



EMPLOYMENT TRIBUNALS

Claimant: Mrs Limara Davies

Respondent: Active 8 Managed Technologies Limited

Record of a Hearing at the Employment Tribunal Audio Recorded by CVP

Heard at: Nottingham

Heard on: 19, 20, 21 August 2024

Before: Employment Judge Hutchinson (sitting alone)

Members: Miss F French
Miss L Lowe

Appearances:

Claimant: Chelsea Brooke-Ward, Counsel

Respondents: Smaira Younis, Solicitor

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The claim of indirect sex discrimination contrary to section 9 Equality Act 2010 succeeds.
2. The claim of pregnancy/maternity discrimination contrary to section 18 Equality Act 2010 succeeds.
3. The claim of unfair dismissal contrary to section 94 Employment Rights Act 1996 succeeds.

4. The claim of breach of the Flexible Working Time Regulations under section 80G(1)(a) Employment Rights Act 1996 succeeds.
5. Remedy will be determined at a hearing on 9 January 2025 at 10.00am at the Nottingham Hearing Centre.

RESERVED REASONS

BACKGROUND TO THIS HEARING

1. The Claimant presented her claim to the Tribunal on 2 January 2023. She had notified ACAS under the Early Conciliation procedure on 25 October 2022 and a certificate was issued on 6 December 2022.
2. The Claimant was employed by the Respondent as a Company Administrator and her employment began on 28 May 2018. She resigned on 27 October 2022 giving one month's notice of termination of her employment and her employment ended with the Respondent on 27 November 2022.
3. The Claimant's claim is for:
 - Indirect sex discrimination.
 - Maternity and pregnancy discrimination.
 - Unfair dismissal.
 - Failure to deal with the Flexible Working request reasonably.
4. The Respondents deny all the allegations.
5. At a Case Management Preliminary Hearing conducted by my colleague Regional Employment Judge Swann on 22 March 2023 he identified the claims and the parties had agreed the list of issues.
6. He also confirmed that the hearing would take place as previously listed on 19 – 21 August 2024. It was anticipated that the hearing would deal with liability only.
7. At the hearing the Tribunal heard evidence and submissions and came to its final conclusions in a reserved judgment but did not have sufficient time to give Judgment and Reasons to the parties at the hearing.

THE ISSUES

Indirect Sex Discrimination Contrary to Section 19 Equality Act 2010 ("EqA")

8. Did the Respondent have the following provision, criterion or practices ("PCP's")?
 - 8.1. A requirement to work full time hours.

8.2. A requirement to work between 8.30am and 5.30pm.

8.3. A Flexible Working Policy and determination of the same.

9. Did the Respondents apply the PCP to the Claimant?

10. Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic e.g. "men" or would it have done so?

11. Did the PCP put persons with whom the Claimant shares the characteristic ie women at a particular disadvantage when compared with persons to whom the Claimant does not share the characteristics i.e. men?

12. Did the PCP put the Claimant at that disadvantage?

13. Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

"Reasonable business needs, operational efficiency and the saving of and avoidance in costs in particular the requirement to provide consistent service to our clients (internal and external) who demand a dedicated accounts specialist of continuity of support during our full operating hours".

14. The Tribunal will decide in particular:

14.1. Was the PCP an appropriate and reasonably necessary way to achieve those aims?

14.2. Could something less discriminatory have been done instead?

14.3. The Claimant says the Respondent could have but not limited to:

14.3.1. Advertise the role to see what interest there was.

14.3.2. Kept the temporary maternity cover on part time.

14.3.3. Kept the allocation of work the same and allow the Claimant to work the hours her temporary maternity cover worked.

14.3.4. Make suggestions of part time working they felt would have worked.

14.4. How should the needs of the Claimant and Respondent be balanced?

Pregnancy/Maternity Discrimination Contrary to Section 18 EqA

15. Did the Respondent treat the Claimant unfavourably by doing the following things:

15.1. Demoting the Claimant to service jobs.

15.2. Removing the Claimant's credit card.

15.3. Failing to carry out adequate risk assessment.

- 15.4. Failing to allow her to work less hours and/or from home.
 - 15.5. Failing to keep in touch and inform her of opportunities and socials.
 - 15.6. Passing her over from promotion.
 - 15.7. Contacting the Claimant one month into her maternity for work related matters.
 - 15.8. Failing to inform her and allow her KIT days.
 - 15.9. Delay in finalising her flexible working requests.
 - 15.10. Delay in her return to work from maternity.
 - 15.11. Suggesting the Claimant use her holidays due to the delays and the requirement for Miss Leathers to agree reduced hours before the Claimant could work part time.
 - 15.12. Rejecting the flexible working request.
16. Did the unfavourable treatment take place in the protected period?
17. If not, did it implement a decision taking in the protected period?
18. Was the unfavourable treatment because of the pregnancy?
19. Was the unfavourable treatment because of illness suffered as a result of pregnancy?
20. Was the unfavourable treatment because the Claimant was on compulsory maternity leave/exercising or seeking to exercise or had exercised or sought to exercise the right to ordinary or additional maternity leave?

