. The disability discrimination claim was identified as being a claim under section 13 of the Act, and the alleged acts of discrimination were the refusal of the special working arrangements (SWA) request in June 2021 and subsequently requiring the claimant to work some evenings and weekends.

6. Paragraph 44 of that case summary is important. Judge Aspden noted that Mr Subramanian was asked if it was the claimant's case that the reason the respondent refused the SWA request was <u>because</u> her husband had a disability. His reply was that it was the opposite, because the respondent would not recognise that he was disabled. When Judge Aspden explained that this claim could only succeed if the Tribunal were to find that the reason for the refusal was because of her husband's disability, he said "We definitely believe that was the case". The Judge noted that the claimant "appeared to me to be somewhat surprised by that assertion" and she urged Mr Subramanian to discuss this further with her.

7. The relevance of these case management orders is that they pre-date the final hearing by at least a year. By the time of the hearing before Judge Aspden, the claimant and her representative were on notice that there was some doubt about the direct discrimination claim and the basis on which it was being put. What is

also clear is that guidance was provided given as to the requirements of section 19 of the Act in relation to indirect discrimination claims. Extracts from the Act are set out under 'Issues and relevant law' below.

Recusal application

8. Before the hearing began the claimant applied for Mrs Tarn to recuse herself from hearing the claim on the grounds of her prior professional contact with Mr Wilkinson, the respondent's counsel. Both of them had volunteered information about their previous contact, in which Mrs Tarn had been represented by Mr Wilkinson at a court hearing some months previously, in a personal injury case. Mr Wilkinson had no contact with Mrs Tarn except on the trial date, as her solicitors had instructed him and they had otherwise conducted the professional relationship throughout the case. The day he represented her in court was the full extent of their contact.

9. After hearing submissions from both sides, and considering the relevant law, we rejected the recusal application. We considered the test set out in Porter v McGill [2002] 1 All ER, which is:

> "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

10. We were guided also by other key authorities, including Lodwick v London Borough of Southwark, Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65, CA. In that case the Court said that the question is not whether a judge has some link with a party involved in the case, but whether the outcome could realistically affect something in which the judge had an interest.

11. In another Court of Appeal case, Ansar v Lloyds Bank [2007] IRLR 211, the Court endorsed the reasoning applied when that case was heard by the Employment Appeal Tribunal. The EAT said that each case must be considered on its own merits, and identified circumstances where "a real danger of bias might well be thought to arise". For example, this might be clear where there were a personal friendship or animosity between the judge and any member of the public involved in the case; or there were a close acquaintance between the judge and someone whose credibility could affect the outcome; or a judge had expressed views in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind.

12. No circumstances of that kind applied in the present case. We concluded that there was no substance behind the claimant's application and that it was not well-founded on the facts. The purely professional and time-limited contact between Mrs Tarn and Mr Wilkinson was not something which did, or could realistically have, any bearing on the hearing of the claimant's claims.

The present hearing

13. Once the substantive hearing began, we were provided with an agreed bundle comprising over 350 pages, the great majority of which were not relevant or referred to during the evidence. Three witnesses gave evidence for the respondent: Leanne Edusei (Operations Manager), Matthew Carr (Grade 7 Operational Leader), and Karen Parr (Business Delivery Manager).

14. The claimant gave evidence on her own behalf, by reference to a very brief witness statement that did not address any of the key issues in her claim.

Although the statement set out a short chronology of her working pattern and the process of applying for an SWA, it had no content dealing with the alleged discriminatory impact of the new shift pattern, nor did it give reasons for alleging that the refusal of this request was an act of direct discrimination. The claimant referred to having caring responsibilities in respect of her husband, but no mention was made of her grandchildren. As to the nature and impact of her caring responsibilities on her ability to adapt her working pattern, the claimant's statement said nothing at all.

15. The absence of relevant content was striking in light of the Tribunal's previous directions and guidance about the need to prove her claim. The Tribunal allowed the claimant to give supplementary evidence in chief to address these defects, and sought further clarification through its own questions during the hearing.

Issues and relevant law

Direct disability discrimination

16. Section 13 of the Equality Act 2010 provides that:

(1) 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.

17. The issues for this part of the claim were as follows:

17.1. Did the respondent, as alleged:

17.1.1. Refuse the claimant's SWA request?

17.1.2. Require the claimant to work on some evenings and weekends?

(The above points were not in dispute on the facts.)

17.2. By doing so, did the respondent treat the claimant less favourably, because of her husband's disability, than it treated or would have treated others whose circumstances were materially the same?

Indirect sex and age discrimination

18. Section 19 of the Act 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.

19. The issues for this part of the claim were as follows:

19.1. The respondent had a provision, criterion or practice of expecting staff in its Customer Support Group (CSG) to work some evening and weekend shifts. The claimant's case was that by applying this PCP, the respondent subjected her to indirect sex discrimination and/or indirect age discrimination.

19.2. The respondent accepted that it applied the practice to men as well as women and to employees of all ages.

19.3. The Tribunal had to decide whether the respondent applied this PCP to the claimant.

19.4. In respect of indirect sex discrimination, the Tribunal had to decide:

19.4.1. Whether the PCP put women at a particular disadvantage when compared with men. The claimant's case was that women were less likely to be able to accommodate evening and/or weekend working than men because they were more likely than men to be carers.

19.4.2. If so, whether the PCP put the claimant at that disadvantage.

19.5. In respect of indirect age discrimination, the Tribunal had to decide:

19.5.1. Whether the PCP put those who were in the same age group as the claimant at a particular disadvantage when compared with those who were not in that age group. The claimant's case was that her age group comprised people between the ages of 50 and 64 (she was aged 59/60 at the relevant time). Her case was that people in that age group were less likely to be able to accommodate the PCP than those aged below 50, because those in the claimant's age group were more likely to be carers than those aged below 50.

19.5.2. If so, whether the PCP put the claimant at that disadvantage.

19.6. Whether the respondent's PCP was a proportionate means of achieving a legitimate aim. The respondent's case was that its aim was to implement a working pattern that enabled it to meet the needs of its customers.

