

Neutral Citation Number: [2026] EAT 32

Case No: EA-2023-001093-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 February 2026

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY

Between:

MRS GEMMA DOBSON

- and -

NORTH CUMBRIA INTEGRATED CARE NHS FOUNDATION TRUST

Appellant
Respondent

Mohinderpal Sethi KC and Callum Rodgers (instructed by Slater and Gordon UK LLP)
for the **Appellant**

Stuart Brittenden KC (instructed by Ward Hadaway) for the **Respondent**

Hearing date: 16 December 2025

JUDGMENT

SUMMARY

Sex Discrimination (4)

At the relevant time, in 2016, the Claimant had three children, two of whom were disabled. From about 2008, the Claimant had a fixed working pattern whereby, due to her caring responsibilities for her children, she would only work on Wednesday and Thursday each week. In 2016, the Respondent introduced a PCP pursuant to which the Claimant was asked to work flexibly, including at weekends. The Claimant was clear that she could not accommodate that request, and she was eventually dismissed. Her claims of indirect discrimination and unfair dismissal were dismissed. The Claimant successfully appealed and the matter was remitted to the same Tribunal to consider, amongst other things, whether the Respondent could show the PCP to be a fair and proportionate means of achieving a legitimate aim. The Tribunal held that the Respondent had established that the PCP was justified and that the dismissal was not unfair. On appeal, it was contended that, in assessing the proportionality of the PCP, the Tribunal had erred in focusing too much on the disadvantage to the Claimant, rather than the affected group more widely, and had placed too much weight on the Claimant's responses during the consultation process prior to her termination.

Held, dismissing the appeal, that the Tribunal had not erred as alleged. It was not irrelevant to consider the disadvantage to the Claimant or her responses. Short of perversity, which is not alleged, the Tribunal was entitled to take the approach that it did to the evidence presented.

THE HONOURABLE MR JUSTICE CHOUDHURY:

Introduction

1. I shall refer to the parties as “the Claimant” and “the Respondent” as they were below.
2. This is the second appeal in these proceedings, which arise out of the Claimant’s former part-time employment with the Respondent as a community nurse. At the relevant time, in 2016, the Claimant had three children, two of whom were disabled. From about 2008, the Claimant had a fixed working pattern whereby, due to her caring responsibilities for her children, she would only work on Wednesday and Thursday each week. In 2016, the Respondent introduced a Flexible Working policy (“the FW Policy”), pursuant to which the Claimant was asked to work flexibly, including at weekends. The Claimant was clear that she could not accommodate that request, and she was eventually dismissed. The Claimant brought proceedings claiming indirect discrimination - in that an unjustified provision, criterion or practice (“PCP”) was applied to her employment - and unfair dismissal. The first hearing of this matter was in 2019, when the Employment Tribunal (“the Tribunal”) (Employment Judge Langridge presiding) dismissed her claim (“the First ET Judgment”). The Claimant’s appeal against the First ET Judgment was heard by the EAT (Choudhury P sitting with members, Ms Branney and Ms Wilson) in February 2021. The EAT upheld the appeal (**Dobson v North Cumbria Integrated Care NHS Foundation Trust** [2021] ICR 1699 (“*Dobson I*”)), deciding that the Tribunal had erred in concluding that there was no evidence of “group disadvantage” to found a claim of indirect discrimination, and that the Tribunal ought to have taken judicial notice of the “childcare disparity”, which meant that women bear the greater burden of child care responsibilities than men. The matter was remitted to the same Tribunal to consider, amongst other things, whether the Respondent could show the PCP to be a fair and proportionate means of achieving a legitimate aim.
3. The remitted issues were considered by the same Tribunal in November 2022, with its judgment being sent to the parties on 11 August 2023 (“the Judgment”). The Tribunal concluded

that the PCP was justified and that the claim of indirect sex discrimination failed, as did the claim of unfair dismissal. The Claimant appeals against the Judgment, the principal issue before the EAT being whether the Tribunal erred in its conclusion that the PCP was justified.

