EMPLOYMENT TRIBUNALS

Claimant:	**Miss S Emmanuel**
Respondent:	**Metroline Travel Limited**
Heard at	**LONDON SOUTH** **By CVP**
On:	**5-7 March 2024**
Before	
Chairman	**EMPLOYMENT JUDGE N COX**
Tribunal Member	**Carol Wickersham**
Tribunal Member	**Colin Rogers**
Appearances:	
For the Claimant:	**Ms Emmanuel – in person**
For the Respondent:	**Ms Nicolaou (Non-practicing Solicitor /Consultant**

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of indirect sex discrimination is not well founded and is dismissed

WRITTEN REASONS

1. This is the unanimous judgment of the tribunal. Numbers in [square brackets] in these reasons refer to page numbers in the bundles.

Claims and Issues

2. The claimant brings a single claim of indirect sex discrimination. The respondent disputes the claim.

3. The claim was presented on 26 July 2021 following conciliation which ended on 22 July 2021. There was no issue that the claim was presented on time.

4. The claimant was employed as a bus driver at the time that the complaint was presented and continued to be employed until August 2023. She left her employment at that date for reasons which are not relevant to our decision.

5. The Issues were determined at a CMH on 14 September 2022 as follows:

    a. Did the respondent apply the following provision, criteria and/ or practise ("the provision") generally, namely that all bus drivers must return to work on fixed hours ?

    b. Did the application of the provision put women at a particular disadvantage when compared with men ?

    c. Did the application of the provision put the claimant at that disadvantage in that she was unable to return to work on fixed hours because of childcare responsibilities/difficulty in obtaining childcare ?

    d. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim ?

    e. If the respondent indirectly discriminated against the claimant, what remedy should the tribunal award ?

6. Neither party disputed that these were the issues to be determined, but at the start of the hearing Ms Nicolaou for the respondent asked the claimant to clarify whether the PCP she relied on was one which required bus drivers to return to work on any fixed hours or one which required them to return to work on their previous fixed hours. The claimant confirmed that she was relying on a PCP which required bus drivers to return to work on their previous fixed hours. The hearing therefore proceeded on that basis.

The Hearing

7. The hearing took place over two days via CVP. We deliberated in chambers and delivered an oral judgment on the third day.

8. Ms Emmanuel represented herself. She provided a witness statement and was cross examined on her evidence.

9. The respondent was represented by Ms Nicolaeou – non practicing solicitor acting as a consultant to the respondent. We were provided with witness statements from the following:-

    a. Mr Burroughs, who was the manager responsible for considering the claimant's original grievance concerning her return to work arrangements; and

    b. Mr Heracleous who was the manager of (then) three bus garages. He conducted the claimant's appeal against that grievance.

10. Both witnesses were cross examined by the claimant, who carried out the task in a focused and measured way and with no little skill.

11. We were provided with a bundle of 220 pages, some additional pages and a chronology. At the beginning of the hearing the claimant referred to 'folders' which she had referenced in her witness statement. There was some confusion as to whether and when those documents had been sent to the tribunal, exchanged with the respondent and included in the bundle. In the course of the hearing we permitted the claimant, with no objection from the respondent, to provide further documents to us which she referred to in her evidence and which she relied upon in cross-examining the respondents' witnesses.

12. Both parties provided oral closing submissions. We have considered those submissions, whether expressly referred to below or not, in reaching our decision.

13. At the end of the hearing after giving an oral judgment the claimant requested written reasons.

Findings of fact

14. We make the following findings necessary for our decision on the balance of probabilities and having regard to all of the evidence we have heard and the documents to which we have been referred and read.

15. The claimant has been a bus driver for 14 years. She was previously an employee of another company but transferred via TUPE in July 2019 to the respondent.

16. The respondent provides bus services out of a number of garages in the London area and employs some 3,500 to 4000 people. It is subject to a legal obligation owed to Transport for London (TFL) to operate its designated routes in accordance with specified requirements. If it fails to meet reliability targets it is at risk of losing the routes when they come up for re-tendering and if too many routes are lost, garages are at risk of being mothballed.

17. The claimant was based at the Lampton garage. She worked part-time fixed hours: Tuesday, Wednesday and Thursday 5.15 -14:00.

18. She is the mother of a son (then) 9 nine years old and is a single parent. She was unable to rely on the support of her family for childcare assistance. It is not necessary to set out the details in a public document, but she explained the reasons to us and told the respondent about her circumstances sometimes. Before the events in this case the claimant had a very good attendance record.

19. She engaged a childminder from 04:30 am at a cost of £15 per hour with the assistance of tax credits. The tax credit was only available to pay registered childminders and only for taxpayers who worked over 16 hours per week. The claimant's fixed working hours were convenient because she could finish in time to do school pick up at 16:30.