Burden of proof

20. Section 136 of the Act deals with the burden of proof.

(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.

21. The Court of Appeal confirmed in Madarassy v Nomura International plc [2007] EWCA Civ 33 that a claimant must establish more than a difference in status and a difference in treatment before a Tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

22. In the Supreme Court case of Royal Mail Group Ltd v Efobi [2021] UKSC 33, the Court confirmed that the burden of proof remains with the claimant at the first stage of the test, meaning that a claimant must prove primary facts from which the Tribunal could conclude that the treatment has been discriminatory. A Tribunal can only find facts based on evidence, and the burden could not shift to the employer to explain the reasons for the treatment unless the claimant is able to convince the Tribunal, on the balance of probabilities, that in the absence of any other explanation, an unlawful act of discrimination has occurred.

23. The approach to be taken in indirect discrimination claims was set out by the Supreme Court in Essop v Home Office / Naeem v Secretary of State for Justice [2017] UKSC 27. The Court recognised that the law of indirect discrimination "aims to achieve a level playing field where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified". It added that "it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence." A claimant must first establish the existence of the relevant provision, criterion or practice (PCP) before the burden can shift in relation to discriminatory impact. There must then be evidence of a causal connection between the PCP and the disadvantage.

Justification

24. In Hardy v Hansons and Lax [2005] IRLR 726 the Court of Appeal, in holding that section 19(2)(d) requires the employer to show that the proposal is objectively justified notwithstanding its discriminatory effect, gave guidance on the Tribunal's approach to proportionality:

> *"The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary."*

25. The qualification of "reasonably" does not permit a margin of discretion or range of reasonable responses. It is also important to assess the impact of the PCP on the particular circumstances of the business, not the individual. In principle, objective justification is possible even if other proposals were possible. The more serious the disparate adverse impact, the more cogent must be the justification for it.

26. In Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601 the test was articulated by the Supreme Court as follows:

    - Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right?
    - Is the measure rationally connected to that aim?
    - Could a less intrusive measure have been used? and
    - Bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?

27. The Court reinforced the view that this is not a question of what a reasonable employer might think justifies the measure. A measure may be appropriate to

achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

Time limit

28. The Tribunal also had to consider whether the claimant's claims were made within the time limit of three months (plus early conciliation extension) in section 123 Equality Act 2010. The Tribunal had to decide:

    28.1. Whether the claims were made within three months of the act(s) to which the complaints relate.

    28.2. If not, whether there was discriminatory conduct extending over a period.

    28.3. If so, whether the claims were made within three months of the end of that period.

    28.4. If not, whether the claims were made within a further period that the Tribunal thinks is just and equitable, taking account of:

        28.4.1. Why the complaints were not made in time; and

        28.4.2. Whether it was just and equitable in all the circumstances ro extend time.

Findings of fact

29. The claimant worked for the respondent as an Administration Officer, with very long service since starting work in September 1977. She undertook a variety of roles and latterly worked in the Child Benefit team giving advice on a telephone helpline to members of the public. This team was known as the Customer Service Group (CSG). The claimant worked 22 hours per week. Mondays to Wednesdays. Her usual working hours were 7am to 3-3.30pm. She had worked these hours for around 10 years and they suited her very much.

30. The team in which the claimant was employed at the time of these events was known as the Customer Service Group (CSG). Nationally this comprised around 24,000 employees, with the number based in the Washington office where the claimant was based being around 100. Within this group, the great majority were female (around 80-85%), and many had caring responsibilities of some kind. Around two people in the local CSG team were under the age of 25 and another two, including the claimant, over 60. The remainder were evenly split between the age ranges of 25-40 and 40-60.

31. In around 2011 the claimant's husband had an accident at work. He has been unable to work since then due to various physical impairments, and the parties agree that he is a disabled person under the Equality Act. His health conditions also include poor mental health due to anxiety and depression.

32. The claimant worked in the Washington office until Covid restrictions were imposed in 2020. She then began for the first time working from home, an arrangement which continued until her employment ended. The respondent allowed the claimant flexibility in a number of ways, partly by agreeing that she could work from home and partly by allowing her five minute breaks every hour, in recognition and acceptance of the fact that she might need to provide some care or company for her husband whilst on duty. The respondent took no issue

with the claimant being able to speak with him or check on his wellbeing between the phone calls she was handling.

33. In reality Mr Forrest did not need consistent care throughout the day and rarely ever needed any urgent care, but the fact of being able to work from home was of value to the claimant, in case something did happen with her husband.

34. Mr Forrest's care needs, so far as those are relevant to the claimant's working day, were that he needed help with dressing and bathing first thing in the morning, as well as his medication. The claimant would prepare a sandwich lunch for him to eat in the middle of the day, and she would prepare an evening meal (dinner) for him to take between around 5-6pm, after her work had finished. At that point she would also give him more medication.

35. Those were the key care needs. In addition, the claimant and her husband were in the habit of sitting together to eat their evening meal and that was a routine they had established over a 10 year period. However, until March 2020 the claimant was out of the house all day in an office environment, and not present in the home to provide care to her husband. In those circumstances, and ongoing after she began working from home, support was available from other people in the family's support network on an ad hoc basis. For example Mr Forrest's sister, a son-in-law of the claimant (not the father of the grandchildren relevant to this case), and various friends would call in for a short visit and to provide some companionship.

36. Turning to the claimant's grandchildren, in 2021 they were 10 and five years old. They were generally collected from school and dropped off by others, occasionally by the claimant herself. The others who dealt with the school run included the parents of the children themselves or their friends who had children at the school. The grandchildren would sometimes go back home with those people, or they would be dropped off at the claimant's home. On the occasions when they were in the claimant's home (which was most of the time), the children entertained themselves and did not need any particular care from the claimant, although she would feed them at the end of her working day.

37. The claimant accepted in her evidence that if she were given notice of late shifts by the respondent, she would be able to make alternative arrangements for her grandchildren.

38. That sets the background and context for the events relevant to this claim, which began in the early part of 2021. By this time the claimant had been used to working from home for around a year.