4. The Claimant is once again represented by Mr Sethi KC, assisted by Ms Berry (who appeared below in the Second ET hearing), Ms Balmelli and Mr Rodgers. The Respondent is represented by Mr Brittenden KC, who also appeared below. I am grateful to all Counsel for their helpful written and oral submissions.

Background

5. As there was no challenge to the findings of background fact, it is convenient to restate the summary of the background set out in *Dobson 1*:

“3 The Claimant was employed by the Respondent as a Band 5 community nurse within the Cockermouth Community Nursing Team (“the Team”) from 1 September 2004 until her dismissal on 19 July 2017. At the time of her dismissal, the Team comprised nine women (seven on Band 5 and two on Band 6) and one man, who was also the only Band 7 nurse.

4 The Claimant made a flexible working request in 2008 after the birth of her first child, who is disabled. It was agreed that she would work 15 hours per week over two fixed days, namely on Wednesday and Thursday. The Claimant’s mother-in-law arranged her work to be able to provide childcare for the children on those two days. In 2012, the Claimant’s third child was born and he was subsequently diagnosed with autism in 2014.

5 In 2013, the Respondent held a working pattern review with the Claimant during which she was asked to work the occasional weekend. However, given the Claimant’s domestic circumstances and caring responsibilities, it was agreed at that time that the existing arrangement of working on two separate days per week only should continue.

6 In 2016, the Respondent issued a new rostering policy under which all flexible working arrangements across the Trust were to be reviewed. On 8 September 2016, the Respondent’s district nurse team leader, Mr Owens, met with the Claimant and her trade union representative to discuss her working arrangements. The Claimant was asked to work an occasional weekend no more than once a month. On 30 September 2016, the Claimant commenced a period of sickness absence for reasons related to the subject matter of the discussion with Mr Owens. On the same day, the Claimant wrote to Mr Owens to inform him that she would not be considering alternative arrangements as she had none available. That remained the Claimant’s position throughout all subsequent discussions. The Respondent gave the Claimant notice that she may be required

to work on other days, including Saturdays. The Claimant rejected the proposed changes to her working arrangements, and, on 8 November 2016, she raised a grievance.

7 The grievance was rejected, as was the Claimant’s appeal against that grievance outcome. On 6 April 2017, the Respondent invited the Claimant to a final meeting to discuss her working arrangements. At a meeting between the Claimant and the Respondent on 20 April 2017, the Claimant was informed that the Respondent had no other option than to issue a notice of dismissal and to re-engage the Claimant on new terms requiring her to work on additional days subject to the Respondent giving notice of any different days to be worked. The Claimant did not accept the new terms, and, on 26 April 2017, the Respondent gave notice to terminate her employment.

8 The Claimant’s appeal against her termination was rejected, and her employment terminated on 19 July 2017.”

6. The Claimant’s eldest child, who was severely disabled, sadly passed away in 2022.
7. At the second ET Hearing, the Tribunal made detailed additional findings relevant to the remitted issues. These included the following:
 - i. At the relevant time in October 2016, the Respondent employed 5,313 people. The Respondent employed a total of 278 Band 5 community nurses across five areas, 178 of whom were on part-time contracts. The Respondent was unable to provide detail showing the number of Band 5 community nurses working set hours and/or days as such data was either not retained or not available.
 - ii. The FW Policy stated that the advantages for the Respondent included providing flexibility in staff planning to match peaks and troughs in activity, having a greater range of skills and experience available in the team, and not losing existing staff who cannot continue to work full time.
 - iii. A Staff Rostering Policy (“the SR Policy”) was introduced in January 2016, applicable to the entire workforce. The SR Policy states, amongst other matters, that “The Trust supports the principle regarding work life balance and flexible working. However this should be set against the need to ensure a safe levels (sic) of staffing to maximise the quality of patient care and reduce clinical and non-clinical risk...”, and that whilst consideration would be given to flexible

working, this needed to be “fair and equitable to all staff”.

