Case Number: 6000470/2024

EMPLOYMENT TRIBUNALS

Claimant: **Nicola Downes**

Respondent: **Chief Constable of West Yorkshire Police**

Heard at: **Leeds** **On:** **10, 11, 12 March 2025 and in chambers on 26 March 2025**

Before: **Employment Judge Bright**
Mr M Brewer

Representation
Claimant: Mrs H Hogben (Counsel)
Respondent: Mr S Mallett (Counsel)

RESERVED JUDGMENT

1. The complaint of less favourable treatment of part-time workers (Regulation 5 Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTW Regs)) is not well-founded and is dismissed.

2. The complaint of breach of the right not to be subjected to a detriment (Regulation 7 PTW Regs) is not well-founded and is dismissed.

3. The complaint of indirect sex discrimination (Section 19 Equality Act 2010) is not well-founded and is dismissed.

REASONS

The claim

1. The claimant presented her claim on 14 February 2024 after a period of early conciliation from 30 December 2023 to 10 February 2024. The claimant's complaints are:

   1.1. Less favourable treatment of part-time workers (Regulation 5 Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR));
   1.2. Breach of the right not to be subjected to a detriment (Regulation 7 PTWR);

1.3. Indirect sex discrimination (Section 19 Equality Act 2010).

The hearing

2. At the start of the hearing, both parties gave consent for the Tribunal to sit as a panel of two, as one of the panel members was indisposed.

The issues/application

3. The parties agreed the list of issues from a preliminary hearing for case management held on 27 September 2024, save that the issues at paragraph 3.5 were the subject of an application to amend. This arose because the respondent had, in the course of these proceedings, presented voluntary further and better particulars containing an objective justification defence in the Regulation 5 PTWR complaint. That defence had not previously been pleaded, including at the preliminary hearing where it was recorded that the respondent did not seek to justify the Regulation 5 PTWR complaint on objective grounds. The respondent therefore made an application at this hearing for the amendment of its response to include that defence.

4. We heard the representations of the parties and determined that leave should be granted for the amendment because, although the formal application was made late in the proceedings, the respondent's stated position at the previous preliminary hearing had been an error, the claimant's solicitor had been on notice that there was an objective justification defence from 3 October 2024 and had not previously objected and the facts giving rise to the defence were contained in the ET3 grounds of response. Above all, if the application were allowed, there appeared to be no prejudice to the claimant which could not be mitigated during these proceedings, since the relevant witnesses were present at the hearing and additional time could be allowed for preparation of cross examination. The prejudice to the respondent in refusing the application, on the other hand, was that, depending on our findings in the other issues in the claim, it may result in the respondent losing the claim despite having an arguable defence. The balance therefore weighed in favour of allowing the application.

5. The final list of issues was therefore:

<u>Regulation 5 PTWR</u>

5.1. Did the respondent:
   5.1.1. Fail, between October and November 2023, to engage and consult with the claimant as part of the Safeguarding Department Review?
   5.1.2. Require the claimant to reapply to become a part-time worker on form FW1, by way of an email of 3 November 2023 from her line manager and/or an email of 6 November 2023 from DCI Dawson?
   5.1.3. In or around November 2023, require the claimant to prepare a proposal to include eligibility for being a part-time worker along with their shift proposal?
   5.1.4. Give the claimant a much shorter time frame to apply and have her proposal considered and approved by management and human resources?
   5.1.5. Fail to consider the claimant's shift proposal in October and/or

November 2023?

5.1.6. Fail to allow any right of appeal, by way of an email of 6 November 2023 from DCI Dawson?

5.2. Was that less favourable treatment? The claimant says she was treated less favourably than DC David Bradbury and DC Andrew Williamson.

5.3. If so, was the treatment on the ground that the claimant was a part-time worker?

5.4. Did the respondent's treatment amount to a detriment?

5.5. Was the treatment justified on objective grounds? The respondent says the treatment was appropriate and reasonably necessary to ensure the effective implementation of the new shift arrangements.

Regulation 7 PTWR

5.6. Did DCI Dawson:

5.6.1. Inform the claimant on 6 November 2023 that she would not be afforded any appeal process?

5.6.2. Along with the claimant's line manager, refuse to consider or negotiate the claimant's shift pattern proposal in October and/or November 2023?

5.6.3. Inform the claimant on 13 November 2023 that she was being moved from her team?

5.6.4. Inform the claimant on 16 November 2023 and on 22 November 2023 that she would be placed on a full-time pattern on Team 4 if she refused to submit the FW1?

5.6.5. Inform the claimant on 22 November 2023 that her part-time working would cease on 18 March 2024?

5.6.6. Summon the claimant to a meeting on 24 November 2023 to seek to force the claimant to complete the FW1?

5.6.7. Tell the claimant during a meeting on 24 November 2023 that she would be moved on to full-time hours as from 18 March 2024?

5.6.8. Move the claimant to Team 4 on 18 March 2024?

5.7. By doing so, did the respondent subject the claimant to detriment?

5.8. If so, was it done on a ground which is prohibited under Regulation 7(3)? In particular:

5.8.1. Did the claimant's emails of 4 November 2023 to DS Bayliss and/or 7 November 2023 to DCI Dawson constitute:

5.8.1.1. Doing anything under the PTWR in relation to the respondent or any other person; and/or

5.8.1.2. Alleging that the respondent had infringed the PTWR; and/or

5.8.1.3. Refusing (or proposing to refuse) to forgo a right conferred on the claimant by the PTWR?

Indirect sex discrimination

5.9. Did the respondent have a provision, criterion or practice ("PCP") of reviewing and implementing a new shift pattern at the Safeguarding Unit,

under the provisions of the Police Regulations 2003?

5.10. Did the respondent apply the PCP to the claimant?

5.11. Did the respondent apply the PCP to men or would it have done so?

5.12. Did the PCP put women at a particular disadvantage when compared with men, in that women are more likely to work part-time or need flexible working patterns because of childcare responsibilities?

5.13. Did the PCP put the claimant at that disadvantage?

5.14. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says a review of the shift pattern and the implementation of a new shift pattern was appropriate and necessary to provide an effective safeguarding unit following the outcome of an HMICFRS PEEL inspection.

The evidence

6. The claimant gave evidence on her own behalf. The respondent called:

   6.1. Detective Superintendent Dawson, previously DCI for Safeguarding at Wakefield District (referred to in these reasons as DCI Dawson);
   6.2. Mrs Priestley, Employee Relations Advisor; and
   6.3. Mrs Chapman, Senior Employee Relations Advisor.

7. The respondent also adduced a witness statement for Detective Superintendent Bickerdyke, but she was not called to give evidence as the claimant did not dispute anything in her statement.

8. There was an agreed file of documents of 359 pages, to which new documents were added on the first day of the hearing at pages 360 – 363. References to page numbers in these reasons are references to the pages of the agreed file of documents.

Submissions

9. Mrs Hogben made oral submissions on behalf of the claimant and Mr Mallett made oral submissions on behalf of the respondent. We took both sets of submissions fully and equally into account in our decision making, although we do not rehearse them in full here. We make reference to them where relevant in our reasons set out below.

Findings of fact

10. We made the following unanimous findings of fact, on the evidence before us. Where there was a dispute, we resolved it on the balance of probabilities. This judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues that the Tribunal must consider in order to decide if the claim succeeds or fails. If we have not mentioned a particular point it does not mean that we have overlooked it. It is simply because it is not relevant to the issues.

11. The claimant is currently a Detective Constable in the Wakefield District Child Safeguarding Department. She joined the respondent in 1996 and has been working part-time since 2013. When she first applied to go part-time she made her application on a form FW1, as required by the respondent in its Flexible Working Policy (page 71).

12. The claimant completed a second FW1 form when she requested a change to her working pattern in April 2017. The part-time working agreement (page 91), which was agreed at that time, recorded that it could be reviewed in the event of 'organisational change' and that the working pattern could be changed without the officer's consent, in line with the respondent's Part-Time Working Policy, giving at least 28 days' notice of the change.

Organisational change

13. Such organizational change arose in the course of 2023 and 2024 as a result of a Police Efficiency, Effectiveness and Legitimacy (PEEL) inspection carried out in 2019 by HM Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS). That inspection had recommended improvements in capacity, capability and wellbeing across the five district safeguarding teams in the respondent police force. The respondent undertook a Safeguarding Review in 2021 and a subsequent Post Implementation Review in 2023 which led to increases in personnel and capacity. That, in turn, required a reconsideration of the structure of the safeguarding department across the five policing districts within the respondent, of which Wakefield District was smallest.

14. The review found that the existing variable shift agreement ("VSA2") shift structure was not ideally suited to child safeguarding or smaller districts. A decision was taken in February 2023 by the Chief Officers' Team ("COT"), to move away from the three week VSA2 shift pattern to a four week shift pattern. We accepted the respondent's evidence that one of the reasons for the decision was to provide more effective cover at weekends.

