EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs Y Zaidi	**v**	1. Dnata Ltd 2. Mr E Bailey 3. Mr I Potter 4. Mrs S Appleton

Heard at: Reading Employment Tribunal

On: 20, 21, 22 and 23 May 2024
and on 21 June 2024 (panel only)

Before: Employment Judge Hawksworth
Mr J Appleton
Ms S Hughes

Appearances
For the claimant: Mr Zaidi (claimant's husband)
For the respondents: Mr J Wallace (counsel)

RESERVED JUDGMENT

1. The claimant's claim against the first respondent succeeds in part. The following complaints are well founded and succeed:

    1.1. indirect sex discrimination contrary to section 19 and 39 of the Equality Act 2010;
    1.2. detriment done for a prescribed family leave reason contrary to section 47C of the Employment Rights Act 1996;
    1.3. unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996.

2. The following complaints against the first respondent under the Employment Rights Act 1996 are not well founded and fail:

    2.1. breach of the right to request flexible working under sections 80F to 80H;
    2.2. failure to provide a written statement of change under section 4;
    2.3. automatic unfair dismissal contrary to section 104.

3. The complaints against the second, third and fourth respondents fail and are dismissed.

REASONS

Claim, hearing and evidence

1. The claimant was employed by the first respondent as a customer services agent at Heathrow from 1 February 2016 until 4 December 2021. The first respondent provides ground handling services for commercial airlines. The second, third and fourth respondents were employees of the first respondent at the material times.

2. The claim arises from the claimant's requests for flexible working and taking time off for dependants. She complains of breach of the right to request flexible working, detriment for taking time off for dependants, indirect sex discrimination, constructive unfair dismissal and automatic unfair dismissal for assertion of a statutory right.

3. The claim form was presented on 3 March 2022. The respondents defend the claim.

4. At the start of the hearing before us, Mr Appleton, one of the tribunal members, and Mrs Appleton, one of the respondents, confirmed that they do not know each other and are not as far as they know related.

5. The respondents provided an opening note, an authorities bundle and a cast list and chronology. The chronology was agreed by the claimant, subject to two additions. Mr Zaidi also provided a note of authorities.

6. The parties had prepared a bundle of documents with 395 pages. The parties resolved an issue about additional documents between themselves; the respondents agreed that in 2020 the claimant made 10 or more applications for annual leave to be taken in 2021, and in light of that agreement there was no need to add any additional documents to the bundle.

7. The issues for us to determine were identified at a preliminary hearing on 8 November 2022. We discussed the list with the parties at the start of the hearing, and clarified some points as identified in the amended list of issues which is included in the appendix to this document. The parties agreed that the amended list contains the issues for us to determine. We decided that because of the complexity of issues, and the time available, this hearing would deal with liability only, and another hearing would be arranged to decide remedy if needed.

8. Mr Wallace made an application to strike out the complaints of breach of the right to request flexible working. For reasons given at the hearing, we refused the application. In short, we decided that it was appropriate to hear all the evidence before deciding whether the claimant had made a request which met the statutory requirements.

9. After dealing with these preliminary matters we heard evidence from Mrs Zaidi and from all three individual respondents. All had produced and exchanged witness statements.

10. After the evidence, Mr Wallace and Mr Zaidi both produced written closing comments documents and made oral submissions.

11. There was insufficient time within the four-day allocation for us to make our decision and tell the parties. We reserved judgment and arranged a deliberation day for the panel. The judge apologises to the parties for the delay in sending out the reserved judgment, this reflects the complexity of the issues to be decided in this case, and the current workload in the tribunal.

Findings of fact

12. This section explains our decision about what happened. Where there is a dispute between the parties about a factual matter, we decide what is most likely to have happened, by reference to the evidence we heard and the documents we read. We include here our findings about the facts which are relevant to the issues we have to decide.

13. The first respondent provides ground handling services for commercial airlines.

14. On 13 January 2016, an offer of employment was sent to the claimant. She signed a statement of terms and conditions of employment on 28 January. Her start date was 1 February 2016, and she was a customer services agent at Heathrow. Her contract said she worked 20 hours per week over a rostered shift pattern (page 125).

15. The majority of the respondent's customer service agents work on rotating shift patterns, for example over a 12 week period.

<u>Flexible working application in 2017</u>

16. On 6 July 2017, the claimant made a request for flexible working which was granted; she moved to a four on, two off roster pattern on Singapore Airlines, working early shifts only. This change was confirmed in a letter (pages 128 to 130). The letter said that the claimant would have 5.30am and 7am start times. It said the change would be reviewed in six months and the right to review the agreement in the event of a significant change in workload or loss or gain of contracts was reserved. The claimant initially worked the new pattern without any difficulties. No formal six-month review of the arrangement was carried out.

17. During the pandemic, the respondent had to re-roster shifts with short notice. An example of this occurred in the claimant's case in October 2020 when her shifts were changed to late shifts with a little over a week's notice (page 137). The claimant contacted HR to ask them to help because the

pattern was outside her agreed flexible working arrangement and she was unable to work the late shifts.

18. In January 2021, there were some more communications between the claimant's duty manager and the respondent's HR team about whether the claimant had a flexible working arrangement to work early shifts only. HR confirmed to the claimant's manager that she did. This exchange of communications was prompted by the claimant telling her manager that late shifts were outside her contracted hours, after late shifts had been included in her roster on some occasions (pages 139-141).

19. On 2 April 2021, the claimant took a day's emergency leave and had a return to work interview when she went back to work (page 145). By 'emergency leave', the parties meant time off to care for dependants. We have referred to this in these reasons as 'dependants' leave'. The claimant also took two one-day periods of dependants' leave on 6 August 2021 and 16 September 2021. There was no record of return to work meetings being held on those two occasions.

20. On 12 April 2021, the claimant emailed HR about her flexible working arrangement. She had again been rostered for late shifts which she was unable to work and which were not in line with her permanent early shifts arrangement.

21. On the following day, 13 April 2021, a duty manager said he would put the claimant on dependants' leave because she was unable to work the shift that she had been rostered (page 147).

22. On 15 April 2021, in response to a question asked by the claimant, HR emailed the claimant to confirm that she had a flexible working arrangement for early shifts only. However, they said that this arrangement was no longer possible on Singapore Airlines. Only full time customer service agents had been working on that contract during covid. The claimant was told that she would be moved to Turkish Airlines so that she could stay on her agreed early shifts only arrangement (page 149).

23. This arrangement worked fine for the next few months.

<u>Flexible working application on 13 August 2021</u>

24. On 13 August 2021, the claimant made another request for flexible working (page 158). The request was dated 12 August 2021 but attached to an email sent on the morning of 13 August 2021. The request was prompted by the claimant's oldest child being due to start school in September 2021 and was to enable the claimant to drop her off at school. The claimant's request was headed "Statutory request for flexible working" and set out the change she was seeking (later start and finish times), the date when she wanted it to start, and the date on which she made a previous request. The request did not mention anything about the effect of the proposed change on the employer or how this might be dealt with.

25. Iain Potter, a resource planning manager, responded to the claimant's request. Mr Potter's role was to prepare the rosters for customer service assistants. He did this manually, not using software or other automated system. There were hundreds of CSAs, a little over half of whom worked part time. The respondent's practice when designing rosters was to include 10% more staff than required, to cover for sickness and other unexpected absences.

26. In his request, Mr Potter asked the claimant whether she was willing to reduce her hours and change to a different airline if that was required to accommodate her request. The claimant said she was willing to do so (pages 156-157). There was an exchange of emails between the claimant and Mr Potter on 25 and 26 August 2021, and they agreed the change of hours with a move to Middle East Airlines. The claimant was to work shifts starting at 9.15am which would give her enough time to drop her daughter at school. The claimant did not mention in this exchange of emails anything about the effect of the proposed change on the employer or how this might be dealt with.

27. The claimant asked whether this change of hours required a new contract but Mr Potter did not reply to this question (pages 159-161). Although the claimant's initial email had been headed "Statutory request for flexible working" the respondent did not treat her email as a formal request. Mr Potter's view was that, as he could accommodate the request, it was not necessary to go through the formal process (page 229).