39. In March 2021 the respondent agreed with the trade unions through collective bargaining some new working relationships. Part and parcel of this negotiation was a pay package representing a 13% pay increase over three years, in return for which a new working pattern would be introduced. This would mean starting work not before 7.45am and a new requirement to work under a collaborative roster arrangement, whereby all staff would work up to one late shift per week and potentially eight Saturdays over the year. The late shift meant working up to 6pm though this could extend to 6.30 or 6.45pm if there were calls still waiting to be handled. Employees could express their preferences for which dates they worked late and were given 3 months' notice of the shifts. The arrangements were based on management forecasting the likely demand from customers and in practice it was not always necessary to work a late shift every week as

fluctuations in demand were taken into account. If the demand was not there, members of the CSG were not required to work late or on Saturdays. In practice, Saturday working never affected the claimant because the Child Benefit Helpline was not open then.

40. These amounted to changes to the employees' contracted terms but they were subject to any Special Working Arrangement (SWA) request that an individual might submit. Any such request would be considered by a manager who then took it to a panel for a decision to be made. It was a new process but a robust one.

41. The SWA Policy set out expectations on both parties. For the respondent these included:

    41.1. Welcoming and agreeing to requests where possible, taking account of operational needs and services to customers;

    41.2. Considering all requests fairly and working to support colleagues where their requests cannot be accommodated;

    41.3. Being transparent and clear about why requests could not be accommodated.

42. Expectations of employees included:

    42.1. Being clear and transparent about requests;

    42.2. Engaging in open and positive conversations about options;

    42.3. Providing potential solutions to help meet the requirements of the role nd support the team;

    42.4. Engaging positively in dialogue about the type of arrangements that night work for the employee.

43. On 25 May 2021 the claimant submitted an SWA request. She stated that her grandchildren were dependent on her care and that she cared for them on evenings and at weekends. She said that her husband was also dependent on her care and that:

> "If I were to have to work evenings and weekends, I would be forced to arrange for this to be covered. This would have a huge impact on my health and wellbeing and as such will cause a great deal of stress, anxiety and worry."

44. The claimant linked her reasons with the respondent's Wellbeing Strategy. She felt that the impact on business need would be negligible and said she wished to maintain her existing working pattern.

45. The claimant's SWA request was considered in a discussion with Leanne Edusei, Operations Manager, on 9 June. Ms Edusei asked about the care arrangements for the grandchildren, and what the children's parents could do. The claimant explained that Saturdays were a problem mainly in relation to her husband. During the week her daughter dropped the children at school and it would be difficult for the claimant to start work at the later time of 7.45am as she would then have to work later in the day. She said that child care was very limited in the absence of local family, but did not mention to Ms Edusei the option of her son-in-law or friends of the family occasionally picking up the grandchildren from

school. She said her daughter had made alternative arrangements and had paid for an additional hour of schooling between Monday and Wednesday.

46. In her evidence at this hearing the claimant said she had included her grandchildren in her SWA request in order to add weight to it. In reality the extent to which the claimant looked after her grandchildren was limited to providing a safe place for them to spend time after school. At no time did the claimant explore other options with the parents of the children, such as after school clubs or other arrangements. We note that on 10 October, some months later, the claimant did work a late shift and on that occasion her daughter changed her working hours to accommodate that.

47. In the case of her husband, the difficulty identified by the claimant was that she did not want to change his routine due to the impact on his mental health. She accepted in evidence that she could have worked a split shift, and could therefore have taken a break enabling her to prepare an evening meal and provide his medication.

48. Mr Forrest's health was such that he relied on extensive pain medication, had limited mobility and took antidepressants. He relied on the claimant's care in the evenings and at weekends. When asked whether other family members or friends could offer support, the claimant initially said no. She then accepted that she could explore the possibility of her daughter caring for her husband on a Saturday, if the number of occasions were limited in number. When Ms Edusei explained that any Saturday working would mean having a day off in the week, the claimant said that Saturdays should not be a problem.

49. Ms Edusei offered to reduce the frequency of the late shift working to once a month instead of once a week but the claimant said she could not do this. The option to work from home remained unchanged. The respondent would give the claimant 12 weeks' notice of the dates of the late shifts, and she could then choose the dates she was available to work.

50. The respondent was not withdrawing the offer of flexibility at that stage, as alleged by the claimant, but rather it was forewarning her that the SWA request could be refused. That is partly because the respondent's preferred approach is to work with employees to reach a compromise outcome. It is clear that the respondent does offer a very high degree of flexibility to its workforce as a whole. The SWA Policy states that "Where we can't accommodate a request we are committed to supporting colleagues where a role can be found that supports the flexibility they need." In this case the claimant was not willing to agree any compromise at all. Although she referred to the possibility of moving to another role, this was not an option because all such roles were subject to the new requirement. In fact, the claimant conceded to the respondent at some point that she had not made any such request. The respondent felt that the claimant at no stage gave them any reason why she could not make herself available on those limited occasions when she was required to work on the flexible roster.

51. The managers who handled the claimant's request were at pains to find a positive outcome by aiming for a compromise with the claimant. However, she was not willing to consider any compromise at all.

52. On 22 June the respondent refused the SWA request and stated in the decision letter that this was because it could have a "detrimental effect on the respondent's ability to meet customer demands". On its face, that wording is

very generic and not particularly helpful, though we accept that the evidence as a whole does demonstrate that customer demand is closely correlated to what the respondent requires of its staff. In any event, that rationale, even if it was unclear in the letter to the claimant, was fully discussed at the later internal meetings with her. Because the respondent had offered to reduce the commitment to evening shifts from once per week to once per month, and because the claimant declined, her SWA was refused. We do not accept that that offer of the reduced commitment was withdrawn.

53. The claimant appealed the decision on 13 July, challenging the sufficiency of the reasoning behind it and saying that no business justification was provided. She complained that the flexibility of working from home and the option to choose the dates of the late shifts was offered to all employees, and did not take account of her personal circumstances.