Unfair Dismissal Contrary to Section 94 Employment Rights Act 1996 (“ERA”)

21. It is accepted that the Claimant resigned from her employment. Did the Respondent do the following things:
- 21.1. Wrongly place the Claimant on furlough.
 - 21.2. Share her job between Carlton and Beth Fairweather whilst she was on furlough.
 - 21.3. Fail to update and train the Claimant on the new systems when she returned from furlough.
 - 21.4. Demote the Claimant following her return from furlough.
 - 21.5. Refuse the Claimant’s request to work from home and/or reduced hours following the advice of her midwife and GP letter.

- 21.6. Failed to carry out a risk assessment when the Claimant was pregnant.
 - 21.7. Failed to carry out the appropriate handover resulting in the Claimant receiving work requests during her maternity period.
 - 21.8. Contact the Claimant one month into her maternity for work related matters.
 - 21.9. Remove her credit card.
 - 21.10. Fail to contact the Claimant and check on her welfare during her maternity period.
 - 21.11. Fail to inform the Claimant of updates in the business including social events and job opportunities.
 - 21.12. Passing the Claimant over for promotion.
 - 21.13. Delay the request for flexible working.
 - 21.14. Delay dealing with her request for flexible working until one month before she was due to return from maternity leave.
 - 21.15. Give the Claimant the impression her request would be successful and thereafter rejecting the same.
 - 21.16. Allowing the notetaker in the meeting to be involved without a conflict of interests.
 - 21.17. Providing inaccurate notes of the meeting.
 - 21.18. Giving priority to a temporary worker, Miss Leathers.
 - 21.19. Delay the outcome of the appeal.
 - 21.20. Stating she would need to use her holidays while the Respondent dealt with the appeal.
 - 21.21. Not delegating the decision making of the appeal to someone impartial.
 - 21.22. Dismissing the Claimant's appeal.
 - 21.23. Informing her colleagues, the Claimant had resigned on 26 October when she had in fact not done so.
22. Did the Respondent breach the implied term of trust and confidence. In this respect the Tribunal will decide:
- 22.1. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and Respondent and whether it had reasonable and proper cause for doing so.

- 22.2. Was the breach a fundamental one?
- 22.3. Was the breach so serious the Claimant was entitled to bring the contract to an end?
- 22.4. Did the Claimant resign in response to the breach?
- 22.5. Was the breach the reason for the Claimant's resignation?
- 22.6. Did the Claimant affirm the contract before resigning?
- 22.7. Did the Claimant's words or actions show that she chose to keep the contract alive even after the breach?

Breach of the flexible working Regulations under Section 80G(1)(a) Employment Rights Act 1996 ("ERA")

23. Did the Respondent fail to deal with the Claimant's flexible working request in a reasonable manner in that it:

- 23.1. Failed to make clear to its employees what information they needed to include in a written request to work flexibly.
- 23.2. Fail to arrange to talk with the Claimant about the request in a reasonable time.
- 23.3. Fail to discuss the request with the Claimant properly in that they never raised any issues with proposals.
- 23.4. Delay unreasonably in dealing with the request by leaving it until one month before the Claimant was due to return from her maternity leave.
- 23.5. Fail to take accurate notes at the meeting.
- 23.6. Allow the notetaker to interject in the meeting.
- 23.7. Delay unduly in informing the Claimant of his decision.
- 23.8. Failing to inform the Claimant of his decision in writing which led to a lack of clarity regarding the outcome.
- 23.9. Delaying unreasonably in dealing with the appeal taking the decision after the Claimant was due to return.
- 23.10. Failing over all to consider the request carefully looking at the benefits that the request to change in working conditions would bring to the Claimant and to the Respondent's business in that the Respondent would retain a loyal employee, would have a more effective worker with less salary to pay to consider a trial period to suggestion and fail to offer any alternatives.
- 23.11. Did the Respondent notify the Claimant of his decision within the 3-month discussion period unless extended by agreement?

23.12. Did the Respondent refuse the request because of a valid business reason.

THE EVIDENCE

24. The Tribunal heard from the following witnesses:

- 24.1. The Claimant.
- 24.2. Jordan Clarke, Operations Manager.
- 24.3. Nick Swindin, Operations Director.

25. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

THE FACTS

26. The Respondent is a sales and service provider of printer and photocopier products for business across the UK. Its head office is at Newark, and it has sales offices in Leeds, London, Silverstone and Peterborough and has a warehouse in Peterborough.

