EMPLOYMENT TRIBUNALS

Claimant: Ms Tiffany Richardson

Respondent: Venture Lighting Europe Ltd

Heard at: Watford Employment Tribunal **On:** 26-28 March 2024

Before: Employment Judge Young
Members: Ms P Barratt
Mrs N Kendrick

Representation
Claimant: Mr B Eaton (Claimant's husband)
Respondent: Mr T Hussain (Litigation consultant)

JUDGMENT having been sent to the parties on 23 April 2024 by Employment Judge Young 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

1. The Claimant was employed by the Respondent who manufactures and supplies energy-efficient lighting materials, components, systems, fixtures and controls. The Claimant was employed from 11 March 2020 as a customer service advisor until 31 October 2022. The Claimant contacted ACAS early conciliation on 22 June 2022. The ACAS early conciliation certificate was issued on 2 August 2022. The Claimant presented her claim on 15 September 2022.

Claims & Issues

2. The Claimant brought a claim for flexible working under section 80H of Employment Rights Act 1996 ('ERA') and an indirect sex discrimination claim under section 19 of Equality Act 2010 ('EqA').

3. The agreed issues set out in EJ Wyeth's case management order dated 29 January 2023 (the case management preliminary hearing was on 23 January 2023) are as follows:

4.Section 19: Indirect discrimination in relation to sex

4.1 Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely the requirement to work full-time at the office.

4.2 Does the application of the provision put other women at a particular disadvantage when compared with persons who do not have this protected characteristic?

4.3 Did the application of the provision put the Claimant at that disadvantage in that the Claimant had child care responsibilities (the Claimant has a daughter who was twelve years old at the material time)?

4.4 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on business efficiency and workplace cohesion as its proportionate means of achieving a legitimate aim.

5.Flexible Working Request – s80H ERA

5.1 The Claimant submitted a flexible working request on 17 May 2022 seeking to be permitted to work from home by default unless there was a reason to attend the office such as training or an in person meeting. The Respondent rejected that request on the ground that it would have a detrimental effect on the Respondent's ability to meet customer demand.

5.2 Did the Respondent fail to consider the Claimant flexible working request (and appeal submitted on 18 July 2022) in a reasonable manner? The Claimant asserts that the Respondent ignored relevant facts, including her performance reviews and performance "metric" during the period she was working from home.

5.3 Was the decision to reject the Claimant's flexible working request based on incorrect facts? The Claimant says that the appeal outcome report contained incorrect factual presumptions including a suggestion that her partner also worked from home.

6.Remedies

6.1 If the Claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy.

6.2 There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings,

and/or the award of interest.

Hearing

4. The hearing was listed for 3 days. The Claimant was represented by her husband who was not legally qualified but had a background in HR. The Respondent was represented by Mr Tufail Hussain who was a litigation consultant. The Tribunal received a 365 page bundle. A witness bundle of 16 pages with 3 witness statements, the Claimant's, Mr Ben Eaton the Claimant's husband and Mr Philip Corker the managing director of the Respondent. On the morning of the first day, the Respondent had failed to provide any hard copy bundles for the Tribunal members or for the witness stand. The Tribunal had to wait until approximately 11:45 before receiving a bundle for the witness stand. The Tribunal also received a cast list and chronology from the Respondent which was not agreed with the Claimant. The Respondent did not obtain a witness order for Mr Philip Croker their only witness to attend and Mr Croker could not attend in person and could not attend on the first or second day. The Tribunal heard evidence from the Claimant, the Claimant's husband Mr Ben Eaton and Mr Philip Croker for the Respondent who attended by CVP on Wednesday 27 March 2024.

Findings of Facts

5. The findings of fact are made on a balance of probabilities. We found all the witnesses to be honest and reliable witnesses of truth.

6. The Claimant started working for the Respondent 2 weeks before the first national lockdown in respect of the covid pandemic on 11 March 2020. At that time the Claimant worked from the Watford office which was 10 minutes commute from her home. The Claimant's contracted hours were 08:30-17:00 Monday to Friday. By the time the Claimant made her application for a statutory flexible work request she had more than 26 weeks service. The Claimant was aged 36 at the time of her statutory flexible work request. The Respondent was a subsidiary of a larger company in the United States. The Claimant worked in the sales department and was one of 4 customer service assistants. There were 2 customer service managers, Ms Sophie Evagora and Ms Nicola Smith. Ms Evagora suffered from a chronic illness, this meant that Ms Evagora regularly worked from home and was not in the office.