20. The COVID pandemic provides the context for the claimant's claims.

21. The claimant was furloughed from 25 April 2020 to 26 June 2020 and returned to work on her previous hours. A female colleague (Ms B) at Lampton garage also worked part-time fixed hours pre-Covid and both she and the claimant returned to work after furlough on 1 August 2020.

22. The claimant contracted COVID herself and was off-sick and had to isolate again because of a case at her son's school January 2021. On 27 January 2021 the claimant's long-term trusted childminder gave one month's notice to terminate the arrangements with the claimant.

23. The claimant informed the respondent's HR department on 1 and again on 8 February 2021 [79-81] that she would not have childcare cover after 27 February 2021. The claimant continued to work her usual fixed hours until the 27 February 2021 when her childminder stopped working for her.

24. In response on 10 February 2021, the respondent suggested the claimant book another two weeks' leave to sort out childcare arrangements, whilst noting the possibility of additional furlough subject to a government announcement on the scheme. The claimant replied that that would not help. She was experiencing difficulty in getting a childminder because of ongoing restrictions on mixing households, and if she used up her holiday

allowance she would not have a break later in the year. Other options were put to her by HR including parental leave or unpaid leave.

25. On 23 February 2021 the claimant asked for a second period of furlough. Mr Sidhu her manager had explained that because there was no reduction in service levels for the respondent the claimant was not eligible for furlough unless she had a letter to demonstrate that she was a Clinically Extremely Vulnerable person (CEV's), but the claimant asked to be considered because of her childcare difficulties and domestic circumstances.

26. In light of the exceptional difficulties the claimant was experiencing with childcare on 26 February 2021 the respondent notified her that it agreed to put her on furlough between 2 and 31 March 2021 [96]. She agreed to furlough terms which provided for 80% of regular pay and that the furlough would end on the earliest of 'the Job Retention Scheme, or restrictions on CEV's ending, the claimant or respondent ceasing to be eligible or the respondent deciding to cancel her furlough leave. Her other terms and conditions remained unaffected.

27. She was the only employee offered this solution. All others furloughed at that point by the respondent (including Ms B the claimant's colleague at Lampton garage) were furloughed because they were CEVs.

28. On 23 March 2021 the respondent wrote to the claimant [103] stating that: *" the government's current health restrictions for those who are deemed clinically extremely vulnerable is ending on 31 March 2021 with those who are unable to work from home now being allowed to return to the workplace.....Consequently we are now in a position to inform you that your furlough will end on 31/2/2021 and your regular employment will resume from 1 /4/2021 on the terms and conditions (including pay) that applied before your furlough commenced. This will allow you time to put into place any necessary arrangements that you may need to make for returning. You will be contacted by your line manager to confirm your return to work details...".* We find this was a standard form letter sent to those employees who were then still on furlough.

29. The claimant replied [105-106] by email (we understand on the same day) explaining that she was on furlough for childcare and not CEV reasons and that because of her fixed duties 5-15 – 14:00 and continuing restrictions on mixing she continued to be unable to locate a registered childminder through on-line resources and continued to have childcare difficulties. She asked for advice on next steps.

30. On same day there was a Blink exchange with Mr Sidhu, the operations manager at Brentford Garage (with we understand responsibility for Lampton Garage as well). He advised the claimant that she would be contacted by HR to confirm that she would be expected to return to work

from 1 April. She explained her childcare problems to Mr Sidhu, that it was linked to financial issues and that it was currently school holidays. Mr Sidhu and was told that as furlough was ending she would be marked absent without leave if she didn't attend. She replied 'fine do that' but complained about her treatment and asked for clarification about furlough because she was not shielding (she had been given exceptional furlough because of her childcare responsibilities)

31. On 24 March 21 Mr Sidhu contacted HR (Coral Johnson) who recommended offering the claimant 4 weeks unpaid parental leave to allow her to sort out childcare [107]

32. On 26 March 21 the claimant made a formal grievance. She explained that she had not been furloughed for shielding but because of the loss of her previous childminder. She explained that her hours were unsociable, so she could not find care then, and there were no half-term clubs because of covid restrictions. She wanted to know why she was not (as she felt) getting the same support as other employees, and she requested a meeting. She attached to her grievance the then current government information about the Coronavirus Job Retention scheme [111]. We note that that document stated that the furlough scheme was being extended until 30 September 2021 (albeit at a lower proportion of regular pay) and included in the list of those potentially eligible for furlough people who were temporarily unable to work because of childcare responsibilities.