- iv. The Respondent had prepared a “business case” specifically for the Claimant in the context of discussion around changes to the Claimant’s working hours. The business case noted that the Claimant’s inability to be flexible has resulted in unfairness to other staff in that the Claimant would work only one in seven Christmas holidays where other staff worked one in three. In practice, the Claimant had never worked on a public holiday. The Claimant’s refusal to work any weekends had also resulted in cover having to be provided during weekends by more senior nursing staff which was considered no longer operationally or financially viable. The Tribunal accepted the Respondent’s evidence as to these practical difficulties as reliable and accurate.
- v. The Tribunal heard evidence from Salli Pilcher, who had been Associate Director of Nursing for Community Services since 2014. Ms Pilcher stated that the nature of the Community Nursing service had changed over the years and was now characterised by increased patient complexity and patient numbers coupled with a need to provide 24/7 care. A change to a more flexible working approach would eradicate emerging problems such as the existence of gaps in the service which meant that some patients were waiting in discomfort or pain before being seen to or being admitted to hospital unnecessarily.
- vi. Ms Pilcher stated that across the whole Trust, no other community nurses experienced the same difficulties as the Claimant in relation to flexible working to the point where they had to leave employment. One physiotherapist had resigned in 2018 due to childcare difficulties, and she later took up bank work.
- vii. Whilst the Claimant had acknowledged the business case and the increase in caseload complexity, she made it clear that she could not accept any change to her existing working pattern. When the Respondent explored with the Claimant

whether she might be able to manage working one in eight Saturdays, she replied (in the course of the grievance investigation):

“No, it doesn’t matter whether it’s every week or once a year it’s not necessarily something that is going to be manageable for me and my family”.

viii. The Tribunal noted that the Claimant wanted her current arrangement to stay in place “forever”.

ix. The Claimant was adamant that neither her mother-in-law (who looked after the children on Wednesday and Thursday) nor her husband (who worked Monday to Friday) could step in to assist at weekends. At no stage did the Claimant put forward any other solution to the problem.

The Tribunal’s decision

8. The Tribunal began its conclusions by identifying the question to be considered:

“191. The question at the heart of this case is whether the respondent could show that the application of its PCP to all community nurses (including the claimant) employed in the Trust was a proportionate means of achieving a legitimate aim – section 19(2)(d). Put simply, this is to be judged objectively by reference to a number of factors, and requires the Tribunal to carry out a careful evaluation of the evidence, in order to strike a fair balance between the claimant's rights as an individual and the interests of the wider community affected (per *Homer*). In this case, that community involved the patients for whose care at home the Trust is responsible, the pool of community nurses in Cumbria who provide that service, and the overarching needs of the organisation to provide its services efficiently and in as cost-effective a manner as reasonably possible.”

9. The Tribunal went on to conclude that:

i. If the PCP was justified for the Cockermouth team in which the Claimant worked, it is no less likely to be justified in respect of the wider pool, i.e. the entire cohort of community nurses: Judgment at [197].

ii. The Respondent had established a legitimate aim, namely:

“the need to provide care to patients in the community, 24 hours per day, 7 days a week and to balance workload amongst the team and reduce the cost of having to use band 6 and 7 registered nurses on a weekend”: Judgment at [203].

iii. The PCP was rationally connected to that legitimate aim: Judgment at [210].

iv. As to the question of proportionality, the Tribunal held as follows:

“240. The fact is that the claimant was determined to retain her set days on Wednesdays and Thursdays for life, and did not want her employer ever to reopen that question again. It is not necessary for the respondent to show that it was impossible to accommodate the claimant’s insistence on being excluded from the PCP. It has nevertheless demonstrated to us through its evidence as a whole that its actions were proportionate and in keeping with its legitimate aim. Weighed against the claimant's intractable position, the reasonable needs of the organisation justified the PCP.