7. The Claimant was not furloughed but commenced working from home. In November 2020 the Respondent was content to allow the Claimant to remain working from home [63]. At the time, the Claimant had an 11 year old child. The Claimant's husband, Mr Eaton worked from home but not every day, 2- 3 times a week. In August 2021, Mr Eaton was able to pick his child from school on Mondays, Tuesdays and Fridays. [91] The Claimant was permitted to work from home on Wednesdays & Thursdays [91] for the period her daughter was at summer school for 2 weeks.

8. In January 2022 most of the Respondent's staff returned to the office on a phased return. The Claimant was permitted to work 2 days from home until 1 March 2022.

9. The Claimant commuted to work by bicycle or Scooter. Her commute was 10 minutes. The Claimant asked to work from home informally when the occasion required it. The Claimant was granted flexibility on an ad hoc basis in respect of any childcare responsibilities.

10. In February 2022, the staff were told that the business was moving to Respondent moved office from Watford to Rickmansworth. The Claimant raised no issues about the move at the time. The Respondent business experienced some down turn during the covid pandemic. The Respondent's order book went from 10 million to 5 million. As a result, the Respondent needed to go through a reorganisation process that resulted in some redundancies as well as moving office. The Respondent moved office to Rickmansworth on 3 May 2022. All staff were expected back in the office from then on. The Claimant agreed with her line manager to try out her commute at that point. The Claimant discovered that when it rained, parts of the Claimant's commute could be difficult. The Claimant's commute increased to 30 minutes.

11. On 13 May 2022, the Claimant's electric scooter broke down on her way to work. The Claimant went home at 9:30 am and requested from her line manager that she work from home for 1-2 weeks until she had replacement transport. The Claimant's line manager Sophie Evagora said that the Claimant could work from home for the next 2 days. On 16 May 2022, Sophie Evagora emailed the Claimant and requested she return to work from the office in accordance with her Contract of Employment and would need to arrange an alternative mode of transport to get into the workplace. In that email, Sophie Evagora also informed the Claimant that if she wished to work from home then she would need to submit a statutory flexible work request, and detailed some information as to how this could be done [120-122]. The Respondent had a flexible working policy [259- 260] contained in the employee handbook [236].

12. The Claimant's workload in 2021 was approximately 333 orders per month. By May 2022 the Claimant's personal average of orders was 232 for the month of May [361].

13. On 17 May 2022 the Claimant submitted a statutory request for flexible working [124-125]. The Claimant's flexible work request proposed a new work location of "*Venture Lighting Europe Ltd., Trinity Court, Batchworth Island, Church Street, WD3 1RT and providing the ability of the Claimant to work from home except where meetings and scheduled training sessions require me to attend my contractual normal work location"* [124]. The Claimant's position was the proposed change of location would have an effect of a reduction in office costs and improved productivity in accordance with the Harvard Business School and Oxford Economics study *"when the walls come down*" [134-147]. The Claimant accept that her contractual place of work was set out as the Watford office and so the address needed to be changed to the Rickmansworth Office. In evidence the Claimant said that she was not asking to change her contractual work location, she said that she was asking to work from home when she needed to and wanted to. She said that was for her to decide when she needed to and wanted to. However, she accepted that her application meant that the Respondent could require her to work from home and that

if her manager said that she could not work from home she would have to come to work. We find that the Claimant's flexible work request requested that the Claimant work from home unless she needed to attend meetings or scheduled training.

14. The Claimant's flexible work request stated that there would not be the burden of additional costs nor would there be an inability to reorganise work amongst existing staff, there would be no need to recruit additional staff and there would not be a detrimental impact on the quality as the Claimant deemed that it was not applicable because her previous performance had been assessed via performance reviews during working from home during the COVID 19 pandemic and hybrid working period post pandemic. [124]

15. The flexible work request also said that there would not be a detrimental impact on performance, again based on previous performance metrics assessed during the COVID 19 period when the Claimant worked from home and there would be no detrimental effect on the ability to meet customer demand as performance metrics had been measured during the COVID pandemic when the Claimant was working from home. The statutory application stated that there was no detrimental effect on the ability to meet customer demands for the same reasons applicable to quality and customer demand and there was no insufficient work for the periods that the employee proposed to work as her periods of work remained the same, and there was no planned structural change that would render the business entirely offline.

