Case No. 3305840/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Emma Sharp	v	Briggs and Forrester Living Limited
Heard at: Cambridge	**On**:	7 and 8 May 2024

Before: Employment Judge de Silva KC, Mr C Davie and Ms L Davies

Appearances

Claimant: In person
Respondent: Ms Suhayla Bewley, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is dismissed.

2. The Claimant's claim for indirect sex discrimination pursuant to sections 19 and 39(2)(c) of the Equality Act 2010 is dismissed.

REASONS

PROCEDURAL HISTORY

1. By Claim Form presented on 25 May 2023, the Claimant made claims for unfair dismissal under section 98 of the Employment Rights Act 1996 and indirect race discrimination under section 19 of the Equality Act 2010.

2. At a remote case management hearing on 13 February 2024, the Tribunal identified the issues in the case, gave case management directions and listed the present hearing on liability and remedy.

3. The parties agreed that the liability issues for the present hearing were as set out in the List of Issues in the Case Management Summary. In addition, the Respondent submitted that all remedies issues should be determined if they arose, even though these were not in the list of issues (the hearing having been listed for remedy as well as liability). The Claimant had not filed witness evidence on remedy which she had been ordered to do at paragraph 4.1 of the Case Management Orders. The Tribunal determined that the present hearing would deal with liability issues, as well as ***Polkey*** and contributory fault if relevant, and reserve any other remedies issues to a remedies hearing if they arose.

4. The Tribunal heard evidence from the Claimant, who submitted a witness statement and was cross-examined by Ms Bewley, and from Graham Brooks (Housing Director) and Duncan Benedetti (Managing Director) on behalf of the Respondent. They were cross-examined by the Claimant. Both parties made oral closing submissions. The Claimant was assisted at the hearing by her father but represented herself.

FINDINGS OF FACT

5. The Tribunal makes the following findings of fact on the chronology of events which are relevant to the issues between the parties. Where there was no dispute between the parties as to a particular fact, the findings are recorded below without further explanation. Where there was a dispute between the parties on the evidence, the Tribunal explains why it made its findings of fact.

The Parties and the Contract of Employment

6. The Respondent is a building services specialist employing around 1,000 people. It is organised into a number of divisions including the Housing Division and the Living Division (also referred to as the Housing and Living teams).

7. The Claimant commenced employment with the Respondent on 7 January 2019 pursuant to a written contract of employment dated 28 February 2019. Her original role was Estimating & Procurement Manager.

8. Clause 5.2 of the contract stated: *"Your contracted hours of work are 38.5 per week and your actual daily hours of work will be 8.30am to 5.00pm Monday to Thursday with 30 minutes for lunch, which should be taken between 12.30pm and 1.00pm and 8.30am to 4.00pm on Friday, with 1 hour for lunch from 12.30pm to 1.30pm. Variations to these daily hours and any other breaks over and above your lunch break are to be by agreement with your Manager"*.

9. The Claimant has a daughter who was around nine at the time of the alleged indirect discrimination. She describes herself as a single mother and in any event is the primary carer for her daughter. She also has an older daughter who was around 20 at the time and was at college. The older daughter lived with the Claimant for some of the time and with her (the older daughter's) father for some of the time. The Claimant has a long-term partner whom she lives with.

Events in 2018 to 2022

10. On 12 December 2018, just before joining the Respondent, the Claimant had told Mr Brooks that she hoped to be in the office at 8.45am and would work through lunch, leaving the chance to leave early.

11. In the first year or so of her employment, she worked mainly in the office for the full working day although there were occasional days when she worked from home. At this time, her parents assisted her with childcare, although they later moved to France.

12. When the national lockdown started in March 2020, the Respondent's employees including the Claimant generally worked from home. In September 2020, the Claimant changed role to Contracts Manager, being based mainly on construction sites. Sometime in 2021, she moved to her role of Production Manager which was a more office-based role. She later became Planning Manager, also an office-based role. Her written contract of employment was never updated to reflect the changes in role.