15. The VSA2 pattern was one which repeated every three weeks and was operated with a three team structure. The core shift pattern was (pages 312 – 313):

> Week One: Monday – Late Shift ("late"), Tuesday - Rest Day ("rest), Wednesday - rest, Thursday - rest, Friday – Early Shift ("early"), Saturday - early, Sunday - early.
>
> Week Two: Monday - early, Tuesday - late, Wednesday - late, Thursday - late, Friday - rest, Saturday - rest, Sunday - rest.
>
> Week Three: Monday - rest, Tuesday - early, Wednesday - early, Thursday - early, Friday - late, Saturday - late, Sunday – late.

16. The early shifts were nine hours' long, the late shifts were eight hours, an average full-time working week was 39.6 hours and the effect of the shift pattern was that full-time officers worked two weekends out of three.

17. The claimant's varied part-time shift pattern from April 2017 was:

Week One: Monday – Free Day (“free”), Tuesday – rest, Wednesday – rest, Thursday – rest, Friday – early, Saturday – early, Sunday – early.

Week Two: Monday – early, Tuesday – late, Wednesday – late, Thursday – late, Friday – rest, Saturday – rest, Sunday – rest.

Week Three: Monday – rest, Tuesday – early, Wednesday – early, Thursday – early, Friday – late (9 hours), Saturday – free, Sunday – free.

18. This resulted in an average working week of 32 hours, with one period of 6 days off every three weeks, and one weekend working out of three.

Consultation

19. Although the relevant period for the claimant’s concerns about consultation, according to the claim form and list of issues agreed by the parties, was October and November 2023, in her evidence and submissions the claimant addressed consultation over a wider period including the change from the three week VSA2 pattern to a four week shift pattern. We cover the whole period in our findings of fact, for completeness.

20. The decision to move away from the VSA2 pattern was a significant organizational change for the respondent, involving around 600 police officers and staff across all five divisions. The Discussion/Decision Paper (“COT paper”) which recorded the COT decision making (pages 297 – 326) set out the alternative potential shift patterns: one which had been piloted in the Calderdale force (the “Calderdale pattern”) and one which was used by the South Yorkshire force (the “South Yorkshire pattern”). We find from the COT paper that there was consultation on the change to a four week pattern with the Police Federation and trade unions (page 320), who supported the change (page 301). While a separate Equalities and Human Rights (“HER”) assessment had not been carried out, the respondent intended to factor its existing diversity, equality and inclusion (“DEI”) policy into the process of change (page 320).

21. The claimant invited us to find that the respondent breached its obligations under the public sector equality duty in relation to the change to a four week shift pattern. In our judgment there was insufficient evidence before us to reach such a conclusion. The respondent submitted that, because the proposed shift patterns were already in use in other forces, we should be satisfied that public sector equality duty considerations must have been taken into account and consultation conducted at the time those patterns were implemented in Calderdale and South Yorkshire respectively. We agreed that, while there was no direct evidence before us relating to implementation in Calderdale or South Yorkshire, it was more likely than not that the COT would not have been considering those options had there been concerns about consultation or equality considerations at the time they were implemented in Calderdale and South Yorkshire. We consider that any previous issues or concerns would also have been mentioned in the Decision Paper, had they existed.

22. On 18 September 2023 the respondent opened consultation on the choice of new shift pattern. A series of consultation meetings commenced. An in-person consultation meeting was held in the claimant's district on 29 September 2023, but the claimant did not attend because of a personal commitment. There was an additional consultation meeting held on MS Teams for those employees who were not available to attend in person and the meetings were all recorded and shared online. The claimant accepted that she could have attended a consultation meeting had she so wished. The respondent's proposals about the changes were also available on the respondent's intranet, including a consultation presentation by DCI Bacon (pages 93 – 103). That consultation presentation set out a clear time-line for consultation, repeated in a document entitled 'shift implementation update' dated 17 September 2023: the consultation would commence on 18 September 2023 and finish on 20 October 2023. Once the choice of shift pattern was decided, from 20 October 2023 to 1 December 2023 the districts would be able to consider and approve submissions about part-time and flexible working patterns. The update recognized that, "I appreciate that until the pattern is chosen with the start and finish times agreed, any effective consideration of existing or new patterns is difficult to commence" (page 105).

23. The claimant alleged that she was not afforded representation by the Police Federation ("the Federation") of which she was a member during the consultation. We find that the claimant was represented by the Federation. There was no evidence before us of any refusal or reluctance by the Federation to afford the claimant representation and the briefing notes and slides (pages 93 – 106) clearly showed the Federation and unions being fully involved in consultation, which considered and included part-time and flexible workers.

24. The claimant's true concerns appeared to be that she should have been consulted individually about the impact on her own working pattern, and that she was afraid of losing, specifically, her six day long break every three weeks and her two full weekends out of three off work. She appeared to expect to be consulted about her individual working pattern before the choice was made whether to move to the Calderdale or South Yorkshire shift patterns. However, we accepted DCI Dawson's evidence, supported by the wording of the shift implementation update (page 105), that there was a logical sequence to the process: the first stage was general consultation on which shift pattern to adopt and the second stage was consideration of individuals' proposed rotas, which was only possible once the choice of pattern was known and those individuals had been allocated to specific teams. The claimant did not explain how she expected the respondent to be able to consult or engage with her about her individual working pattern during the first stage. We accepted that part-time or flexible workers would not, as a matter of common sense, be able to identify their own individual needs or patterns going forward until they knew which core shift pattern was being used and to which team they were allocated. It was not possible for the respondent to consult on individual patterns until the core shift pattern had been chosen and the teams allocated.

25. In any event, we accepted DCI Dawson's evidence that between 18 September 2023 and 20 October 2023 she spoke to the claimant's team about how the proposals were likely to affect them. She was having conversations on a regular basis with part-time and flexible workers about the possible impact of

the changes on their working patterns. By 9 October 2023 the favoured shift pattern (the South Yorkshire pattern) was beginning to emerge. The South Yorkshire pattern comprised (with length of shift in hours shown in brackets):

> Week One: Monday early (9), Tuesday early (9), Wednesday early (9), Thursday early (9), Friday early (9), Saturday rest, Sunday rest;
>
> Week Two: Monday rest, Tuesday rest, Wednesday early (8), Thursday early (8), Friday late (9), Saturday late (9), Sunday late (9);
>
> Week Three: Monday late (9), Tuesday rest, Wednesday rest, Thursday rest, Friday early (9), Saturday early (9), Sunday early (9);
>
> Week Four: Monday early (9), Tuesday late (9), Wednesday late (9), Thursday late (9), Friday rest, Saturday rest, Sunday rest.

26. This pattern resulted in an average working week of 40 hours (0.4 hours' longer than under the VSA2), with two full weekends in four off work (compared to one weekend in three under the VSA2). There were more nine hour shifts, on average, than in the VSA2 pattern.

Use of FW1 form

27. In a communication on 9 October 2023 to the various managers and employee relations (ER) department, DCI Bacon acknowledged that the three week timescale for submission of approved flexible working patterns was tight. He also explained that ER would be sending out pattern templates to all officers on part-time and flexible patters and "new applications are not required for those that currently have part-time and flexible patterns in place. They just need to send back the template" (page 120). However, in a further communication on 11 October 2023 (page 124) he stated, "I had previously briefed out that people with existing part-time and flexi patterns will not need to submit a new application. After review Employee Relations have quite rightly decided everyone will need to submit a full application. This is to assist with recording the rationale for the request which may be different for the new pattern".

28. By 'full application' DCI Bacon was referring to the completion of a form FW1. The Flexible Working Policy (page 71) provided that, when applying for a new flexible working arrangement or changes to an existing flexible working arrangement, an employee was responsible for submitting a form FW1. However, the Policy provided that, where a role was impacted by organizational change, "Flexible working patterns will be reviewed". It was agreed therefore that the Flexible Working Policy did not require a new FW1 to be completed where an employee's existing role and flexible working arrangements were impacted by organizational change. However, we were not directed to a definition of 'review' in the Policy and we find that there was nothing in the Flexible Working Policy or elsewhere to say that the respondent could not require submission of the FW1 form as part of the process of reviewing part-time working and flexible working patterns in the event of organizational change. In our judgment, the respondent's instruction to the claimant to complete the form was a reasonable one and one which the respondent was entitled to make.

29. We accepted DCI Dawson's evidence that the FW1 form was used to document the rationale for the pattern sought, the line management endorsement, approval or refusal, and the appeal process in a structured way, so that all the relevant information was concentrated in one document, laid out step-by-step, should an appeal be required. We accepted that the design and use of the FW1 form ensured that equality issues would be properly taken into account and that there was transparency, fairness and consistency in decision making across the respondent organization. This was a 'full application' but it was not a 'new application', in the sense that employees were not applying to go part-time or work flexibly for the first time. It was merely a mechanism for the review process. The claimant complained that she was required to 're-apply' for part-time working, but that implies that she was being asked to start from scratch, putting forward a proposal to change from full to part-time. We find that was never the respondent's intention and the claimant knew that to be the case. There was no suggestion by the respondent that the claimant would lose the right to work part-time, or be treated as a full-time worker, if she completed the FW1 form. On the contrary, the only talk of losing part-time hours arose, in error as it eventually became clear, because of the claimant's refusal to complete the FW1 form (see below).