241. The Supreme Court in *Essop* referred to requirements which many people sharing a particular protected characteristic of them cannot meet. In this case, we find on the facts that the claimant could meet the respondent's requirement to work flexibly, including at some weekends, albeit with difficulty. That disadvantage needs to be balanced against the respondent's business needs. That the claimant might have had some difficulty or inconvenience in comply with the PCP does reflect the disadvantage she experienced as a working mother, but the degree of disadvantage when weighed up against the respondent's aims and systems of work did not warrant a conclusion that the PCP was unjustifiably discriminatory.

242. For these reasons, we conclude that the respondent acted proportionately in its application of the PCP to the claimant and that it met the burden of establishing it was justified pursuant to section 19(2)(d) Equality Act 2010.”

Legal Framework

10. As in *Dobson I*, the key provision here is s.19 of the *Equality Act 2010* (“EqA”), which provides:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

...

sex;

...”.

Grounds of Appeal

11. Permission was granted to proceed with the following grounds of appeal:
 - i. Grounds 4 (& 7): discriminatory effect of the PCP on the pool of comparison.
The Tribunal failed to give consideration to, or gave insufficient consideration to, the discriminatory effect of the PCP on the pool of comparison in that it focused too much on the disparate impact of the PCP on the Claimant rather than on the entire affected cohort;
 - ii. Ground 8: irrelevant considerations. The Tribunal erred in finding that the Claimant's responses and lack of suggestions during the consultation with the Respondent were a relevant factor in determining the proportionality of the PCP. The Tribunal also erred by focusing on the Claimant's rejection of the more limited PCP proposed to her in consultation rather than the PCP that was in fact imposed on her.
 - iii. Ground 11: if the dismissal was discriminatory then it was also unfair and the Tribunal ought to have so found.
- 12 I shall deal with each ground in turn.

Grounds 4 (& 7): Failure to consider discriminatory impact of PCP on entire pool

Claimant's submissions

13. Mr Sethi submits that the analysis of proportionality required the Tribunal to focus on the impact of the PCP on the "*class who will be put at a disadvantage by it ... rather than the impact on the individual*": *Harvey on Industrial Relations* at [352.04]. Moreover, the discriminatory effect should be looked at both quantitatively (in terms of the numbers or proportion of persons affected) and qualitatively (in terms of the impact and how long-lasting it is): **University of Manchester v Jones** [1993] ICR 474 (CA) per Ralph Gibson LJ at 497G. Instead, says Mr Sethi,

the Tribunal focused on the discriminatory effect of the PCP on the Claimant. In doing so, the Tribunal is said to have lost sight of the fact that the Respondent's evidence as to the effect of the PCP on the group was lacking, the only such evidence being that of Ms Pilcher that no other Community Nurse was affected to the point of having to leave employment. The Tribunal thereby failed to consider that members of the group may have suffered considerable disadvantage – e.g. in having to pay for additional childcare – in order to comply with the PCP albeit they did not have to cease employment. It is submitted that it is not possible in those circumstances to assess properly whether the Respondent had discharged the burden of justification.

14. It is further submitted that the Tribunal erred in finding that if the PCP was justified in the Claimant's team, then it was no less likely to be justified in respect of the wider pool. Such 'scaling up' was not appropriate on the evidence available. This was not a case where there could be a "reasoned projection" of the discriminatory effect of the PCP as there was simply insufficient information on which to undertake the required analysis.

15. The result, submits Mr Sethi, is that the Tribunal failed to apply the EAT's conclusion in *Dobson 1* to the effect that group disadvantage was made out. The Tribunal's subsequent analysis in respect of justification could not therefore be regarded as safe, and ought to be set aside, with the EAT substituting its own decision on justification or remitting the matter to a freshly constituted Tribunal.

Respondent's submissions.

16. Mr Brittenden reminded the EAT that the Tribunal's finding on justification is essentially one of fact (see *Dobson 1* at [64]), and that, as such, the Claimant's appeal amounts to a perversity challenge. In any event, submits Mr Brittenden, the Tribunal correctly directed itself on the legal principles and went on quite clearly to consider justification by reference to the impact of the PCP on all community nurses as well as on the Claimant herself, the latter analysis being perfectly legitimate. In this case, whilst group disadvantage was a given (in light of *Dobson 1*),

the evidential burden as to the extent of such disadvantage lay with the Claimant and clearly had not been discharged. Even if that were not so, it was not a requirement for the Respondent to undertake a granular analysis of the myriad different ways in which Community Nurses could be disadvantaged, as the particular disadvantage being relied upon by the Claimant was the inability to comply with the PCP at all (which led to her termination) and any such analysis would impose a disproportionate burden on the employer.