13. From 2021, the Claimant started to work a regular pattern of hours where she would work from home from around 7.30am to 8.30am, drop her daughter at school between 8.40am and 8.50am and then go into the office. The office timesheets show that she generally arrived at the office between 9.05am and 9.30am, arriving at around 9.15am on average. She left at around 2.50pm to collect her daughter from school and then worked from home until around 5pm or later.

14. On 1 March 2021, the Claimant wrote to Ruth Dyball at the Respondent stating that she hoped that it was okay to bring her daughter into the office. Ms Dyball replied stating that the company did not see this as a problem *"on occasional days"*.

15. In the school holidays, the Claimant would frequently bring her daughter into the office when she was not working from home and her daughter would entertain herself while the Claimant was working. The Tribunal accepts the evidence of the Respondent that other staff were uncomfortable with this arrangement.

16. As Planning Manager in the Housing team, the Claimant was involved in the procurement of supplies, including planning what supplies were needed, and dealing with suppliers. Until late 2022, she worked closely with Madeline Brooks (Mr Brooks's wife) who was a Procurement Clerk in the Living team, responsible for ordering building supplies by placing purchase orders with suppliers, and carrying out associated tasks, for both the Housing team and the Living team. Supplies are requested from teams within the Respondent who may require them as soon as that day or the following day.

17. In December 2022, following the resignation of Mrs Brooks, the Respondent placed an advertisement for the role of Buyer. The Claimant alleges that this was an advertisement for her role and the Respondent was trying to replace her. The Tribunal does not accept this. Although there were planning duties in the new job description of the type that the Claimant did, the Tribunal is satisfied that Mrs

Brooks carried out such duties in particular for the Living team (and the Claimant was focused on such duties for the Housing team).

Proposed New Role

18. In early 2023, Mr Brooks saw an opportunity for the Housing team to be responsible for its own purchasing and decided that there should be a new role in the team dealing with both planning and purchasing for both the Housing and the Living teams. This was a time of considerable growth for the Respondent. Mr Brooks's view was that this should be a role that was carried out in the office during what were referred to as core hours, i.e. from around 8am to 4.30pm. The need for the role to be office-based was something that he agreed with Mr Benedetti.

19. Mr Brooks and the Claimant are in agreement that the Claimant was already doing the majority of the new role, around 60% which Mr Brooks describing as being the scheduling and planning element. In his witness statement he described the new element (i.e. the other 40%) as being the raising of purchasing orders. This was done on a system called CyberQube.

20. In their oral evidence, both Mr Brooks and Mr Benedetti sought to suggest that the proposed new elements of the new role (which Mrs Brooks had previously carried out) were not just administrative and were much wider and more complex than merely raising purchasing orders. For example Mr Benedetti said in examination-in-chief that the role included going to market, asking for quotations and negotiating terms and that it required use of the Respondent's confidential information. The Tribunal does not accept this. There was no discussion at the time (even between Mr Brooks and Mr Benedetti) about such tasks being part of the new role and as, stated above, Mr Brooks's witness statement states clearly that the additional part of the new role consisted solely of raising purchase orders. Mr Benedetti's witness statement also speaks of the additional requirement to raise purchase orders without mentioning any other tasks of the kind he mentioned in evidence-in-chief.

Meeting on 20 January 2023

21. Mr Brooks had the first of two informal meetings with the Claimant on 20 January 2023 to ask her to take on the new role, stating that she should be in the office from 8am to 4.30pm.

22. The Claimant asked for a pay rise to take on the additional duties. Mr Brooks told the Tribunal that he found this request surprising but the Tribunal does not see this as surprising – the Claimant was being asked to take on substantial extra duties.