30. The claimant invited us to conclude from the fact that there were just two days between DCI Bacon's original position on the FW1 application and his change of heart, that Federation and trade unions could not have been consulted about the use of the form. We agreed that it seemed unlikely that such consultation would have occurred in just two days and Mrs Chapman's evidence in cross examination regarding consultation on the use of the FW1 form for existing part-time and full-time employees was generally vague and contradictory. However, her evidence that there was no objection to the use of the FW1 by the Federation or trade unions was supported by the absence of any concerns cited in the documents available to us. We accepted DCI Dawson's evidence that the FW1 had been used before in circumstances where there was organizational change.

31. We find that the requirement to use the FW1 to review flexible working arrangements was applied by the respondent to both part-time workers and full-time workers alike. Some full-time workers were on existing flexible working patterns (for example, compressed hours and/or early or late starts/finishes) and were therefore in a similar position to the claimant and other part-time workers, in that they would be required to complete an FW1 to present their proposed pattern, based on the new four week shift pattern. We find that there was no difference in the treatment of full-time and part-time workers generally in that regard.

Short time scale

32. The claimant first became aware of the need to submit an FW1 with her proposed shift pattern on 24 October 2023. She, and other employees, were asked to submit their applications for part-time working by 5 November 2023. The respondent acknowledged that this was a tight timetable, and DCI Dawon extended the deadline to 8 November 2023 in recognition of the tight timescale. However, we accepted DCI Dawson's evidence that the employees with flexible and part-time patterns already knew by 20 October 2023 in general what the full-time shift patterns were going to look like and many

already knew by 24 October 2023 what individual pattern they wanted. It was not clear who the claimant says was given a longer time frame to apply and have their proposal for part-time/flexible hours considered and approved. If the claimant meant that she was given a shorter time period for consultation, we refer to our findings set out above. We find that the tight timescale for submission of the FW1 and proposed rota (which could be requesting part-time hours, compressed full-time hours or late or early starts) applied to full and part-time employees alike.

Claimant's refusal to complete FW1

33. Although the claimant accepted it would have been a simple matter for her to complete the FW1 form, she refused to do so. Her evidence was that the FW1 was used to apply for part-time working and, as she was already a part-time worker, she did not need to apply to be part-time. She explained that, by completing the form, she would have been 'conducting herself outside of the policy process' and doing so would suggest that it was her who requested the alteration to her shift pattern, rather than it being a result of organizational change by the respondent. However, the claimant accepted in cross examination that everyone in the respondent organization knew that the reason existing part-time and flexible working staff were being asked to complete the FW1 was because of the organizational change, that the Federation endorsed the process and that management and everyone else considered this was the correct approach. We find that there was no suggestion by the respondent at any stage of the consultation process that it was seeking to deny part-time or flexible workers the right to work part-time or flexibly. As a matter of common sense, when the core shift pattern changed, individual working arrangements would be impacted and part-time and flexible working arrangements reviewed as a result. We accepted that the respondent adopted the FW1 as a practical and common-sense way to conduct the individual reviews for the reasons given by DCI Dawson. In our judgment this was a decision which the respondent was entitled to make and the requirement to complete an FW1 in these circumstances was a reasonable management instruction. It was not 'outside the policy' or a breach of policy.

34. We did not accept the claimant's evidence that she was afraid of being denied the right to work part-time if she completed the FW1 form. She accepted in cross examination that it was clear to her that she was not losing the right to work part-time or being made to apply to become part-time. She accepted that there was no indication the respondent was trying to abolish or reduce flexible working. We did not accept her evidence in reexamination that that she believed it would be a disciplinary offence not to follow the wording of the Flexible Working Policy. There were clear and repeated instructions from management to submit an FW1 and every other part-time and flexible working employee of the respondent ultimately did so. It is not plausible that, in those circumstances, the claimant genuinely believed it would be a disciplinary offence to complete an FW1 or that she would be denied the right to work part-time per se. We find that her refusal to complete the FW1 was because she anticipated she may be required to give up her six day block of time off and work more full weekends.

Impact on part-time workers/women

35. The respondent produced an EHR assessment in or around 20 October 2023, at the end of the consultation period, to consider the impact of the shift pattern change. While we agreed with the claimant's submission that this document was completed as an afterthought (the consultation on which shift pattern to adopt had already happened by 20 October 2023), it recorded (pages 110 – 114) that:

> *The data identifies that there are a disproportionately higher number of females within safeguarding to males. So therefore, the shift changes will impact females to a greater extent. There are considerations that females historically and culturally, but not exclusively, tend to have more involvement with childcare responsibilities so shift changes will have a significant impact upon childcare arrangements.*
> *This has been considered through the shift change. The new pattern has less weekends (2 in 4 rather than 2 in 3) working and less late shifts (7 in 28 rather than 7 in 21) to the current VSA2 pattern so should extend childcare opportunities rather than negatively impact upon them. For officers and staff that have partners working on a different pattern (such as VSA and FSDR) this will require childcare arrangements to be reviewed and flexible/part time patterns to be resubmitted. However, it will also lead to some no longer requiring flexible and part time patterns with the greater number of weekends off and less number of lates. We have also built in a clear process to support flexible and part time pattern submissions with timescales defined, continuous consultation and ER and SLT SPOCs. Police officers may also experience a slight reduction in antisocial payments working 7 lates in 28 rather than 7 in 21. However, the impact will be minimal and the benefits in potentially reduced childcare needs will balance this.*

36. We find, from this document and Mrs Priestley's evidence, that the respondent both collected data and considered the impact of the shift pattern changes on women and part-time workers. We accepted that the change in the core shift pattern from two out of three weekends working, to two out of four weekends working could benefit both full and part-time workers, depending on their current working pattern and requirements going forward. We accepted Mrs Priestley's evidence that some part-time some workers might no longer want or require part-time working because the shift pattern of fewer weekends working and fewer late shifts fitted more appropriately with childcare or other needs.

37. We were not able to assess whether the change in fact impacted positively or negatively or disproportionately on the respondent's part-time workers or women because, although we know there were a total of 21 part-time working applications made out of 90 staff in the Wakefield Division in October 2023, there was insufficient evidence of the numbers and existing shift patterns of part-time workers or women before that date. There was therefore insufficient evidence for us to make a finding that the proposed new shift patterns had a disproportionately negative impact on women or part-time workers at the respondent.

Respondent's rejection of claimant's shift proposal

38. Consultation on the choice of pattern concluded on 20 October 2023 and, the South Yorkshire pattern having been selected, DCI Dawson sent her draft Team allocations to the sergeants and asked them to share it with their teams as soon as possible.

39. On 3 November 2023 DS Bayliss (page 153) sent an email to the claimant and two others relaying DCI Dawson's indication that she could not accept a pattern with six days off and "a Fri, Sat and Sun off" for operational reasons. We find that DCI Dawson's decision not to agree to shift patterns which allowed extended blocks and more full weekends off was consistent with the rationale for changing the shift pattern from three weeks to four weeks following the HMICFRS PEEL inspection. In particular, one of the reasons for the change was to ensure more effective weekend cover. The claimant accepted that others who requested similar patterns were refused and it was no surprise to her that the pattern she proposed (which was based on the pattern she worked when the core pattern was VSA2) was not acceptable for organizational reasons.

40. Despite understanding the respondent's intentions with regard to weekends and blocks of time off, an hour after receiving the email from DS Bayliss, the claimant sent through her proposed shift pattern (page 155), without a form FW1, requesting:

> Week One: Monday – 8 hours, Tuesday – 8 hours, Wednesday – 8 hours, Thursday – 8 hours, Friday – 8 hours, Saturday – rest, Sunday – rest.
>
> Week Two: Monday – rest, Tuesday – rest, Wednesday – 8 hours, Thursday – 8 hours, Friday – 13 hours, Saturday – rest, Sunday – rest.
>
> Week Three: Monday – rest, Tuesday – rest, Wednesday – rest, Thursday – rest, Friday - 8 hours, Saturday - 8 hours, Sunday - 8 hours,
>
> Week Four: Monday - 8 hours, Tuesday - 12 hours, Wednesday - 12 hours, Thursday - 12 hours, Friday - rest, Saturday - rest, Sunday - rest. It is not clear from her email whether the shifts requested were early, late or both.

41. The claimant's requested shift pattern thus proposed six days off in week two to three and three weekends off out of four. The total hours proposed by the claimant were 137 hours over four weeks, or 34.25 hours per week (2.25 hours per week more than her existing pattern). We accepted DCI Dawson's evidence that, although she did not intend to authorize additional weekends or extended blocks of time off for operational reasons, had the claimant completed the FW1 she would have been able to see the claimant's rationale for asking for that time off under the new four week pattern.