33. At this stage the claimant was not asking for a change of hours but was claiming in effect the right to be considered for continuation of furlough to provide her with some income while she addressed childcare arrangements and while household mixing restrictions made finding a registered childminder difficult.

34. We interpose to record that as regards the Furlough/Coronavirus Job Retention Scheme and its extension, the purpose of the scheme was not simply to provide for or to top up income. Its purpose was as a temporary scheme designed to protect the UK economy by helping employers whose operations were affected by coronavirus to retain their employees.

35. An internal exchange took place between HR and management [114] in which the question of whether the claimant – as a (indeed the only) employee furloughed for childcare rather than for shielding – could be an exception to the return-to-work directive from the respondent.

36. On 29 March the issue was delegated to Mr Burroughs who was to conduct the grievance. The date of the grievance hearing was deferred until after 6 April 2021 so that exceptional cases (including the claimant) could be the subject of discussion at 'exco' level (we infer this is a reference to the senior executive committee).

37. Following the exco review no employee was furloughed after the respondent's furlough scheme ended on 31 March 2021. This is confirmed in by an internal email dated 16 April 21 [127].

38. Mr Burroughs stated in his witness statement, and we find, that the claimant's case was considered by the respondent's senior management and was also determined not to be an exceptional case. By the time the grievance was heard he had been informed of this and told that he could offer her alternative shifts and potentially an alternative location of work to assist her being able to return to work.

39. On 29 March 2021 the claimant was invited to a grievance hearing with Mr Burroughs to take place on 7 April 2021. She had wanted to be accompanied but the relevant manager was not available. The claimant agreed to proceed without a representative present as she wished to resolve the matter as soon as possible.

40. At the grievance hearing, amongst other matters, Mr Burrough's enquired about the possibility of help from the claimant's family, and after school clubs. The claimant explained why neither was available to her. Although she told us she was upset about being asked about help from her family because of her family circumstances, we did not find anything in Mr Burrough's questions insensitive or inappropriate. Most significantly for this case Mr Burrows asked the claimant *'Are you willing to change shifts to help during this time?*' She said *'Yes, I have already updated my profile. I could be available between 8.15 and 18 Hours"*. He asked *'Could you be willing to work from Brentford to assist with finding alternative duties?"* She replied: *"Yes because I need to work. I have not been paid. I have a mortgage and a son to support. If I have no money coming in I can't even pay for the sites I am using to find a child minder*." She asked for a further 3 days annual leave and this was immediately authorized.

41. Immediately after the hearing we find that he and the claimant went to see the allocating officer to see what duties were available. Mr Burroughs told us, and we accept that he confirmed that once the claimant had arranged breakfast or afternoon clubs the respondent would work her hours around those clubs. This might have included a half shift because for the respondent half a shift covered was better than no shift cover. We find that at that meeting no specific hours or duty variation was agreed, but that availability was discussed. The claimant did not subsequently identify specific duties that she would be able to or wished to assume in place of her previous duty times.

42. On 12 April 2021 [125] Mr Burroughs issued his outcome letter. This letter confirms that the furlough arrangements had come to an end and records what the claimant had said she could accommodate in terms of alternative duties. In response to the problem the claimant had highlighted about lack

of school clubs during half term, in addition to the three days paid holiday Mr Burroughs authorized the claimant to have a further 2 weeks of unpaid parental leave to get her through the half term. He stated: *"My recommendation is that whilst you continue to look for a suitable child minder you enrol your son into breakfast/after school club which would offer you the flexibility to RTW on alternative duty. This would be on a temporary basis with you returning to your original duty once a minder has been sought ".* He continued *"With the above in mind you will be expected to return to work on Tuesday 27 April on your usual duty. You should confirm whether you require an amendment to your duty times by Friday 23 April 2021".* He advised the claimant of her right to appeal the decision.

43. We find that the claimant's grievance was conducted in accordance with the timetable envisaged in the respondent's published grievance procedures.

44. Pausing there although the respondent's letter of 23 March 2021 told those employees returning from furlough that they were required to return to their previous duties, we find that in fact that requirement was not applied to the respondent because she was offered the option to change her previous duties both as regards hours and location while she sought a childminder.

45. On 13 April 2021 [128] the claimant appealed the outcome of her grievance. The reason she gave was: *"the hours suggested would not be possible without care for my son"*. This was because the after-school club times had been reduced and would end at 4pm. We take the reference to *'the hours suggested*" to be a reference to the hours which she had previously stated that she could work i.e. from 8.15 to 18;00. She said her only option for clubs now was on Wednesdays. She expressed concern about how the position would be managed in future during holidays etc and she also emphasized that availability of child minding was still restricted due to COVID govt restrictions and guidelines. She also complained that she had not been told why she had not had her furlough extended despite recognizing that the company had ended furlough internally.