23. The Claimant was left to consider whether the new office-based role was acceptable to her.

Meeting on 8 and 9 February 2023

24. At their second informal meeting, which was on 8 February 2023, the Claimant told Mr Brooks that she would not be able to work in the office full-time. Mr Brooks also told the Claimant that there would be no extra wages for the role, to which the

Claimant replied that she would not take on the new role. There was also a discussion about the Claimant's working hours. Mr Brooks ended the meeting for both parties to explore alternative options.

25. The meeting was reconvened the following day. The Claimant said that she would compromise on the pay rise but wanted flexibility on working in the office. They discussed the possibility of the Claimant's daughter attending 'wrap-around' care at her primary school. The Claimant said that this was not acceptable. There were very few children at the school she attended and she thought that her daughter might be by herself for example in breakfast clubs, assuming that these were available. Mr Brooks reiterated to the Claimant the need for the role to be office-based. Neither party put forward any proposals by way of compromise in relation to office working.

Consultation Meeting on 27 February 2023

26. The Claimant was invited to a formal consultation meeting with Mr Brooks on 27 February 2023. At this meeting, the parties broadly reiterated their positions on office working. The Claimant raised the fact that others within the Respondent worked flexible hours. This was accepted by Mr Brooks who said that the need for the Claimant to work full-time in arose from the requirements of that particular role.

27. Following the meeting, Mr Brooks emailed managing directors of other businesses within the Respondent's group of companies to see if there were suitable alternative roles for the Claimant. However, there were no positive responses.

Consultation Meeting on 2 March 2023

28. A further consultation meeting with Mr Brooks took place on 2 March 2023. There was another discussion about the need for the role to be office-based and again no agreement was reached.

Consultation Meeting on 6 March 2023

29. At a further meeting on 6 March 2023, both parties in effect reiterated their respective positions and the Claimant was put on notice of termination effective on 3 April 2023. This was confirmed in a letter the same day. In the event, the Claimant did not work her notice period but was paid for it.

Appeal against Dismissal

30. The appeal was heard by Mr Benedetti who held a meeting with the Claimant on 21 March 2023. At this meeting, the Claimant said that she did not want her role back but wanted a settlement package. She was told that that was not part of the process.

31. Following the meeting, on 22 March 2023, Mr Benedetti spoke to Mr Brooks who reiterated the need for full-time office working. He also spoke to Justin Van Walwyk, Pre-Contracts Director, on 24 March 2023 about the new role.

32. By letter dated 31 March 2023, Mr Benedetti dismissed the appeal, giving reasons set out in a four-page letter. The new role was later offered to Mrs Brooks.

RELEVANT LAW

Unfair Dismissal

33. Section 98(1) of the Employment Right Act 1996 states that it is for a respondent to show the reason (or principal reason) for the dismissal. The Respondent relies on the following 'some other substantial reason' (**"SOSR"**) for the purposes of section 98(1)(b) of the Employment Rights Act 1996: *"the Claimant's unreasonable refusal to agree to the proposed change to her working pattern"*.

34. As stated in ***Hollister v National Farmers Union*** [1979] ICR 542 CA, a unilateral change alleged to be 'SOSR' cannot be imposed for arbitrary or capricious reasons but must be in pursuit of a sound business reason, i.e. one which a reasonable employer would consider sound, bearing in mind the requirement that the Tribunal should not substitute its own opinion for that of the employer on this issue.

35. If a potentially fair reason is established, the Tribunal will go on to consider whether the employer acted reasonably in all the circumstances, including its size and administrative resources, in treating this as a sufficient reason for the Claimant's dismissal. This involves consideration of the procedure followed by the employer including whether there was reasonable consultation. The decision of the employer and its procedure must be within the 'band of reasonable responses' for a reasonable employer.

36. In ***Hollister***, the Court of Appeal referred to the following description of consultation (taken from a code of practice then in force): *"Consultation means jointly examining and discussing problems of concern to both management and employees. It involves seeking mutually acceptable solutions through a genuine exchange of views and information"*. The Tribunal takes this to be a reasonable description of the scope of purpose of consultation.