28. The claimant worked the new agreed hours for about four weeks until 27 September 2021 when Mr Potter emailed her to say that, under the new winter schedule, the time of the flight she was working on was to change and that a shift timing adjustment would be required to 8am. The claimant's new shift would be from 8am in the morning to 1.30pm in the afternoon.

29. The claimant replied to say that those hours would be impossible for her. She emailed again on 3 October to say that she was unable to do 7am starts which she had been rostered (pages 163-167).

30. On 21 October 2021, Mr Potter prepared a proposed 12 week rotating roster for part-time Customer Service Agents for the winter schedule on Middle East Airlines, Iran Air and Sri Lanka Air. He invited the team to contact him if there were any issues or queries with the proposed roster (pages 169-170).

31. The claimant replied on 29 October to say again that she could not do 7am starts. She offered to work weekends.

32. On 1 November, she emailed again to say that she was still rostered to start at 7am the following day and to ask what she should do (pages 174-173).

33. In his reply, Mr Potter said that the permanent early shifts starting at 9.15am no longer had any operational validity because of the clock change. He said the only possible early shifts that the claimant could work would be a Singapore Airlines flight starting at 5.30am or a Turkish Air flight starting at

7am. (The Middle East Airlines flight that the claimant used to work on which allowed her to start at 9.15am and which would have required an 8am start under the winter schedule was no longer available.)

34. The claimant replied to propose an alternative suggestion of working for fixed days instead. She said she could start work earlier if her days were Thursday, Friday, Saturday and Sunday. This working arrangement would be possible for her because her husband could ask to work from home on Thursday and Friday so that he could drop their daughter at school. He was not working on Saturdays and Sundays. This meant that the claimant could start work earlier on those four days.

Flexible working application on 1 November 2021

35. On 1 November 2021, Mr Potter sent the claimant a flexible working application form and she completed it, asking for a fixed days arrangement for Thursday, Friday, Saturday and Sunday only. The form included a box about the impact of the new working pattern and how any negative impacts can be mitigated. The claimant filled this in and said there was no negative impact. The form did not include a box to give the date of any previous requests and the claimant did not say anywhere on the form whether she had made a previous request.

36. The respondent treated the claimant's request as a formal flexible working request. Its policy on flexible working recognised the significant business benefits to be gained from retaining a diverse and motivated workforce through the implementation of flexible working, and included job-sharing as an example of flexible working (page 206).

37. On 2 November 2021, the claimant was invited to attend a meeting with Mr Potter on 9 November 2021 to discuss her flexible working request (pages 178, 180-189). She said she believed her August flexible working request was still being considered. Mr Potter said that the August flexible working was not a formal request. They discussed the proposed fixed days arrangement.

38. After the meeting, on 16 November 2021, Mr Potter wrote to the claimant to inform her that her flexible working request was refused (page 195). He gave three reasons:

    38.1 the business was planning changes to the workforce;

    38.2 there was a lack of work to do during the proposed working times; and

    38.3 the work could not be reorganised amongst other staff.

39. He said that the times of the fixed day proposal were more suitable operationally but that a fixed day roster would create the issue of covering remaining days in its rotation and that could not be reorganised amongst

other staff without making the claimant surplus to operational requirements. Mr Potter gave the claimant details of the right of appeal.

40. The claimant replied to say that she was still confused (page 201). She said that her contract had already been changed following her August flexible working request, which she understood to be a permanent change, and she was chasing up her amended contract. She did not understand why she had been asked to put in another flexible working request, when employees were only allowed to apply once a year. She said, 'Can you please let me know what is going on?'

41. The claimant appealed against Mr Potter's decision. Before the appeal was heard, another issue arose; we explain this next.

Absence on 16 November 2021 and disciplinary investigation

42. On 16 November 2021, the claimant was absent from work to care for her daughter who was sick. The claimant's daughter had been unwell from 13 November but had been improving. The claimant thought that her daughter would be well enough to go to school on 16 November but on that morning she was unexpectedly not well enough to return to school, resulting in the claimant having to take dependants' leave. We find, based on the claimant's account given at an investigation meeting on 23 November 2021, that the claimant had to take her daughter to the doctor on this day. The claimant's mother could have looked after the claimant's children, but she is unable to drive and was therefore not able to take the claimant's daughter to the doctor.

43. The claimant telephoned the respondent at 7am, an hour before her shift started, to tell her manager that she would be off on that day. The absence was recorded as dependants' leave.

44. On 17 November 2021, the claimant had a return to work interview with a duty manager, Elliot Bailey, about her absence the previous day (page 197). Mr Bailey noted that the claimant had taken dependants' leave on five occasions in a rolling 12 month period, (in fact in the previous eight months) and he thought this was excessive. He told her that she would be invited to attend an investigation interview in respect of the dependants' leave taken. He wrote to the claimant to say that she would be required to attend an investigation meeting (page 199).

45. The respondent's disciplinary procedure said that an investigation is carried out when a breach of discipline may have occurred (page 110). It said the investigation did not form part of the disciplinary process but was a pre-requisite to it.

46. The investigation meeting with Mr Bailey took place on 23 November 2021 (pages 212-214). During the meeting Mr Bailey identified the dates on which the claimant had taken dependants' leave that year: 2 April, 13 April, 6 August, 16 September and 16 November.

47. Mr Bailey noted that 2 April 2021 was a day for which the claimant had previously asked to book annual leave but her request had been refused. The respondent's procedure requires annual leave to be booked one year in advance. We accept that the claimant was not seeking to take dependant's leave on 2 April 2021 to circumvent the refusal of annual leave. The claimant had not remembered that she had requested annual leave for that date a year before. It was a coincidence of dates.

48. After his investigation, Mr Bailey recommended that the case should be put forward for a disciplinary hearing (page 215-217).

49. On 25 November 2021, the claimant was invited to attend a disciplinary hearing. It was due to take place on 30 November 2021. The letter recorded that the allegation was taking an excessive amount of dependants' leave. The respondent did not pursue any allegation that the leave taken on 2 April 2021 was not genuinely because of an emergency or ill-health (pages 221-222). It was not suggested to the claimant in the hearing before us that the leave on 2 April 2021 was anything other than dependant's leave.

50. On 29 November 2021, the invitation to a disciplinary hearing letter was resent to the claimant: the date for the disciplinary hearing was re-scheduled to 4 December 2021 because of sickness in the team dealing with the disciplinary process (page 227).

Flexible working appeal

51. The claimant's appeal against the refusal of her flexible working request which she had submitted on 23 November 2021 (pages 210-211) was progressing at the same time.

52. The flexible working appeal hearing took place on 30 November 2021. At this time, there was a shortage of staff because of reductions in numbers during the covid period and, as flights were increasing again, the respondent was actively recruiting.

53. The appeal was heard by Sarah Appleton, passenger services business manager (pages 233-240). As part of her consideration of the appeal Mrs Appleton considered about 30 rosters to see if the claimant's requested working patterns could be accommodated. During these investigations, she became aware of a very recent proposal to change the times of an Iran Air flight which could make a fixed day roster workable.

54. Mrs Appleton wrote to the claimant with the outcome of the appeal, including the suggested roster which allowed fixed day working on Tuesday, Thursday and Sunday (pages 230-231). The letter was dated 30 November 2021 but emailed to the claimant on 1 December 2021 (page 232). Mrs Appleton said the claimant should take into account that the suggested fixed day roster may only be a temporary solution, and the respondent would need to review the request if the times of the Iran Air flight changed. She added:

'Unfortunately, at the moment, constant flexibility is needed and we are unable to commit to a permanent flexible working arrangement at this time'.

Claimant's resignation

55. On 3 December 2021 the claimant asked the respondent's HR business partner whether she could be considered for a role working on the JetBlue contract. The claimant said that a discussion which had taken place at the appeal meeting about the possibility of working on a roster for this airline was missing from the minutes (page 242). The HR business partner replied to say that the minutes were not verbatim, and she would ask Mr Potter about the possibility of working on the JetBlue contract (page 241).