16. The Claimant wished the new change of work location to come into force on the 1 July 2022. The Claimant was happy to agree to a trial period of three months so that the business could properly assess if the Claimant's proposal was a viable option if the Respondent would not agree to a permanent change. The Claimant clarified in that request that she had not made another statutory flexible work request in the last 12 months.

17. The Claimant's position was that her flexible work request was based upon her childcare responsibilities. She said that she needed flexible working because was that women with childcare responsibility were more concerned about their child being at home by themselves because it was more dangerous.

18. By letter dated 23 May 2022, sent by email [154 & 156] the Claimant was invited to attend a meeting on 25 May 2022 to discuss her flexible work request with Mr Croker. The Claimant confirmed that she would attend [163] on 24 May 2022 but she wanted her husband to attend with her as a companion. On the same day, Mr Croker responded to the Claimant's request and stated that the Claimant had *"the right to be accompanied as you were looking to change your terms and conditions"* [162]. Mr Croker would not permit the Claimant's husband to attend as a companion. We find that Mr Croker understood that the statutory Claimant's flexible work request was a request to change her terms and conditions.

19. The Claimant attended the meeting and was sent the notes of the meeting

on 31 May 2022. The Claimant did not accept the accuracy of the minutes of the meeting. [14]

20. At the meeting the Claimant offered a trial period and offered to come in to work when needed. The Claimant expressed one of the reasons why she wanted flexible was in respect of the cost of commuting (4 miles) and that it would be more convenient to work from home. [186] The Claimant said in evidence that it was more dangerous for her to commute. Mr Croker said to the Claimant that he had had conversations with the customer team back in January February at the time of the business redundancy process. The Claimant was asked on a one to one basis that relocation would not pose any issues for her commuting to work. The Claimant responded at that time that it wasn't until she did the commute that she discovered challenges with the journey. The Claimant referred to the fact that her daughter started school at 08:20 which made it more challenging to get to the office. [186-187].

21. Mr Croker's evidence was that the Claimant did not rely upon child care responsibilities in her flexible work request. The basis of her request was in relation to convenience and commuting and the benefits of being at home. Mr Croker said that the Claimant did not mention childcare responsibilities in the informal meeting on 25 May 2022. The Claimant accepted in evidence that she did not mention childcare responsibilities in her flexible work request, she said it was not an issue at that time because her managers had been flexible regarding her needs. The Claimant did mention in the meeting *"her daughter starts school at 8.20 which can also make it more challenging getting to the office." [187]* However, the Claimant did not provide any evidence as to her difficulties. We find that the Claimant's flexible work request was not because of the Claimant's childcare responsibilities.

22. On 20 June 2022 Mr Croker rejected the Claimant's flexible work request. [200] Mr Croker's reason for rejecting the Claimant's flexible work request was the detrimental effect on the Respondent's ability to meet customer demand. The Claimant was given a right to appeal. Mr Croker's evidence was that his reasoning for rejecting the Claimant's flexible work request application was because of supply chain issues and low stock and there was an increase in customer enquiries. In order to resolve this the Claimant needed to be in the office with her team in order to exchange information. There needed to be a free flowing of information in order to meet customer demand. The business had been severely damaged in the pandemic, the team the Claimant was in needed to be in the office support each other so that the managers could support them. Mr Croker commented that the Claimant was a very good employee with high levels of productivity and that he wanted other members of her team to learn from her. We accept Mr Croker's evidence and find this was the basis for the reason of refusing the Claimant's application on the basis of detrimental effect on ability to meet customer demand.

23. On 18 July 2022 the Claimant submitted a letter [222-223] that questioned the sufficiency of Mr Croker's 20 June 2022 rejection of the Claimant's flexible work request. The letter mentioned 5 grounds for why Mr Croker's 20 June decision was insufficient. The Claimant's childcare responsibilities

were not mentioned at all.

24. The Respondent treated the 18 July letter as an appeal. The Respondent instructed a third-party HR Consultant Charlotte Butterwick to conduct the Flexible Working Appeal Hearing. The Claimant was invited to attend an appeal hearing with Ms Butterwick on 20 July 2022. In the appeal meeting with Ms Butterwick, the Claimant said that she didn't think appealing would be useful *"because at the end of the day it would be the same person making the decision".*[245] Mr Croker explained that he hired the Croner's HR service because he wanted an impartial position on the appeal. Mr Croker trusted Croner and had no reason to believe that they wouldn't be impartial. Mr Croker's evidence was that although he made the decision to reject the Claimant's appeal he did not think about whether someone else could have dealt with the decision other than him. But had he thought about it at the time, he guessed that he could have got an independent decision maker rather than reaffirming his own decision. We find Mr Croker was not an impartial decision maker, there were other people available who could have made the appeal decision.

