EMPLOYMENT TRIBUNALS

Claimant: **Ms N Jones**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre**
(by hybrid and remote video hearing)

On: **22, 23 and 24 March 2023 and in Chambers on 28 March 2023**

Before: **Employment Judge S Shore**

Members: **Ms J Land**
Mr S Woodhouse

Representation
Claimant: Ms B Grossman (Counsel)
Respondent: Ms R Thomas (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:-

1. The Claimant's claims of direct sex discrimination under s.13 of the Equality Act 2010 fail.

2. The Claimant's claims of indirect sex discrimination under s.19 of the Equality Act 2010 fail.

3. The Claimant's claims of victimisation under s.27 of the Equality Act 2010 fail.

4. The Claimant's claim under s.80(G) and 80(H) of the Employment Rights Act 1996 in respect of flexible working succeed. The Tribunal makes a declaration that the Respondent failed to deal with the Claimant's application for flexible working dated 15 April 2021 in a reasonable manner under s.80(G)(1)(a) of the Employment Rights Act 1996.

5. The Respondent shall pay the Claimant compensation calculated as 5 weeks gross pay capped at £544.00 per week = **£2,720. 00**.

6. As this judgment deals with remedy in respect of the only claim in which the Claimant has succeeded, there is no requirement for a remedy hearing.

REASONS

Introduction and history of proceedings

1. The Claimant commenced her employment with the Respondent on 22 January 2001 and remains employed by the Respondent. The Claimant is currently employed as a Train Operator based at the Respondent's depot at Hainault. The Claimant has been based at the Respondent's Hainault depot since 2005.

2. The Respondent is responsible for operating the Underground network in London.

3. The Claimant gave birth to a child in February 2013. She made applications for flexible working on 24 November 2013 [110-112] and 27 November 2013 [113-114]. The Claimant sought the following flexible arrangements:

    3.1. Not to work on any Saturday;

    3.2. Not to work on alternate Sundays; and

    3.3. On all other days, to work between 07:00am and 21:00pm, finishing at Hainault Depot.

4. Her application was refused following a meeting on 17 December 2013 [116-117]. Whilst refusing the application for flexible working, the Respondent granted the Claimant a local temporary arrangement that partially met her needs.

5. The Claimant joined the Hainault Depot Syndicate in 2014, which enabled her to arrange a swap of shifts so that she did not have to work on Saturdays. Everything proceeded on that basis until the Claimant was invited to a meeting with her manager on 27 November 2020, which she attended with her trade union representative. The outcome of that meeting was that the Claimant was advised that the local agreement would terminate with two weeks' notice from 26 December 2020.

6. The Claimant appealed the decision. Her appeal was heard on the 15 April 2021. After the meeting, the Claimant completed a formal flexible working agreement. The circumstances of that application and how it was dealt with are in dispute and will be dealt with in the findings of fact.

7. The Claimant began early conciliation with ACAS on 8 July 2021 and received an early conciliation certificate on 19 August 2021. The Claimant presented an ET1 on 17 September 2021.

8. The Claimant presented claims of:-

    8.1. Direct discrimination because of the protected characteristics of sex under s.13 of the Equality Act 2010;

8.2. Indirect discrimination because of the protected characteristics of sex under s.19 of the Equality Act 2010;

8.3. Victimisation under s.27 of the Equality Act 2010; and

8.4. Breach of the procedures for flexible working under ss.80(F)-80(H) of the Employment Rights Act 1996.

9. The claim was case managed on the Tribunal's own initiative on 22 March 2022 [32-33] when Regional Employment Judge Taylor listed the case for a hearing on 22 to 24 March 2023 and listed a telephone preliminary hearing for 4 April 2022. The parties were ordered to agree a schedule of issues by 31 March 2022.

10. The preliminary hearing took place on 4 April 2022 before Employment Judge Russell who produced a case management order dated 17 June 2022 that the Tribunal sent to the parties on 21 June 2022 [34-38]. The parties had not produced an agreed list of issues as ordered but EJ Russell made case management orders.

11. The parties agreed a list of issues which they sent to the Tribunal on 21 March 2023.

Issues

Direct Sex Discrimination – Section 13 Equality Act 2010

1 Was the Claimant subject to detriments as follows:

a) Not allowing the Claimant any flexibility to her working pattern following her return from sick leave on 14th June 2021;

b) Not referring her to OH for an assessment of the work that could be carried out by her on or around 14th June 2021;

c) Requiring her to work to her pre 2013 roster on her return to work on 14th June 2021;

d) Failing to allow her to work her contracted hours (those she had been carrying out since 2013) on her return to work on 14th June 2021.

2 If so, did any detriment constitute less favourable treatment than a male comparator? The Claimant relies on John Bowden, Andrew Barer, and Arjun Floray. The Claimant relies on all 3 comparators for each of the acts listed at (a) – (d) above.

3 Has the Claimant proved facts from which the Tribunal could decide, in the absence of any other explanation, that the alleged detriments above were act(s) of unlawful discrimination because of her sex?

4 If so, can the Respondent show that the treatment was in no sense whatsoever because of sex.

Indirect Discrimination – Section 19 Equality Act 2010

5 Did the Respondent apply a provision, condition, or practice ("PCP")?

6 The PCPs relied on by the Claimant are:

a) Requiring Train Operators and the Claimant to work on a Saturday:

b) Requiring the Claimant to work a week of earlies, a week of lates and every other Saturday/Sunday;

c) Requiring Train Operators and the Claimant to work with the syndicate.

7 Did the PCP put or would put those who share the Claimant's protected characteristic of sex at a particular disadvantage in comparison to others?