46. On 22 April 2021 [137] and [189] the claimant contacted Mr Burroughs by phone and then by Blink to chase up the appeal and to tell him that she could not return to work on Tuesday 27 April 2021 because she could not arrange childcare. She did this because in the outcome letter she had been asked to inform Mr Burroughs by 23 April 2021 if she wanted an amendment to her usual duties. She did not propose any amendment to her duties but complained that no changes had been discussed since the letter.

47. The correspondence at this point regrettably seems to us to have involved ships passing in the night. Mr Burroughs, whose evidence on this point we accept, said that the respondent would have been willing to accommodate amendments to suit the claimant. On the other hand, the claimant told us, which we also accept, was that she was expecting to be contacted and told what duties could be provided.

48. In the meantime, on 26 April 2021 [135] the claimant's appeal notice was acknowledged by HR and she was advised of an appeal hearing on 28 April with Mr Heracleous. The claimant was unable to attend that appointment because she could not arrange a carer [137]. She was justifiably upset that this appointment was fixed at a time when it must have been evident that her child care obligations would prevent her attending. Her garage manager Ms Dubarry wrote to apologise that the appointment was inconsiderate of her situation and asked her for suitable times and days to avoid [138].

49. The appeal was eventually heard remotely on 4 May 2021 by Mr Heracleous [142]. The claimant was accompanied by a union representative, and a note taker was present.

50. There was a dispute of fact before us as to the reliability of the typed notes of the meeting. We prefer the typed notes as being the output from a note taker. The claimant claimed the minutes are not an accurate record and she provided a handwritten document recording points she disputed about the meeting notes. We considered her points, but even if we were to have accepted all of the claimant's challenges, they would not alter the conclusion we have reached.

51. The key points in summary were as follows:-

    a. Mr Heracleous asked the claimant what her desired outcome of the appeal was. She replied that she would like to change her hours because she was a lone parent and she couldn't sit at home not earning. Mr Heracleous asked what hours she proposed and referred to her suggestion of working 8am to 6pm.

    b. The claimant explained the problem that she had of not being able to work her previous fixed hours because she could not get a childminder, and that she could no longer work 8am to as late as 6pm (except possibly on a Wednesday) because the times of after school clubs had changed since she offered that.

    c. Mr Heracleous then said that his understanding was that changing her hours would not make any difference to her ability to come in to work at that point because the problem for her was that so long as the restrictions on mixing continued she could not get a childminder. He raised options such as unpaid leave.

d. The claimant said that the respondent could not expect her to break guidelines and that she could not leave her son unattended or with an unregistered childminder. She asked to work with flexible furlough so that she could have some income. She said that she had consulted ACAS who had told her that flexible furlough should be considered.

e. After discussing other options he asked: “Am I right in saying that it doesn't matter what hours we discuss or agree, you believe you wont be able to get childcare until the restrictions are lifted. The claimant replied that that was correct.

f. Mr Heracleous explained that furlough had come to an end because of business needs and staff are required to return to work. The claimant drew his attention to the furlough guidelines which referred to those with childcare responsibilities as being eligible and complained that the respondent was ignoring that.

g. After some comments from Mr Sheikh, Mr Heracleous summarised the position as being that in the claimant’s opinion either the respondent put her back on furlough or it waited until June (or whenever the mixing restrictions were lifted) then agree revised times when she could work around childcare. The claimant confirmed that that was reasonable and the only option they had.

h. There followed a discussion about working Wednesday only 8am to 6pm. The claimant explained she could only work on Wednesdays until 4 pm because of changed times of after school clubs. She could also not work on Wednesday unless the respondent paid her for the after school club fees.

52. On 6 May 2021 [165] an appeal outcome letter was issued. The letter recorded the claimant’s desired outcome was to be put back on furlough until childcare could be put in place. She suggested initially she could work 8am to 6 pm then that she could only do Wednesdays 8am to 4pm as after school club does not run till 6pm. This means she still had to get childcare arranged. The letter stated: “I have looked into this and there are no duties that fall within those hours”. Mr Heracleous explained that the respondent could not seek support from the furlough scheme to support just one employee, especially when the business required all employes to be back from furlough as from 1 April 2021. “Furlough is at the absolute discretion of the company.” He concluded that he believed the outcome of the grievance was fair and proportionate, having agreed to holiday and unpaid leave. Mr Heracleous therefore rejected the appeal and said that the claimant was now “expected to resume your contracted duties as already stated in [Mr Burroughs’] letter of 12 April 2021.