56. On 4 December 2021, the claimant resigned with immediate effect. In her resignation letter (pages 247-250) she said her reasons for resigning were:

    56.1 the way in which the respondent dealt with her request for flexible working including failing to put an approved agreement in writing and asking her to fill in an additional flexible working form;

    56.2 disciplining her for taking time off for a dependant;

    56.3 treating her flexible working application in an extremely unreasonable manner, which the claimant said amounted to indirect sex discrimination.

57. The claimant said that the second of these (the steps taken by the respondent in relation to the dependants' leave) amounted to detriment for asserting her right to take dependants' leave under section 57A of the Employment Rights Act, and she wanted to make a formal complaint about that aspect.

58. The main reason for the claimant's decision to resign was the respondent's inability to commit to a permanent flexible working arrangement. The claimant felt that she was continuously fighting for her flexible working rights in a detrimental and unsupportive environment. The claimant was unable to provide the constant flexibility which the respondent said it needed. For her to work fixed days, her husband would have to make a flexible working request to work from home on the days the claimant would be working, and he would only be able to make one statutory request in a year. The claimant would not be able to accommodate a change of fixed days once agreed.

59. On 8 December 2021, the claimant was invited to attend a grievance hearing.

60. The grievance hearing took place on 14 December 2021. The claimant confirmed that her grievance was about the dependants' leave issue and not the flexible working requests or her allegation of indirect sex discrimination (page 254).

61. The claimant was notified on 10 January 2022 that her grievance had not been upheld (page 266-267).

The law

62. This section explains the legal principles which apply to the complaints the claimant is bringing.

Protection against detriment

63. Section 47C of the Employment Rights Act 1996 says:

    (1) "An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason."

64. The prescribed reasons relate to leave for family and domestic reasons and include (at paragraph 47C(2)(d)) reasons which relate to time off under section 57A, that is time off for dependants.

65. Regulation 19 of the Maternity and Parental Leave etc Regulations 1999 says that taking or seeking to take time off under section 57A is a prescribed reason.

66. 'Detriment' is given a wide interpretation. It means putting a worker under a disadvantage, or doing something that a reasonable worker would consider to be to their detriment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11).

67. The relevant test for causation, as explained in the context of detriment complaints under section 47B (protected disclosure detriment), is whether the act or omission was materially influenced by the prescribed reason, in the sense that it had more than a trivial influence (*Fecitt v NHS Manchester* [2011] IRLR 64).

68. Section 48 provides for enforcement of section 47C. Section 48(2) says that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that the burden shifts to the employer where the other elements of a complaint of detriment are shown by the claimant.

69. Section 47B (detriment for making a protected disclosure) provides a right not to be subjected to a detriment by the employer or (pursuant to s47B(1A)) by another worker. There is no such provision under section 47C. Section 48 provides that employer includes worker, but only in relation to proceedings under section 47B(1A).

Time off for dependants

70. Section 57A of the Employment Rights Act 1996 provides for time off for dependants. It says:

(1) "An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—

(a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,

(b) to make arrangements for the provision of care for a dependant who is ill or injured,

(c) in consequence of the death of a dependant,

(d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or

(e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.

(2) Subsection (1) does not apply unless the employee—

(a) tells his employer the reason for his absence as soon as reasonably practicable, and

(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.

(3) Subject to subsections (4) and (5), for the purposes of this section "dependant" means, in relation to an employee—

(a) a spouse or civil partner,

(b) a child,

(c) a parent,

(d) a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder."

71. In *Qua v John Morrison Solicitors* [2003] IRLR 185 the EAT explained the approach to be taken when determining what is a reasonable amount of time off work, saying:

> "Parliament chose not to limit the entitlement to a certain amount of time per year and/or per case, as they could have done pursuant to clause 3.2 of the Directive. It is not possible to specify maximum periods of time which are reasonable in any particular circumstances. This will depend on the individual circumstances in each case and it will always be a question of fact for a tribunal as to what was reasonable in every situation (paragraph 18)" and

> "The disruption or inconvenience caused to an employer's business by the employee's absence are irrelevant factors, which should not be taken into account. The right is, essentially, a right to time off to deal with the unexpected. The operational needs of the employer cannot be relevant to a consideration of the amount of time an employee reasonably needs to deal with emergency circumstances of the kind specified. Taking into account the employer's needs as relevant to the overall reasonableness of the amount of time taken off would frustrate the clear purpose of the legislation which is to ensure that employees are permitted time off to deal with such an event, whenever it occurs, without fear of reprisals, so long as they comply with the requirements of s.57A(2)." (paragraph 22).

72. The EAT went on at paragraph 25 to summarise the questions the tribunal should ask, in the context of a claim of automatic unfair dismissal for taking or seeking to take time off under section 57A:

(1) "Did the applicant take time off or seek to take time off from work during her working hours? If so, on how many occasions and when?

(2) If so, on each of those occasions did the applicant (a) as soon as reasonably practicable inform her employer of the reason for her absence; and (b) inform him how long she expected to be absent; (c) if not, were the circumstances such that she could not inform him of the reason until after she had returned to work?

If the tribunal finds that the applicant had not complied with the requirements of s.57A(2), then the right to take time off work under subsection (1) does not apply. The absences would be unauthorised and the dismissal would not be automatically unfair.

(3) If the applicant had complied with these requirements then the following questions arise:

(a) Did she take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at para- graphs (a) to (e) of subsection (1)?

(b) If so, was the amount of time off taken or sought to be taken reasonable in the circumstances?

(4) If the applicant satisfied questions (3)(a) and (b), was the reason or principal reason for her dismissal that she had taken/sought to take that time off work?"

73. In this case, question (4) will relate to detriment rather than dismissal.

74. Mr Wallace submitted that, in relation to the test for determining reasonableness, *Qua* is unsound when considering an earlier case, *Ministry of Defence v Crook and Irvine* [1982] IRLR 488. In that case, which was about the reasonableness of time taken off for union duties/training, the EAT

said at paragraph 16 that the approach should be the same as the approach in cases of unfair dismissal, and therefore the correct test was the range of reasonable responses, not the tribunal's own standard of reasonableness. Mr Wallace submitted that there is no good reason to limit the assessment of reasonableness as *Qua* does. We return to this in our conclusions.

75. In *Royal Bank of Scotland plc v Harrison* [2009] IRLR 28, the EAT, explained that, when assessing whether a period of absence fell under section 57A(1)(d) (unexpected disruption of care arrangements) there was no need to import the words 'sudden' or 'emergency' into the straightforward statutory words. The words 'unexpected' and 'necessary' are ordinary words to be construed according to their natural meaning.

76. The EAT in *Harrison* also said that it is for the tribunal to determine, if there is an issue about it, on the facts of each case, whether the action the employee wishes to take or took fell within the terms of section 57A(1).

Right to request flexible working

77. Amendments to the law on the right to request flexible working were made by the Employment Relations (Flexible Working) Act 2023 which was brought into force on 6 April 2024 by the Employment Relations (Flexible Working) Act 2023 (Commencement) Regulations 2024. The amendments were not in force at the material times in relation to the claimant's case. The provisions which applied in the claimant's case were those in force prior to 6 April 2024, they are set out below.

78. Section 80F of the Employment Rights Act 1996 (as in force at the material times in this claim) said:

> (1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—
>
> (a) the change relates to—
>
> (i) the hours he is required to work,
>
> (ii) the times when he is required to work,
>
> (iii) where, as between his home and a place of business of his employer, he is required to work, or
>
> (iv) 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,

(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,

(3) …

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

(5) The Secretary of State may by regulations make provision about—

(a) the form of applications under this section, and

(b) when such an application is to be taken as made."

79. Section 80G sets out the employer's duties in relation to an application under section 80F. The provision which was in force at the time said:

(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 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."