8 Was the Claimant put or would be put at that disadvantage by the PCP?

9 Can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim?

5.1 What is the Respondent's aim? Is it a legitimate aim? The Respondent relies on

i. the need to ensure the efficient performance of the Central Line by making sure there is adequate staff in place.

ii. The need to balance the rights and needs of the workforce.

iii. The need to maintain good industrial relations and honour union negotiated agreements.

5.2 Was the PCP a proportionate means of achieving that aim?

Victimisation – Section 27 Equality Act 2010

10 Did the Respondent subject the Claimant to a detriment as follows:

a) Not allowing the Claimant any flexibility to her working pattern following her return from sick leave on 14th June 2021;
b) Not referring her to OH for an assessment of the work that could be carried out by her on or around 14th June 2021;
c) Requiring her to work to her pre 2013 roster on her return to work on 14th June 2021;
d) Failing to allow her to work her contracted hours (those she had been carrying out since 2013) on her return to work on 14th June 2021.

11 Was she subjected to these detriments because she carried out a protected act?

12 The Claimant relies on the following protected act:

a) Complaint of bullying and harassment on the grounds of sex on 10th June 2021.

Flexible Working – Section 80G and 80H of the Employment Rights Act 1996

13 Did the Claimant make a flexible working application under Section 80F ERA 1996?

The Law

12. The statutory law related to the Claimant's claims of discrimination is contained in the Equality Act 2010. The relevant sections are section 13 (direct discrimination); section 19 (indirect discrimination); section 27 (victimisation); section 136 (burden of proof). The relevant provisions are set out here:

13. Direct discrimination

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.

If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

The relevant protected characteristics are—

(a) …

(b) sex;

(g) ….

19. Indirect discrimination

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 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.

27. Victimisation

A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(a) making an allegation (whether or not express) that A or another person has contravened this Act.

Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

136. 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.

(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…

12. The law relating to flexible working is primarily contained in sections 80G and 80H of the Employment Rights Act 1996.

80G Employer's duties in relation to application under section 80F

5.2.1.1.1 An employer to whom an application under section 80F is made—

(a) shall deal with the application in a reasonable manner,

5.2.1.1.1.1 shall notify the employee of the decision on the application within the decision period, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies—

(i) the burden of additional costs,

(ii) detrimental effect on ability to meet customer demand,

(iii) inability to re-organise work among existing staff,

(iv) inability to recruit additional staff,

(v) detrimental impact on quality,

(vi) detrimental impact on performance,

(vii) insufficiency of work during the periods the employee proposes to work,

(viii) planned structural changes, and

(ix) such other grounds as the Secretary of State may specify by regulations.

(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to—

(a) the decision on the appeal, or

(b) if more than one appeal is allowed, the decision on the final appeal.

(1B) For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is—

(a) the period of three months beginning with the date on which the application is made, or

(b) such longer period as may be agreed by the employer and the employee.

(1C) An agreement to extend the decision period in a particular case may be made—

(a) before it ends, or

(b) with retrospective effect, before the end of a period of three months beginning with the day after that on which the decision period that is being extended came to an end.

(1D) An application under section 80F is to be treated as having been withdrawn by the employee if—

(a) the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the application and the next meeting arranged for that purpose, or

(b) where the employer allows the employee to appeal a decision to reject an application or to make a further appeal, the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the appeal and the next meeting arranged for that purpose, and the employer has notified the employee that the employer has decided to treat that conduct of the employee as a withdrawal of the application.

80H Complaints to employment tribunals

(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—

(a) that his employer has failed in relation to the application to comply with section 80G(1),

(b) that a decision by his employer to reject the application was based on incorrect facts or

(c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).

(2) No complaint under subsection (1)(a) or (b) may be made in respect of an application which has been disposed of by agreement or withdrawn.

(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under subsection (1)(a) or (b) may be made until—

(a) the employer notifies the employee of the employer's decision on the application, or

(b) if the decision period applicable to the application (see section 80G(1B)) comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period.

(3A) If an employer allows an employee to appeal a decision to reject an application, a reference in other subsections of this section to the decision on the application is a reference to the decision on the appeal or, if more than one appeal is allowed, the decision on the final appeal.

(3B) If an agreement to extend the decision period is made as described in section 80G(1C)(b), subsection (3)(b) is to be treated as not allowing a complaint until the end of the extended period.

(3C) A complaint under subsection (1)(c) may be made as soon as the notification under section 80G(1D) complained of is given to the employee.

(4). . . . . .

(5) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the relevant date, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(6) In subsection (5)(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.

(7) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(a).

13. We were also referred to the following cases:

13.1. ***Glasgow City Council v Zafar*** [1998] ICR 420;

13.2. ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 HL;

13.3. ***IGEN Ltd v Wong and others*** [2005] IRLR 258;

13.4. ***Madarassay v Nomura international Plc*** [2007] ICR 867;

13.5. ***Hewage v Grampian Health Board*** [2012] ICR 1054;

13.6. ***Bahl v Law Society*** [2003] IRLR 640;

13.7. ***Essop v Home Office (UK) Border Agency*** [2017] ICR 640;

13.8. ***Rutherford v Secretary of State for Trade and Industry (No.2)*** [2006] ICR 785;

13.9. ***Pike v Somerset Council and another*** [2010] ICR 46;

13.10. ***Dobson v (1) (North Cumbria integrated Care NHS Foundation Trust (2) Working families intervening*** UK EAT/0220/19;

13.11. ***HM Chief inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah school*** [2018] IRLR 334;

13.12. ***Dziedziak v Future Electronics Limited*** UKEAT/0271/11;

13.13. ***Efobi v Royal Mail*** UKSC 2019/0068

13.14. ***Hampson v Department of Education for Science*** [1989] ICR 179; and

13.15. ***Chief Constable of West Yorkshire Police and another v Homer*** [2012] ICR 704.