27. Its Managing Director is Mr Swindin and there are 5 other Directors who are:

- 27.1. Colin Daniel, Non-executive.
- 27.2. Alex Patterson, Sales Director.
- 27.3. Kevin Ingham, IT Director.
- 27.4. Darren Haywood, Sales Director.
- 27.5. Richard Appleton, Sales Director.

28. The Company has 68 employees nationally but no part time employees.

29. They did have one part time employee in Peterborough who retired shortly before the Tribunal hearing.

30. All the management in the business are male with the exception of Kirsty Sharman who is in charge of warehousing in Peterborough.

31. The Claimant commenced her employment on 28 May 2018. Her contract of employment is dated 22 June 2018 and is at pages 62-68.

32. She was engaged as Customer Support Administrator working 40 hours per week and her normal working hours were from 8.30am to 5.30pm with a 1-hour break for lunch.

33. The contract refers to the Respondent being an equal opportunity employer and stated it would not tolerate any employee engaging in any discrimination by reason of sex, marital status, race, ethnic or national origin, colour, nationality, disability, age, religion or belief or sexual orientation.

34. The Company has a Flexible Working Policy which is at page 82-84 and has a procedure for applying for flexible working which is at page 83.

35. The procedure is as follows:

“

- *The employee should first make their request in writing to the Company setting out the flexible working arrangements they seek.*
- *Within 28 days of receipt of this application we will set up a meeting with the employee to discuss the changes the employee has proposed, the effect of the proposed changes and any possible alternative work patterns that might suit both parties. The employee has a right to be accompanied at this meeting by a work colleague.*
- *The Company will properly consider the request and will make a practical business assessment on whether and, if so, how the flexible working request could be accommodated.*
- *The Company will notify its decision to the employee within 14 days of the meeting. If we accept the employees request, we will write to them, establishing a start date and providing a written note of the contract of employment variation. If the application is refused, we will explain the grounds of refusal in writing and confirm the internal appeal procedure.*
- *Where requested as agreed to, it constitutes a permanent change to the employee's terms of conditions of employment. This means the new working arrangement will not lapse merely because the child reaches the age of 17 or the adult no longer needs care and neither has the employee a right to revert to their previous pattern of working at a future date.*
- *The employee can appeal against the refusal within 14 days of receipt of the Company's rejection letter. The Company will then set up a meeting with the employee to discuss the appeal within 14 days after receiving the employees appeal letter. After that meeting has been held, will write to the employee within 14 days to notify the employee of the outcome of the appeal.”*

36. The policy sets out the grounds upon which the Company would refuse an application. It states that there are only 8 grounds which are:

- “ 1. *The burden of additional costs.*
2. *Detrimental effect on ability to meet customer demand.*
3. *Inability to re-organise work amongst existing staff.*

4. *Inability to recruit additional staff.*
5. *Detrimental impact on quality.*
6. *Detrimental impact on performance.*
7. *Insufficiency of work during the period when the employee proposed to work*
8. *Planned structural changes.”*

37. The Claimant was a valued and hard-working member of staff.
38. On 25 March 2019 the Claimant was promoted to Company Administrator. The job description is at pages 85-87. The Claimant was issued with a new contract of employment which is at pages 88-95. The hours of work were now 8.00am to 5.00pm Monday to Friday and her remuneration was £24,000 per annum.
39. This was a different role to her previous role. She was now working as a Personal Assistant to the Directors dealing with HR and Payroll Management, managing, and overseeing facilities for the office and building and fleet management. The Claimant was not happy in the role and felt that she had not received sufficient training, support, or guidance.
40. As a result of the Covid-19 pandemic the Claimant was placed on furlough on 6 April 2020 (page 99-102). Despite being placed on furlough the Claimant was still expected to continue working but was instructed not to use her business account but only her personal account.
41. Although furlough ended on 19 July 2020, she no longer had to attend the office but work from home.
42. The Claimant continued to feel unsupported and on 20 April 2021 she expressed her concerns to her Line Manager, Jordan Clarke (page 104-105).
43. On 20 April 2021 she had a conversation with Mr Clarke to express how she felt stressed, undervalued and unheard. Immediately after raising these concerns, she was furloughed again and was told that she could have some time away from the office “*to think about what I want*” she had not agreed to this furlough and there was an exchange of emails between herself and Mr Clarke on 21 April about this. These emails are pages 106-114.
44. Her furlough was then delayed further until 26 April so that she could prepare handover documents and a list of information for her colleagues who would take over responsibility for her role. Her company credit card was taken from her, and an email was sent to the workforce to explain that the Claimant had been placed on furlough and that her roles were being undertaken between Carlton and Beth (page 121).
45. There was no formal agreement to this furlough and no letter confirming the position to her, but her wages were reduced by 20%.
46. The Claimant discovered that she was pregnant in June 2021. She had previously believed that she could not have children and she had had several failed IVF

treatments. The pregnancy was clearly important to her, and she was told that her due date was 21 January 2022.