80. At the material time, the decision period was three months beginning with the date on which the application is made.

81. More information about the form of a statutory flexible working application is contained in regulation 4 of the Flexible Working Regulations 2014. That says:

"A flexible working application must—

(a) be in writing;

(b) state whether the employee has previously made any such application to the employer and, if so, when; and

(c) be dated."

Constructive dismissal

82. The definition of dismissal in complaints of automatic and ordinary unfair dismissal includes constructive dismissal. Section 95(1)(c) provides that an employee is dismissed where:

> "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

83. *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27* sets out the required elements for constructive dismissal:

83.1 that there was a fundamental breach of contract on the part of the employer;
83.2 that the employer's breach caused the employee to resign; and
83.3 that the employee did not affirm the contract, for example by delaying too long before resigning.

84. The claimant in this case relies on breaches of the implied term of trust and confidence. This term was explained by the House of Lords in *Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL* as a term to the effect that neither party will, without reasonable and proper cause, conduct itself in a manner which, looked at objectively, is calculated or likely to destroy or seriously damage the degree of trust and confidence the parties are reasonably entitled to have in each other. That requires one to look at all the circumstances.

85. In *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* Underhill LJ set out guidance on the questions to be considered where an employee claims to have been constructively dismissed and where there are said to be a number of breaches of the implied term. Those questions are:

85.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, the resignation?

85.2 Has the employee affirmed the contract since that act?

85.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

85.4 If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence?

85.5 If so, did the employee resign in response (or partly in response) to that breach?

86. If a constructive dismissal is established, the tribunal must also consider the reason for dismissal, including whether it is for one of the 'automatically' unfair reasons, and if not, whether the reason for the dismissal is a potentially fair reason, and whether the dismissal is fair in all the circumstances, pursuant to section 98(4) of the Employment Rights Act 1996.

Automatic unfair dismissal

87. Section 104 of the Employment Rights Act says:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –
>
> a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right; or
> b) alleged that the employer had infringed a right of his which is a relevant statutory right."

88. A dismissal which is contrary to section 104 is 'automatically' unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.

89. In a complaint of constructive dismissal for assertion of a statutory right, the question is whether the assertion of the right was the sole or principal reason for the conduct which constituted the fundamental breach of contract by the employer which triggered the claimant's resignation.

'Ordinary' unfair dismissal

90. An employee with two or more years' service has the right not to be unfairly dismissed (section 94 of the Employment Rights Act). This is sometimes called 'ordinary' unfair dismissal, to distinguish it from automatic unfair dismissal, such as dismissal for assertion of a statutory right.

91. Section 98 of the Employment Rights Act sets out the tests for determining whether there has been an 'ordinary' unfair dismissal. Subsection 1 provides:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

92. Redundancy and reasons which relate to the conduct of the employee are reasons falling within subsection (2).

93. Where there is a potentially fair reason for dismissal, section 98(4) of the Employment Rights Act 1996 says that the question of whether the dismissal is fair or unfair:

    a) "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissing the employee; and
    b) shall be determined in accordance with equity and the substantial merits of the case."

94. This includes considering whether the respondent acted in a procedurally fair manner and whether dismissal was within the range of reasonable responses open to the employer. The test under section 98(4) recognises that there may be more than one reasonable approach for an employer to take in the circumstances of the case; the tribunal must assess whether the respondent's was one such reasonable approach. The tribunal must not decide what it would have done in the circumstances, or substitute its own view for that of the employer.

Indirect sex discrimination

95. Section 19 of the Equality Act 2010 deals with indirect discrimination. It says:

    (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."

96. Sex is one of the relevant protected characteristics for the purpose of section 19.

97. In *Dobson v North Cumbria Integrated Care NHS Foundation Trust* UKEAT/0220/19/LA, the EAT reviewed the authorities on judicial notice and disadvantage arising from childcare responsibilities, concluding at paragraph 46 that two points emerge:

> "a. First, the fact that women bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. We refer to this fact as 'the childcare disparity';
>
> b. Whilst the childcare disparity is not a matter directed by statute to be taken into account, it is one that has been noticed by Courts at all levels for many years. As such it falls into the category of matters that, according to Phipson [on Evidence, 19th edition], a tribunal must take into account if relevant."

98. Section 136 provides for a shifting burden of proof, saying at sub-section (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."

99. This shifting burden is built in to the structure of a complaint of indirect discrimination. In a complaint of indirect sex discrimination by a female claimant, the claimant must first show that a provision, criterion or practice (a 'PCP') has been applied that puts (or would put) women, including her, at a particular disadvantage. If she is able to do so, the burden shifts to the employer to show that the PCP was imposed in pursuit of a legitimate aim and was a proportionate means of achieving that aim. This is sometimes called 'justification'.

100. The legal principles of justification were summarised by the EAT in *MacCulloch v ICI* [2008] IRLR 846 at paragraph 10 (approved by the Court of Appeal in *Lockwood v DWP* [2013] EWCA Civ 1195 at paragraph 46):

100.1 The burden is on the employer to establish justification;

100.2 The legitimate aim pleaded must correspond to a real need and must be appropriate with a view to achieving the objectives pursued and reasonably necessary to that end;

100.3 Proportionality requires an objective balance to be struck between the discriminatory effect and the needs of the undertaking; and

100.4 There is no "range of reasonable responses test". The employment tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the measure and make its own assessment.

101. In *Akerman-Livingstone v Aster Communities Limited* [2015] UKSC 15, [2015] AC 1399 at paragraph 28, the Supreme Court said that the justification test comprises four questions:

    101.1 Is the objective sufficiently important to justify limiting a fundamental right?

    101.2 Is the measure rationally connected to the objective?

    101.3 Are the means chosen no more than is necessary to accomplish the objective? and

    101.4 Is the impact of the rights infringement disproportionate to the likely benefit of the impugned measure?

Liability of employers and employees under the Equality Act 2010

102. Section 39 prohibits discrimination by employers against employees and applicants for employment. In relation to employees, it says at subsection 2:

> "(2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment".

103. Under section 109 of the Equality Act an employer can also be liable for the acts of others, including its employees who are acting in the course of their employment. Section 109 says (as far as relevant here):

    (1) "Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

    (2) …

    (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

    (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

    (a) from doing that thing, or

(b) from doing anything of that description."

104. Section 110 deals with the liability of employees (and agents). Again, as far as relevant, it says:

(1) "A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if—

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

(b) it is reasonable for A to do so".

Conclusions

105. This section explains how we have applied these legal principles to the facts in the claimant's case, to reach our decisions on the issues we have to decide. We have considered the issues in a different order to the list of issues. We have started with the complaints about flexible working and indirect sex discrimination, then considered the complaint about detriment, then the complaints about dismissal and finally the question of time limits.

Issue 5: Breach of the statutory right to request flexible working (sections 80F to 80H of the Employment Rights Act)

106. The claimant made flexible working requests on 13 August 2021 (page 158) and 1 November 2021 (page 190). We have considered whether either request met the statutory requirements so that it amounted to a statutory flexible working request.

107. The application on 13 August 2021 did not comply with all the statutory requirements which were in force at the time. This is because it did not explain what effect, if any, the claimant thought making the change applied for would have on her employer and how, in her opinion, any such effect might be dealt with. Even applying a generous interpretation, nothing in the claimant's email of 13 August 2021 could be considered to meet that requirement. We considered whether the subsequent emails which the claimant exchanged with Mr Potter included that information, such that we could treat the series of communications as one request which met the

requirements when considered together. However, even if we were to accept that section 80F permits an amalgamated request of this nature, we have not found that any of the claimant's communications with Mr Potter at this time included any information about the effect on the employer.

108. We also considered whether, if the claimant thought there was no effect on the employer, she was still required to explain that. Based on the wording of subsection 80F(2)(c) and in particular the placement of the words 'if any', we have concluded that, even if the employee thought there was no effect, there was still a mandatory requirement to say so. It was not a requirement to provide an explanation only if the employee thought there would be some effect. Therefore, in respect of her application on 13 August 2021, the claimant did not comply with a requirement under section 80F(2)(c) which was (at the material time) a mandatory requirement of the statutory regime. Without that information being included, the application on 13 August 2021 did not amount to a statutory application under section 80F.