Housekeeping and conduct of the hearing

14. The parties produced an agreed bundle of 308 pages. If we refer to pages in the bundle, we will note the relevant page numbers in square brackets (e.g. [423]).

15. The Claimant gave evidence in person. Her evidence in chief was a witness statement running to 13 pages and 89 paragraphs.

16. Evidence was given in person on behalf of the Respondent by:-

16.1. Joe Thomas, who is a Trains Manager employed by the Respondent at Hainault. His witness statement ran to 6 pages and 36 paragraphs.

16.2. Dale Smith, who at all material times was Head of Line Operations on the Central Line for the Respondent. His witness statement ran to 5 pages and 51 paragraphs.

16.3. Andrew White, who at all material times was employed by the Respondent as Train Operations Manager at Hainault. His witness statement ran to 4 pages and 17 paragraphs.

16.4. Peter Tollington, who at the time of the matters was covered by the claim, was Head of Line Operations for the Respondent. His witness statement ran to 6 pages and 35 paragraphs. He investigated the Claimant's complaint of harassment and bullying.

17. All witnesses gave evidence either in person or by video link and produced a witness statement. All witnesses gave evidence on affirmation. All witnesses were cross-examined by the representatives of the opposing party and the Tribunal asked questions of the witnesses as we saw fit.

18. The hearing was scheduled for three days to include remedy. At the outset, we indicated that we would deal with liability and then deal with remedy if and when any of the claimant's claims were successful. Unfortunately, we were unable to complete the hearing within the three days allocated to it, through no fault of either of the parties, or the representatives, or the Tribunal. We are most grateful to Miss Grossman who was able to continue to represent the Claimant, even though she was unwell and to Ms Thomas for her understanding of the situation.

19. We were unable to start the substantive hearing until the first afternoon but the delay enabled us to complete our reading. As Ms Grossman was unable to attend in person on the first day. The hearing on that day was hybrid. We then remained with a hybrid hearing for the second and third days. We had several interruptions because of poor connectivity of the remote participants. We are grateful to all attendees for their patience and good humour in the face of the technical difficulties.

20. We heard the evidence and closing submissions by the end of the third day and started our deliberations. We did not complete our deliberations on the third day and met again in chambers on 20 April 2023 to complete the consideration of our decision. There was an initial delay between the end of those deliberations and the promulgation of this decision because of annual leave booked by members of the Tribunal.

21. **Note from Employment Judge Shore – It is entirely my responsibility that it has taken far too long to produce this Judgment and Reasons, for which I offer my sincere and profuse apologies to the parties, the representatives, and my colleagues. Following the hearing, I had to deal with several serious personal matters that reduced the time I had available to complete the decision in a complex case, whilst also fulfilling my obligations to ongoing hearings and family duties. I underestimated the time it would take to finally prepare the written judgment and the seriousness of my personal circumstances regrettably affected my focus and capacity to conclude it in good time.**

Findings of fact

22. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we have set out the reasons why we have decided to prefer one party's case over the other. If there is no dispute over matter, we leave the record of the finding of a no comment as to the reason the finding was made. We have not dealt with every single matter that was raised in evidence or on the documents. We have only dealt with matters that we found relevant to the issues that we had to determine. No application was made by either side to adjourn this hearing to complete disclosure, to obtain more documents or call more evidence, so we have dealt with the case based on the documents and evidence produced to us and the claim as set out in the list of issues.

23. The factual nexus of the individual elements of this case are closely interwoven. It means that in dealing with the claims on an individual basis, we must make findings in respect of one claim that are also relevant to other claims.

24. Much of the factual nexus of this case was not in dispute. The dispute was about the interpretation of what happened.

Undisputed facts

25. We should record as a preliminary finding that there are several relevant facts not disputed, not challenged, or agreed by the parties. We therefore record them as formal findings of fact. These were:-

    25.1. The Respondent operates the London Underground service. The Claimant has been employed by the Respondent as a train operator since 22 January 2001 and remains in the Respondent's employment. The Claimant has been based in the Respondent's Hainault depot since 2005.

    25.2. The Respondent is a heavily unionised employer and has several workplace agreements in place in recognised trade unions such as ASLEF and the RMT.

25.3. It was agreed that weekend working is unpopular with most Train Operators and that the Claimant's wish not to work on Saturdays is at the core of this case. It was agreed that staff were required to work slightly longer shifts on weekends than in the week and so the requirement to work at weekends was kept to a minimum.

25.4. The Respondent's train service is organised by Line and by Depot. It was agreed evidence that the Hainault depot where the Claimant worked had a driver roster that runs over 122 weeks in 12-week rotations and that all drivers work through the rota from start to finish. When they end one block of 122 weeks, they start the roster again. It was not challenged in evidence that drivers at the Hainault depot are rostered to work approximately 50% of weekends.

25.5. As part of the agreement that the Respondent entered into with recognised trade unions, it may not unilaterally require a driver to change their roster shifts or require them to work additional roster duties.

25.6. It was agreed evidence that in addition to the rostered drivers, the Respondent also had two other cohorts of drivers available to it. First of those cohorts are called 'Spare Drivers' who are used to cover unplanned absence or other unplanned availability of drivers. The Spare Drivers attend work and wait to see if a colleague has phoned in sick or is otherwise available. in such circumstances, the Spare Drivers will undertake the work of their colleagues.