54. Matthew Carr (Grade 7 Operational Leader) dealt with the appeal meeting on 21 September. He re-opened the possibility of the claimant working a late shift once a month, but the claimant was still adamant that this was not an option. She told Mr Carr that her husband had “extensive caring needs”. She was unable to say with any certainty what Saturdays she could work. She had a support network of friends and family they could rely on, and said that at that stage she had not considered switching the school drop off or collection with her daughter to accommodate the late working on occasion. She clarified to Mr Carr that she did not need to provide urgent care to her husband on a regular basis, and said she is ”like his comfort blanket” and if she was on the phone and he wanted to chat, she would need to support him. Little mention was made of the claimant's grandchildren during this discussion, except to say that she looked after them “at short notice”. The claimant explained that her daughter had a high profile job and her son-in-law often worked away. Mr Carr outlined the respondent's business needs and the need to serve customer demand.

55. In the appeal outcome letter dated 29 September Mr Carr said he felt that the claimant's circumstances had been taken into account, that the decision was in line with policy and it was proportionate. The letter stated that: “Any colleague unable to meet the needs of our customers during our hours of operation reduces our ability to serve customer demand”. He offered the claimant the option of working a late shift once a month and recommended she accept this. She did not.

56. This appeal brought the internal procedure to a close. On 13 December the claimant contacted ACAS and submitted a formal grievance to the respondent on 14 December, following advice to do so in anticipation of Tribunal proceedings. The manager tasked with dealing with the grievance was Karen Parr, Business Delivery Manager.

57. In early January 2022 the claimant and Ms Edusei exchanged emails about the fact that she had not received 16 weeks’ notice to cover an upcoming shift. Ms Edusei agreed that since early conciliation was underway with ACAS, they would await the outcome before the claimant had to provide her preferences on dates. Once the EC certificate was issued at the end of January, a fact-finding meeting took place in order to take the claimant’s grievance forward. This was attended by the claimant and Ms Parr on 15 February. There was a discussion about the use of the grievance procedure as a further right of appeal against the decision on the SWA request. Mrs Parr said she could not treat it as a further right of

appeal and could not therefore overturn the decision that was made, because this was outside procedure, but nevertheless she was prepared to make recommendations.

58. By then, the outcome the claimant wanted from the grievance was for the Child Benefit centre to be aware of how she felt. She acknowledged that the once a month offer was still on the table, but she had not yet made a final decision about that. There was a discussion about the issues and the claimant explained that she cared for her husband. She did not refer to her grandchildren.

59. The following week the Tribunal claim was filed on 21 February. On 23 February Ms Parr carried out fact-finding meetings with Ms Edusei and Mr Carr to explore their rationale for making their decisions. Ms Edusei said she had had in depth discussions with the claimant about the SWA application before taking it to the panel. She said the claimant had said she could not work evenings as she cared for her daughter's children. When asked about what support her daughter or others could provide, Ms Edusei felt she got nothing back from the claimant. Her view was that the respondent had bent over backwards to accommodate the claimant and the claimant was not being reasonable because she "would not budge". Lots of other employees had childcare responsibilities but no one else had requested to opt out of late shifts. The claimant had been offered a split shift but refused that as well. Ms Edusei explained to Ms Parr that the issue with the claimant's husband revolved around Saturday working. She believed that the respondent had explored all options but the claimant was simply unwilling to agree any of them.

60. At his interview, Mr Carr explained his understanding of the claimant's circumstances, which were about caring for her grandchildren and her husband. So far as he understood it, the claimant's care for her husband was not always hands-on, but there were some mental health issues present. The claimant had told him she could provide care for her husband on Saturdays through her support network, and that she had not thought of switching her hours with her daughter to manage the school runs. Mr Carr had made her aware of the ability to take short breaks to support her husband while working from home. The claimant told him (and this was a feature of the evidence we heard in this hearing) that she saw herself as a small cog in a big wheel and could not understand why she could not be accommodated. Mr Carr by contrast had a perception that the claimant did not have barriers, just preferences.

61. A follow up meeting took place between Ms Parr and the claimant on 11 May. In advance of this the claimant had been provided with the fact-finding report and the records of the meetings with Ms Edusei and Mr Carr. The claimant had very little if anything substantive to say, and said she felt her managers were not going to change their minds even if they knew how she felt. She said she would be going ahead with ACAS.

62. The grievance outcome letter dated 29 June brought the internal procedures to a close. Ms Parr did not uphold the grievance. She gave detailed reasons for her decision and said the claimant's caring responsibilities had been taken into consideration by management, and flexible options had been offered. She noted that the claimant had told Ms Edusei no one could help with her caring responsibilities, except that her daughter could cover some care on Saturdays for the claimant's husband. She noted that working from home in itself was a flexible option which allowed the claimant to support her husband, and the

support he needed was more about his morale than practical physical support. She noted that the claimant did not seem interested in exploring a compromise of one late shift per month. She concluded that there was no discrimination and that the claimant had been treated fairly.

Submissions for the claimant

63. The claimant's submissions were focussed on the data summarised in her Further Information document and Mr Subramanian's brief skeleton argument. The latter relied on the refusal of the SWA as the foundation for the complaints. She relied on a hypothetical comparator for the purpose of the direct disability discrimination claim, that being a person in the same position as the claimant but without any caring responsibilities.

64. The claimant submitted that the reason for the refusal of the SWA was not because of a business need, as the respondent had conceded there was in reality no Saturday working and it had offered to limit evening shifts to once a month. She asserted that the real reason for the refusal was that the respondent did not want to set a precedent by granting the SWA so the claimant could look after her disabled husband.

65. The claimant relied on the ongoing internal process relating to the SWA as forming a continuing series of acts, such that the claim was brought within time.

66. On indirect discrimination, Mr Subramanian's skeleton argument set out the requirement for a PCP to have been applied to the claimant. He identified the pool for the purpose of showing group disadvantage as being "the CSG staff", meaning the Customer Services Group, but he did not identify any evidence showing group disadvantage among the members of this pool, an essential ingredient under section 19 of the Act, alongside individual disadvantage to the claimant. Nor did he make any distinction between the protected characteristics of sex and age in this group, upon which the claimant relied.