47. The Claimant told Mr Clarke about the pregnancy on 17 June 2021.
48. After 3 months on furlough the Claimant returned to work on 19 July 2021. She had a meeting with Mr Clarke on 16 July 2021. He told her the business was making some changes and implementing a new system and asked the Claimant to help him with the task of moving all Active 8 customer details from one system to another. We are satisfied that there was no discussion at all that the job was changing permanently, and it was the Claimant's understanding this was a temporary role to complete an important project and that Beth would continue to carry out her, the Claimant's role, as temporary measure. This is supported by the fact that there was no correspondence with the Claimant about any change in her role and no amended contract of employment was issued to her. We do not accept Mr Clarke's contention that they agreed a permanent change in her role.
49. Various changes were made to the task that she had previously been undertaking but she wasn't informed of any of these. Responsibility for payroll was transferred to Gareth Leathers and third-party support for human resources is change from Camino HR to Peninsula.
50. After the Respondents were aware that the Claimant was pregnant, they did not carry out any risk assessment.
51. On the 28 October 2021 the Claimant emailed Mr Clarke about a maternity plan. This is at pages 126 – 127. She told him that she wanted to have 39 weeks maternity leave from 18 January 2022. She wanted to be able to work from home from 1 to 17 December and then take holiday until her maternity leave commenced.
52. Mr Clarke did not agree to this suggestion saying that she could not work from home, nor could she take the holiday that she had requested. His reply is at page 125 The exchange is at pages 123-127 with a further email at page 129-130 on 3 November.
53. The Claimant continued to work from the office. On 19 November 2021 after a check-up with her doctor and midwife she was provided with a fit note (page 131) which stated that "*patient can do job from home, office Covid safety can't be given so done to protect mum and developing foetus*".
54. No action was taken on the fit note and still no pregnancy risk assessment undertaken. The Claimant was told there would be no changes in her role and she was pressured to either work full time or to start her maternity leave early.
55. On 15 December 2021 Mrs Davies contacted Mr Clarke by email (page 133) requesting further holidays. She was not allowed to take the holidays she had previously requested from 13 December 2021.
56. On 16 December 2021 she had another appointment with her midwife following which she emailed Mr Clarke on 17 December (page 127). She said that she needed to work from home or at least do half days.

57. His response is at page 128 when he said that she should work mornings in the office. No comment was made by him about the concerns raised by the midwife.
58. On 20 December 2021 Mrs Davies developed Covid symptoms. Her lateral flow test was positive, and she visited a drive-in test centre, and it was confirmed that she had Covid.
59. On 23 December 2021 her health deteriorated she had to be taken to Kingsmill Hospital (page 150).
60. On 21 January 2022 the Claimant gave birth to her baby. Prior to beginning her maternity leave there was no discussion about any maternity plan with the Claimant and although she had discussions with both Beth and Jordan Clarke on a personal basis there was no other discussions or arrangements made to keep in touch.
61. She was not told of any changes that had taken place in the workplace. She was not told that while she was on maternity leave the wife of one of the directors Mrs Leathers was taken on a part-time basis to undertake the role of a company administrator.
62. Her return-to-work date was to be 24 October 2022 and she contact Jordan Clarke on 25 April 2022 asking about making arrangements to have a chat about her return to work and what her options were.
63. In the exchange at page 186 the Claimant indicated that she was hoping to return to work in October and that she was looking for part time hours probably 16 to 20 hours per week.
64. Despite this exchange Mr Clarke made no effort to arrange to see Mrs Davis to respond to her suggestions or discuss her return to work in anyway despite indication that he would do so.
65. On 19 July 2022 Mrs Davies then chased him again saying, "*when we gonna look at having a catch up, will soon be Oct*". They agreed to have a discussion on the following day. In that discussion Mrs Davis said that she would like to reduce her working hours to approximately 20 hours per week and suggested working Monday to Friday 10am until 2.00pm.
66. Mr Clarke now said that she would need to put her request in writing and Mrs Davies immediately wrote to him on 20 July 2022 (pages 188-189). She used the form that he had provided for her, but this only required brief details of her application.
67. The Claimant then had to chase up the progress of her application and on 15 September 2022, just 5 weeks before she was due to return to work, she received a letter at page 190 informing her that she should attend a meeting on Monday 26 September.
68. The meeting was conducted by Mr Clarke on 26 September with Beth Fairweather in attendance to make notes. The notes of the meeting are at pages 191-193. Beth Fairweather was playing an active part in the meeting. By this time, she was doing a large part of Mrs Davies's role.