109. We recognise that this conclusion appears to elevate form over substance. The claimant complied with the other requirements of the legislation, and her request expressly said it was a 'statutory request'. She could have complied fully by providing the same request in substance, but simply adding, 'There would be no effect on my employer'. This would not have given the employer any more information than they in fact had. The respondent did not tell the claimant that she had failed to comply with one of the requirements, and did not ask her to provide the missing information. We note that since 6 April 2024, it is no longer a requirement of a statutory request to explain the effect on the employer. However, the legislation gives us no discretion to ignore or waive a requirement which was mandatory at the time, and therefore, despite these factors, as the claimant's request did not meet all the statutory requirements, it was not a statutory request.

110. As to the request on 1 November 2021, the claimant made this application at the respondent's request and on the respondent's form. She completed a box about the impact of the new working pattern. She did not refer to any positive effect on the employer but in relation to negative impacts, she said she did not believe there would be any. This request therefore complied with section 80F in this respect (without providing any more information than her August request).

111. However, another piece of information was missing. The form did not include a section for the employee to state whether they had previously made a statutory flexible working request, and if so, when. This is also mandatory information, required by regulation 4(b) of the Flexible Working Regulations 2014. The claimant did not provide this information. This second request cannot be amalgamated with the August request (which did include information about the claimant's previous request) because the arrangement sought in this second request was different: it was for fixed days rather than later start times. It was clearly a new request.

112. For this reason, we have come to the conclusion that the claimant's request of 1 November 2021 also did not meet the requirements to make it a

statutory request for flexible working. Again, this conclusion might seem unfair. The reason the information was missing from the claimant's request was a deficiency in the respondent's form, and the respondent now relies on that deficiency. However, as explained, the legislation does not allow us any discretion to ignore any of the statutory requirements which are necessary for a request to be a statutory request, whatever the reason for the failure to provide all the required information.

113. Therefore, the claimant did not make any statutory request for flexible working, either on 13 August 2021 or 1 November 2021.

114. This complaint, which was brought against the first respondent only, does not succeed.

Issue 6: failure to provide a written statement of change (section 4 of the Employment Rights Act)

115. This issue relates to the shift pattern changes which were agreed after the claimant's flexible working request in August 2021. The claimant said that the respondent failed to provide her with a written statement of change in employment particulars after the agreement to change her shift times in August 2021. She said this was a breach of section 4 of the Employment Rights Act.

116. There was no change in terms and conditions as a result of changes under section 80F, as we have found that the claimant's request was not a statutory request.

117. As to whether there was more generally an agreed change in the claimant's terms and conditions which required written notice of change, the claimant's contract said she worked 20 hours per week over a rostered shift pattern, without specifying the pattern. The letter recording the variation in 2017 said that shift patterns were subject to change and that the respondent reserved the right to review the claimant's roster.

118. We have concluded that the claimant's change of shift pattern in August 2021 was done informally, within the terms of her existing contract. While it might have been good practice to inform the claimant in writing of the agreed shift pattern changes in August 2021, there was no requirement to notify the claimant of a change in her written particulars under section 4 of the Employment Rights Act.

119. This complaint, also brought against the first respondent only, does not succeed.

Issue 4: Indirect sex discrimination (section 19 of the Equality Act 2010)

120. We first consider whether the claimant has shown that the respondent applied a PCP which put women, including the claimant herself, at a particular disadvantage compared to men.

121. The claimant relied on a PCP that the respondent required its workers to be available for work potentially every day of the week and at any time, rather than on specified days and times. We have concluded that the respondent did apply a PCP of this nature. We reach this conclusion based on the explanation provided by Mrs Appleton in the claimant's flexible working appeal that 'constant flexibility is needed and we are unable to commit to a permanent flexible working arrangement at this time'.

122. The claimant said that this requirement put female parents at a particular disadvantage compared with male parents as they are less likely to be able to find reliable childcare provision which is compatible with constantly shifting work days and times, such that they will be less likely than male parents to stay in employment.

123. We take judicial notice of the childcare disparity, as explained by the EAT in *Dobson v North Cumbria*. We accept that the respondent's requirement for constant flexibility put or would put women at a particular disadvantage compared to men, because women bear the greater burden of childcare responsibilities. This can limit their ability to work certain hours and this makes it difficult for them to work a pattern which potentially includes all hours because it is not set. Having a set work pattern makes it easier to plan childcare; it is more difficult to balance work and childcare responsibilities when working a shift pattern where the days and times of work may change. Providing short notice of changes to shift patterns may ameliorate the disadvantage slightly but it remains a disadvantage because of the need to change childcare arrangements at short notice.

124. The claimant was put at that disadvantage by being unable to continue working for the respondent because the application of the PCP led to a refusal to agree a permanent flexible working arrangement. The claimant was unable to work early shifts, because she needed to drop her daughter at school. She was unable to accept a temporary fixed day working pattern which was offered to her because the family's childcare arrangements for a fixed day pattern were dependent on the claimant's husband working at home on the days she was working, and he would not be able to change his working pattern more than once a year.

125. Therefore, the claimant has shown that the respondent applied a PCP which put women, including her, at a particular disadvantage compared with men. The burden shifts to the respondent to satisfy us that the PCP was a proportionate means of achieving a legitimate aim.

126. The legitimate aim relied on by the respondent is the duty to meet the passenger demands of its customer airlines in order to meet its Service Level Agreements and avoid any potential loss of contracts, fines or penalties as a result of any breach. We accept that this is a legitimate aim. It is central to the respondent's business. It is a sufficiently important objective to justify limiting a fundamental right.

127. The PCP of requiring constant flexibility is connected to this aim. Complete flexibility would, on the face of it, allow the respondent to deploy its

customer service agents as and when needed, and therefore to meet the demands of its customer airlines. However, the PCP would not meet this aim if the requirement for constant flexibility means customer services agents have to leave because they are unable to meet the requirement for constant flexibility. This would result in the respondent being more short staffed and less able to meet its customer demands. This is especially true at a time when, as here, the number of flights was increasing after covid and the respondent was already short staffed.

128. In any event, the PCP was not a proportionate means of achieving this aim because the PCP went further than necessary to do so:

128.1 The tribunal appreciates the difficulties faced by the respondent during the covid pandemic arising from changing airline schedules and staffing issues. However, in relation to the claimant's November 2021 request for flexible working, there was a less discriminatory way for the respondent to achieve its aim of meeting customer demands than by refusing to grant any permanent flexible working arrangement.

128.2 The respondent could have allowed the claimant to work fixed days on a longer-term basis by permitting the claimant to work the four days she could offer while another employee worked the other days in that week, dividing up a full week's rota between them, similar to a job share arrangement. Job-sharing was named in the respondent's flexible working policy as an example of flexible working.

128.3 The working days which could have been offered to another employee or applicant would have been Monday, Tuesday and Wednesday, that is a fixed day working pattern without weekend working. This could have been an attractive arrangement for some. A little over 50% of the respondent's customer service agents worked part time. The respondent could have asked whether there were any volunteers to make up a full week with the claimant.

128.4 In addition, the respondent was understaffed and actively recruiting at this time: a part week fixed days role could have been offered as part of that recruitment process.

128.5 With the claimant and another employee working a full week between them, a full-time shift pattern could have been covered. That would have given more scope for the claimant to be accommodated than the part-time only shift patterns. Some airlines, Singapore Airlines for example, were covered by full time staff only. Mrs Appleton agreed that there was no particular reason why two employees covering a 40 hour rota between them would not work.

128.6 Two staff sharing one full time rota would not give rise to any problem with back-to-back shifts, as the respondent suggested. If the rota did not include back-to-back shifts when completed by one person, dividing the same rota up for two people would also not include back-to-back shifts. The job share partners would work the shifts that fell on 'their'

days, or take a rest day when it fell on their day. If there was any problem, Mr Potter prepared the rotas manually and could have made a 'bespoke' adjustment, and staff were permitted to swap shifts, so there was scope for some flexibility if needed. The rosters already included flexibility in other respects, for example with the extra 10% of staff who were rostered for cover purposes.