25.7. The second cohort of Drivers are known as Pool Drivers. It was agreed when a Driver first joins a depot they will be required to work in the "pool" until a rostered position becomes available. Pool drivers have less certainty and notice than rostered drivers. They are used to cover planned absence (unlike Spare Drivers, who are used to cover unplanned absence).

25.8. The Claimant initially worked at Edgware Road station between January 2001 and March 2005. The bundle contained her offer letter dated 11 January 2001 [60-62] and her original statement of main terms and condition of her employment [63-68]. The Claimant's contractual hours of work have been 35 per week throughout her employment.

25.9. The bundle also contained the Respondent's framework agreement for train staff [69-75], the Respondent's policy on short term arrangement [76-79] and Compliance and Guidance on the Respondent's Syndicate system dated 30 April 2015 [81-86]. We were also provided with the Respondent's Guidance on Managing Train Operators' Requests for Special Leave and Flexible Working [87-97].

25.10. A Syndicate is a grouping of train drivers that are all based at the same Depot. There are several Syndicates. At all relevant times, the Claimant belonged to the Hainault Syndicate. The Syndicates are run by the staff for the staff. An employee can give all their rostered shifts to their Syndicate, which then seeks to match the employee's preferred shift pattern by effecting a swap of shifts with other colleagues. In the

Claimant's case, this meant that she was able to put all her rostered shifts into the Hainault Syndicate which found a colleague who would be prepared to work every Saturday that she was rostered to work for a period of approximately 10 years.

25.11. The Claimant has one child who was born in 2013. It was unchallenged evidence that her partner is a bus driver who works on route that is staffed by three drivers and which requires him to work every weekend. The Claimant has therefore sought to avoid working on Saturdays since the birth of her child. The Claimant initially did this by making requests for flexible working on 24 November 2013 [110-112] and 27 November 2023 [113-114]. Her application stated that she wanted to change her working arrangements because of childcare arrangements with her parents, who had undertaken sole childcare for the Claimant's child whilst the Claimant and/or her husband were unable to do so because of work, could not continue.

25.12. It was the Claimant's unchallenged evidence that she needed shift patterns that were opposite to her husband so that their child was always cared for.

25.13. The Claimant's flexible working request was determined after meeting on 17 December 2013 [116-117] after which the request was declined.

25.14. It was agreed evidence that as an alternative, a three-week temporary arrangement was put in place to grant the Claimant the shift pattern that she asked for whilst she obtained further information about her husband's shift pattern. The agreement was in place for the weekends of 4 January 2014, 11 January 2014, and 18 January 2014. During this period, the Claimant did not work Saturdays and worked alternate Sundays. All her shifts started and finished between 7:00am and 21:00pm, as she had requested [117].

25.15. On 13 January 2014, the Claimant met with representatives of the Respondent again and discussed the flexible working request [118-120]. She advised them that her husband had met with his manager on 21 January 2014 and was awaiting the outcome of that meeting to see if he would be granted flexible working in his job.

25.16. At the meeting on 13 January 2014, the Respondent's managers agreed that the Claimant could take every other Saturday off and that the alternate Saturdays could be managed through the Syndicate. It was agreed that the arrangement will be reviewed in 6 months' time [120]. It was agreed evidence that at the end of the 6-month period, in July 2014, the Respondent did not ask the Claimant to engage in a review of the temporary arrangement. She continued to not work on alternate Saturdays due the temporary arrangement and did not to work the alternate Saturdays because of a rearrangement of shifts through the Syndicate.

25.17. The Claimant met with management on 10 June 2014 to review what the invite letter [126-127] described as 'your current temporary flexible working agreement'.

25.18. The agreement continued until the Claimant made a further flexible working request on 24 October 2014 [128-129]. The application was for a rest day every other Saturday so that she could alternate childcare with her husband [128].

25.19. The application of the Claimant's husband for his own flexible working arrangement was rejected on 30 October 2014 [130].

25.20. The Claimant met with managers on 4 November 2014 [131-132] to discuss her own flexible working request of 24 October 2014.

25.21. The outcome of that meeting was communicated to the Claimant in a letter dated 25 November 2014 [133-135]. Her flexible working request was rejected but it was noted that the Syndicate was able to facilitate the Claimant only working alternate Saturdays and the Respondent was prepared to "…agree to a local temporary arrangement to help you and to be reviewed no later than 12 weeks from start date 6 December 2014." [134]

25.22. The arrangement was that if the Syndicate was not able to accommodate a Saturday rest day on alternate weeks, then the Respondent would assign the Claimant a rest day on that date only and assign her a duty on one of her other rest days during the week.

25.23. It was agreed evidence that this arrangement was never reviewed at the end of the proposed 12-week period [137] but a further meeting was arranged with the Claimant on 18 June 2015 [138-139].

25.24. The outcome of the meeting of 18 June 2015 was communicated to the Claimant in a letter dated 30 June 2015 [140-141]. It was agreed to continue the local agreement working in conjunction with the Syndicate arrangement.

25.25. The Claimant met with her manager, Mike Donnithorne, on 25 July 2018 [142] for a review of the local arrangement. Mr Donnithorne wrote to the Claimant on 7 September 2018 and summarised her position as follows:

> "*As part of the Syndicate you have had every other weekend off. You work every other Sunday, but you speak to the admin to get Saturdays if the Syndicate cannot assist, meaning that you do not work on Saturdays. We did discuss whether you can explore working Saturdays if the syndicate cannot offer you a Saturday rest day. I will write to you in due course to catch up again to discuss further."*

25.26. No evidence was put before us that there was any subsequent review of the arrangements which continued until the Claimant was invited to a meeting with her manager, Train Operations Manager Kieran Dimelow, on 27 November 2020, which she attended with her trade union

representative. The outcome of that meeting was documented in a letter from Mr Dimelow to the Claimant dated 11 December 2020 [145-146].