25. In response to the question from the consultant in the appeal meeting what is it that you're struggling with childcare that you now can't do, now you're working in the office five days a week and what is difficult? The Claimant said *"Well, for right now, she's just in school during the day. But school ends this week. So after that, she'll be in summer camp. So, I would assume that this process would be over with by that point, so that when school starts next year and I don't have necessarily a friend whose house she can go after, go to after school or anything like that, hopefully this will be resolved by then." [248].* The Claimant explained in evidence that the basis of her flexible work request application was the commute, childcare responsibilities and covid and productivity. She said that when she referred to childcare responsibilities she was referring to she was not able to look after her child who was 12 at the time in the way that she wished to and to be around more. She explained that her husband would be working from home he would be in confidential meetings that meant he could not pay attention to their daughter and gave the example that on a hot day her daughter wanted a popsicle and couldn't reach it in their kitchen and that was the kind of thing that she could do for her daughter if she was allowed to work from home and that this was a disadvantage to her. The Claimant accepted that she did not appeal the application on the basis of childcare responsibilities. We find that this was not the basis of her flexible work request and not how she put it to the Respondent at all.

26. In Ms Butterwick's report it is stated at paragraph 24 -25

"24. TR added to point 1 of Appeal that no proof was given that the rejection of the request was evidenced based, rather than opinion based.

25. PC commented on TR's point of Appeal and states that the justification for the rejection is more than just an opinion and is formed based on many years' experience leading a sales organisation and understanding the impact on the culture of the customer facing teams to effectively build rapport with each other and with customers during the periods of isolation working from home." [236]

27. The Claimant said that what Mr Croker said about why there was customer demand was opinion and that it was false to claim that the rejection of the Claimant's flexible working request was fact based but based upon opinion. However, we find that Ms Butterwick's report does not refer to Mr Croker's rejection of the Claimant's flexible working request being based upon fact, Ms Butterwick's report refers to it being evidence based. Mr Croker's evidence was that his 3 ½ years in running the business made his opinion of it expert. What Mr Croker said about what the reason the request is rejected was evidence based. We accept that Mr Croker had an expert opinion of the business that he had been running 3 ½ years at the point he made the decision. We find that that his opinion was evidence and so there were no incorrect facts.

28. The Claimant's evidence was that paragraph 29 of Ms Butterwick's report was false as Mr Croker did not evidence that the Claimant's day to day role was different during the pandemic. At paragraph 26 [236] of Ms Butterwick's report, she refers to Mr Croker's explanation of why the Claimant's day to day role was different in the pandemic. In evidence Mr Croker summarised it as the pace was slow during the pandemic as most customers were also subject to the pandemic restrictions and were also working from home. When the pandemic was over the pace picked up as customer expectations picked up because they were back at work. Paragraph 29 state*s "29. CBU finds that PC's assessment of how the business works is not opinion but facts based on precedent and that PC has articulated and evidenced that the working from home period during the pandemic was not an accurate depiction of TR's day-to-day role as the business was operating in a different way in an unprecedented time." [236]* We accept Mr Croker's evidence and find that there were no incorrect facts in relation to the evidence that Mr Croker provided.

29. At paragraphs 38-40, Ms Butterwick's report states:

    "38. CBU finds that the covid period was unprecedented and cannot be an accurate comparison for operating conditions now that the pandemic has subsided.

    39. CBU finds that the industry, and Venture Lighting Europe Ltd, are now working at a far more increased rate, and that TR's role of Customer Service Administrator, which deals with customers would subsequently be larger, dealing with increased orders and enquiries.

    40. Therefore, CBU dismisses this point of Appeal, as the period of working from home through an unprecedented pandemic is not comparable to Venture Lighting Europe Ltd.'s current situation." [238]

30. The Claimant's evidence was that paragraph 39 of Ms Butterwick's report was false. She said that her KPI's indicated that her volume order was lower since the pandemic. Mr Croker's evidence was that paragraph 39 was a summary of what Mr Croker had stated in his own report. The sentence had no context, and it was only part of what Mr Croker stated about the orders and enquires. Mr Croker said that there was an increased order book and enquires but the Respondent could not meet the customer

orders due to supply chain issues and low availability of stock. There were other ways that customers communicated that is via email and there were mobile phone numbers as well as internal queries from different departments in the Respondent. We find that the these were not incorrect facts, we accept Mr Croker's evidence just because the Claimant had a lower call volume it did not mean that she would not be expected to deal with increased orders and enquires. The phone call evidence that the Claimant relied upon did not reflect the whole picture of what the Claimant was expected to deal with.