128.7 There would have been some additional cost incurred by employing two people to cover one full-time rota, for example car parking costs, but these would not be disproportionate.

128.8 A fixed day job share arrangement would have given the respondent wide flexibility in terms of shift times and would have enabled the respondent to retain an experienced customer services agent at a time when it was short staffed and actively recruiting. That would have assisted it to meet its legitimate aim.

129. The respondent took no steps to investigate this arrangement. This would have been a proportionate way of the respondent meeting its aim, and providing the claimant with the regular working pattern which she was seeking.

130. The Iran Airline option put forward to the claimant by Mrs Appleton (a fixed day rota with working days on Sunday, Tuesday and Thursday) was insufficient to meet the requirement for proportionality. It did not offer the claimant the days she had requested, and more fundamentally, the respondent made clear that the pattern could only be offered on a temporary basis as constant flexibility was required. The claimant was unable to accommodate a fixed day pattern which was very likely to change, for the reasons explained.

131. The respondent's requirement for constant flexibility could be expected to have a significant discriminatory effect on female employees, taking the childcare disparity into account. In the claimant's case, it meant that she had to leave her job. Meeting the passenger demands of the respondent's customers is clearly an important business need for the respondent, but we have concluded that there was a less discriminatory way for the first respondent to meet that need and accommodate the claimant, an experienced employee. Weighing up the discriminatory effect of the PCP against the benefit of the PCP to the employer, we have decided that the application of the PCP in this case was not justified.

132. The complaint of indirect sex discrimination succeeds against the first respondent, the employer. It was the application of the employer's PCP which was the act of unlawful discrimination against the claimant.

133. This complaint was also brought against the third and fourth respondents, Mr Potter and Mrs Appleton. They responded to the claimant's request for flexible working at stage 1 and at appeal stage. The first respondent did not run any defence under section 109(4), that it took reasonable steps to prevent the individual respondents from acting as they did. That is

consistent with the fact that the complaint of indirect discrimination concerned the application of the first respondent's policy requirement for constant flexibility, rather than an act by the third or fourth respondents personally.

134. We have concluded, given the nature of the complaint in this case, that liability attaches to the first respondent 'directly', under section 39(2)(d). The application of the unjustified PCP amounts to a detriment to the claimant to which she was subjected by her employer, the first respondent.

135. Liability does not arise under section 109, the provision which imposes liability on the employer for the unlawful acts of its employees done in the course of their employment. The act complained of in this complaint of indirect discrimination was not an act by the third and fourth respondents for which the employer was liable, but rather the application by the first respondent itself of a policy requirement. The employer is liable under section 39(2), not section 109. The third and fourth respondents put the employer's policy into place, but were not personally responsible for the PCP or its discriminatory effect. No liability arises under section 110 in respect of the third and fourth respondents.

136. For this reason, the complaints against the third and fourth respondents fail and are dismissed.

Issue 7: Detriment for family leave (s.47C of the Employment Rights Act)

137. This complaint is brought against the first respondent and the second respondent. We accept Mr Wallace's submission that it can only be brought against the first respondent, the employer. Section 47C only gives the right not to be subjected to a detriment by an employer. There is no provision under section 47C equivalent to section 47B(1A), which extends the right in whistleblowing detriment complaints to prohibit detriments done by another worker, expressly providing for personal liability. No such express provision exists in relation to detriment for family leave.

138. The legislative framework is therefore that in relation to complaints of detriment for reasons related to family leave, the complaint can only be brought against the employer. This means that a complaint brought under sections 47C and 48 can only be brought against the employer, not against another worker or employee. The complaint against the second respondent is dismissed for this reason.

139. As to the complaint against the first respondent, the claimant says that she was subjected to a detriment for taking time off under section 57A. We have to decide whether the time off taken by the claimant qualifies as time off taken under that section. We do so following the approach in *Qua*.

140. The first questions are: did the applicant take time off or seek to take time off from work during her working hours? If so, on how many occasions and when?

141. The respondent said that the claimant took dependant's leave on 5 occasions: 2 April, 13 April, 6 August, 16 September and 16 November 2021.

142. We have found that 13 April 2021 was a day on which the respondent recorded the claimant as having taken dependants' leave, but this was because it had rostered her for a shift which started later than her agreed flexible working arrangement, and she was unable to work that shift. That was not a day's leave taken under section 57A, it was time off taken at the employer's request.

143. Therefore the claimant took time off from work on 4 occasions: 2 April, 6 August, 16 September and 16 November 2021.

144. The next question is whether, on each of those occasions the applicant (a) as soon as reasonably practicable informed her employer of the reason for her absence; and (b) informed her employer how long she expected to be absent; (c) if not, were the circumstances such that she could not inform her employer of the reason until after she had returned to work?

145. As to 2 April 2021, we have found that the claimant did not take leave on that date to circumvent a refusal of annual leave; that was a coincidence of dates. The respondent did not suggest that the claimant failed to provide reasonable and proper notice of her absence on 2 April.

146. The respondent did not suggest that the claimant failed to provide reasonable and proper notice on 6 August 2021 and 16 November 2021.

147. The respondent said that the claimant failed to provide reasonable notice of her absence on 16 November 2021. She called her manager an hour before her shift was due to start and said she would be absent that day. In the circumstances, when the claimant's daughter had been improving but woke up on 16 November not well enough to go to school, we have concluded that the claimant informed her employer as soon as reasonably practicable of the reason for her absence, and that she would be absent on that day.

148. The claimant having complied with these requirements, the following questions arise:

    (a) Did she take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paragraphs (a) to (e) of subsection (1)?

    (b) If so, was the amount of time off taken or sought to be taken reasonable in the circumstances?

149. In relation to (a), the respondent did not suggest that the claimant's absence on 2 April, 6 August or 16 September were not within section 57(1).

150. The respondent said that the claimant's absence on 16 November 2021 did not meet the requirements of section 57A because the claimant was

seeking time off to care for her child in circumstances which did not amount to an emergency.

151. As the EAT explained in *Harrison* in the context of section 57A(1)(d), it is not helpful to import words like 'emergency' into the legislation. The claimant relies on section 57A(1)(a), which does not include the word 'emergency'. The question for the tribunal is whether it was necessary for the claimant to be absent to provide assistance on an occasion when a dependant (her daughter) fell ill.

152. The claimant expected her daughter to be well enough to return to school on 16 November and only became aware on the morning of 16 November that she would not be. The only other option available to the claimant was to ask her mother to look after her daughter. However, the claimant's mother is unable to drive and was therefore not able to take the claimant's daughter to the doctor. We have concluded that it was necessary for the claimant to be absent and that her absence fell within section 57A(1)(a).

153. We next consider question 3(b) of the *Qua* questions, that is whether the amount of time off taken or sought to be taken was reasonable in the circumstances.

154. The absences were of one day on each occasion. The respondent did not suggest that the amount of time taken on any of 2 April, 6 August or 16 September was unreasonable. To the extent that the respondent suggested that one day's absence on 16 November 2021 was unreasonable, we do not agree. We have concluded that it was necessary for the claimant to be absent from work to take her daughter to the doctor and one day's absence was reasonable in those circumstances.

155. The respondent also said that the number of days taken in an eight month period was unreasonable. Again, we do not agree. The claimant had taken four days absence (not five) over eight months within a rolling 12 month period to provide assistance when her daughter fell ill. That was not an unreasonable number of absences.

156. We have reached these conclusions having assessed the questions of necessity and reasonableness on an objective basis in line with the decision in *Qua*. We do not accept Mr Wallace's submission that we ought to apply a range of reasonable responses test here. We accept the approach explained in both *Qua* and *Harrison*, that these are questions for the tribunal. We do so because in both of these authorities the EAT was considering this issue in the context of section 57A. *MOD v Crook,* is a much earlier authority and was considering a different statutory provision.