Claimant's email 4 November 2023

42. The claimant continued to refuse to complete form FW1 and sent an email to DS Bayliss on 4 November 2023 (page 343) in which, we find, she referred to having "taken advice", asserted that she was "already a Part Time Worker", offered to discuss her working pattern without completing an FW1 and obliquely threatened legal action ("this communication is without prejudice to any subsequent civil proceedings") if the respondent imposed a different working pattern on her. We find that the tone of this email was adversarial and, as a result, DCI Dawson sought advice from the Employee Relations ("ER") department about how to proceed, rather than immediately responding to the claimant.

Advice from employee relations

43. We find that, over the course of 6 November 2023 to 28 November 2023 the respondent's ER department gave confusing advice to DS Bayliss and DCI Dawson about what would happen if the claimant did not complete form FW1. It was clear from the advice provided to DCI Dawson (for example at page 165) that, if the claimant did not complete an FW1, her proposed working pattern would not be considered and there would be no access to an appeal. It was also clear from ER's advice that, if agreement could not be reached with the claimant, the respondent could impose a working pattern on the claimant without her consent: something which was consistent with the contractual provision in the claimant's part-time working agreement (page 91).

44. What was unclear, until an email from Sara Knight on 16 November 2023 (page 177), was whether that would mean the claimant would be required to work full-time or part-time hours and, if part-time, how those hours would be determined. Ranjit Atwal of ER appeared to be advising that, without an FW1, the claimant's working hours would revert to full-time, while Sara Knight of ER ultimately advised (page 177) that the new working pattern would be based on the claimant's previous number of working hours. We find from DCI Dawson's evidence that it was the ongoing confusion which led her to tell the claimant on 16 November 2023 (page 176) that she would be place on a full-time working pattern in March 2024, even though ER had actually told her otherwise earlier that day (page 177). In our judgment DCI Dawson could not have realized that she had misrepresented the position, or she would not have emailed ER to urgently seek clarification on 28 November 2023 (pages 340 and 341) as soon as she realized her mistake.

45. We find that, throughout the email exchanges, DCI Dawson was trying to relay the advice from ER to the claimant (for example at page 163). The claimant characterized DCI Dawson's communication as 'threatening' but we find there was nothing in DCI Dawson's communication with the claimant which could, objectively, be characterized as threatening.

Failure to consider the pattern proposed by the claimant

46. We find that, although DCI Dawson's evidence in cross examination was occasionally unclear, her decision-making was at no time negatively impacted by the claimant's status as a part-time worker, the claimant's assertion of rights as a part-time worker or any belief by DCI Dawson that the claimant was

asserting those rights. There was nothing to suggest that DCI Dawson wanted the claimant to work full-time or had any negative views about the claimant's part-time status. It was put to DCI Dawson in cross examination that she was irritated by the claimant's refusal to complete the FW1 form. However, we accepted her evidence, supported by the tone of her emails to the claimant and others during November 2023, that she was not irritated. We find, from the contemporaneous email evidence, that DCI Dawson's reason for refusing to consider the claimant's submitted shift pattern and refusing to allow any appeal was solely because it was not accompanied by the FW1 form, and was on the advice of ER.

47. We find that during this period, the respondent made efforts to engage and consult with the claimant by repeatedly asking her to complete the FW1 form and investigating her reasons for refusing to do so. It was the claimant's own inflexibility about the FW1 form which ultimately caused there to be no consultation or review of her proposal.

48. We accepted, based on the contemporaneous emails (for example page 174) that DCI Dawson's reason for refusing, more generally, to consider patterns which allowed for long blocks of time off or additional weekends off was that they did not align with operational needs, as identified in the organizational reviews, including the Safeguarding Review. The claimant was not singled out in this regard.

Claimant's email 7 November 2023

49. The claimant emailed DCI Dawson on 7 November 2023 (pages 171 – 172) explaining why she was refusing to complete the FW1:

> *Submitting an application for part time working would suggest that it is I that requires a change to my flexible working arrangement and as a result it is I that would then need to submit a new application as is specified in Force Policy – Flexible Working Arrangement – Review – Paragraph 1 – Bullet Point number 5; I must stress that I do not require a change to my part time working arrangement or have I requested any such change. I accept this review is a necessary review, due to organizational change and I have attempted to assist in that by submitting an alternative pattern. Unfortunately, and unhelpfully local management are refusing to discuss my proposal so I am now forced to elect to remain on my existing arrangement until a forced change is implemented which is disappointing … I will await a forced change and take necessary action to remedy any unfair treatment or breach of policy or legislation".*

50. The reference to 'forced change' in particular, suggests that the claimant believed the respondent would be acting unlawfully and in breach of contract if it unilaterally changed her agreed working pattern. However, her part-time working agreement contained a clause expressly entitling the respondent to change her shift pattern on notice but without consent in the event of organizational change.

Team allocation

51. The claimant was originally allocated on 20 October 2023 to Team One, a smaller team under the leadership of her existing line manager, DS Bayliss (page 147). We accepted that it suited the claimant to be in Team One for the reasons set out in her witness statement at paragraph 113: she had a good working relationship with DS Bayliss, of the kind which took a long time to build up and was important in the context of the demanding work of child safeguarding.

52. On 13 November 2023, however, DCI Dawson emailed (page 175) the claimant to inform her that she was being moved to a different team, Team Four, "due to organizational need within the department". The claimant accepted in cross examination that everyone was shuffled around on the teams when the new shift patterns were introduced. She also accepted that the teams were constructed by DCI Dawson to get the right balance of roles and experience. However, she alleged that the change on 13 November 2023 was in retaliation for her assertion of her rights as a part-time worker in her emails of 4 and 7 November 2023. We agreed that DCI Dawson's original rationale for making further changes to team composition (the outcome of the sergeants' exams) could not have been a factor in switching the claimant to Team Four because of the timing of the change. However, eleven officers were moved after the initial teams had been announced (though not all in child safeguarding) (page 360), suggesting that the claimant was not singled out. We accepted DCI Dawson's evidence that she had to re-shuffle the teams for all sorts of reasons, including people's personal requirements, upcoming promotions or moves to CID, and employees' childcare requirements. One person moving could affect the balance of women and men on teams and the balance of staff experience, leading to teams being further reshuffled. We accepted DCI Dawson's evidence that she moved the claimant to Team Four for operational reasons: the claimant was experienced and a good mentor and Team Four consisted of trainee investigators and police constables who had not worked in child safety before and who would benefit from the claimant's experience. That rationale was corroborated by contemporaneous emails (for example at page 192). We do not find that DCI Dawson had in mind the claimant's emails of 4 or 7 November 2023 when making the decision to move her team.

Full-time working

53. We accepted the claimant's evidence that, although she had received conflicting advice on what would happen on 18 March 2024 if she did not complete an FW1 and Sara Knight had told her she would not be working full-time, she relied on what DCI Dawson told her by email (page 183) and at a meeting on 24 November 2023, because DCI Dawson was her superior officer. We accepted that the claimant, having been told repeatedly by DCI Dawson, and not hearing anything further after 24 November 2023, believed that she would be forced to work full-time hours from 18 March 2024.

54. The claimant accepted in cross examination that, although she did not realise it at the time, DCI Dawson's erroneous advice to her about full-time working in fact arose because of the confusion caused by the conflicting advice from ER. In re-examination, however, the claimant re-asserted that the reason she was

told she would be put on full-time hours was because of her email of 4 November 2023. We preferred the claimant's evidence in cross examination, which was supported by the emails between DCI Dawson and ER (pages 192 and 341).

55. We find, from the timing and tone of DCI Dawson's email seeking further clarification as soon as she realized the advice from Sara Knight was different to what she had advised the claimant (pages 340 and 341) and the other correspondence, that DCI Dawson had not understood the true position prior to 28 November 2023 and had genuinely believed that the claimant would revert to full-time working. We find DCI Dawson's reason for telling the claimant she would work full-time was not because DCI Dawson wanted the claimant to work full-time, nor was it because she was irritated at the claimant, punishing the claimant for her refusal to complete an FW1 or for the claimant's emails of 4 or 7 November 2023. It was because the claimant had not submitted an FW1 and DCI Dawson misunderstood what would happen in the absence of an FW1.

Meeting on 24 November 2023

56. DCI Dawson invited the claimant to discuss matters (page 184). The claimant characterized DCI Dawson's invitation to the discussion as being 'summoned to a meeting'. However, the claimant's own notes of the meeting (page 185) refer to DCI Dawson sending an MS Teams message asking if the claimant was "free for a chat". We find from the claimant's notes that this was a brief informal conversation (not a consultation meeting) but that the claimant was not 'summoned' in a threatening manner, as implied. The claimant's meeting notes also corroborate DCI Dawson's evidence as to the reasons for her telling the claimant she would move onto full-time hours (advice from ER) and for moving the claimant's team (the claimant's experience).