31. The Claimant also said that paragraph 52 of Ms Butterwick's report was incorrect as the quotes referred to were taken out of context which changed the meaning. Paragraph 52 stated *"52. However, PC provided TR's one to one's and pulled out the below quotes from TR's meetings with her manager. October 2020 – "When in the office working very efficient and productive. I have noticed whilst WFH your name on Teams, sales inbox drops. Also a lack of calls being answered over the last few days."* January 2021 – TR *"Mentioned being at home sometimes it can be harder not having the team around to quickly ask questions to etc. But happy within her role and likes the team she works with which is great*." [239]. We find that the quotes were contained in the Claimant's one to ones. Taking quotes out of context is not the same as saying that they are incorrect. We find that it would not therefore be accurate to say that they were incorrect facts.

32. The Claimant also said that paragraph 59 of Ms Butterwick's report was incorrect by stating *"CBU finds that working in the office is more beneficial for the staff and customers, as it creates a more effective, fast-paced working environment. CBU finds that this is backed up by TR herself in her one to one meetings."* The Claimant said that this was taking what was said out of context as she actually said in the one to one that working from home was more productive for her. However, the Claimant accepted in her evidence that she did state "*When in the office working very efficient and productive"* [302] which this the statement relied upon by Ms Butterwick's report. Ms Butterwick's statement in paragraph 59 was not referring to productivity of the Claimant herself as such but effectiveness of the staff in doing their job. We find that the Claimant's statement in her one to one is not inconsistent with Ms Butterwick's report at paragraph 59. Paragraph 59 does not contain incorrect facts.

33. The Claimant said that the flexible work request decision and appeal was based upon incorrect facts as her husband did not work from home everyday and paragraph 82 of Ms Butterwick's report stated *"82. Additionally, CBU notes that TR stated that her husband works from home, so CBU finds that TR's childcare would be covered by her husband, if he is at home working."* We heard evidence from the Claimant that the Claimant's husband did not work at home everyday but between 2-3 days a week, which we accept. However, we find that the statement in paragraph 82 takes into account the fact that the Claimant's husband would not always be working at home because it says "if he is at home working", thus the statement acknowledges that the Claimant's husband Mr Eaton did not always work at home. Ms Butterwick's statement about the Claimant's husband's home working is not an incorrect fact.

34. Ms Butterwick's report dated 28 July 2022 [232-242] recommended that the Claimant's flexible working request appeal be dismissed in its entirety [241]. Ms Butterwick's report included a number of appendices which included the Claimant's appeal letter with Mr Croker's comments in red [265-266] and Mr Croker's own report setting out the reasons rejecting the Claimant's appeal [262-264]. Mr Croker's report set out in more detail the reasons why the operating conditions changed from the pandemic environment to post pandemic. In his report Mr Croker said that strong team culture was a critical aspect of success for the department the Claimant was in. *"the organisation is dependent upon them providing information in a timely manner, staying well informed, being empathetic and being proactive in times of disruption and change in a fast paced business environment.*" [262]. The Claimant whilst mentioning childcare responsibilities in the appeal did not base her appeal on childcare responsibilities either in her 18 July 2022 letter or in the meeting. We find that it is highly determinative that any management considering the findings of Ms Butterwick's report and Mr Croker report would have refused the Claimant's application.

35. Mr Croker considered Ms Butterwick's report. In particular in respect of the point relating to paragraph 39 of Ms Butterwick's report he said that did not accept the totality of that finding, and was of the view that the finding came from his report and so he took his own findings in relation to the increase in orders and enquires in his report, however we were not taken to a specific part of the report which would explain this. Mr Croker said in his oral evidence that he did not take into account the reference to the Claimant's husband working from home. We accept Mr Croker's evidence and find that he made his own findings in relation to that particular point in Ms Butterwick's report in coming to his decision to reject the Claimant's appeal.

36. By letter dated 29 July 2022 the Claimant was informed that Mr Croker had rejected her appeal [231]. Mr Croker based his decision to reject the Claimant's appeal upon findings and recommendations of Ms Butterwick's report which included his own report.