157. Our conclusions so far mean that the claimant's absences on 4 occasions were time off taken under section 57A: 2 April, 6 August, 16 September and 16 November 2021.

158. The last question for us on this complaint is whether the claimant was subjected to any detriment by her employer because of taking time off under section 57A, which is a prescribed reason under section 47C.

159. The detriments relied on by the claimant are:

    159.1 on 17 November 2021 inviting the claimant to attend an investigation meeting;

    159.2 on 23 November 2021 holding an investigation meeting with the claimant;

    159.3 on 25 November 2021 inviting the claimant to attend a disciplinary hearing.

160. The investigation meeting was not part of the disciplinary process, but was a pre-requisite to it, and was carried out when a breach of disciplinary may have occurred. It was a step required to move to the formal disciplinary process. The disciplinary hearing was a step at which the claimant could be issued with a sanction. For these reasons, we have concluded that a reasonable worker would have considered the investigatory and disciplinary steps taken by the respondent to be to their detriment.

161. At this stage the burden shifts to the respondent to show the ground on which any act was done. Mr Wallace said that the reason Mr Bailey took steps to investigate the claimant and recommended a disciplinary hearing was not because the claimant had availed herself of her statutory right to time off, but rather because he was concerned that she had taken excessive time off by exceeding the amount of time afforded by the right.

162. We have found that four of the days the claimant took off were time taken off under section 57A. That time off was the reason for Mr Bailey's actions. The detriments were done because of or materially influenced by time taken off under section 57A. They were done because the claimant took time off to which she had a statutory right. The detriments were therefore done for a prescribed reason.

163. The complaints of detriment under sections 47C and 48 succeed against the first respondent.

Issue 2: Constructive dismissal

164. The dismissal complaints are against the first respondent only.

165. We have to decide whether the claimant was dismissed. The respondent says she resigned. The claimant says she was constructively dismissed; she relies on breaches of the implied term of trust and confidence.

166. We have to ask whether the conduct relied on by the claimant, viewed objectively, was conduct which was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent. The claimant relied on:

166.1 the respondent's alleged breaches of flexible working regulations;

166.2 the respondent's alleged failure to provide written particulars of employment;

166.3 the alleged indirect sex discrimination;

166.4 alleged unfair treatment for asserting a statutory right (the right was identified in the particulars of claim as unfair detrimental treatment for asserting the right to time off for dependants).

167. These were also the reasons given by the claimant in her resignation letter.

168. In our findings of fact, we have found in relation to each of these allegations, that the following treatment took place:

168.1 the respondent treated the claimant's first request for flexible working informally and required the claimant to make another flexible working request;

168.2 the respondent failed to provide written confirmation of the arrangement agreed in response to the first request;

168.3 the respondent refused the claimant's request for a fixed day working pattern and told her that there was a requirement for constant flexibility and that the respondent could not provide any permanent flexible working arrangement;

168.4 the respondent took steps to investigate and to consider disciplining the claimant for taking statutory time off to care for a dependant.

169. In line with the guidance in *Kaur*, we start by considering the most recent act which the employee says triggered the resignation. This was the response on appeal to the claimant's request for flexible working (we have found that this was a non-statutory request). This act by the respondent happened on 1 December 2021.

170. The claimant resigned three days later, on 4 December 2021. She did not affirm the contract between the outcome of her flexible working appeal and her resignation. The claimant's enquiry on 3 December 2021 about the appeal hearing minutes and the JetBlue contract indicated that she had not accepted and was still considering the respondent's response to her flexible working request. She was still considering whether she would be able to continue working for the respondent. It did not amount to an affirmation of the contract.

171. We have decided that the first respondent's appeal response to the claimant's flexible working request in November 2021 was conduct which, viewed objectively, was likely to seriously damage the relationship of trust between the respondent and the claimant, because telling the claimant that constant flexibility was required, and that no permanent flexible working arrangement could be agreed meant that the claimant would be unable to

balance her home and work life. The claimant felt that she was continuously fighting for her flexible working rights in a detrimental and unsupportive environment. Viewed objectively, it was reasonable for her to have that impression. There was no reasonable and proper cause for the conduct. It was contrary to the respondent's own flexible working policy.

172. Further, the appeal response to the claimant's November 2021 flexible working request was part of a course of conduct which, viewed cumulatively, was likely to seriously damage the relationship of trust between the claimant and the respondent and for which there was no reasonable and proper cause. This course of conduct comprised the most recent act together with the following acts:

    172.1 The respondent's failure to deal formally with the claimant's request for flexible working in August 2021, despite the claimant making what was clearly intended to be a formal request. We have found that it was not a statutory request because it failed to say what the impact would be on the employer, but this was not the reason the respondent did not treat it formally. Mr Potter thought that as he was able to accommodate it, he did not have to go through a formal process. This was contrary to the respondent's policy, and afforded the claimant less protection than if the request had been considered formally;

    172.2 The respondent's failure to provide formal confirmation of the changes agreed in August 2021, despite the claimant asking for this. The claimant had prior experience of her previous flexible working arrangements being overlooked by managers and having to be confirmed by HR, so, viewed objectively, it was reasonable that she would ask to have formal confirmation of the agreement reached in August 2021. The respondent did not reply to her request about this;

    172.3 The respondent's request that the claimant complete another flexible working request in November 2021. Because of the respondent's failure to treat the claimant's August 2021 request formally or to confirm the outcome clearly to the claimant, the claimant was confused by this second process and the respondent failed to clarify this to her. Viewed objectively, it appeared to the claimant that the respondent was not following its flexible working policy and was going back on something which had been agreed in August;

    172.4 At the same time that the claimant was going through the confusing November 2021 procedure, the respondent commenced an unjustified investigation of the claimant's time off to care for a dependant, and recommended that the matter should progress to a disciplinary hearing.

173. We have decided that the respondent's conduct, looked at objectively, was likely to destroy or damage the implied term of mutual trust and confidence

between the claimant and the respondent and that there was no reasonable and proper cause for it. This applies to the most recent act on the part of the employer in itself, but also to that act viewed cumulatively as part of a course of conduct.

174. All breaches of the implied term of mutual trust and confidence are fundamental breaches which go to the heart of the contract.

175. The claimant resigned in response to the breach. She made this clear in her resignation letter.

176. For these reasons, we have concluded that the claimant was constructively dismissed. We go on to consider whether the dismissal was unfair, starting with the complaint of automatic unfair dismissal.

Issue 3: Automatic unfair dismissal for asserting a statutory right

177. We have found that the principal reason for the claimant's dismissal was the respondent's failure to agree her request for flexible working, other than to offer different fixed days on a temporary basis. The principal reason was not because the claimant had asserted a statutory right.

178. This complaint fails.

Issue 2 (continued): 'Ordinary' unfair dismissal

179. This means we come back to issue 2, to consider whether the claimant's dismissal was an 'ordinary' unfair dismissal. In this complaint, the first question is whether the reason for the dismissal is a potentially fair reason,

180. The respondent said the dismissal was for redundancy or, in the alternative, for a reason relating to the claimant's conduct, namely she was not willing to work her contracted hours. We have found that the principal reason for the dismissal was the respondent's response to the claimant's flexible working request which required constant flexibility in circumstances where she could not comply with that and where there was another option available to the respondent. That was not a redundancy reason or a reason relating to the claimant's conduct. It was not any other substantial reason justifying dismissal.

181. As there was no fair reason for dismissal, the complaint of ordinary unfair dismissal is well-founded and succeeds.

Issue 1: Jurisdiction

182. Finally, we come back to the question of whether the complaints were brought within the time limit.

183. The claimant notified Acas for early conciliation on 18 December 2021 and the EC certificate was issued on 28 January 2022. The claimant brought her claim on 3 March 2022.