69. The Claimant in the meeting made various suggestions about ways in which she could work flexibly. Whilst she had suggested the first option of working 10.00am to 2.00pm 5 days a week she made alternative suggestion including working Monday to Friday 12.00pm to 5.00pm as well as working the 20 hours per week. The Claimant was willing to be flexible on working from home or at the office and about finishing times and breaks to ensure that the position that she undertook was properly covered.
70. Mrs Davies explained that childcare would be available from her mother and that she was willing to be flexible on what suited the business.
71. She made it clear that she wanted to come back as Company Administrator but she knew that changes had happened and that Peninsula was now performing the HR role and that Gareth dealt with payroll and on the face of it Mr Clarke was willing to support the idea that she could work 12.00pm until 4.00pm 5 days a week and he indicated that he would be taking the proposal to the Directors but that he didn't see that her request was a problem.
72. There were some contradictions between the two sets of notes made by Miss Fairweather and Mr Gillard for the Claimant. Mr Gillard's notes are at pages 194-202. These are from a tape recording that had been covertly taken by the Claimant at the meeting. Whilst it was wrong for the Claimant to record the meeting covertly the notes that are provided from the transcript of that clearly show that the Claimant was prepared to be flexible about her requests and it can be seen that Mr Clarke went away positive about the application for flexible working and suggested that he might come up with a couple of suggestions and come back to her with those.
73. Without any further discussion and only 2 days after the meeting on 28 September 2022 the Claimant was told in a telephone conversation from Mr Clarke that following a meeting with Nick Swindin in which they had discussed her application her flexible working request had been rejected. There was no opportunity for the Claimant to discuss any issues that the Respondent had or answer any of the issues they might have raised. The Claimant was devastated by the way that she had been treated and she received a letter dated 28 September 2022 saying that her application for flexible working had been rejected (page 205). The reasons given were brief. It said:
- ".... agreeing to this change would have too much of a detrimental impact on the quality of service we expect to deliver. We have carefully considered the implications, our conclusion is we would not achieve the workload demands required of the administration team, revenues would be impacted, and quality of service provided to internal staff and customers will be compromised. We have an inability to reorganise work amongst existing staff, the administration team are already operating at full capacity and have no available time to pick up any additional work to assist with the 50% extra that would be required. We have also considered job-sharing possibility but feel this would be far from ideal and too much of a compromise, even if we could find a suitable and capable candidate to cover the required hours."*
74. The letter explained that her job as Company Administrator was a full-time role and *"simply cannot be carried out in 20 hours per week"*. The Claimant was instead offered the role of Service Administrator, but she would be still working 40 hours per week and on the same rate of pay, she was expected to return to work full-time on

Monday 24 October 2022 just 4 weeks later she was given 5 working days to accept the position and told she could appeal to Mr Swindin who was the person who had made the original decision that her role could not be undertaken on a part-time basis.

75. There was no mention in the letter that the role of Company Administrator had greatly reduced during her maternity leave and the role had been undertaken by Mrs Leathers on a part-time basis during this period. Beth Fairweather was dealing with recruitment; Gareth Leathers was dealing with payroll and Peninsula dealing with HR support.
76. There was no explanation about any reasons why job-share would be *“too much of a compromise”*.
77. Mrs Davies appealed against the decision on 30 September 2022 (pages 206-208).
78. Mr Swindin’s response was sent on 7 October. This was 8 days after Mr Swindin had received the appeal. He said that the intention of the appeal process was for her to put forward alternative suggestions or options for them to consider. He took issue with her suggestion that she had suffered sex discrimination accused Mrs Daveis of manipulating her position to achieve the outcome of her *“desire”*. He made clear that he was not accepting her documents as an appeal and if she didn’t do so she would be expected to return to work on 24 October 2022 to her current position on her current hours.
79. Mrs Davies responded on 11 October 2022 (page 213-215). In the letter she set out various proposals that she had made about flexible working. She said in her letter:

“I am open to any solutions you may have which would work for us both. For the reasons given above working full-time is the one thing I have been clear about and cannot do (this has been known by Jordan and Beth since my maternity started) and if you are unable to compromise and will remain in the same position then we need to discuss how this can be resolved for both of us.”
80. Some 10 days later 21 October 2022 Miss Fairweather wrote on Mr Swindin’s behalf to acknowledge the letter of appeal and said that the business had not been able to:

“Thoroughly review your appeal and will not be able to have this completed prior to your return date of 24 October.”
81. Miss Fairweather suggested that she might like to take some of her holiday entitlement or have this as unpaid leave until they are able to respond. No date was provided as to when they would respond. Mrs Davies objected to this by another email of the same date (page 220-221). She pointed out that any delays were clearly the fault of the business, and it was unfair to expect her to either return to work on 24 October, take unpaid leave or take holiday entitlement.
82. On 25 October Mr Swindin responded to her appeal. He had not held any meeting with her or discussed the matter of her appeal with her in any way. The response is at pages 224-226. It confirmed the outcome as before and said that they had *“considered”* her flexible working request. That her role could only be done full-time, and that staff needed support full-time and that she could only return at a full-time role. Mrs Davies was told that she had to answer whether she was returning to work

by 9.00am on 26 October.