Claimant's imposed shift pattern

57. We find that it was not until 1 December 2023 that the claimant learned that she would not be moved onto full-time hours the following March (page 194 – 196). DCI Dawson confirmed to the claimant that the new pattern would be the same hours as the claimant currently worked, apart from longer late shifts. The claimant submitted that the respondent had unilaterally increased her hours by 6 hours per month, from 32 hours per week to 33 ½. It appeared to us, from the shift patterns provided in evidence and DCI Dawson's email at pages 194 – 196 that part of that increase in hours was attributable to the increase in working week which applied to everyone (0.4 hours per week). The remainder of the increase appears to have been a result of the balance of longer and shorter shifts in the claimant's pattern, which was also reflected in the claimant's own proposals for her working pattern. While we accepted that there was an increased number of working hours in the pattern imposed on the claimant, and she was not individually consulted about the impact of those increased hours, we find the imposition of increased hours was consistent with the provisions of the claimant's part-time working agreement. We also find that the respondent was reasonably entitled to assume the claimant did not object, because increased hours were a feature of her own proposals for working pattern. The increase in the claimant's weekend working was, in part by virtue of the claimant's previous pattern, which was unique to her and included

working only one in three weekends. Other employees of the respondent, including full-time workers (both those working the standard pattern or flexible working patterns) and, potentially, part-time workers on different patterns to the claimant, worked fewer weekends (two in four) under the new shift pattern.

58. The new shift pattern went live in March 2024 but the claimant was off work and did not return to work until 8 May 2024. When she returned, she worked reduced hours but was seconded to work on an investigation, so did not work in Team Four of child safeguarding as planned.

Failure to review shift pattern proposal

59. It was put to DCI Dawson in cross examination that, on becoming aware in December 2023 that the Flexible Working Policy did not require an FW1, she could have taken the opportunity to review the shift pattern proposed by the claimant at that point in time, rather than imposing a shift pattern without talking to the claimant. DCI Dawson was unable to explain why that had not occurred. The same question was put to Mrs Chapman in cross examination and we accepted her response was that she had merely been told the claimant was not 'engaging in the process'. We find that it is more likely than not, on the evidence before us, neither DCI Dawson nor any of the other managers of the claimant considered the alternative option of discussing her proposed working pattern because the window for discussion of proposed flexible working patterns had closed and the claimant had not submitted an FW1. There was therefore no consideration of the claimant's proposed working pattern. The pattern proposed by DCI Dawson was imposed, although the claimant never in reality ended up working it because of intervening events.

60. We find that the respondent ultimately unilaterally changed the claimant's flexible working pattern, such that she would be required to work more hours and more at weekends. However, the respondent was entitled to make that change, by the terms of the claimant's part-time working agreement (page 91). In addition, the increase in weekly hours was mainly a result of an increase in average shift length in the four week pattern and in the increase in the claimant's hours which she herself proposed when she put forward her suggested part-time working pattern.

Grievance

61. The claimant submitted a grievance and an appeal against the outcome of the grievance. A grievance appeal outcome letter dated 7 May 2024 (pages 235 – 236) recorded the findings of Detective Superintendent Whoriskey that the claimant had not been treated unfairly as a result of her part-time worker status or victimized as a result of not submitting the FW1 form. The letter acknowledged, "I do however believe that there could have been better engagement with you at a more timely point with clear rationale provided for decisions and clarification on points that were not as originally stated. I do not believe that this was done in malice or to victimize you but that advice initially provided to DCI Dawson was not accurate". On the evidence before us, that assessment appears to be correct.

The law

Regulation 5 complaint

62. The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the PTWR") provide that:

> *5(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker –*
> *(a) as regards the terms of his contract; or*
> *(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.*
> *(2) The right conferred by paragraph (1) applies only if –*
> *(a) the treatment is on the ground that the worker is a part-time worker, and*
> *(b) the treatment is not justified on objective grounds.*

63. In **Hendrickson Europe Ltd v Pipe** EAT 0272/02 the Employment Appeal Tribunal ("EAT") held that an Employment Tribunal considering whether a breach of Regulation 5 has occurred must answer the following four key questions:
    63.1. What is the treatment complained of?
    63.2. Is that treatment less favourable?
    63.3. Is that less favourable treatment on the ground that the worker is part-time?
    63.4. If so, is the less favourable treatment justified?

64. The Government's **Online Guide to 'Part-time workers' rights'** suggests a non-exhaustive list of treatment in respect of which part-time workers should receive the same treatment as full-time workers, including pay rates, sick pay, maternity, paternity and adoption leave and pay, pension opportunities and benefits, holidays, training and career development, selection for promotion and transfer, redundancy selection and opportunities for career breaks.

65. Regulation 5 provides the right to be treated no less favourably than a 'comparable full-time worker'. The comparator must be a full-time worker, not a part-time worker working longer hours.

66. Regulation 2(4) provides:

> *A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place –*
> *(a) both workers are –*
> *(i) employed by the same employer under the same type of contract, and*
> *(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and*
> *(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.*

67. A part-time worker can therefore compare her position with a full-time worker's position provided that both workers are employed under the same type of contract, by the same employer, at the time the alleged less favourable treatment occurs and they are engaged in the same or broadly similar work, having regard, where relevant, to whether they have a similar level of qualification, skills and experience, and they are based at the same establishment.

68. In respect of the requirement to be working under the same type of contract, Regulation 3 sets out that the following shall be regarded as being employed under different types of contract:

    68.1. employees employed under a contract that is not a contract of apprenticeship;

    68.2. employees employed under a contract of apprenticeship;

    68.3. workers who are not employees;

    68.4. any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract (Regulation 7(3)(d).

69. In **Matthews and ors v Kent and Medway Towns Fire Authority and ors** 2006 ICR 365, the House of Lords identified that, in assessing whether work is the same or broadly similar, particular weight should be given to the extent to which the work of the two groups is in fact the same and the importance of that work to the enterprise as a whole. Otherwise there is a risk of giving too much weight to differences which are the almost inevitable result of one worker being full-time and the other working less than full-time. The key question is whether the work of the two groups is 'broadly similar' not whether it is different. In **Roddis v Sheffield Hallam University** UKEAT/0299/17 EAT, to which the claimant directed us, it was held that a zero hours part-time worker could compare themselves to a full-time permanent worker.

70. Regulation 5(1)(b) requires no less favourable treatment "by being subjected to any other detriment by any act, or deliberate failure to act, of his employer". The test for detriment is essentially the same as in discrimination law. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they had been disadvantaged in the circumstances in which they had to work. The individual's belief that they have been disadvantaged has to be objectively reasonable in all the circumstances. There is no need for the claimant to prove some physical or financial consequence of the detriment, but an 'unjustified sense of grievance' is not enough (**Barclays Bank plc v Kapur (No 2)** [1995] IRLR 87. The Tribunal should ask whether a reasonable person would take the view that they have been disadvantaged in some way. Examples of detriment have included unjustified or excessive disciplinary action and a failure to investigate or redress grievances.

71. Regulation 5(2)(a) provides that, even where there is less favourable treatment of a part-time worker than a comparable full-time worker, the claim will not

succeed unless the treatment was 'on the ground that the worker is a part-time worker'.

72. The Tribunal should only make a finding as to the reason for the treatment once it has decided that the worker was treated less favourably. The burden of proving the ground for the less favourable treatment rests on the employer (Regulation 8(6)). In **Gibson v Scottish Ambulance Service** EATS 0052/04 it was held that the correct test was the 'reason why' test applied in the **House of Lords in Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065 in a discrimination case. The test was not a 'but for' test. Thus, the Employment Tribunal should examine the reason or motive, conscious or subconscious for the less favourable treatment, not ask whether, 'but for' the worker's part-time status, she would have been treated in the same way.

73. In **Sharma and ors v Manchester City Council** UKEAT 0561/07 and **Carl v University of Sheffield** UKEAT/0261/08 it was held that the fact the claimant was a part-time worker does not need to be the sole reason for the less favourable treatment, but it must be an 'effective and predominant cause' of it. However, the Scottish Court of Session in **McMenemy v Capita Business Services Ltd** [2007] IRLR 400 approved the finding in **Gibson** that the part-time worker status must be the sole reason for the less favourable treatment, as suggested by clause 4 of the Framework Agreement annexed to the Part Time Workers Directive. The EAT in England and Wales also agreed with the approach taken in the two Scottish cases, in the case of **Engel v Ministry of Justice** 2017 ICR 277 where the EAT noted that Regulation 5 is not intended to redress any and all injustices that may exist, but is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time workers.

74. Thus, it appears that the position in Scotland is clear (a decision of the Court of Session binds the EAT in Scotland), but there are conflicting authorities at EAT level in England and Wales. The claimant's representative referred us to the passage in **Harveys on Industrial Relations and Employment Law** (paragraph 146) addressing this problem of precedent. We noted that **Harveys** cited the unreported case of **Augustine v Data Cars Ltd** [2024] EAT 117 in which the EAT reluctantly upheld the decision of a Tribunal applying the 'sole reason' test. In **Augustine** the EAT "accepted the argument that, free from higher authority it would have followed Sharma and Carl and held that it is enough if the part-time status was an effective cause, not the sole one; but on the overall law on precedent here (a problem because the EAT is one court north and south of the border, but generally English lower courts and tribunals are not bound by the Court of Session) the position is that, although not actually bound by that court, ETs and the EAT should normally follow it. Thus unless and until there is a substantive change somehow to McMenemy, the requirement is for the part-time status to be the sole reason for the less favourable treatment".