25.27. Mr Dimelow advised the Claimant that the local agreement would terminate with two weeks' notice from the date of the letter, on 26 December 2020. The letter was sent to the Claimant, her trade union representative and to Dale Smith, Head of Central London, Waterloo, and Central Line operations.

25.28. The Claimant asked for an appeal by an email from her union representative on 14 December 2020 [147]. That appeal meeting took place before Dale Smith, then Head of Line Operations (Central Line). The Claimant attended with her trade union representative on 15 April 2021.

25.29. The minutes of the meeting [150] was headed 'Nicola Jones Local agreement Appeal Hearing'. The Tribunal notes that in the minutes, the Claimant explained that her arrangement had been in place since 2013 as "a flexible working agreement but then progressed to a local agreement." Given the agreed findings of fact above, that statement was obviously mistaken. It was not the only mistaken statement or mis-labelling instance in this case.

25.30. Mr Smith wrote to the Claimant on 28 April 2021 [151] with the outcome of that meeting. The letter was headed 'Flexible Working Appeal', which it plainly was not, despite the Claimant's comment about the meeting itself. Mr Smith made the following comment:-

> *"Having reviewed the documentation that you provided, I have established that you have actually had a mixture of flexible working* agreements in place which between the management team and the syndicate have enabled you to have every Saturday off work."

Again, we find Mr Smith's words to be an inaccurate description of the true circumstances.

25.31. Mr Smith noted that the Claimant was requesting every other Saturday as a rest day to provide childcare for her child and that Mr Dimelow had indicated that the Claimant's local agreement would end on 26 December 2020.

25.32. Mr Smith declined the Claimant's request due to the detrimental impact to the depot's coverage of Saturdays and, ultimately, the quality of service the Respondent was able to provide its customers. Mr Smith agreed to extend the current agreement up to Saturday 15 May 2021 to enable the Claimant to make alternative arrangements for childcare.

25.33. At the end of the meeting with Mr Smith on 15 April 2021, the Claimant had completed and signed an application for flexible working [148-149]. The application was counter-signed by Andrew White and is the subject of disputed evidence, so we return to it later.

25.34. On 3 May 2021, the Claimant wrote to Mr White [155] as she was confused. She realised that Mr Smith had cancelled her agreement and noted that she had filled in an application for flexible working after the meeting. Ms Jones wondered what had happened to that application, which we find to be understandable.

25.35. Mr White responded by writing to Mr Smith on 4 May 2021 [154-155] to advise that he had added the Claimant's flexible working request in the overall pack that he had sent to Mr Smith. Mr White asked Mr Smith if he should get the paperwork from Mr Smith regarding the meeting on 15 April 2021, review it and give Ms Jones a decision.

25.36. Mr Smith responded on 6 May 2021 to advise that he had been asked to treat the Claimant's request "…as Flexible Working". He had considered this as part of the appeal and was unable to agree it due to the business impact. [154]

25.37. Mr White then wrote to the Claimant on 7 May 2021 to confirm that the Respondent was unable to grant the Claimant's request for flexible working due to the business impact that it would have. Mr White apologised for the delay and said that Mr Smith's decision letter "…regarding the appeal…" was the end of the appeal process.

25.38. The Claimant filed a harassment and bullying complaint under the Respondent's Harassment and Bullying Procedure through her trade union on 10 June 2021 [156-157] in which she named Mr Smith and Mr White as perpetrators of bullying and discrimination against her on the grounds of sex.

25.39. The Claimant alleged that Mr Smith had wilfully breached:

25.39.1. "London Underground's Flexible Working Procedure";

25.39.2. "The Employment Rights Act 1996, section 80(F)-80(I) and expanded Flexible Working Regulations";

25.39.3. "ACAS Code of Practice aimed at employers handling in a reasonable manner requests to work flexibly";

25.39.4. "Equality Act 2010, indirect discrimination"; and

25.39.5. "My own conduct of employment, mutual trust and confidence."

25.40. The Respondent replied to the complaint on 14 June 2021 [158-159] and confirmed that it would be dealing with the complaint under the Respondent's Harassment and Bullying at Work Policy and Procedure [47-54].

25.41. On 23 May 2021, the Claimant had a second COVID-19 vaccination. She had an adverse reaction to the vaccination that made her right arm swell.

25.42. By 29 May 2021, the Claimant was still feeling unwell and advised her manager that she would take a week's leave that she previously booked for that week and would hopefully return thereafter.

25.43. On 6 June 2021, the Claimant advised her manager that she would have to stay off sick as her GP had signed and certified her as unfit for work. The Claimant remained off work between 24 May 2021 and 13 June 2021.

25.44. On 14 June 2021, the Claimant had return to work (RTW) interview with Joe Thomas [162-167] at which the question of temporary additional duties (TAD) was discussed. It was agreed evidence that employees of the Respondent who were returning to work after a period of sickness absence and who could not undertake their normal duties would be considered for TAD.

25.45. It was agreed that TAD could be at the employees' usual place of work or could be at other locations on the network. It was agreed that if an employee was being considered for TAD at a location other than their usual place of work the location manager at the station/depot that the employee was to be assigned to would have to approve the assignment.

25.46. It was agreed that Occupational Health had advised the Claimant to return on a phased basis working 4 hours per day on 4 days per week with one day to be released to attend physiotherapy.