67. The claimant challenged that the respondent had shown that the PCP was a proportionate means of achieving a legitimate aim, in the context of no Saturday working and potentially working 1 additional hour per week on 29 days per year.

68. The key points set out in the Further Information can be summarised as follows.

69. The claimant relied on her caring responsibilities for her disabled husband as meaning she was unable to work evenings and weekends. The refusal of the SWA request put her at a disadvantage compared to a person without a disabled spouse. The claimant compared her position with that of a 35 year old man with no dependants. She did not deal with the question of the *reason why* the respondent refused the SWA request, only the consequences for her. She relied on the fact that she had worked the same shift pattern for 10 years and could not afford to pay for alternative caring arrangements during the extra hours she was being required to work.

70. The information relating to the indirect discrimination claims referred to a number of sources which the claimant had found through her own research. The sources themselves were not produced. The claimant relied on the following:

    70.1. A 'research briefing' published by the House of Commons Library in June 2022 stating that around 60% of carers in the UK are likely to be women, and adults aged 55-64 are most likely to care for others.

70.2. Caring falls particularly on women in their 40s, 50s and 60s. 1 in 4 women aged 50-64 has caring responsibilities for older or disabled loved ones (2011 Census).

70.3. Female carers are more likely to be providing 'round the clock' care, with 60% of those caring for over 50 hours a week being female (NHS Information Centre for Health and Social Care, 2010 and Survey of Carers in Households, 2009-10).

70.4. Women are more likely to have given up work or reduced working hours to care, particularly in their 40s to 60s (YouGov polling 2013).

70.5. Women have a 50:50 chance of providing care by the time they are 59; compared with men who have the same chance by the time they are 75 years old (Carers UK, 2015).

70.6. The Taylor Review (July 2017) which, as part of the statutory evaluation of the right to request flexible working, recommended that the government Consider how further to promote genuine flexibility in the workplace, for example to accommodate flexibility needed for a particular caring requirement.

71. The claimant relied on these figures to support her claim that as a 61 year old woman she was put at a disadvantage and could not work her contracted hours.

Submissions for the respondent

72. Mr Wilkinson gave oral submissions as well as providing a skeleton argument. He outlined the chronology of the claimant's SWA request and its refusal, and put this in the context of the new collective agreement reached with the unions.

73. The respondent cited Royal Mail Group Ltd v Efobi on the burden of proof. It submitted that the claimant had not identified a comparator for the direct discrimination claim, referring to Shamoon v Chief Constable of the RUC [2003] UKHL 11. There had been no 'less favourable treatment' as required by section 13 of the Act. The refusal of the SWA request was not *because of* the claimant's husband's disability, but rather it was to enable the respondent to meet customer demand.

74. Mr Wilkinson set out the legal test in indirect discrimination claims under section 19 of the Act, setting out the approach in Essop v Home Office. In short, a PCP must be identified, and it must be established that the PCP places people with the relevant protected characteristic at a particular disadvantage compared with others. There must be a causal link between the PCP and the particular disadvantage. There is no requirement that the PCP puts every member of the affected group at a disadvantage. The Supreme Court said in its judgment that:

> "It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. Statistical evidence is designed to show correlations between variables and outcomes and to assess the significance of the correlations. However, a correlation is not the same as a causal link."

75. The respondent further relied on the justification defence, submitting that the measures it took were a proportionate means of achieving the legitimate aim of

meeting customer demand. Applying Essop, it submitted that this should not be seen as placing an unreasonable burden upon respondents.

76. As to disadvantage, the claimant had to show that this applied to her personally. The respondent pointed out that the PCP – as applied to the CSG generally – referred to a maximum of one late shift per week and six Saturdays per year. Late shifts would be up to 8pm at the latest, but not necessarily that late. As the need for call handling was driven by customer forecasting, actual demand might be for less time. These arrangements were relaxed in the claimant's case with a proposal of one late shift per month and three Saturdays per year.

77. The question of disadvantage requires consideration as to whether a reasonable person would have considered him or herself to be disadvantaged: Cowie v Scottish Fire and Rescue Service [2022] EAT 121.

78. Mr Wilkinson said it was necessary to consider the proportion of those *without* the protected characteristic who are disadvantaged by the PCP, as against those *with* the protected characteristic who are disadvantaged by it, in order to consider whether the latter group is put to a particular disadvantage compared to the former group. He submitted that although judicial notice can be taken of the 'childcare disparity', that does not necessarily mean that group disadvantage is made out, because that depends on the interrelationship between the general position and the PCP in question, relying on Dobson v Cumbria Integrated Care NHS Foundation Trust UKEAT/0220/19/LA.

79. As for statistical analysis, Mr Wilkinson referred to McNeil and others v Commissioners for HM Revenue and Customs UKEAT/0183/17/RN. In particular, where statistical evidence is relied upon, the critical question is whether and to what extent people with the relevant characteristic are differentially affected by the PCP in comparison to those without it. Furthermore, where statistics are relied upon "a mere difference in the statistical outcome for men and women is not sufficient: the disparate effect must be "to such a degree as to amount to indirect discrimination"... The Court of Appeal held that there must be "a substantial and not merely marginal discriminatory effect... It must form a view that the impact is considerable".

80. The respondent agreed that the pool affected by the PCP was the CSG. Mr Wilkinson submitted that the childcare disparity referred to in Dobson did not automatically translate to the PCP causing a group disadvantage to the CSG. This was for the claimant to prove. He relied on the fact that the new shift arrangements were limited in their impact on the group, with a maximum of one evening per week and six Saturdays a year. The total hours worked would remain the same, and the dates of the new shifts were subject to significant advance warning. Members of the CSG could also indicate their preferences on the dates. Overall, this allowed them a significant degree of flexibility.

81. On the evidence in this case, the claimant was unable to prove that the childcare disparity put women in the CSG at a particular disadvantage, never mind a substantial' or 'considerable' one per McNeil. The respondent's evidence was that the CSG was predominantly female and the terms had been negotiated and agreed through collective bargaining.