75. Regulation 8(6) provides that it is for the employer to identify the ground for any less favourable treatment or detriment. Even if a part-time worker shows that she has been treated less favourably than a comparable full-time worker, and that the treatment was on the ground that she is a part-time worker, that is not the end of the matter because the claim will fail if the employer is able to justify the less favourable treatment on objective grounds (Regulation 5(2)(b)).

76. The Government **Online Guide** suggests that an employer must be able to show that there is a 'good reason' to treat part-time workers less favourably. In **Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien** 2013 ICR 499, the Supreme Court noted that the test, cited by the European Court of Justice on a reference in the same litigation, was the "familiar general principles applicable to objective justification: the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary to do so' (paragraph 45). The measure chosen must correspond to a real need, be appropriate with a view to achieving the objective pursued and be necessary to that end. Baroness Hale noted in that case at paragraph 48 (to which the claimant directed us) that it is difficult to justify the proportionality of the means chosen to carry out the aims if the employer did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at the time.

77. The claimant also drew our attention, in that regard, to the guidance '**How to Consider Equality in Policy Making: A 10 Step Guide for Public Bodies in England'** produced by the Equality and Human Rights Commission (EHRC) published on 12 September 2024.

Regulation 7

78. Regulation 7(2) PTWR provides that –

> *A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in paragraph (3)*.

79. Regulation 7(3) PTWR provides that –

> *The reasons or, as the case may be, grounds are –*
> *(a) that the worker has –*
> *(i) brought proceedings against the employer under these Regulations;*
> *(ii) requested from his employer a written statement of reasons under regulation 6;*
> *(iii) given evidence or information in connection with such proceedings brought by any worker;*
> *(iv) otherwise done anything under these Regulations in relation to the employer or any other person;*
> *(v) alleged that the employer had infringed these Regulations; or*
> *(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations, or*
> *(b) that the employer believes or suspects that the worker has done or intends to do any of the things mentioned in sub-paragraph (a).*

80. A detriment claim under regulation 7(2) is similar in substance and purpose to a victimization complaint in discrimination law. As in a victimization complaint, it is not necessary that the relevant legislation be specifically mentioned in an allegation for the purposes of 7(2)(a)(v), nor need it even be envisaged as coming into play. But the asserted facts must, if verified, be capable of amounting to an infringement of the PTWR.

Indirect sex discrimination

81. Section 19(1) of the Equality Act 2010 ("EqA") provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's. Subsection (2) goes on to explain that a PCP 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.*

82. For section 19(2)(b) the pool of people used for the purposes of comparison must be those whose circumstances are the same or not materially different from the claimant (section 23(1) EqA). In other words, the comparison must be with those who, apart from the particular characteristic in question, are in circumstances which are the same or not materially different to those of the claimant (**Pendleton v Derbyshire County Council** [2016] IRLR 580).

83. The **Equality and Human Rights Commissions' Statutory Code of Practice** (2011) ("EHRC Code") provides that: "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively" (paragraph 4.18).

84. The joined cases of **Essop v Home Office**; **Naeem v Secretary of State for Justice** [2017] UKSC 27, [2017] IRLR 558 at [27] in the Supreme Court comprehensively considered the principles relating to a claim of indirect discrimination (Lady Hale at paragraphs 23 – 29):

    84.1. There is no requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others.
    84.2. Indirect discrimination does not require a causal link between the less favourable treatment and the protected characteristic (like direct discrimination). Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. It assumes equality of treatment, but aims to achieve equality of results.
    84.3. The reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider. Both the PCP and the reason for the disadvantage are 'but for' causes of the disadvantage: removing one or the other would solve the problem.
    84.4. There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.
    84.5. It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence, but a correlation in the statistics is not the same as a causal link.

84.6. It is always open to the respondent to show that the PCP is justified.

85. For the purpose of finding discrimination, a tribunal is entitled to take account of (take "judicial notice" of) facts that are "so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry" (**Phipson on Evidence** (19th Edition)).

86. A respondent has a defence to an indirect discrimination complaint where it can show that the PCP was a proportionate means of achieving a legitimate aim (i.e. it is objectively justified). The respondent is only required to demonstrate that the measures taken were "reasonably necessary" in order to achieve the legitimate aim(s) (**Barry v Midland Bank** [1999] ICR 859). The Tribunal should undertake a fair and detailed analysis of the working practices and business considerations involved so as to reach its own decision as to whether the treatment was justified.

Determinations

87. We set out here our unanimous determinations of the issues in accordance with our findings, including any additional findings of fact set out below.

Regulation 5 complaint

The treatment

88. The first issue is one of fact: did the treatment complained of happen? In our findings of fact, above, we found the following.

88.1. The respondent did not fail to engage and consult with the claimant between October and November 2023 as part of the Safeguarding Department Review, or at all.
88.2. The respondent did not require the claimant to re-apply to become a part-time worker by way of an email of 3 November 2023 or an email of 6 November 2023, nor did it require the claimant to prepare a proposal to include eligibility for being a part-time worker. It did require the claimant to complete a form FW1 for the purposes of reviewing her existing part-time pattern and ask her to make proposals for an adjusted pattern which would fit with the new four week shift pattern.
88.3. The time frame for consideration and approval of individual patterns was short but it was not 'shorter' than anyone else.
88.4. The respondent did refuse to consider the claimant's shift proposal in October and/or November 2023.
88.5. The respondent did refuse to allow any right of appeal, by way of an email of 6 November 2023 from DCI Dawson.

Regulation 5(1)(b) – 'other detriment'

89. The claimant says that she was treated less favourably than a comparable full-time worker by being subjected to "any other detriment by any act, or deliberate failure to act", of her employer (Regulation 5(1)(b)). She does not complain that the less favourable treatment was as regards the terms of her contract (Regulation 5(1)(a)). The question for us is therefore whether the treatment complained of is treatment of a type within Regulation 5(1)(b).

90. We find that the claimant has failed to identify what detriment she was subjected to by the requirement to complete the FW1 form or explain her rationale for the shift pattern she was proposing. The FW1 form was merely a mechanism for reviewing the claimant's part-time working pattern necessitated by the organisational change from a three week shift pattern to a four week shift pattern. The claimant knew why the respondent required the form and understood that it was not an attempt by the respondent to change her status as a part-time worker or deny her rights. We find that she had an 'unjustified sense of grievance'. This was not a detriment.

91. The claimant has not identified how the short time frame for submission of the FW1 and shift pattern was a detriment. The evidence was that employees knew the direction of travel in terms of the choice of four week shift pattern earlier than the announcement, many were discussing their part-time working patterns with DCI Dawson over a number of weeks and the claimant has not alleged that the short time period did not give her enough time to submit the FW1 or have the relevant discussions. We find that the short time period was not a detriment.

92. We find that the respondent's refusal to consider the claimant's shift proposal was a detriment. It resulted in the prospect of a working pattern being imposed on her and in her erroneously being told that she would revert to full-time hours and would not be afforded a right of appeal. That undoubtedly caused the claimant distress and would have caused a reasonable person distress. The respondent's refusal to consider shift patterns which included additional full weekends or blocks of six days off was also a detriment, because it meant the claimant would lose some of the time off she had previously been afforded and around which she had organized her childcare.

93. We find that the respondent's notification to the claimant on 6 November 2023 that she would not be accorded a right of appeal if she did not complete the form FW1 was a detriment. It was later determined that the advice given to DCI Dawson was wrong and the claimant should have been afforded a right of appeal. Had the claimant been given the opportunity to have her proposed working pattern considered and/or a right of appeal, she might have been able to work hours which were more suited to her personal needs, rather than having the prospect of a working pattern ultimately being imposed by the respondent. We consider that a reasonable person would view this as a disadvantage.

94. We therefore concluded that the following treatment both occurred and was a detriment for the purposes of Regulation 5:

    94.1. The respondent's refusal to consider the claimant's shift proposal;
    94.2. The notification to the claimant that she would not be accorded a right of appeal.

Less favourable treatment

95. We accepted the claimant's submissions that DC David Bradbury and DC Andrew Williamson were appropriate comparators for the purposes of the claimant's claim. We rejected the respondent's submissions that they were not

appropriate comparators because they were not on flexible working arrangements. There is no requirement in the PTWR, unlike for the purposes of a direct discrimination complaint, that there be 'no material difference between the circumstances' of the claimant and her comparators (section 23 Equality Act 2010). The PTWR merely require that the comparator is employed by the same employer under the same type of contract at the same establishment and is engaged in the same or broadly similar work.