37. On 4 August 2022, the Claimant got into an accident on the way into work on her electric scooter. Having spoken with the Claimant during the month of August and consulting the relevant fitness to work notes, the Claimant was deemed fit for work with no phased return required. Upon the Claimant's return to work on 6 September 2022, [279] Ms Green informed the Claimant that work from home was not an option. The Claimant was signed off work on 8 September 2022 [283]. Mr Croker said that the Claimant was not well enough to work as she had problems when she came into the office. The Respondent could not be sure that she was well enough to work from home. We find that the Respondent's reason for not permitting the Claimant to work from home was because it did not think the Claimant was well enough. This was in the end supported by the fact that the Claimant was signed off work 2 days later.

The Law

Indirect sex discrimination

38. Section 19 of the EqA, provides:

"19 Indirect discrimination

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

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

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are-[….] sex;"

39. Section 23 of the EqA, states:

"23 Comparison by reference to circumstances

(1) *On a comparison of cases for the purposes of sections 13,14, or 19 there must be no material differences between the circumstances relating to each case."*

40. The seminal decision of the supreme court in Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558 set out the salient features of indirect discrimination as:

41. "1*. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but 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. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'*

2. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

3. The contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead, it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but 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. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

4.The reasons why one group may find it harder to comply with the PCP than others are many and various […]. They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in Homer v Chief Constable of West Yorkshire [2012] IRLR 601, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

5.There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the

test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

6.It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

7.It is always open to the Respondent to show that his PCP is justified – in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon Respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

Pool:

42. In the case of Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558: per Allonby identifying the pool was not a matter of discretion or of fact-finding but of logic: *"There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition."*

43. The EHRC Statutory Code of Practice (2011), states: "*In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively."*

Disadvantage:

44. Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15:

confirms that statistical evidence is no longer necessary in order to show a 'particular disadvantage when compared to other people who do not share the characteristic in question'.

45. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 the House of Lords (as it was then) held that the test was whether "a reasonable worker would or might take the view that he had… been disadvantaged in the circumstances in which he had thereafter to work" (see paragraph 34 per Lord Hope)

Statutory flexible work request

46. Section 80F sets out the extent of the right to make a flexible work request. The section is headed "*Statutory right to request contract variation*" and provides,

"(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if –

(1) the change relates to –

(a) the hours he is required to work,
(b) the times when he is required to work,
(c) where, as between his home and a place of business of his employer, he is required to work, or
(d) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations

(2) An application under this section must –

(a) state that it is such an application,
(b) specify the change applied for and the date on which it is proposed the change should become effective, and
(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with."

47. Section 80G ERA goes on to provide:

"(*1) An employer to whom an application under section 80F is made –*

(a) shall deal with the application in a reasonable manner
(aa) 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 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 regulation."*

48. Section 80H states:

"*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," ….

"(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)."

49. The relevant part of section 80I ERA states:

"(1) Where an employment tribunal finds a complaint under section 80H well-founded it shall make a declaration to that effect and may –
(a) make an order for reconsideration of the application, and
(b) make an award of compensation to be paid by the employer to the employee.

(2) The amount of compensation shall be such amount, not exceeding the permitted maximum, as the tribunal considers just and equitable in all the circumstances."

50. Regulation 4 of the Flexible Working Regulations 2014 provides,

"A flexible working application must –

(a) be in writing.
(b) state whether the employee has previously made any such application and, if so, when; and
(c) be dated"

"For the purposes of section 80I of the 1996 Act (remedies) the maximum amount of compensation is 8 weeks' pay of the employee who presented the complaint under section 80H of the 1996 Act."

51. Tribunals should take into account when considering complaints under section 80H the ACAS Code of Practice -Handling in a reasonable manner requests to work flexibly (2014) "code". The Code contains helpful guidance to employers, it states:

"6. You should discuss the request with your employee. It will help you get a better idea of what changes they are looking for and how they might benefit your business and the employee…

8. You should consider the request carefully looking at the benefits of the requested changes in working conditions for the employee and your business and weighing these against any adverse business impact of implementing the changes ...

12. If you reject the request you should allow your employee to appeal the decision."

52. The Tribunal acknowledges that these are points of good practice and not legal requirements imposed on the Respondent.