25.47. On 15 June 2021, the Claimant was signed off for work by her GP until 27 June 2021 [167].

25.48. On 22 June 2021, the Claimant made a further complaint [168-169] to the Respondent about the way she felt she was treated in respect of the TAD arrangements that were proposed for her at Liverpool Street Station. In a meeting with Joe Thomas on 14 June 2021, he had told the Claimant that she would be following her rostered hours on TAD at Liverpool Street and not her 'normal' hours as provided by the Syndicate arrangement.

25.49. On 29 June 2021, the Claimant was referred to occupational health (OH) [166].

25.50. On 13 July 2021, the Claimant had a bullying and harassment investigation meeting with Peter Tollington, who had been appointed to investigate her complaint [177-179].

25.51. Mr Tollington interviewed Dale Smith on 13 July 2021 [180-181]. Mr Tollington interviewed Joe Thomas on 20 July 2021 [186]; and Andrew White on 22 July 2021 [187-189]. Mr Tollington interviewed Kieran Dimelow on 22 July 2021 [190-191].

25.52. Mr Tollington rejected the Claimant's complaint on 18 August 2021 [198].

25.53. The Claimant started early conciliation on 8 July 2021 and obtained an early conciliation certificate on 19 August 2021 [1]. She presented her ET1 to the Tribunal on 17 September 2021 2-19].

25.54. Mr Tollington provided a report into the complaints made by Ms Jones on 18 August 2021 [200-209].

Points of dispute

Direct sex discrimination

26. In addition to the agreed facts, we make the following findings in respect of the claim of direct sex discrimination.

26.1. We find that at all material times, the Claimant's contractual position was that she worked 35 hours a week on the 122-week Hainault roster and that roster required her to work some weekends. We do not find that the Claimant's contract of employment was amended by practice or performance whilst she was using local agreements and the Syndicate, as the core contract was still in place.

26.2. We find that the Respondent offered the Claimant some flexibility to her working pattern following her RTW meeting on 14 June 2021 with Mr Thomas. She was offered TAD duties on a phased return with reduced hours and with time to return to physiotherapy.

26.3. We find that the Respondent did not offer to reinstate the local agreement which had expired by 14 June 2021 and that, because the Claimant was not fit to drive trains, she was unable to take advantage of the Syndicate system to swap rostered shifts. We make that finding because it was agreed evidence that each Syndicate was run only in respect of the Depot or Station to which its members were allocated.

26.4. We find that the Syndicate system was entirely voluntary as the Claimant admitted in cross-examination.

26.5. We find that the Respondent did not refer the Claimant to Occupational Health for an assessment on or around 14 June 2021. The Claimant was referred for an assessment on 29 June 2021 [166].

26.6. We also find that the Respondent normally considered a referral after 4 weeks' absence because its evidence on the point was unchallenged.

26.7. We find that the Respondent required the Claimant to work her pre-2013 roster on her return to work, but subject to the TAD terms and conditions discussed above. We do not accept that the Claimant's contractual hours were those she had been carrying out since 2013, so do not accept that the fourth detriment pleaded by the Claimant under the direct discrimination head is made out to the required standard of proof.

26.8. We find that the three comparators named by the Claimant were all significantly different to the Claimant because of their individual circumstances as compared with the Claimant's individual circumstances. They were not materially the same as the Claimant. In this regard, we accept

Joe Thomas's evidence as to the individual circumstances of all all three comparators contended for as it was internally consistent, sufficiently detailed, and consistent with the documents produced.

26.9. Mr Thomas's answers to cross-examination questions were also consistent with his written evidence. We find that each of the three comparators had different medical circumstances to the Claimant. We find that none of them had previously had any local arrangement regarding their hours of work and that none of them had utilised the Syndicate to swap duties. We find that none of them had been referred to Occupational Health, and none had an RTW interview at any other point in their employment equivalent to the meeting that the Claimant had on 14 June 2021.

26.10. We accept Joe Thomas' evidence that there was no request by the Claimant for an Occupational Health report at his meeting with the Claimant on 14 June 2021. We find therefore, that there was no reason for him to make such a referral or seek advice on such a referral from his line manager. There was no evidence produced to us, other than the assertion and suspicion of the Claimant, that Mr White had in any way influenced Mr Thomas' decision on the Occupational Health report.

26.11. We agree with Ms Thomas' submissions that the three complaints of the Claimant regarding direct discrimination are all variations upon a theme. We find that the reference to the 'pre-2013' roster is misleading because the Claimant never worked her regular roster: she always used the Syndicate.

26.12. We agree with Ms Thomas' submission that, even if there had been a permanent contractual variation at some time since 2013, it could not have amounted to more than guaranteeing the Claimant would have every alternate Saturday as a rest day, because she had utilised the Syndicate for the alternate Saturdays.

26.13. We considered whether the Claimant could rely on a hypothetical comparator but found that there was no evidence before us to show a hypothetical male who was materially the same as the Claimant in would not have been treated differently to the Claimant.

26.14. We accept Mr White's evidence as credible that his explanation for refusing the Claimant's request to be allowed not to work on Saturdays was motivated by a wish to avoid a queue of employees requesting alternate duties on hours which suited them. That reason is not because of sex. The Claimant's claims of direct discrimination therefore fail.

Indirect discrimination

27. We make the following findings in respect of the Claimant's claims of indirect discrimination because of the protected characteristic of sex:

27.1. We find that the Respondent required Train Operators such as the Claimant to work on Saturdays.

27.2. We find that the Respondent required the Claimant to work on the roster that she had been working on for many years, subject to the local arrangements that were in place from time to time and the Claimant's right to join the Syndicate and utilise its services.