Indirect Race Discrimination

37. Section 19 of the Equality Act 2010 states:

> *"(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. …".

38. The provision, criterion or practice (**"PCP"**) relied on by the Respondent here is *"a requirement for the Claimant to attend the office during core working hours"*.

39. In order to consider whether there is a disparate impact on people with whom a claimant shares a protected characteristic (here, sex), it is necessary to identify a pool for comparison. Such a pool must allow the allegation of indirect discrimination to be tested and it is not incumbent on a Tribunal to address in detail each possible basis on which discriminatory impact could be assessed (see ***Allen v Primark Stores Ltd*** [2022] EAT 57 paragraph 35 (Eady P)).

40. In order to establish disparate impact, the evidence must support this conclusion and lead directly to its necessary inference (***Ministry of Defence v MacMillan*** EAT/0003/04). A Tribunal may take judicial notice of the preponderance of single mothers having care of a child (see ***Edwards v London Underground*** [1999] ICR 494 CA paragraph 24). Although ***Edwards*** was decided in the last century, the Tribunal notes the evidence on behalf of Working Families as intervener in ***Dobson v North Cumbria Integrated Case NHS Foundation and Working Families*** [2021] ICR 1699 EAT (Choudhury P and members) (paragraph 39) to the effect that women are more likely than men to have childcare responsibilities and difficulties for women still exist with evening and weekend working, with unpredictable hours presenting particular difficulties.

41. The legitimate aim relied on by the Respondent is *"the efficient performance of the Claimant's role to support the wider business and its clients"*. It is the PCP which must be justified. An employer must establish that the PCP was reasonably necessary to achieve the aim (see e.g. ***Barry v Midland Bank*** [1999] ICR 859 HL). Consideration of the proportionality of an aim involves consideration of whether less discriminatory measures could have been used and the Tribunal should also carry out a balancing exercise considering the discriminatory impact of any measure, including on the claimant in question.

THE TRIBUNAL'S CONCLUSIONS

Unfair Dismissal

Potentially Fair Reason

42. The Tribunal concludes that the Claimant's refusal to agree to the proposed change to her working pattern, that is the requirement to work full-time from the office, was a potentially fair reason for dismissal. It is not necessary for the Tribunal to consider the reasonableness or unreasonableness of the Claimant's refusal, the key issue is whether the proposed change was in pursuit of a sound business reason (i.e. one which a reasonable employer would consider sound) which it was.

43. The role required the Claimant to raise purchase orders, a task which the Tribunal accepts had some degree of urgency to so that stores could be delivered efficiently

and swiftly to sites where the Respondent was carrying out work. Some of these might be requested when the Claimant was driving to or from her daughter's school when she would not be able to access CyberQube.

44. More generally, there was a sufficiently sound basis for requiring someone to be in the office throughout the day, for example to deal with queries and have meetings. Although the Claimant could continue to make herself available to attend meetings which had been planned in advance, the Tribunal accepts that the purchasing system and the business generally would be very likely to work less efficiently if the person in the role was not in the office to speak face-to-face to colleagues.

45. The Tribunal also took into account the fact that there had never been any formal agreement or contractual variation to allow the Claimant to work some of her contracted hours at home. This working pattern had emerged, in particular after lockdown, as the Claimant started to do the school drop-off and work from home during 'core hours' and the Respondent did not take any objection to this.