53. ACAS advice says it is good practice to "deal with an appeal impartially".

'Reasonable manner'- section 80G(1) (a) ERA

54. Some helpful insight may be gained from the Employment Tribunal's approach in the ET case of *Whiteman v CPS Interiors Ltd and ors ET Case No.2601103/15 to* what amounts to a reasonable manner under section 80G(1)(a) ERA. The ET considered that reasonableness in this context referred more to the decision-making process rather than the substance of the decision. It took the view that section 80G(1)(a) referred to *dealing* with the application in a reasonable manner, rather than making a reasonable decision. The ET also observed that, the ACAS Code states that requests must be *handled* — as opposed to decided — in a reasonable manner. The tribunal noted that the Code has 'next to nothing to say' about the substance of the decision, beyond reminding employers that they must not unlawfully discriminate and that if a request is rejected it must be on one or more of the potentially permissible bases or 'grounds' set out in section 80G(1)(b) ERA.

'Incorrect facts' -section 80H (1) (b)

55. In *Singh v Pennine Care NHS Foundation Trust EAT 0027/16* the EAT held that it is not for an employment tribunal to judge the reasonableness of an employer's refusal to provide flexible working in a S.80H(1)(b) claim: it simply needs to investigate the facts on which the decision was based.

56. In *Commotion Ltd v Rutty 2006 ICR 290, EAT*, The EAT held that: "*[I]n order for the tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the tribunal*

are entitled to enquire into what would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? and matters of that type. We do not propose to go exhaustively through the matters at which a tribunal might wish to look, but if the tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of their powers and they would not be committing an error of law."

'Just and equitable'

57. The Employment Tribunal case of *Coxon v Landesbank Baden-Wurttemberg ET Case No.2203702/04 provides some parameters of when the 8 week compensation made not be awarded. In that case,* the employment tribunal held that an employer had 'patently failed' to observe the requirements set out in the (now repealed) Flexible Working (Procedural Requirements) Regulations 2002 SI 2002/3207 and, as a result, was minded to make the maximum award of eight weeks. However, in view of the fact that, had serious consideration been given to the Claimant's request to work flexibly it would have been rejected by any reasonable employer, the tribunal decided that it would be just and equitable to reduce the award to six weeks' compensation.

Submissions

58. The Claimant submitted written submissions which we considered and took into account. The parties had 15 minutes each for oral submissions, which we considered in coming to our conclusions.

Analysis and Conclusions

Indirect discrimination in relation to sex

Issue 4.1- Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely the requirement to work full-time at the office.

59. There was no dispute that that the Respondent did apply their policy that from May 2022 there was a requirement for staff to work at the office full time.

Issue 4.2- Does the application of the provision put other women at a particular disadvantage when compared with persons who do not have this protected characteristic?

60. We find that based upon the agreed PCP, the pool that was applicable was the workforce in the UK office of the Respondent who are required to work in the office full time. We concluded that, based upon the Claimant's reference that "women disproportionately value and rely on flexible working" when referring to the disadvantage she said she experienced. The Claimant did not provide any evidence of any another specific pool. The Claimant referred to senior management who were all men were as

being treated differently, but this was an attempt to establish direct discrimination not indirect discrimination.

61. The Claimant said in evidence that her disadvantage was she was required to commute, and her commute was dangerous and furthermore that she was not able to look after her child who was 12 at the time in the way that she wished to and she wanted to be around more. We do not consider that the Claimant's dangerous commute put women at a particular disadvantage. There was no evidence presented to the Tribunal that it did. Mr Eaton referred to some statistics in his submissions that women are more concerned about hybrid working those men. However, the Claimant was not asking for hybrid working and that was not the disadvantage that the Claimant was relying upon. The Tribunal does accept that the requirement to work full time in the office does put women at a disadvantage in respect of childcare responsibilities. We take judicial notice that the majority of child care responsibilities fall to women in their 20's and 30's in society. However, the requirement to work full time in the office did not put women in the pool at the disadvantage that the Claimant relied upon in evidence and in Mr Eaton's submissions which was that women with childcare responsibility were more concerned about their child being at home by themselves because it was more dangerous or that wanting to spend more time with her child put women at a disadvantage as opposed to men. The Claimant did not provide any evidence that there was a disadvantage to women of this. As the Claimant has not gotten over the hurdle of section 19(2) (b) EqA, in those circumstances the claim fails, and the claim was dismissed.

Issue 4.3- Did the application of the provision put the Claimant at that disadvantage in that the Claimant had child care responsibilities (the Claimant has a daughter who was twelve years old at the material time)?