82. The position regarding caring for a disabled person is different, in that there is no equivalent to the childcare disparity.

83. Mr Wilkinson took issue with the claimant's statistics, for which the raw data had not been provided. For example, the reference to “carers” in the Further Information did not define that group and whether they were carers for children, or elderly people, or disabled people. Furthermore, the statistics are not concerned with this particular PCP and this particular disadvantage. By way of example, some of the 60% of female carers in the UK may not be of working age and would not be affected by any such PCP. In order to assist the claimant, the statistics would need to show that a greater proportion of men and/or people below the age range 50-64 in the CSG were unable to comply with the respondent's PCP. The extent of any disparate impact could not be gleaned from the information supplied by the claimant.

84. The only statistic the claimant produced to support her age discrimination argument was based on a 2011 Census saying that 1 in 4 women aged 50-64 had caring responsibilities for older or disabled loved ones. This did not assist with the need for a comparison with the relevant pool in this case, nor did it have any bearing on the particular PCP. No comparative exercise could be undertaken because there was no evidence about the ability of people younger than 50-64 to comply with the PCP.

85. As for individual disadvantage, the respondent challenged whether the claimant was actually put at a particular disadvantage compared with men or younger members of the pool. For example, the claimant was not the primary carer of her grandchildren and their needs were unaffected by Saturday working. The only requirement was for her to work one evening per month. The parents of those children were the ones responsible for making care arrangements, not the claimant.

86. The arrangements the claimant had in place for the care of her husband would not have been any different if the claimant had worked one evening a month or an occasional Saturday. The existing support network they had available to them would have continued in the same way.

87. Finally, the respondent submitted that the PCP was justified under section 19(2)(d) of the Act. Prior to the changes, it had identified gaps in the service, with many customers contacting the helpline at 8am, after 3pm or on Saturdays. An important feature of the case is that the CSG team members were only required to work evenings or weekend of customer demand required it. The new requirements were a maximum and could well reduce according to actual customer demand.

Conclusions

Time point

88. Before dealing with the merits of the discrimination claims, it is necessary to set our our conclusion on the time point raised in the pleadings, although this was not particularly pursued during the course of the hearing. We considered whether the claims were brought within the statutory 3 month time limit under the Equality Act 2010, based on the respondent's decision to refuse the claimant's SWA request in June 2021. We concluded that the decision-making process which began then and ended with an appeal outcome dated 29 September 2021 constituted conduct extending over a period for the purposes of section 123 of

the Act. Accordingly, the claim was brought within time by reference to the conclusion of that process.

Burden of proof

89. It is necessary to revisit the concerns expressed in the Introduction to this judgment about the lack of evidence in this case. Although we had the benefit of oral evidence from witnesses, the claimant's written statement did not give us any factual content to support her claim. In particular, there was nothing in her witness statement about the nature of her caring responsibilities and their impact on her ability to adapt to the new shift pattern. We raised that concern at the outset of the hearing and invited the claimant to give additional evidence-in-chief in order to fill the key gaps. Evidence about the demands on her of caring for her husband and grandchildren were part of the essential foundations of the case.

90. It was concerning that despite clear guidance being provided at preliminary hearings in August and November 2022, the claimant had not addressed her mind to the need to present her case clearly and to support it through relevant evidence. It was for the claimant to prove primary facts from which we could infer that her treatment by the respondent was discriminatory. At the second preliminary hearing before Judge Aspden, there was a specific discussion about the need to show the reason for the treatment which was alleged to be direct disability discrimination under section 13 of the Act. Put simply, the claimant had to provide some evidence tending to show that the refusal of the SWA request and the requirement for her to work some evenings and weekends happened *because* her husband is a disabled person. No attempt was made to identify any such evidence, and none was presented to us at this hearing.

91. Despite the previous indications given to the claimant at preliminary hearings, this Tribunal was struck by the almost complete absence of evidence to support the claims, which as the claimant knew was her responsibility to produce. We did take account of the evidence as a whole, including the claimant's supplementary evidence-in-chief and the information set out in her Further Information document.

92. Overall, we found the claimant's evidence to be unconvincing and noted that even on her own case, her oral evidence did not always support the complaints she was making. This was, for example, particularly apparent when the claimant told us she had included her grandchildren in her SWA request to “add weight” to the application. In respect of her caring responsibilities towards her husband, we found that the claimant tended to overstate the severity and extent of these, both to the respondent and to the Tribunal. In her appeal to Mr Carr, the claimant stated that her husband had “extensive caring needs” and yet this was not supported by her own evidence during this hearing. In a similar vein, the claimant's Further Information referred to her inability to pay for alternative caring arrangement, yet she raised nothing in her evidence to suggest that this was ever a factor. That is not to undermine the real difficulties of caring for a spouse with disabilities, but these issues did have a bearing on the credibility of the claimant's assertions that she could not accommodate any new arrangement with her employer.

Direct disability discrimination

93. The claimant's claim under section 13 of the Act required her to show that she was less favourably treated than her hypothetical comparator because of

disability. The disability can be her husband's. The acts of discrimination complained of were the refusal of the SWA request and the resulting requirement to work occasional evenings and Saturdays. As stated above, it was striking that the claimant gave no evidence whatsoever to support the allegation that the respondent took these steps *because of* her husband's disability. The claimant offered no evidence at all to support the allegation that this decision was discriminatory. It was not in her witness statement, nor mentioned in the few documents we were referred to. The evidence was simply absent from the hearing.

94. The point was not addressed in Mr Subramaniam's submissions either. In fact, he contended that the "real reason" for the refusal of the SWA was that the respondent did not wish to set a precedent. That argument does not support a claim of direct discrimination.