27.3. We find that the Respondent did not require Train Operators, including the Claimant to work within the Syndicate because the Claimant accepted that joining the Syndicate was voluntary.

27.4. We find that the Respondent operated the following PCPs:

27.4.1. Requiring Train Operators and the Claimant to work on a Saturday; and

27.4.2. Requiring the Claimant to work a week of earlies, a week of lates and every other Saturday/Sunday.

27.5. We find that the two PCPs operated by the Respondent would put the Claimant and those who share the Claimant's protected characteristic of sex at a particular disadvantage in comparison to men because of the accepted greater responsibility for childcare on women compared with men. We find that the Claimant was put to that disadvantage by the PCP.

27.6. However, we find that the PCPs were a proportionate means of achieving a legitimate aim of the Respondent. We find that the Respondent showed on the balance of probabilities that its legitimate aims were:

27.6.1. the need to ensure an efficient performance of the Central Line and making sure that there were adequate staff in place;

27.6.2. the need to balance the rights of the needs of the workforce; and

27.6.3. the need to maintain good industrial relations and a union-negotiated agreement.

27.7. We make those findings because we find the evidence of the Respondent's witnesses, particularly, Mr White, credible on the question of the issues faced by the Respondent following the pandemic. Mr White was not really challenged on his evidence upon which we make the following findings of fact: -

27.7.1. The Respondent has a shortage of train operators and has had such a shortage for some time.

27.7.2. That shortage was exacerbated by the pandemic.

27.7.3. Most train drivers prefer not to work weekends.

27.7.4. Following the pandemic, the demand for Underground services on the line upon which the Claimant worked increased by a greater amount than the requirement for services on weekdays.

27.7.5. As a result, the Respondent's services were stretched.

27.7.6. As a further result, the Respondent had to cancel more trains because it did not have the drivers to drive them on Saturdays.

27.7.7. It was not feasible to employ Spare Drivers to cover the Claimant for planned absences on Saturdays, as this removed a driver from being able to cover an unplanned absence, which was the purpose of the Spare Drivers.

27.7.8. It was not feasible to use Pool Drivers for the same reason.

28. We find that the claimant's claims of indirect discrimination because of the protected characteristic of sex fail.

Victimisation

29. We find that that the Claimant was not victimised as alleged. We make that finding because:

29.1. The Claimant's evidence, when taken at its height, showed no connection between her protected act on 10 June 2021 and the four facts of alleged detriment, other than her assertion of such a connection.

29.2. We find that the Claimant did not show facts from which we could decide, in the absence of any other explanation, that the Respondent contravened section 27 of the Equality Act 2010.

30. We would add that if the Claimant had managed to switch the burden of proof to the Respondent, we would have made the following findings in respect of the detriments contended for as follows:

30.1. We find that the Respondent's reason for not allowing the Claimant any flexibility to her working pattern following her return from sick leave on 14th June 2021 was because she was returning to a TAD position at Liverpool Street and that the requirements of that Station did not allow the Claimant to work the shift patterns she had worked at Hainault. The decision was made by a manager who had nothing to do with the Claimant's complaints;

30.2. We find that the Respondent showed on the balance of probabilities that it never referred staff to OH for an assessment of the work that they could do after a period of absence of less than 4 weeks. The Clamant was absent because of the effects of her reaction to a Covid vaccination between 24 May 2021 and 13 June 2021;

30.3. We find that the Claimant was unable to do her usual work during that period and on her return.

30.4. We find that the Claimant's point about the Respondent requiring her to work to her pre-2013 roster on her return to work on 14th June 2021 is covered in our findings about indirect discrimination above.

30.5. We repeat our finding that the Claimant's contracted hours were never the hours she had worked because she used the Syndicate and local agreements,

so she had not shown that the Respondent had failed to allow her to work her contracted hours (those she had been carrying out since 2013) on her return to work on 14th June 2021.

Flexible working

31. We find that the Claimant's claim is well-founded and succeeds. We find that the Respondent did not act reasonably in the way that it dealt with the Claimant's request of flexible working on 14 April 2021. We make that finding because:

    31.1. We repeat the findings of agreed facts above about the operation of the Respondent's service.

    31.2. We repeat the findings of fact above about the Respondent's legitimate aim and the pressure on its service post-pandemic.

    31.3. The scope of the Claimant's claim must be limited to her application for flexible working dated 15 April 2021 [148-149]. That application sought an agreement that the Claimant would have alternate Saturdays off starting on 3 January 2021.

    31.4. We find that the evidence of Mr White about how the application form came to be produced and signed was more credible than the Claimant's account. We make that finding because Mr White's account is simply the more likely version of events.

    31.5. The Respondent is a very large employer. It is highly regulated and unionised. It has many policies and procedures in place. We find that there is little excuse for the Respondent getting the process of dealing with a flexible working request as wrong as it did in this case. The Claimant's use of the wrong terminology does not excuse the Respondent.

    31.6. We note that the Claimant told Mr Smith at the meeting on 15 April 2021 that her local arrangement had been in place since 2013 as a Flexible Working agreement but then progressed to a local agreement [150]. We find that the Claimant had never had a Flexible Working agreement in place with the Respondent.

    31.7. We also note that Mr Smith suggested that the Claimant complete a flexible working request at the meeting on 15 April 2021 [150].

    31.8. We find that the document completed by the Claimant on 15 April 2021 [148-149], which was countersigned by Mr White, met the requirements of section 80F(2) of the Employment Rights Act 1996 that stipulates the form in which an application for contract variation must be made. To use the words of the list of issues; the Claimant made an application for flexible working. The Respondent did not deny that it received the application.