96. To make a distinction between full-time workers who do not have flexible working arrangements (the claimant's comparators) and those who do (the comparators proposed by the respondent, i.e. full-time workers on flexible working arrangements) was, in effect, an argument that the claimant's proposed comparators were not employed under the 'same type of contract' as the claimant. The case law (**Matthews** and **Roddis**) is clear that the 'same type of contract' is a broad construct and the exceptions in Regulation 2(3) are narrow. It was concluded in those cases that Regulation 2(3)(d) ("any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that the workers of that description have a different type of contract") was not intended to allow employers to single out particular kinds of part-time working arrangements and treat them differently from the rest. A worker on a zero-hours contract could compare themselves with a full-time employee. To say that a part-time worker can only compare themselves with full-time workers who work flexibly introduces an additional hurdle which, in our view, defeats the purpose of the legislation. If that were an arguable limitation on the comparisons available, a part-time worker might never be able to compare themselves to a full-time worker. The purpose of the PTWR is to enable comparisons to be made and for unjustified less favourable treatment on grounds of part-time worker status to be prohibited. It would be self-defeating to say 'you can only compare yourself with a type of full-time worker who is, by definition, similarly disadvantaged'. We agreed with the claimant that the respondent was seeking to introduce the mischief warned against in **Matthews**, and thereby defeat the purpose of the PTWR.

97. The claimant's chosen comparators were not working under a different type of contract for the purposes of Regulation 2(3). They were employed by the same employer under the same type of contract and engaged in the same or broadly similar work. They both worked in child safeguarding, which required a particular level of skill and experience involved in dealing with external partners specific to children, schools, children's social care and the statutory framework.

98. We concluded that the respondent's refusal to consider the claimant's shift proposal and the notification to her that she would not be afforded a right of appeal constituted less favourable treatment than that afforded to her comparators, for whom working pattern proposals were not refused (because they were not required to submit them) and an appeal was not denied (because they did not require an appeal).

Regulation 5(2)(a) - causation

99. Regulation 5(2)(a) provides that the claim will not succeed unless the treatment was 'on the ground that the worker is a part-time worker'. Regulation 8(6) places the burden of proving the ground for the less favourable treatment on the employer. The claimant submitted that the refusal to consider her shift

proposal and the denial of a right of appeal were because she was a part-time worker. We found as a fact that the reason for those actions was because ER gave DCI Dawson confusing advice and because the claimant refused to complete the FW1.

100. The claimant's argument appears to be that 'but for' the fact that she was a part-time worker, the less favourable treatment would not have occurred. The core of her case is that it was only because she was a part-time worker that she was required to present a proposed working pattern on form FW1. In effect, she says the fact of her part-time status led to a chain of events: Had she not been on an existing part-time pattern:

100.1. she would not have been required to complete an FW1; then
100.2. she would not have refused to complete the FW1 and instead submitted a shift pattern proposal without an FW1; then
100.3. ER would not have given DCI Dawson incorrect or confusing advice; then
100.4. the respondent would not have failed to review her proposed shift pattern; then
100.5. she would not have needed to appeal; and then
100.6. she would not have been denied a right of appeal.

101. However, the case law is clear (**Gibson** and **Khan**) that the correct test is the 'reason why' test, not a 'but for' test. The Tribunal should examine the reason or motive, conscious or subconscious, for the less favourable treatment. The respondent has satisfied us that the cause of both the failure to consider the claimant's working pattern proposal and the refusal of an appeal was the claimant's own refusal to complete the FW1 form and confusing advice to DCI Dawson from ER. The respondent has also persuaded us that the refusal of additional full weekends/long blocks of time off was because of the operational needs of the respondent, as identified in the original safeguarding review.

102. We are satisfied that the fact that the claimant was a part-time worker was not a factor, conscious or subconscious, in DCI Dawson's decision to refuse to review the claimant's part-time working pattern or deny a right of appeal. Even if it had featured to some extent, we would find it was not an effective or predominant cause of it. Further and separately, we consider that we are bound by the views of the EAT in **Augustine** that, at present, the correct state of law in England and Wales is that the part-time status must be the sole reason for the less favourable treatment, as per **McMenemy**. We find that the respondent has shown that the reason for the less favourable treatment was not that the claimant was a part-time worker.

103. In our judgment, therefore, any acts or omissions of the respondent which amounted to less favourable treatment were not on the ground that the claimant was a part-time worker. The complaint under Regulation 5 PTWR therefore fails and is dismissed. It is not therefore necessary to consider whether the respondent can show that its actions were a proportionate means of achieving a legitimate aim.

Regulation 7 complaint

104. Regulation 7(2) provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by the employer on a 'specified ground'. The first question is therefore one of fact: Did the act or deliberate failure to act complained of actually occur. The second question is whether, if it did occur, it was a detriment.

105. We find that:

105.1. As discussed above, the respondent's actions in refusing to consider the claimant's working pattern proposal and refusing to allow an appeal (by way of DCI Dawson's email dated 6 November 2023) were detriments.

105.2. DCI Dawson decided to move the claimant to Team Four as notified to the claimant on 13 November 2023. That move would have occurred in March 2024, had the claimant been at work at that time. We find that this move was a detriment because she had worked under DS Bayliss for some considerable time and had a good relationship with him which was important to her. We find it was reasonable for her to view it in that way in the circumstances, in particular in the context of the difficult nature of the work the claimant was involved in.

105.3. DCI Dawson notified the claimant on 16, 22 and 24 November 2023 that, if she did not submit an FW1, she would revert to full-time hours in March 2024 and her part-time working would cease. We find that this was a detriment to the claimant in that she genuinely believed the respondent intended to deny her part-time working from March 2024 and a reasonable person would clearly view this as a disadvantage. We accepted that DCI Dawson's word overrode any reassurances given to the claimant by ER, by virtue of DCI Dawson's authority.

105.4. The claimant was invited to a meeting with DCI Dawson on 24 November 2023 at which DCI Dawson told the claimant she would need to complete the FW1 form. We find that being invited to a meeting and being told she needed to complete the FW1 form were neutral and innocuous acts of a manager needing to talk to an employee. They cannot, in and of themselves, be characterized as a detriment. The claimant appeared, in her evidence, to suggest that it was the tone with which she was 'summoned' to the meeting and the tone in which DCI Dawson tried to 'force' her to complete the FW1 which represented a detriment. However, from the claimant's own record of the meeting we find that there was nothing detrimental or threatening in DCI Dawson's actions. We find the claimant had an 'unjustified sense of grievance' and a reasonable person would not have taken the view that this was a detriment.

106. We therefore concluded that the respondent subjected the claimant to the following detriments for the purposes of the Regulation 7 complaint:

106.1. Refusing to consider her shift pattern;
106.2. Denying her the right of appeal;
106.3. Notifying her that she would revert to full-time;
106.4. Moving her to Team Four.

Regulation 7(3) – ‘specified grounds’

107. The claimant says these actions were done by the respondent on a ground specified in Regulation 7(3), specifically her email dated 4 November 2023 to DS Bayliss and her email dated 7 November 2023 to DCI Dawson. She says those emails constituted actions under Regulation 7(3)(a)(iv) because she had “otherwise done anything under these PTWR in relation to the employer or any other person”, (v) “alleged that the employer had infringed these Regulations” and/or (vi) “ refused (or proposed to refuse) to forgo a right conferred on him by these Regulations”. The question for us is whether the two emails identified by the claimant did something under those paragraphs.

108. The claimant’s email to DS Bayliss on 4 November 2023 (page 343) objected to the use of the FW1 form and submitted her proposed shift pattern. The email stated ‘I am already a PT worker, with an agreed PT shift arrangement… This is a review of my part time working and not an application”. The email referred to the respondent’s Flexible Working Policy. The claimant was clearly referencing her existing part-time hours and her concern about changes to her agreed pattern of work. What the claimant’s email did not do was assert that the claimant had been treated less favourably than full-time workers, nor make reference to any other right under the PTWR. Although the email mentioned part-time working and the claimant’s part-time working status, there was no allegation or insinuation of less favourable treatment, detriment or anything breaching the PTWR. The email merely objected to the use of the FW1 form. We are conscious that the caselaw is clear that there is no requirement that the claimant specifically reference the PTWR, but the asserted facts must, if verified, be capable of amounting to an infringement of the PTWR. In our judgment, merely making reference to being a part-time worker or to an agreed part-time working pattern, or objecting to being required to put forward an alternative pattern in a specific form is not capable of amounting to an allegation of an infringement of the PTWR. The PTWR do not afford the right to work part-time, nor to retain existing part-time working or specific part-time working patterns. We are not convinced the claimant was refusing to forgo a right conferred on her by the PTWR, since the PTWR do not confer the right she appeared to be asserting.