53. At that point the position was that the C had been offered alternative hours and alternative locations (Brentford Garage) but was unable to

accommodate any of those available and the respondent was requiring her to resume her previous duties.

54. The claimant did not return to work on her previous hours or at all. However, she was not subjected to any disciplinary sanction. Initially she was not even the subject of an absence inquiry. Neither she nor the respondent corresponded to move the position on. There was a hiatus until 20 May 2021.

55. On 20 May 21 Mr Burroughs contacted the claimant via Blink [188]. He inquired how she was getting on with finding childcare with the restrictions on mixing now being lifted further. She explained that she still could not find a registered childminder. We interpose to note that the problem was by now largely the result of the financial difficulties the claimant found herself in.

56. She asked if she was being marked absent. He said that she was and that that could not continue indefinitely and that he needed to establish when she could return to work.

57. There was a discussion about childcare possibilities in the course of which Mr Burroughs asked whether weekend working was a possibility but she said this was not possible. The claimant observed at this point that: "change of hours was discussed but never offered to me. Weekends wasn't on the table neither..... As yourself and Stavros stated I am expected to return to my regular shift which is 5 am start. You are saying that days and hours can be changed now ?" . Mr Burroughs responded "that is what I have always offered. If you re-read the outcome letter I sent you it clearly states I am willing to amend your duties until you are able to find a suitable childminder, but you needed to confirm if this was needed".

58. The claimant said that there had been no offer of other duties just 8am to 6pm, no weekends or middles offered. He asked what alternative days/ hours she could work other than the Wednesday between 8 and 4 ? She then asked for some proposed times to see what she could arrange. He replied 'no problem'.

59. At some time following that exchange the claimant contacted Mr Burroughs to explain that her efforts had turned up the possibility that she could be available to work on a Thursday and possibly Friday starting after school drop off.

60. Mr Burroughs wrote back to the claimant on 7 June 2021 [174] summarising their exchange via Blink and the subsequent contact. He noted that after that contact the claimant had told him that the Thursday and Friday options she had offered were not available because she was having to travel by public transport to drop off her son and that took too long for her to get to work. He concluded by stating that he was:

"committed to finding a solution which will enable you to return to work whether this be on your contractual duties or alternative". He said he would await an update from her on her availability.

61. There appear to have been minimal further contacts after that letter. The claimant explained that she was depressed and struggling to cope in that period.

62. On 28 June 2021 [175] the respondent invited the claimant to an investigation meeting into her continued absence without leave since 1 April 2021. This letter is unhappily worded and does not accurately reflect the realty of the discussions and correspondence which had transpired between the relevant people.

63. The meeting took place on 1 July 2021 [214-216]. The claimant was accompanied by a union representative. During the meeting, as recorded in the meeting outcome letter [190] the claimant's history and present circumstances were discussed in detail. The claimant's belief that the respondent's managers' communication was poor was noted. The claimant was asked why she had not taken up the offer of alternative duties she said she had not been offered hours she could work. She said she could not arrange childcare without funds. She was asked when would she be able to return to work if she had funds available? She responded that she would be able to return to work in September at the end of the school holidays. There was a discussion about what hours/days she could work and she said that from 6 July 2021 that she could attend between 9.20 and 14.45. due to school pick up and drop off. This, together with any necessary type-training on minibuses, was offered as a temporary adjustment to help her return to work and would be reviewed on a monthly basis. She would revert back to usual duties once she had found a suitable child minder.

64. These arrangements were in fact then put into place.

Relevant Law

65. Section 19 of the Equality Act 2010 provides as follows:

> *"(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."

66. The burden is on the claimant of proving that i) the employer applied a provision, criterion or practice ('PCP') to the employee (ii) it has or would apply the PCP to persons who do not share the employee's protected characteristic, iii) the PCP puts persons who share the employee's protected characteristic at a particular disadvantage compared with persons who do not and iv) the PCP put the employee at that disadvantage?

67. If the claimant proves that the answer to the foregoing questions is yes, the employer may nevertheless show that the PCP is a proportionate means of achieving a legitimate aim. The burden of establishing that justification is on the employer.

68. In Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601, Lade Hale explained the purpose of the law of indirect discrimination. She said at paragraph 17: "The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality, work to the comparative disadvantage of people with a particular protected characteristic … The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified …"

69. We have reminded ourselves that indirect discrimination can be intentional or unintentional (Enderby v Frenchay Health Authority [1993] IRLR 591 ECJ) and that a 'PCP' is no more than a way of doing things: it may or may not be a written process or policy (see British Airways plc v Starmer [2005] IRLR 862).