83. On 27 October 2022 Mrs Davies wrote to Mr Clarke, page 227, informing him that she was resigning from the role and her final day would be 28 November 2022. When she resigned, she was immediately locked out of all her accounts, and she had to return all company property including her laptop. Her resignation was immediately accepted on 28 October (page 230). She was told that the expectation would be that she would attend work during her notice even though she had explained that she could not return to work full-time. She did not return to work during the notice period, and it was treated as paid leave.

THE LAW

Indirect Sex Discrimination

84. Section 19 EqA provides:

“(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.”*

85. The burden of proof is dealt with at section 136 EqA which provides:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

86. This comprises a two-stage process:

Stage 1 - The Tribunal must consider if there are facts from which it could decide in the absence of any other explanation that a Respondent contravened the provision concerned.

Stage 2 - If Stage 1 is satisfied the Tribunal must hold the contravention occurred unless the Respondent shows they did not contravene the provision.

87. The Respondent in this case accepts that the PCP's applied and that they put the Claimant and women at a disadvantage when compared with men. In this case the Tribunal is therefore concerned with the “justification” defence.

88. The case law establishes we must balance the discriminatory effect of the PCP

against the reasonable needs of the Respondent. In carrying out this exercise we should consider whether:

- (a) The Respondents objective was legitimate.
- (b) The means used to achieve it were reasonable in themselves.
- (c) The means used were justified on principles of proportionality when balanced against their discriminatory effect.

89. Miss Brooke-Ward referred us to a number of cases:

- ***Ali v Torrosian (T/A Bedford Hill Family Practice) [2018] 5WLUK25***
- ***Di Insurance Services v O'Connor UKEAT/0230/17/LA***

90. In Miss Younis's submissions she referred us to a number of cases on indirect discrimination namely:

- ***Dziedziak v Future Electronics Ltd EAT0271-11***
- ***MacCulloch v ICI [2008] IRLR 846***
- ***Lockwood v DWP [2013] EWCA Civ 1195***
- ***Akerman-Livingstone v Aster Communities Ltd [2015] UKSC15***

Pregnancy/Maternity Discrimination Contrary to Section 18 EqA

91. Section 18 EqA provides:

“(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of the pregnancy.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purpose of subsection (2), if the treatment of a woman is implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy begins when the pregnancy begins and ends.

(a) If she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy.”

92. Miss Brooke-Ward referred us to:

- ***Trustees of Swansea University Pension and Assurance Scheme v Williams [2015] IRLR885.***

93. Miss Younis referred us to:

- ***Madarassy v Nomura International Plc [2007] EWCA Civ 33.***

Flexible Working Request

94. Section 80F of the Employment Rights Act 1996 (“ERA”) provides: that an employee with at least 26 weeks of continuous service has the statutory right to request flexible working.

95. Once the request is submitted the employer must deal with the application in a reasonable manner as required by section 80G ERA. The flexible working regulations 2014 provide further guidance on what constitutes a reasonable manner which includes holding a meeting to discuss the request and providing a decision within 3 months unless an extension is agreed upon.

96. Section 80G ERA deals with an employer’s duty in relation to an application under section 80F and provides:

“(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 reorganise 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) Such other grounds as the Secretary of State may specify by regulations.

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

(a) The decision on the appeal, or

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

(1b) For the purpose of subsection (1)(aa) the decision period applicable to an employees application under section 80F is:

- (a) The period of 3 months beginning with the date on which the application is made or*
- (b) Such longer period as maybe agreed by the employer and employee.*

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

- (a) Before it ends, or*
- (b) With retrospective effect, before the end of a period of 3 months beginning with the day after that on which the decision period that is being extended came to an end.”*

Unfair Dismissal

97. The claim of unfair dismissal is made under Section 94 ERA.

98. Section 95 details the circumstances in which an employee is dismissed and provides:

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

- (a) ...*
- (b) ...*
- (c) 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.”*

99. Miss Younis referred us to the leading cases in respect of constructive unfair dismissal namely:

- ***Western Excavating v Sharp [1978] ICR 221***
- ***Meikle v Nottinghamshire County Council [2005] ICR 1***
- ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 878***

100. The burden is on the Claimant to establish on the balance of probabilities that her employer has committed a fundamental breach of her contract of employment, that she has resigned because of that breach, and she has not affirmed her contract. In this case the Respondents submit the Claimant has not discharged that burden to the relevant standard.