95. The Tribunal is very familiar with the difficulties of proving discrimination and sometimes claimants attend their hearings without firm proof. That is not unusual. A claimant may be relying on a suspicion or a theory that discrimination has tainted the way they were treated. But a claimant who holds such a belief must support it with some evidence. The law requires Tribunals to consider whether evidence of primary facts has been presented, from which we could conclude that the treatment was discriminatory. In that case the burden of proof would shift to the respondent to explain itself. In this case, however, no evidence of any such primary facts was provided at all. The burden of proof did not shift from the claimant to the respondent, and nothing in the evidence we heard would permit us to infer that the decision to refuse the SWA was in any way done because of disability. On the contrary, there was clear evidence from the respondent of the business need for the new roster, which had been negotiated and agreed by the trade unions. That evidence would have displaced any suggestion of a discriminatory reason for refusing the SWA.

96. For these reasons we conclude that the direct discrimination claim is without merit and fails.

Indirect sex and age discrimination

97. The indirect discrimination complaints under section 19 of the Act are separate claims based on two different protected characteristics: age and sex. It is nevertheless convenient to deal with some aspects of these claims together, as the legal arguments in support of them have little if anything to distinguish them.

98. Section 19 of the Act requires there to be a provision, criterion or practice (a PCP) which puts a person with the relevant protected characteristic at a disadvantage, and puts that category of person at a group disadvantage. Early on in this case, the PCP was identified as a 'practice' of expecting staff in the respondent's CSG team to work some evening and weekend shifts. Having considered the evidence presented to us, we conclude that it amounted in fact to a contractual obligation and therefore more akin to a 'provision'. The new shift system was agreed through collective bargaining with the relevant unions, and was contractually binding on staff unless they applied for and were given an SWA (or some other flexible working arrangement). This was a new requirement of staff in the CSG team, who had agreed to work under a new collaborative roster. In practical terms, this meant CSG employees starting work not before 7.45am and working a maximum of one late shift a week. In theory the roster

required occasional Saturday working, but in practice this did not affect the CSG team or the claimant.

99. The PCP was applied to the claimant, although not to its full extent because the respondent was prepared to relax the requirement to one late shift per month. Like her colleagues, the claimant could express preferences for the dates when she would work until 6-6.30pm, and she would be given three months' notice of the dates. Her total working hours would remain unchanged.

100. An essential feature of an indirect discrimination claim is the need to identify a pool for comparison. It was agreed in this case that this would be the entire CSG group. We accept Mr Carr's figure that this amounted to 24,000 employees nationally. We were given no concrete data by either party about the demographic of that pool, though we were given some information through Ms Edusei's oral evidence about the make-up of the team in the Washington office. Allowing for the fact she was relying on estimates and perhaps had not anticipated the question, we were nevertheless prepared to accept this oral evidence, which we noted was unchallenged. In summary, of the 100 members of the CSG team in Washington, a significant majority (80-85%) was female. Many had caring responsibilities. The age range was evenly divided between two main groups: those aged 25-40 and an older group aged between 40-60. Around two people were younger than 25 and two were older than 60. Predominately it was an older workforce, partly because of a lack of recruitment during the pandemic.

101. That is not the correct pool because the PCP was applied to the whole CSG group nationally, but that evidence was helpful for us to understand what we might expect to see if we were to look at the pool as a whole. It would be unsurprising if the demographic in Washington were not replicated broadly in the wider team.

102. A PCP is not necessarily discriminatory. It can be if certain conditions are met. Applying section 19 to the features of this case, it was necessary for the claimant to show that the PCP put women and/or people in the 50-64 age bracket at a particular disadvantage compared to men or people in a younger age bracket. The claimant needed to establish not only that she – as a woman and/or as a person in the age bracket 50-64 – was disadvantaged by the PCP and furthermore that others with those same protected characteristics were (or would be) disadvantaged by the PCP. This is the requirement for there to be both group disadvantage and individual disadvantage in order for a section 19 claim to succeed.

103. We examined these questions by working through a number of questions. Firstly, we asked ourselves whether the PCP put women at a disadvantage compared to men, and what evidence we had in support of that argument. We took note of the reminder in Dobson and Cumbria NHS Trust that we should take judicial notice of the childcare disparity which falls mainly on women. That relates to those who have childcare responsibilities. In other words, it can be expected that mothers of children for whom they are directly responsible will be taking on more of that burden than the fathers of those children. We gave careful consideration to the claimant's Further Information document, which includes extracts from her research sources. Having done that, we reached the conclusion that we had no statistical evidence nor any other foundation for taking judicial notice of anything beyond the childcare disparity. It seemed to us that there is no

recognised well-established concept (based on common sense and knowledge of how society tends to work) about caring responsibilities on a broader basis. It may well be the case that women bear more of a burden than men for other caring responsibilities, not related to their children, but we were presented with no evidence at all to support that, and we were unable to make that assumption. For example, any spouse might be disabled, male or female. Any spouse might experience an accident or an injury. Any adult in the family might have care needs which other members of the family provide. But in the absence of any evidence that such scenarios tend towards women being the carers, we are unable to draw that conclusion. If we were to do so, it would be an unfounded generalisation.

104. That is a summary of our analysis of the disadvantage in relation to sex. Turning to the protected characteristic of age, we asked ourselves whether the PCP put people in the 50-64 age bracket at a disadvantage when compared with people under 50, and again we asked what evidence we had in support of that. The question is whether that age group is disadvantaged by the requirement to work some evenings and weekends. In our view this is unlikely to be a question of caring for one's own children, unless the child were an adult with a disability. It may well be that some over 50s are caring for elderly parents or for a disabled spouse. It may be that older people bear more of a burden than those under 50, but there is simply no evidence to support that and again we were unable to make that assumption.

105. Having given this question careful consideration, we concluded that there are too many variables from which we could make broad assumptions about where the burden of caring responsibilities lies. On the one hand, we have an ageing population but we are also, many of us, fortunate to be fitter and to be living healthier lives for a longer period of time. We know it is not uncommon for elderly parents to have care needs – but they are just as likely to be looked after in a care home or by professional carers as by members of their own families.