70. It is for a claimant to identify the PCP that she relies on and the question whether it is, in fact, a PCP is one of fact for the Tribunal (see Allonby v Accrington and Rossendale College [2001] EWCA Civ 529, [2001] IRLR 364, CA and Jones v University of Manchester [1993] IRLR 218). There is no need for a claimant to show that a person who shares her protected characteristic cannot comply with the PCP.

71. The PCP being complained of must be one which the alleged discriminator applies or would apply equally to persons who do not have the protected characteristic in question: it is not necessary that the PCP was actually applied to others, so long as consideration is given to what its effect would

have been if it had been applied. Solitary disadvantage does not give rise to indirect discrimination but it may be appropriate to aggregate a solitary employee with others known to have the same characteristic and known to be potentially affected in the same way — a lone female worker, for example, could claim indirect discrimination on the basis of the way a particular policy would affect a hypothetical group of female staff: Eweida v British Airways plc 2010 ICR 890, CA per Lord Sedley.

72. There is no requirement for a claimant to prove why a PCP puts a group at a disadvantage (see Essop v Home Office [2017] UKSC 27) but it is generally necessary for a claimant to adduce evidence tending to show that persons who share her protected characteristic (though not necessarily all of them) are placed at a particular disadvantage by the PCP and that she is also at that disadvantage. The correct approach is first to identify the relevant group disadvantage and then to consider whether the claimant suffered that disadvantage.

73. What constitutes a 'disadvantage' depends on the facts of the case and is not defined in the Equality Act. But we draw assistance from those cases which shed light on the meaning of the word 'detriment' in the Act (see, for example, Shamoon v Chief Constable of the RUC [2003] IRLR 285). The EHRC Employment Code states that 'disadvantage' is to be construed as 'something that a reasonable person would complain about — so an unjustified sense of grievance would not qualify but it is enough that the worker can reasonably say that they would have preferred to be treated differently': EHRC Employment Code paragraph 4.9. A disadvantage does not have to be quantifiable, and the worker does not have to experience actual loss (economic or otherwise).

74. Proving that the disadvantage affects the cohort of people who share the claimant's characteristic may involve consideration of pools of employees (so called Group detriment), statistical evidence, expert or other evidence. A Tribunal should take account of well-known matters such as the childcare disparity: Dobson v North Cumbria Integrated Care NHS Foundation Trust 2021 ICR 1699, EAT. It is well known that an employer's rejection of a woman's request for part-time or other flexible working arrangements can give rise to a claim of indirect sex discrimination. The rationale behind such a claim is that, since women are more likely than men to have primary responsibility for childcare, a refusal to allow flexible working — or, for that matter, the imposition of working arrangements that are incompatible with school or nursery hours — amounts to the application of a PCP that puts women at a particular disadvantage.

75. If the tribunal finds that there has been discriminatory conduct the respondent may prove that there is an objective justification for that conduct. The burden is on the employer to provide both an explanation and justification. Generalisations are not sufficient. Operational needs may amount to a legitimate aim. The EAT summarised the principles tribunals

must apply in assessing this issue in City of Oxford Bus Services Ltd t/a Oxford Bus Company v Harvey EAT 0171/18, as follows:

a. the objective justification test requires (at a minimum) a critical evaluation of whether the employer's reasons demonstrated a real need to take the action in question;

b. if there was such a need, there must be consideration of the seriousness of a disparate impact of the PCP on those sharing the relevant protected characteristic, including the complainant, and an evaluation of whether the former was sufficient to outweigh the latter;

c. in performing this balancing exercise, the tribunal must assess not only the needs of the employer but also the discriminatory effect on those who share the relevant protected characteristic. Proportionality requires the importance of the legitimate aim to be weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so

d. the caveat imported by the word 'reasonably' in the phrase 'reasonably necessary' allows that an employer is not required to prove there was no other way of achieving its objectives. On the other hand, the test is something more than the 'range of reasonable responses' test that applies in unfair dismissal claims

e. when carrying out the requisite assessment, there is a distinction between justifying the application of the rule to a particular individual and justifying the rule in the particular circumstances of the business.

Conclusions

76. Applying the relevant law to the facts as we find them and having regard t the parties' submissions our conclusions on the issues are follows.

Did the respondent apply the following PCP generally, namely that bus drivers must return to work on their previous fixed hours?

77. The respondent did apply a practice or policy of requiring employees returning from furlough to return to work on their previous fixed hours.

78. The PCP applied only to those bus drivers who had been and remained on furlough during March 2021. It applied to all drivers employed by the respondent – both men and women - who had been furloughed.

79. The respondent wrote a standard letter to employees then on furlough that furlough arrangements were ending with effect from 31 March 2021 and that regular employment will resume from 1 April 2021 “on the terms and conditions including pay that applied before furlough commenced”.