184. The complaints which have succeeded against the first respondent are the complaints of indirect discrimination, detriment for a family leave reason, and ordinary unfair dismissal. The dates on which the relevant acts took place are:

    184.1 The indirect discrimination which we have found relates to the application of a PCP which was a continuing state of affairs, and which was applied in the claimant's case on 30 November 2021;

    184.2 The detriment for a family leave reason relates to a course of conduct between 17 November and 25 November 2021;

    184.3 The unfair dismissal relates to the termination of the claimant's employment with immediate effect on 4 December 2021.

185. Taking the earliest of these dates, 17 November 2021, the 'primary' three month time limit expired on 16 February 2022. However, when calculating the expiry date, the period from 19 December 2021 to 28 January 2022 is not counted, because that was a period when the claimant was in the early conciliation process. That is a period of one month and 9 days. Therefore the primary time limit, adjusted to take account of the period of Acas early conciliation, expired on 25 March 2022.

186. The claimant presented her claim on 3 March 2022.

187. The three complaints which have succeeded were therefore brought in time.

188. A date has been set for a remedy hearing. Notice of the hearing and case management orders to prepare for the hearing have been sent separately.

_____

Employment Judge Hawksworth

Date: 2 August 2024

Sent to the parties on: 6 August 2024

For the Tribunal Office

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

Appendix: list of issues based on the list in the case management orders sent to the parties on 15 November 2022 (pages 101 to 103 of the hearing bundle) together with additions discussed at the start of the hearing on 20 and 21 May 2024

1. Jurisdiction

1.1 Have the Claimant's claims been brought within the relevant time period of three months starting with the acts/omissions to which the claims relate or from when employment ceased (for the s.4 ERA 1996 claim) and constructive unfair dismissal claims?

1.2 If not, do the alleged acts or omissions which the Claimant refers to in her claim form constitute a continuing act of discrimination, the end of which fell within the time limit?

1.3 If not, are there any grounds on which it would be just and equitable to extend time?

2. Constructive unfair dismissal (claim against R1)

2.1 Was the claimant dismissed in accordance with section 95(1)(c) of the Employment Rights Act 1996 (ERA)? Specifically:

2.2 Did the Respondent breach the Claimant's contract of employment?

2.3 The breach of contract relied on by the Claimant is breach of the implied term of mutual trust and confidence by:

2.3.1 The Respondent's alleged breaches of flexible working Regulations

2.3.2 The Respondent's alleged failure to provide written particulars of employment,

2.3.3 the alleged indirect sex discrimination

2.3.4 alleged unfair treatment for asserting a statutory right

2.4 If so, was any such alleged breach sufficiently fundamental to allow the Claimant to resign and treat herself as dismissed?

2.5 Did the Claimant waive any such repudiatory breach of contract?

2.6 Did the Claimant resign as a result of the alleged breach of contract?

2.7 If there was a dismissal, was that dismissal fair in all the circumstances of the case? The respondent says the dismissal was for redundancy or, in the alternative, for a reason relating to the claimant's conduct, namely she was not willing to work her contracted hours or she unreasonably took leave without notice or prior permission on 16 November 2021 and/or 2 April 2021.

3. Automatic unfair dismissal for asserting a statutory right (section 104 Employment Rights Act 1996) (claim against R1)

3.1 Was the reason or principal reason for dismissal because the Claimant had allegedly asserted a statutory right? The statutory right relied on by the Claimant is the right to take time off for

dependants under section 57 ERA 1996, asserted by the claimant on 16 November 2021 to her line manager who she told that her daughter was sick so she could not work.

3.2 If yes, was the Claimant automatically unfairly dismissed contrary to the ERA 1996??

4. Indirect discrimination (claim against R1, R3 and R4)

4.1 Did the Respondent apply a provision, criterion or practice (PCP) which is applied or would be applied to persons not of the same sex as the Claimant for the purposes of section 19 of the EqA?

4.2 The Claimant relies on the following PCP:

> 4.2.1 The practice applied by the Respondent is the requirement of its workers to be available for worker potentially every day of the week and at any time, rather than on specified days and time of the week. This practice substantially disadvantaged female employees over male ones, as it is mothers who are most commonly responsible for childcare which includes responsibility for taking children to childcare.

4.3 If so, does the PCP put or would it put persons of the same sex as the Claimant at a particular disadvantage when compared with persons not of that sex? The disadvantage relied on by the Claimant is:

> 4.3.1 This practice disadvantages female parents as they are less likely to be able to find reliable childcare provision which is compatible with the constantly shifting work days and times, such that they will be less likely than male parents to stay in employment.

4.4 If so, was the Claimant put at that disadvantage?

4.5 If so, was the relevant PCP a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the Respondent is:

> 4.5.1 The Respondent's duty to meet the passenger demands of its customer airlines in order to meet its SLAs and avoid any potential loss of contracts, fines or penalties as a result of any breach.

5. Breach of flexible working provisions (claim against R1)

5.1 Did the Claimant's flexible working applications made on 12 August 2021 and 1 November 2021 comply with section 80F(2)(a)-(c) ERA 1996?

5.2 Did the Respondent fail to consider the Claimant's flexible working application in a 'reasonable manner', within ERA section 80G(1)(a)? The claimant says the respondent's consideration of her application made on 12 August 2021 was unreasonable in that:

> 5.2.1 Mr Potter did not provide written particulars of the change;
>
> 5.2.2 On 21 October 2021 Mr Potter asked the claimant to complete an additional flexible working request.

5.3 Did the Respondent fail to notify the claimant of the decision on the application, including any appeal, within three months of the date of the application, within ERA section 80G(1)(aa)

(unless the parties had agreed a longer period if extended by agreement was that before the initial period ended)? The claimant says that if the decision of 30 November 2021 was the decision on the application of 3 August 2021, it was not provided within 3 months.

5.4 Did the Respondent refuse the application on a ground that is not a valid business reason within ERA section 80G(1)(b)?

5.5 Did the Respondent make the decision based on incorrect facts, within ERA section 80H(1)(b)? The claimant says the respondent's decision of 30 November 2021 was based on the following incorrect facts:

5.5.1 it was incorrect to say that fixed days and fixed hours were not suitable because there were two individuals on fixed hours contracts, and the hours offered to the claimant on appeal were also fixed days and fixed hours;

5.5.2 it was incorrect to say the claimant's application could not be accommodated at 4 airlines when the respondent provided staff for more airlines than this.

6. Breach of Section 4 ERA 1996 (claim against R1)

6.1 In respect of the Claimant's employment, has there been a change in any of the matters for which particulars are required under Sections 1 – 3 of the Employment Rights Act 1996?

6.2 If so, has the Respondent failed to provide a written statement containing particulars of that change?

7. Detriment for family leave ~~asserting right to time off for dependants~~ (section 47C of the Employment Rights Act) (claim against R1 and R2)

7.1 Is the Claimant an eligible person for the purposes of section 57A ERA 1996?

7.2 Did the Claimant carry out any of the acts listed in sections 57A(1)(a)-(e)? The claimant says that she took time off to care for a dependant who was sick, under section 57A(1)(a) on 16 November 2021

7.3 If so, was the Claimant subjected to a detriment because of such act(s)? The detriment relied on by the claimant is the respondent subjecting her to disciplinary action, namely:

7.3.1 on 17 November 2021 inviting the claimant to attend investigation meeting;

7.3.2 on 23 November 2021 holding an investigation meeting with the claimant;

7.3.3 on 25 November 2021 inviting the claimant to attend a disciplinary hearing.

7.4 The respondent says it took these steps because of the claimant's conduct in taking a day's leave on 16 November 2021 and/or 2 April 2021.

8. Remedy

8.1 What financial loss, if any, has the Claimant suffered as a result of her alleged unlawful discrimination / dismissal?

8.2 What award, if any, should be made for injury to feelings?

8.3 Should any compensatory award be reduced to reflect the fact that the Claimant would have been dismissed in any event?

8.4 Should any award be reduced on account of any failure by the Claimant to mitigate her loss?

8.5 What award, if any, should be made as a result of the alleged breach of flexible working provisions?

8.6 What award, if any, should be made as a result of the alleged breach of section 4(3)(a) ERA 1996?

8.7 What is the appropriate rate of interest and from when should it be applied?