Reasonableness

46. So far as the reasonableness of the process leading to the Claimant's dismissal is concerned, the Tribunal is of the view that the Respondent showed a degree of inflexibility to the Claimant. This is apparent among other things from Mr Brooks' own account of his dealings with the Claimant (all emphasis added):

    a. He said that the informal discussions were commenced *"hoping that the Claimant would buy into it and agree to the role"*;

    b. Following the first informal meeting he *"left the Claimant to consider her own position in terms of the office-based nature of the role"*;

    c. At the first consultation meeting he said that he *"couldn't get the Claimant to see her current hours do not meet the core hours which the Housing Division operates"*;

    d. At the second consultation meeting he said that he *"gave the Claimant examples of where we needed her to be in the office during core hours"*;

    e. In his discussion with Mr Benedetti following the consultation process he said that he had *"done all [he] can in a fair and reasonable manner to get the Claimant to see our needs…*".

47. That is to say that there was a lack of compromise on his part or an attempt to find "*mutually acceptable solutions"* (***Hollister***, above). He did not for example suggest a trial period or offer any flexibility to the Respondent's position such as the Claimant being able to do drop-off on one or two days per week.

48. The Tribunal nonetheless recognises the importance to the Respondent of having someone carrying out the functions of the new role from the office, in particular at a time when the turnover of the business was increasing significantly, and also in light of the fact that the Claimant was herself not offering any flexibility whatsoever

(other than continuing to make herself available for planned meetings, as she had been doing previously). There was little realistic scope for common ground being reached between the parties given those factors.

49. The Tribunal also had in mind the Claimant's proposal for the school holidays which was that she bring her daughter into the office when she was there. The Tribunal does not think that this is a reasonable solution. The office is a place of work and not an appropriate place for a child of primary school age to spend time, and not just because other staff felt that they had to mind their P's and Q's as it was put. Further, Mr Brooks made some effort to find suitable alternative employment for the Claimant but none was available.

50. To the extent that the Claimant submits that the dismissal was a means of giving the new role to Mrs Brooks, this is not accepted by the Tribunal. The Claimant was a valued employee and was given a genuine opportunity to do the new role, albeit on the basis that it was office-based, and there are no plausible grounds to suppose that the Respondent had the ulterior motive of creating an opportunity for Mrs Brooks.

51. The Tribunal is also conscious that a dismissal procedure will only be unfair if no reasonable employer would have acted as the Respondent did. This is not the case here.

52. For these reasons, the Tribunal is of the view that, while the Respondent might have done more, its decision and actions were reasonable in the circumstances and that the dismissal is accordingly fair. In the circumstances, it is unnecessary to consider contributory fault or ***Polkey***.

Indirect Sex Discrimination

PCP

53. As set out above, the PCP relied on by the Respondent, which it accepts that it applied to the Claimant, is *"a requirement for the Claimant to attend the office during core working hours"*.

The Pool

54. In order to assess disparate impact, the Tribunal must identify a pool for comparison. The pool which enables the Tribunal to consider the impact of the PCP is the pool of individuals who might be considered for the proposed new role and this was the pool that the Tribunal used to determine the issue of whether there was discriminatory impact. It would have been less useful to look at all employees in the Respondent as the PCP was not applied to all of them and the same would go for taking the national workforce as a whole as the pool for comparison.

55. The Respondent accepted in closing submissions that this was potentially an appropriate pool (although its primary position was that the Claimant had not established the correct pool)

Particular Disadvantage to the Women in Pool

56. Although the Claimant put forward no evidence as to the impact of the PCP on the pool, the Tribunal does not sit in blinkers and it took judicial notice of the fact that women are still generally more likely to have childcare responsibilities than men.

57. The Respondent submitted that many of the decided cases where disparate adverse impact on women was established were different to the present case in that the women in those other cases were single parents which the Claimant was not. Leaving aside the fact that the Claimant described herself as a single parent and in any event had primary childcare responsibilities for her daughter, the status of the Claimant is not determinative of the issue of whether there was a disparate impact on women in the pool generally.

58. The Respondent also submitted that many of the decided cases involved evening or irregular shifts and the claimants in those cases wanted what the Claimant had here, i.e. regular daytime working hours. Even if that is the case, the Tribunal has to consider whether there was a disparate impact on women in the pool caused by the PCP in the present case. It concludes, on the basis of the fact that women generally have more childcare responsibilities than men, that women in the pool would be put at a particular disadvantage by the PCP when compared to men.