62. If we are wrong and the Claimant relied upon childcare responsibilities as her particular disadvantage, we would still have found that the Claimant has not established a particular disadvantage to her. We found the Claimant did not have child care responsibilities at the relevant time and gave evidence to that effect, this meant that she was not disadvantaged by working full time at in the office by the application of the PCP. The Claimant did not need to take her child to school or home. She said that it was difficult to take her child to school at 08:20 she did not provide any evidence as to why it was difficult. There was no evidence that she took her child to school at all. The only difficulty that arose was when the Claimant's child attended summer school and the Claimant was told that her child was not permitted to cross the road by herself. As the Claimant's daughter finished her day at 14:30 this meant that someone needed to collect her child from school for summer school however this was not something that the Claimant relied upon in respect of her flexible working application, and so there was no evidence that it was a disadvantage at the relevant time, that meant that the Claimant was not put at the same disadvantage as women working full time required to attend the office, notwithstanding that it was not the disadvantage that the Claimant actually relied upon.

Issue 4.4- Does the Respondent show that the treatment was a

proportionate means of achieving a legitimate aim?

63. As the Claimant was not able to demonstrate that she was at a particular disadvantage by virtue of the application of the policy of the Respondent requiring staff to work full time in the office, the Respondent did not need to justify the treatment.

Flexible Working Request – s80H ERA

Issue 5.1- The Claimant submitted a flexible working request on 17 May 2022 seeking to be permitted to work from home by default unless there was a reason to attend the office such as training or an in person meeting. The Respondent rejected that request on the ground that it would have a detrimental effect on the Respondent's ability to meet customer demand.

64. The Claimant's flexible work request specifically stated, "*I would like my new working pattern to be unchanged hours and terms, updating the normal working location to Venture Lighting Europe Ltd., Trinity Court, Batchworth Island, Church Street, WD3 1RT and providing the ability to perform working activities from home except where meetings and scheduled training sessions require me to attend my contractual normal working location.*" Although the flexible work request categorically stated that she was not changing her terms and conditions, we find that the Claimant was applying for her terms and conditions to be changed by asking to work from home on a permanent basis. We conclude that the Claimant made a valid flexible work request. We also conclude that the Respondent did refuse the Claimant's application on the grounds of a detrimental effect on the ability to meet customer demands under section 80G(ii).

65. Issue 5.2- Did the Respondent fail to consider the Claimant's flexible working request (and appeal submitted on 18 July 2022) in a reasonable manner? The Claimant asserts that the Respondent ignored relevant facts, including her performance reviews and performance "metric" during the period she was working from home.

66. We found the comments of the ET in Whiteman v CPS interiors helpful. We considered that to make a decision on the flexible work request and then make the appeal of that decision was not dealing with the application in a reasonable manner, particularly where Mr Croker accepted himself that he could have got another person in the business to have heard the appeal. We consider this was a matter of process not a substance point that goes to the decision. The Claimant herself did not have confidence in the process because Mr Croker made the initial decision and the appeal and expressed this in the appeal meeting, Mr Croker would have known this when he considered Ms Butterwick's report but did not take the opportunity to seek another appeal decision maker. We find this complaint well founded and the complaint succeeds.

Issue 5.3- Was the decision to reject the Claimant's flexible working request based on incorrect facts? The Claimant says that the appeal outcome report contained incorrect factual presumptions including a suggestion that her partner also worked from home.

67. We made findings that there were no incorrect facts relied upon by the Respondent in coming to their decision on the Claimant's flexible work request.

68. The Respondent did not reject the Claimant's flexible work request based on the incorrect fact of the Mr Eaton working from home. It was not something the Respondent took into account at all. We found that the Claimant's flexible work request was not because of the Claimant's childcare responsibilities. Consequently, we conclude that it could not be an incorrect fact.

Remedy

69. We make a declaration that the Claimant's complaint under section 80G is well founded. We award 6 weeks compensation. We considered whether it was just and equitable to award 8 weeks by considering the prejudice to the Claimant of the decision by Mr Croker because he also made the decision on the appeal having heard the original application. We took into account that there would have been no difference to the outcome had someone else made the decision.

70. The calculation is (£23500 /52 x 6) - £2711.53.

Employment Judge Young
Date 20 May 2024

REASONS SENT TO THE PARTIES ON
22 May 2024

FOR THE TRIBUNAL OFFICE

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