109. The claimant’s email to DCI Dawson on 7 November 2023 highlighted the respondent’s Flexible Working Policy and the claimant’s interpretation of it. It asked DCI Dawson to consider the template the claimant had previously submitted and stated, “I am a part time worker” and made reference to contemplated legal action. It stated, “it is regrettable that I am being directed to apply for PT working when I am already a part time worker”. The implication of this sentence was, in our view, that the claimant believed the respondent was planning to deny her the right to work part-time. However, the right to work part-time is not a right conferred by the PTWR. The claimant submitted that the emails referred to rights under the Flexible Working Policy and that, because that Policy was implemented in accordance with the PTWR, her emails must fall under the category of ‘protected acts’ (to make use of terminology from discrimination law). The claimant submitted that she was asserting her right as a part-time worker not to have to fill in an FW1 and her right to have her working pattern reviewed instead. However, those are not rights contained in the PTWR. The claimant’s email of 7 November 2023 did

not assert that she was being treated less favourably than full-time workers nor assert any other right conferred by the PTWR. Again, we are not persuaded that the claimant's email was capable of amounting to something under Regulation 7(3)(a).

110. Further, and separately, we find that DCI Dawson did not view the claimant's emails as asserting any rights under the PTWR, or she would have said as much in her requests for advice to ER. She did not believe or suspect that the claimant had done or intended to do any of the things in Regulation 7(3) PTWR

Regulation 7(3) - causation

111. Regulation 7(3) requires that the reason or grounds for the detriment are those set out in the remainder of that paragraph. We find, separately from our consideration of whether the claimant's emails of 4 and 7 November 2023 fell within Regulation 7(3)(a), that the detrimental actions by the respondent were not caused by those emails or by the claimant asserting rights under the PTWR. We find that DCI Dawson's actions were caused by the claimant's refusal to complete form FW1 and DCI Dawson's understanding of the incorrect/confusing advice from ER. We find that DCI Dawson did not interpret the claimant's emails as an assertion of rights under the PTWR. We find that DCI Dawson was not seeking to punish the claimant for anything, but instead, was trying to get the process right: The claimant's emails of 4 and 7 November 2023 were not the cause of or grounds for DCI Dawson's actions, either subconsciously or consciously, except in so far as they formed part of the overall chain of events described.

112. In our judgment, therefore, although the respondent subjected the claimant to some detrimental treatment, the claimant's emails were not 'specified grounds' under Regulation 7(3) and, separately, the respondent did not subject the claimant to the detriments because of her emails or for any of the reasons in Regulation 7(3) PTWR. The Regulation 7 complaint therefore fails and is dismissed.

<u>Indirect sex discrimination complaint</u>

113. Section 19(1) EQA refers to a provision, criterion or practice (PCP) applied by the respondent. It was not disputed that the respondent had a PCP of 'reviewing and implementing a new shift pattern at the safeguarding unit', as alleged by the claimant.

114. Section 19(2)(a) requires that the respondent applies the PCP to persons with whom the claimant does not share their protected characteristic. In this case, the claimant is a woman and it was not disputed that the respondent applied the PCP to men: it was applied to all of the respondent's employees in the safeguarding department.

115. Section 19(2)(b) requires that the PCP puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it. In other words, the PCP must put women at a particular disadvantage in comparison

with men. Section 19(2)(c) requires that it puts, or would put, the claimant at that same disadvantage. While we accepted that the PCP and change to the four week pattern put the claimant at a disadvantage because it would include more weekend working and shorter blocks of time off causing her a problem with childcare, we did not conclude that the PCP put female employees in the safeguarding department at that same particular disadvantage. The pool for comparison when assessing particular disadvantage is not straightforward. Section 23 requires that it should be a comparison with those whose circumstances are the same or not materially different. Neither the claimant nor respondent made any specific submissions on the correct pool for comparison. We considered that there were two potential pools for comparison: all men in the safeguarding unit or, as the respondent pleaded in relation to comparison for the purposes of the PTWR claims, men in the safeguarding unit who were required to complete an FW1 because they worked flexibly. Whichever pool is the correct one, the claimant is required to show that women suffered a particular disadvantage in comparison. As explained below, it is not necessary to determine which of the two potential pools is appropriate, because in our judgment there is no 'particular disadvantage' to women, whichever pool is used.

116. The claimant submitted that there would 'inevitably be a detriment' to women from the shift changes proposed and asked us to take judicial notice of the fact that more women than men have childcare responsibilities. We accept that we are required to take judicial notice of the well-established concept of the 'childcare disparity'. However, we consider that taking judicial notice of the childcare disparity does not necessarily mean that group disadvantage is made out. Whether group disadvantage occurs depends on the interrelationship of that childcare disparity and the PCP in question. In this case, the specific PCP, and the South Yorkshire shift pattern which resulted, was not necessarily disadvantageous or more disadvantageous for those with childcare responsibilities. In fact, the data and analysis in the EHR assessment showed that it was likely to be less problematic for those with childcare responsibilities. The specific circumstances have to be considered and taking judicial notice of the childcare disparity in this case does not result in a finding that women were put at a particular disadvantage, whichever pool for comparison is used. In the absence of specific evidence, we are cannot conclude that the PCP put women at a particular disadvantage when compared with men, whether they worked flexibly or not. On the contrary, the evidence before us suggested that the new pattern had fewer weekends (2 in 4 rather than 2 in 3) and fewer late shifts (7 in 28 rather than 7 in 21), compared to the previous pattern. The conclusion of the EHR assessment was that the shift change may actually benefit women and/or part-time and flexible workers and/or those with childcare commitments, depending on their current working patterns and requirements going forward, as some might no longer require part-time working because the new shift pattern was a potentially better fit with childcare and other needs. We considered that that was a reasonable conclusion, given that fewer weekends and fewer late shifts would be worked in general. Without clear statistical evidence to contradict that conclusion in the EHR assessment, we are not prepared to conclude that the PCP put women at a particular disadvantage when compared to either of the potential pools for comparison.

117. Section 19(2)(d) provides a defence, in that the respondent can prove that the potentially discriminatory PCP was a proportionate means of achieving a

legitimate aim. In our judgment, even if we are wrong in our conclusions in the preceding paragraphs, and the PCP does or would put women at a disadvantage, we find that the respondent has proved that its decision to change the shift pattern was a proportionate means of achieving a legitimate aim. The HMICFRS PEEL inspection and subsequent reviews highlighted issues with the three week shift pattern in safeguarding and made recommendations for change. The respondent's safeguarding review and COT decision paper record that the decision to move to a four week shift pattern was to provide a more effective safeguarding unit. It was not disputed that this was a legitimate aim.

118. We find that the respondent has shown that the PCP was a proportionate means of achieving its aim. The review and implementing of the new shift pattern (the PCP) was intended to achieve the aim of a more effective safeguarding unit, for example providing more cover at weekends. It was specifically in response to the HMICFRS PEEL inspection and recommendations. The respondent has satisfied us that it was reasonably necessary. The respondent consulted on the change from a three week to a four week pattern and, in particular, on which four week pattern to adopt, with the Federation, the trade unions and employees and carried out an EHR assessment. A decision on which pattern to adopt was not finally announced until the end of the consultation period. The respondent adopted a common-sense approach by announcing which pattern was adopted, then identifying which teams employees would be allocated to and then inviting submission of individual proposed flexible working patterns based on the shift pattern/team information. The claimant submitted that it could have consulted with part-time workers at an earlier stage, but our finding is that part-time workers were fully included in all the stages of consultation. Individual consultation on specific working patterns could not have occurred sooner, as a matter of common sense, for the reasons set out above. The claimant did not assert that she should have been permitted to remain on her previous three week shift pattern, presumably because she acknowledged that it would be impossible when everyone else was working to a four week shift pattern.

119. The claimant's objection to the process was to the use of the FW1 form as a mechanism for review of her previous working pattern. In our judgment, the requirement to complete an FW1 was a proportionate means of achieving the respondent's aim. The respondent's specific aim, in using the FW1, was to review all part-time working patterns in light of the new core four week shift pattern, in an equitable, fair and consistent manner. It opted to use the FW1 to do so because the structure of the form ensured that all the relevant information could be gathered, presented to managers and their conclusions be recorded appropriately ready for an appeal, if required. The respondent was introducing change across a large number of employees, departments and Districts, with different managers doing the decision making. We are persuaded that it prioritized consistency in decision making. Although the respondent could have reviewed the claimant's proposed shift pattern in the form she submitted it on 4 November 2023, to do so would have risked treating her differently to others, producing a result which was not equitable, consistent or fair to her or others and opening the respondent up to complaints of discrimination or inequitable, unfair or inconsistent treatment. It would not therefore have been 'less discriminatory'. In our judgment, the claimant's preference to avoid completing an FW1 form and/or to retain her existing

working pattern does not outweigh the respondent's needs in this regard. We find that the respondent has shown that, balancing the respective needs of the parties, the respondent's review and implementation of the new shift pattern, including its use of the FW1 and refusal to consider the claimant's individual shift pattern proposal and denial of appeal without the FW1, were a proportionate means of achieving the legitimate aim of providing an effective safeguarding unit following the outcome of the HMICFRS PEEL inspection in the circumstances.

120. In conclusion, we find that the complaint of indirect sex discrimination (section 19 EQA) fails and is dismissed.

Approved by:

Employment Judge Bright

1 May 2025

Notes

1. All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

2. If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

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