    31.9. We find that the Respondent was therefore under an obligation to comply with the duties of an employer under section 80G of the Employment Rights Act 1996. The Claimant's claim is that the Respondent failed to deal with the request in a reasonable manner contrary to section 80G(1)(a).

31.10. We reject the submission by Ms Thomas that the written application was a technical point, as it had been submitted after the meetings with Mr Dimelow and Mr Smith, who had given the matter full consideration. We find that if the boot was on the other foot and it was the Claimant who was alleging that the meetings with Messrs Dimelow and Smith were part of a statutory application, the Respondent would be raising a failure to comply with the requirements of section 80F(2).

31.11. We find that from the submission of the statutory request, which Mr Smith had asked the Claimant to make, the Respondent did not act reasonably in dealing with it. Specifically:

31.11.1. Mr Smith's letter to the Claimant dated 28 April 2021 [151], following the meeting on 15 April 2021 was headed "Flexible Working Appeal". We appreciate that the situation was complicated, but Mr Smith had HR advice available to him. He had not heard an appeal.

31.11.2. Mr Smith wrongly identified that the Claimant had a mix of flexible working and local arrangements. Again, this could and should have been checked more carefully and advice taken from HR if Mr Smith was unsure.

31.11.3. Mr Smith refers to Mr Dimelow's decision to decline the Claimant's request. That request was not a statutory flexible working request. The ACAS Code of Practice 5 – Handling in a Reasonable Manner Requests to Work Flexibly (2014) (the ACAS Code) states at paragraph 3 the statutory requirements of a request.

31.11.4. Paragraph 4 of the ACAS Code says that the employer should arrange to speak with the employee. That did not happen between the application on 15 April and Mr Smith's decision on 28 April.

31.11.5. Paragraph 6 requires a discussion with the employee. That did not happen.

32. We therefore make a declaration that the Respondent failed to comply with section 80G(1)(a) of the Employment Rights Act 1996.

33. Neither party had made submissions on any aspect of remedy in respect of the flexible working claim. Regulation 7 of the Flexible Working (ECR) Regulations 2002 set a maximum award at 8 weeks' gross pay capped at the prevailing rate (£544.00 per week).

34. We considered listing the remedy for a hearing, but decided that the overriding objective (particularly proportionality, time, and cost) was not best served by calling all the parties and the Tribunal back when we had heard all the evidence and could make a determination.

35. In making the award of 5 weeks' pay, we were mindful that there had been some discussions about flexible working prior to the statutory request, but those

discussions had not absolved the Respondent of the duty to deal with that request reasonably.

Summary – How we Applied the Law and Issues to the Findings of Fact

36. As Ms Grossman submitted, there was little disagreement about the law in this case. The disagreements were about the facts.

Direct Sex Discrimination

37. We refer to our findings above on the detriments contended for by the Claimant.

38. Where the Claimant's case fell was in respect of the comparators that she relied upon. Again, we refer to our findings of fact above. We noted the words of section 23(1) of the Equality Act 2010 that states that there must be no material difference between the circumstances relating to each case. We considered the guidance given in **Shamoon**: it must be the circumstances that are relevant which must not be materially different. In this case, we found all the comparators to be materially different from the Claimant.

39. We considered a hypothetical comparator but did not consider that the Claimant moved the burden of proof by showing facts from which we could decide in the absence of any other explanation that the Respondent contravened section 13 of the Act. We were guided by the cases of **Efobi**, **IGEN**, **Madarassay**, **Bahl**, and **Hewage**.

40. With no comparators, the Claimant's claim was doomed to failure.

Indirect Sex Discrimination

41. We refer to our findings of fact above.

42. We made a finding of fact that the Respondent did not require Train Operators and the Claimant to work with the Syndicate. The Claimant agreed as much in cross-examination, so she is unable to rely on that as a PCP.

43. We find that the Respondent operated the other 2 PCPs contended for:

    43.1. Requiring Train Operators and the Claimant to work on a Saturday: and

    43.2. Requiring the Claimant to work a week of earlies, a week of lates and every other Saturday/Sunday.

44. We preferred Ms Grossman's submission on the group (or pool) disadvantage point to that of Ms Thomas. We note the words of Baroness Hale in **Essop** (paragraphs 40 and 41) and the guidance in **Rutherford**, **Pike**, and **Dobson**, but find that in the absence of precedent that overturns the presumption that women have more responsibility for childcare than men, we were not presented with the evidence that enabled us to take that step.

45. Our consideration of this claim then moved to the justification offered by the Respondent. As we commented in our findings above, the legitimate aims contended for by the Respondent were put under little scrutiny in cross examination and we

made the finding that the Respondent established them. We followed the guidance in **Hampson** and **Webb**.

46. This claim came down to the proportionality question. In assessing this, we followed the guidance in **Homer** and assessed the needs of the Respondent and the discriminatory effect on those with whom the Claimant shared the protected characteristic. The results of our assessment are set out above. The two PCPs that we found were in operation were a proportionate means of achieving a legitimate aim. In making that decision, we accepted the submissions of Ms Thomas on the issue.

Victimisation

47. We repeat or findings of fact above. On those findings, the Clamant failed to show facts from which we could decide in the absence of any other explanation that the Respondent contravened section 27 of the Act. We were guided by the cases of **Efobi**, **IGEN**, **Madarassay**, **Bahl**, and **Hewage**.

Flexible Working

48. We addressed the statute in some detail in our reasons above. We did not apply any case law.

Employment Judge Shore

8 March 2024