101. The Respondent in this case do not say that if there was a dismissal they had a fair reason for dismissing the Claimant and we are therefore only considering whether there has been a constructive dismissal in this case. Miss Brooke-Ward in her submissions referred us to:

- ***Buckland v Bournemouth University Higher Education Corporation [2010]***

*IRLR 445***OUR CONCLUSIONS****Indirect Discrimination on Grounds of Sex**

102. In this case the Respondents accept that they applied several PCP's:
- 102.1. A requirement to work full-time hours.
 - 102.2. The requirement to work between 8.30am and 5.30pm.
 - 102.3. The Flexible Working Policy and the determination of the same.
103. The Respondent accept that they applied the PCP's and it is not in dispute that these PCP's put the Claimant and women at a disadvantage compared with men.
104. We are left to consider therefore the justification defence.
105. As I have said above the Tribunal must balance the discriminatory effect of the PCP against the reasonable needs of the Respondent. In doing this we should consider whether:
- (a) The Respondents objective was legitimate.
 - (b) The means used to achieve it were reasonable in themselves.
 - (c) The means used were justified on principals of proportionality when balanced against their discriminatory effect.
106. The Respondents are required to produce to us cogent evidence to show that the PCP's imposed were a proportionate means of achieving their objective and that there was no viable less discriminatory alternative means of doing the same.
107. In this case the Respondents have merely asserted their case without producing any evidence to support their contentions.
108. We are required to consider all the evidence before us and use our common sense and knowledge of human nature when considering whether the PCP was justified.
109. In this case the Respondent submit to us that the business was getting busier post Covid and there was a genuine business need for a full-time employee to undertake the administration role that the Claimant was undertaking and that the workload demands could not have been achieved if the Claimant had returned to work part-time. That this would have impacted the revenue and quality of service provided.

110. They rely on the need for operational efficiency and saving and avoidance of costs, in particular the requirement to provide consistent service to their clients, both internal and external, who demanded a dedicated account specialist for continuity of support during their full operating hours.
111. We are satisfied in this case that the Respondents do not have a defence of justification. In this case they were never prepared to properly consider whether the Claimant's role could be undertaken on a job-share or part-time basis.
112. We take judicial notice of the fact that the Respondent had no experience of job-share to say whether it would work or not and they only had full-time employees.
113. In an event the Claimant was not asking for job-share but was simply contending, quite reasonably, that her reduced role in administration could be undertaken on a part-time basis, as it had been while she was on maternity leave. She never suggested that there should be a job-share.
114. By their behaviour the Respondent indicated they had a closed mind to the idea of the Claimant undertaking her work in administration on a part-time basis. They first sought to ignore her request and then when they were chased about this, they then told her she needed to complete a form in writing. The form that they provided only sought very limited information.
115. When they had received that form, they then delayed for a further 2 months before they met with the Claimant. At the meeting with Mr Clarke, they did not raise any real objection. Apparently, Mr Clarke's meeting with the Claimant was described as a fact-finding exercise to see what the Claimant was looking for. Mr Clarke would put the proposal to Mr Swindin to see if he could obtain approval.
116. The response without any further consultation with the Claimant was as described in our findings of fact in the letter of 28 September merely stating that agreeing the change would have too much of a detrimental impact on the quality of service they were expecting to deliver. That they could not achieve the workload demand required of the administration team. That revenues would be impacted, and quality of service provided to internal staff and customers would be compromised. They were unable to reorganise work amongst the existing staff because the administration team were already operating at full capacity.
117. None of this was discussed at all with the Claimant and no evidence was produced to the Claimant or to this Tribunal that there was any good reason why the Claimant could not return on a part-time basis or that any of their objections were justified. We are satisfied that they weren't.
118. When the Claimant appealed against that decision her appeal was initially rejected and then when she set out the basis of why she wanted to have the flexible working her appeal was dismissed without conducting any meeting at all with her to discuss the issues and see if a resolution could be reached and without considering her proposals properly.
119. The response ignores several matters which we consider to be relevant. The Claimant's duties had been shared out amongst existing staff who had been coping

for 9 months with increased workload showing there was no need for the continuity of a single person. If they were unsure about the prospect of whether the Claimant could undertake the work on a part-time basis, they could have suggested a trial period, but they did not do so.

120. They also ignored the fact that the wife of one of the Directors, Mrs Leathers had been taken on part-time to do a Service Administration role which showed that this role could be done on a part-time basis. She was subsequently made full-time even though she was supposed to be providing maternity cover for the Claimant.
121. The respondents have produced no evidence that granting the claimant's application for part time work would have any effect on the efficiency of their operation or that it would increase their costs.
122. We have also not seen any evidence to show that staff were working to full capacity which meant that they could not accommodate the Claimant.
123. We are satisfied in this case that there was no objective justification for the Respondents refusal of the Claimant's request to work part-time and her claim for indirect discrimination therefore succeeds.