59. Having said that, the Tribunal is drawn to the conclusion that the comparative disadvantage caused by this PCP is much less than the comparative disadvantage of imposing, say, evening or weekend working or irregular hours. For example, the opportunities for childcare (including school and 'wrap around' care provided by a school) are much greater during weekdays than would be available during long evening or weekend shifts.

Particular Disadvantage to Claimant

60. The Tribunal also concludes that the PCP caused a particular disadvantage to the Claimant. She wanted to take her daughter to school and pick her up and did not want to leave her in a breakfast club or after-school clubs. It is relevant to note here that the Claimant did not make enquiries as to the availability of 'wrap around' school care. The Claimant felt that her daughter would be by herself in a pre- or post-school clubs as her school was a small one and the Claimant did not want this. However, this is not to say that such care was unavailable.

Proportionate Means

61. Therefore, the Tribunal must consider whether the PCP was a proportionate means of achieving the legitimate aim of *"the efficient performance of the Claimant's role to support the wider business and its clients"*. The Tribunal is of the view that it was. The Respondent has a business need of having someone in the office during core hours to raise purchase orders and carry out related tasks.

62. Even if this could be done when the Claimant was at home and with the Claimant doing school drop-off and pick-up during work hours (when she could take calls while she was driving), it would have been disruptive to the Respondent's business

to allow this working pattern, for example having two periods during the day when the Claimant was driving and therefore could not place orders and could not carry out the full range of her duties as she was not at her desk. It would also be disruptive to have periods when the Claimant would not be in the office and therefore unable to have face-to-face or *ad hoc* conversations about orders being placed that day. This is particularly so given the Claimant would be the only person carrying out the purchasing order function.

63. Further the disadvantage to women caused by the PCP was relatively small as it concerned requiring regular working hours in the course of the working day, as set out above. So far as the impact to the Claimant is concerned, although there was a disadvantage to the Claimant, this arose out of her wish to take her daughter to and from school. Her reasons are her own and the Tribunal does not in any way criticise these but it is not proven to be the case that childcare was in fact unavailable. Moreover, the Claimant's proposal would have required her daughter to be in the office for long periods in the school holidays, which is not an appropriate solution for the reasons set out above.

64. As the PCP was a proportionate means of achieving a legitimate aim, the indirect discrimination claim must fail.

Concluding Comments

65. The Tribunal makes a final observation about the point raised by the Claimant that the Respondent does not have an HR department. Although the absence of an HR department in no way renders a dismissal unfair or discriminatory, an HR adviser would be likely to have approached the issue in a different way, for example by seeking to find common ground between the parties.

66. As the Claimant said, she had no one to speak to about this situation other than her manager who was imposing the change. An HR adviser might also have engaged the Respondent's Agile Working Policy which neither Mr Brooks nor Mr Benedetti considered (the policy was not put before the Tribunal) or pursued alternatively employment more vigorously. We do not accept the submission on behalf of the Respondent to the effect that HR generally simply does the bidding of management.

67. The suggestion by Mr Benedetti (who said that HR was unnecessary) that the Claimant might have spoken to another senior manager outside the business line such as the Commercial Director seems to the Tribunal to miss the point. An employee cannot realistically be expected to raise issues of this kind with senior managers in a large business. Further, a senior director of the company would not be expected to approach the issue from the same perspective as an HR adviser, for example providing the necessary support or seeking mutually acceptable solutions to avoid valued employees departing. That is partly why larger companies often have HR departments.

68. In any event, for the reasons set out above, the Tribunal has concluded that the dismissal was fair and that it was not indirectly discriminatory.

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Employment Judge de Silva KC

Date:…27 June 2024……..……

Sent to the parties on:
1 July 2024
……..…...

For the Tribunal:

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