106. Again we looked at the information in the claimant's Further Information. It quotes from some sources but without the raw data that sits behind it. We went through this carefully but we did not find it helpful because it had no real bearing on the workplace context in this case, and it bore no relationship to the PCP that we were dealing with. For example, there is an assessment of who comprises the pool of carers in the UK, and that group is said to be mostly women (60%). That is, however, an assessment of those who are in the pool defined as 'carers'. They may and may not be actively involved in a workplace. In the quoted example of carers providing 50-plus caring hours a week, it seems very unlikely that they would also be participating in a workplace. It is not therefore a valid comparison to make.

107. One of the other examples set out in the claimant's Further Information relates to people in the age bracket 40-60. The example given shows that a younger age group may be disadvantaged by having to give up work to provide care. This suggests that somebody of the claimant's age, at the upper end of that bracket (she was around 60 at the relevant time) is no more disadvantaged than a 40 year old.

108. In summary, we accept that women are more likely than men to be responsible for the care of their own children, but we have no reliable data extending that to caring responsibilities generally. Otherwise, the claimant's statement that the

older you are, the more likely it is that you have caring responsibilities, is a generalisation not supported by the very limited information she has provided.

109. As part of our consideration of group disadvantage, we also asked ourselves (following McNeil), what proportion of the pool is disadvantaged. The question is whether and to what extent there is a differential impact, because were being invited to look at whether women compared to men, or people in an older age bracket compared to under 50s, are disparately impacted. That would need us to assess how many men, or younger people, were in the CSG pool and what proportions of those groups were (or were not) disadvantaged by the PCP. The same question applies to the women and people over 50 in that pool, but we simply had no data at all on which to make that assessment.

110. We accepted Mr Wilkinson's submission that the information provided does not assist the claimant because it is not concerned with the PCP and this particular disadvantage. For all these reasons we cannot accept that the requirement under section 19 of the Act to demonstrate group disadvantage was met.

111. It is nevertheless important to deal with the other elements of the claims in our reasoning. Aside from group disadvantage, we had to consider whether the claimant herself was put to a disadvantage by the PCP. Our conclusion on this was influenced by the inconsistent stance taken by the claimant in her statements to the respondent during the internal meetings. The same can be said to some extent about her evidence to this Tribunal. The key inconsistency was about whether she could or could not in fact comply with the PCP.

112. At times the claimant made concessions that she could switch times with her daughter so that the claimant would drop off her grandchildren at school in the morning, and her daughter would collect them at the end of the day. She accepted that she could make arrangements for people to keep her husband company on Saturdays, through her existing support network of friends and family who already called in to provide that kind of support. Yet the claimant gave no concrete reasons, either to the respondent or to us, why she could not comply with the PCP. As is apparent from our findings of fact, there are numerous examples of the claimant going back and forth with the respondent about the accommodations she could possibly make, while at the same time being adamant that there was no compromise that she was able or willing to agree.

113. No doubt there was some inconvenience to the claimant in having to adapt her routines and make other arrangements with her daughter or with her support network. However, we do not conclude that these were of any real substance and even the claimant herself accepted during evidence that she could make those arrangements. For example, she agreed that she could have worked a split shift allowing her to have a break in her work in the late afternoon to prepare or heat up an evening meal for her husband. Through questioning the claimant in oral evidence, we came to the clear conclusion that the only obstacle to her working an occasional late shift was that she and her husband had a routine which they were used to and enjoyed. In the latter part of the working day, her husband's only 'care needs' were to have his evening meal prepared and medication dispensed. Beyond that, the only real objection was that the claimant and her husband had a preference to eat their dinner together.

114. Having already concluded that the claimant does not meet the requirements of the Act to show group disadvantage, we are also not satisfied that individual

disadvantage has been demonstrated. But if we are wrong about that and if we were to accept that the claimant was put to a disadvantage, then our conclusion would be that it was minimal. The change to her husband's routine was, on the evidence we were given, the only point of substance and we agree with Mr Carr's terminology that this represented a preference rather than a need. It was a minor change which could be accommodated well in advance.

115. We recognise that the claimant had to juggle her work and family life, but we also conclude that she overstated both to the respondent and to the Tribunal the nature and extent of her caring responsibilities. For example, to say that both the grandchildren and her husband were "dependent on her care" was clearly not the case. She added her grandchildren to the SWA request to add weight to it. The claimant may have felt this was an appropriate thing to do in an internal meeting with her employer, but it did not assist her in this claim. The claimant said that her husband had "extensive caring needs", yet the only obstacle was her inability to keep him company at dinner one evening a month.

Justification

116. Finally, although we have not found in the claimant's favour on the elements of section 19 that need to be proven, we considered the justification defence in the alternative. This required the respondent to show that it had a legitimate aim. Put simply, that was the need to meet customer demand. The question then was whether their requirement for the claimant to work late shifts once a month was a proportionate means of achieving that aim. Our conclusion is that it was wholly proportionate. The way in which the new roster operated was driven directly by customer demand, being based on forecasts which were then adjusted as demand fluctuated. The respondent's systems combined a robust planning tool with a very flexible approach towards members of the CSG team. The arrangements enabled the respondent to work collaboratively with staff, who could give notice of their preferences and be given 12 weeks' notice of their actual working dates. Given the ebb and flow of the working pattern, it seemed clear to us that it was by its very nature proportionate, in that no more was demanded of staff than was actually required to meet customer demand.

117. The PCP was also appropriate to achieve the legitimate aim. The respondent had a cap on the obligation to work late, up to a maximum of once a week, and in practice it was at times well below that limit. This was evidenced by the fact that others in the CSG team in Washington sometimes worked late shifts only once a month instead of weekly.

118. Applying Homer, we concluded that a fair balance was struck between the reasonable needs of the respondent's service to customers, and the claimant's personal circumstances. The PCP was not applied to the claimant fully, and the relaxation of the requirement to work late once a month was a concession which would have had a less intrusive effect on the claimant's ability to balance her home and working life. The claimant was the only person in the local CSG who asked to opt out of the new roster. Significantly, she was not prepared to explore or even consider any compromise with the respondent.

119. For all the above reasons, we find that the claims under section 19 of the Act are not well-founded and fail.

SE Langridge

Employment Judge Langridge

Date: 8 February 2024