80. However, as we explain below, the claimant did not prove that the PCP was in fact applied to her, or to the extent it was applied that it caused her the particular disadvantage relied upon.

Did the PCP put women at a particular disadvantage when compared with men?

81. The particular disadvantage relied upon by the claimant was childcare responsibilities/difficulty in arranging childcare.

82. Ms Nicolaou for the respondent argued that the claimant had not proven this element. She submitted that in identifying the relevant group disadvantage compared to men the appropriate pool (which needs to be shown to have no material differences from the claimant except in relation to sex as between the disadvantaged and the non-disadvantaged group) was ‘all drivers working part time at Lampton garage’. She said there were only two people in that group – the claimant and Ms B - and both were female so there was therefore no evidence of a group disadvantage. Alternatively she argued that if a wider pool was to be used as the reference pool that pool should only extend to the Brentford and Lampton garages. In this respect she pointed out that the records show only 6 men and 4 women on part time hours. Of these the claimant was the only one unable to return to work on her previous fixed hours so that the claimant had not proved group disadvantage on the basis of this evidence either.

83. The claimant, although she could not be expected as a litigant in person to master this complex area of law submitted that the reference group should be, in effect as wide as possible, female bus drivers.

84. The claimant was the only person furloughed at that time for childcare reasons as distinct from CEV. The claimant was therefore an exceptional case as regards the reason for her furlough. We reminded ourselves that while solitary disadvantage does not give rise to indirect discrimination it is possible to aggregate a solitary employee with others known to have the same characteristic and known to be potentially affected in the same way — a lone female worker, for example, could claim indirect discrimination on the basis of the way a particular policy would affect a hypothetical group of female staff. In so far as it is necessary for the claimant to identify a reference pool for group disadvantage, we consider that since the PCP applied company wide, an appropriate pool would be all part-time drivers employed by the respondent who were furloughed in March 2021.

85. We had no details – apart from those provided in relation to Lampton and Brentford garages – of the numbers or members in that group. However, it is only necessary for the claimant to prove that the PCP would be applied to them. We were satisfied on the evidence that it would.

86. It was not necessary for the claimant to adduce evidence to prove that the particular disadvantage in fact affected those in the group sharing her characteristic. This is in our opinion a case in which it is appropriate to take judicial notice of the childcare disparity – the unequal incidence of the burden of childcare on females. The claimant and the group were in a cohort including part-time female employees which would be likely to experience the need for part-time or other flexible working arrangements because of childcare responsibilities and difficulties arranging childcare.

Did the application of the PCP put the claimant at that disadvantage because she was unable to arrange childcare ?

87. The burden is on the claimant to prove that she was herself put at that particular disadvantage by the application to her of the PCP of requiring her to return to work after furlough on her previous fixed hours. We consider that she had not satisfied that burden. The PCP in the form relied upon by the claimant was not in fact applied to her by the respondent so that she was not put at the particular disadvantage. This is fatal to the claimant's complaint.

88. We fully accept that the claimant found herself in an intractable situation after late January 2021 when she lost the services of her trusted childminder. She was required to use registered childminders because tax credits were only available to contribute to the cost of childminders who were registered. She explained to us why she was unable to recruit a replacement. Initially that was because government restrictions on mixing meant that outsiders could not do the childminding, and her family could not offer her support. By the time those restrictions began to ease in June 2021, the claimant was in financial difficulties. She needed to work at least 16 hours to earn tax credits to subsidise the cost of a childminder. Lack of income also restricted her ability to find childminders through subscription-based websites, and/or to pay for school breakfast or after-hours clubs. Such clubs, and (typically according to the claimant) childminders were anyway unavailable during school holiday periods. She was by then reliant on public transport to take her sone to and from school and the time taken for that restricted further the times she could manage to start and end shifts. We fully recognise the severe pressure and difficulties that the claimant was experiencing during this time. In practice that the claimant's freedom to work any hours in order to earn income was severely limited. There was a mismatch between the need for the claimant to get back to work for more than the 16 hours she needed and her ability to do so

because restrictions on mixing precluded her from obtaining childcare to free her up to work.