Pregnancy/Maternity Discrimination

124. In this case the protected period was when Mrs Davis's pregnancy began in June 2021 and ended when she was due to return to work after pregnancy namely in October 2022.
125. In this case we are satisfied that several events which amounted to unfavourable treatment was suffered by the Claimant because of her pregnancy or because she was going on maternity leave and that this behaviour amounted to continuing behaviour throughout the protected period. We are satisfied:
 - 125.1. That after she told the Respondents that she was pregnant many of her functions were taken away from her and she was provided with an alternative job.
 - 125.2. The Respondents failed to carry out any risk assessment in respect of her pregnancy.
 - 125.3. The Respondents unreasonably refused to allow her to work less hours and/or from home and take leave on the lead up to the commencement of her maternity leave.
 - 125.4. They failed to inform her and allow her keeping in touch days after she commenced her maternity leave.
 - 125.5. They deliberately delayed her flexible working request, initially ignoring it and then when she could no longer be ignored failed to adequately deal with the request by delaying it and then without any good reason refusing her request to work flexibly.

125.6. Their unreasonable behaviour towards the Claimant continued during the period of the appeal which had not been dealt with prior to her return to work and the Respondents then informed the Claimant that she should take either unpaid leave or holiday during the period before she was informed of the outcome of her appeal.

125.7. Their behaviour in rejecting her request without any good reason and in the manner, they did so amounted to maternity discrimination.

Breach of Flexible Working Regulations

126. We are satisfied that for the reasons we have set out above that the employers in this case have not dealt with the Claimant's application for flexible working in a reasonable manner.

127. They refused the application without undertaking any proper consultation about the application with the Claimant.

128. They did not notify the Claimant of the decision within a reasonable period.

129. They have not substantiated any of the grounds upon which they said they refused the application for flexible working.

130. We are satisfied that the handling of the request indicated a company that was not prepared to consider flexible working under any circumstances. After the Claimant had submitted her original request in April 2022, she had to chase up her manager in July. He then sent her a form which he did nothing about for a further two months until September by which there was only one month before the Claimant was due to return to work.

131. Having indicated that it was likely that the application would be agreed it was then rejected after the matter was referred to the Directors for no good reason at all and without any discussion with the Claimant and then when the Claimant appealed her appeal it was rejected without any discussion with her and without any consideration of the reasons why the Respondents could not agree to the request.

132. This Tribunal has heard no evidence of any detrimental impact on the Respondents business or any increase in workload demands or how the revenues would be affected. No adequate explanation has been given as to how the quality of service would be affected or why they could not reorganise work internally so that the Claimant could be accommodated.

133. In this case the Respondents have failed to properly consider the request, consider the benefits that the requested changes could bring or the effect that their refusal to consider part-time work would have on the Claimant.

134. We are satisfied that this Claimant was a loyal and hard-working employee who was not treated fairly or properly by her employers and that the Respondents failed to handle the flexible working request in accordance with the statutory requirements and their own policies. The decision was made unfairly with undue delay and on unsubstantiated reasons.

Constructive Unfair Dismissal

135. In this case the Claimant gives several reasons in the list of issues as to why she resigned from her employment.
136. Many of those reasons relate to the period before she commenced her maternity leave. Having heard the evidence we are satisfied that the reason that the Claimant resigned from her employment was because of the discrimination that she suffered which we have found above and the way in which her flexible working request was dealt with.
137. The events that we are satisfied led to her resignation were:
- 137.1. The delay in dealing with her request for flexible working initially from April until July and then from July until September.
 - 137.2. Delaying dealing with her request for flexible working until one month before she was due to return from maternity leave.
 - 137.3. Not considering her request for flexible working reasonably or properly.
 - 137.4. Refusing her request initially and then delaying further her appeal before not properly considering her appeal and dismissing her appeal against the decision on flexible working.
138. We are satisfied that the above behaviour by the Respondents amounted to a breach of the implied term of mutual trust and confidence and the Claimant has shown that the Respondent has without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or damage the relationship of trust and confidence between them. There was no reasonable or proper cause for the conduct the Claimant suffered in this case.
139. We are satisfied in this case that after the Claimant had told her employers that she wanted to return on a part-time basis they were no longer interested in employing her and knew very well that by insisting that she should return to work full-time that she would have to resign.
140. We are satisfied that the Claimant resigned because of this behaviour and not for any other reason and that she did not delay too long.
141. Her claim therefore of constructive unfair dismissal also succeeds.
142. Remedy will be dealt with at the hearing on 9 January 2025.

Employment Judge Hutchinson

Date: 14 November 2024

JUDGMENT SENT TO THE PARTIES ON

.....14 November 2025.....

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FOR THE TRIBUNAL OFFICE

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