89. However, we consider that the PCP relied upon by the claimant, notwithstanding the contents of the 23 March 2021 letter was not applied to the claimant:-

    a. Although she had been required, and had in fact without difficulty, returned to work on her pre-COVID fixed hours in August 2021, after reporting the loss of her childcarer she was offered the chance to change her duties in February 2021 [87]. She did not take up this offer to vary her hours because no hours were practicable for her at that time.

    b. She was not required to return to work on her previous fixed hours at that time. Instead, she was offered leave options including 4 weeks unpaid parental leave [78].

    c. In March 2021 she was given furlough as an exception to accommodate her childcare difficulties.

    d. At her grievance hearing Mr Burroughs offered her alternative shifts including the option for a wider variety of shifts/routes out of Brentford Garage on a temporary basis to accommodate her childcare difficulties. She was also authorised further unpaid leave. Although the grievance outcome letter stated that she would be expected to return to work on Tuesday 27 April on her 'usual duty', she was asked to confirm whether she required an amendment to her duty times by Friday 23 April 2021.

    e. Although given the opportunity to do so the claimant did not request alternative duties although the respondent was willing to consider them.

    f. At the Appeal hearing on 4 May 2021 the claimant confirmed that there were no alternative times that she could offer (given the practical difficulties of her childcaring responsibilities) that could be accommodated by the respondent.

    g. Following the appeal, although the respondent and the claimant could not find a feasible solution on the basis of amended duty hours the claimant was not subject to any sanction for not returning to work.

    h. When the position was reconsidered on 20 May 2021 and further and on 1 July 2021 the claimant was offered the half-shift she said she was able to accommodate and then a further

variation of duty hours later to accommodate her childcare difficulties.

90. The claimant said that she felt that the company was just undertaking a tick box exercise and not genuinely trying to offer flexibility, we do not accept that that was the case. The respondent needed its drivers to operate its routes and it was as keen to retain the claimant's services as she was, as it appears, to remain on the respondent's books so she could work as soon as practicable. The sentiments about finding a solution expressed in Mr Burroughs were genuine, and this is evidenced by the fact that ultimately a solution was found for the claimant.

91. We considered whether the claimant was put at the particular disadvantage by the PCP because of delays or failures by the respondent to act. Having regard to all the circumstances, although the respondent could on one view have been more pro-active in seeking to ascertain the claimant's wishes, we were not persuaded that the claimant had proved that the PCP was applied to her such that she suffered the particular disadvantage that she relies upon.

    a. In the period before the Appeal, the respondent had offered flexibility but communications between the parties seemed to pass by each other. The claimant was expecting to be offered alternative shifts, the respondent was awaiting clarification from her as to what she could accommodate. The claimant ultimately was not able to be clear about that because the circumstances facing her were fluid, and largely practically unsolvable. This reality is reflected in the changing responses of the claimant to the offers of flexible hours by the respondent: she originally suggested working from 8:15 am to 6pm, this she became unable to do when the hours reduced to 4pm latest because of club times and then only on Wednesdays, she was unable to accept shifts during weekends or during school holidays. A later possibility of working Thursdays and Fridays fell through because of transport difficulties for her. The respondent did explore options but as Mr Burroughs explained if a route was to be operated as a split shift, it was necessary to find a replacement driver to do the early or late part, and the middle of the day option open to the claimant did not fit with operational requirements.

    b. Although there was a period of hiatus and delay in the period after the appeal this was in our judgment the result of a working through of the respondent's standard procedures to investigate the reasons for absence.

92. In reality the course of action the claimant which the claimant says should have been applied before July 2021 was for her furlough to be continued so as to provide her with a base level of income until such time as she could sort out childcare (in practice until restrictions were lifted and school holidays were over) and for there to be additional flexible shifts available to her to allow her to work 16 hours so as to keep her tax credits. However, the claimant did not rely upon the fact that the respondent ended furlough for all employees as constituting the PCP which she says caused indirect sex discrimination. In any event, the problem with this position would be that the purpose of the Furlough Scheme was not simply to provide income to employees experiencing difficulties with working due to the pandemic but rather to enable employers to retain workers who might otherwise be lost for that reason. By April 2021 the respondent was operating a full service again and had the staff it needed to do so. It was reasonable for the respondent to decide to end its reliance on government subsidy at that point for all employees, and the respondent did offer the claimant consensual leave of absence and flexible hours after that point and did not subject her to any sanction or punishment by reason of her absence from work.

93. We conclude therefore that the claimant has not proven the matters necessary to make out her claim and the claim therefore is not well founded and is dismissed.

94. Ms Nicolaou submitted that in any event the respondent's actions were a proportionate means of achieving a legitimate aim. The legitimate aim was to fulfil the respondent's obligations owed to TFL to operate buses on routes and at the times stipulated by TFL and the means of achieving that aim was to require drivers to work such hours as were required to enable that to happen. She submitted that the actions the respondent took were reasonably necessary and proportionate. She reminded us that the respondent does not need to establish that nothing else could have been done, only that what was done were reasonably necessary measures.

95. In light of our conclusion it is unnecessary to determine the remaining issues.

Employment Judge N Cox

Date: 9 May 2024

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.