17. As to ‘scaling up’, it is submitted that this was a perfectly legitimate finding of fact and discloses no error of law.

Grounds 4 (& 7) - Discussion

18. Guidance on the approach to be taken to the question of justification was provided by the Supreme Court in **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704 at [19]-[24]:

“19 The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from articles 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer’s business: *Bilka-Kaufhaus GmbH v Weber von Hartz (Case 170/84)* [1987] ICR 110.

20 As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] 1WLR 3213, para 151: the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. He went on, at para 165, to commend the three-stage test for determining proportionality derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1AC 69, 80:

“First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?”
As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] ICR 1565, paras 31, 32, it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

...

22 ...Although the regulation refers only to a “proportionate means of achieving a legitimate aim”, this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so...

23 A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. The Employment Appeal Tribunal suggested, at para 44 that “what has to be justified is the discriminatory effect of the unacceptable criterion”. Mr Lewis points out that this is incorrect: both Directive 2000/78 and the 2006 Age Regulations require that the criterion itself be justified rather than that its discriminatory effect be justified (there may well be a difference here between justification under the anti-discrimination law derived from the European Union and the justification of discrimination in the enjoyment of convention rights under the Convention for the Protection of Human Rights and Fundamental Freedoms).

24 Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer...” (Emphasis added)

19. From these passages, it can be seen that, in determining whether the PCP in question is justified, the Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the PCP on “the affected group”. The affected group will of course include the Claimant. This is not a straightforward task as was made clear in **Hardy & Hansons plc v Lax** [2005] ICR 1565 at [32] to [33]:

“32...The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546 , a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman* , the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there

are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.”

20. The Claimant’s contention is that the Tribunal failed in its task by focusing on the disadvantage to the Claimant rather than the disadvantage to the group. Mr Sethi made it clear that in making that submission it was not being suggested that the impact on the Claimant was irrelevant. The submission therefore appears to be that the Tribunal placed undue weight or focus on the impact on her as opposed to the impact on the group. Indeed, that is the basis on which permission to pursue this ground of appeal was granted when it was said:

“It is arguable that the authorities establish that the focus of the tribunal, for the purposes of the balancing exercise, should be on the extent of the disparate impact of the PCP on the group, although the extent of the disparate impact on the individual claimant is not to be excluded altogether and may be considered as well. It is arguable that the present tribunal
(a) focused, in relation to disparate impact, too much on the disparate impact on the Appellant, and not sufficiently on the disparate impact on the group...”
(Emphasis added)

21. The legal proposition relied upon by the Claimant to establish an error of law is therefore that the Tribunal should not focus “too much” on the disparate impact of the PCP on the Claimant. However, that begs the question, “How much is too much?” Where a Tribunal has, in accordance with the authorities, considered the impact on the affected group, which will necessarily include the claimant, at what point does it become erroneous in law for that analysis to consider one aspect more than the other? The apparent emphasis on the impact on the individual may arise for good reason, for example, the preponderance of the evidence presented being to that effect, or that the evidence of impact on the group addresses a different period of time from that which is relevant. In other cases, where the position of others is not materially different, the evidence of the impact on the individual may reliably inform the Tribunal about the impact on the group. Where the law stipulates no precise level of “focus” to be placed on either the group or the individual, it is a matter of judgment for the Tribunal as to how to approach the available

evidence. In the present case, the Tribunal repeatedly noted that the evidence as to the precise statistical evidence about the wider pool of community nurses was lacking. However, there were some concrete items of evidence about them, including the fact that none worked on fixed days and none had had to leave employment as a result of the PCP. There was of course extensive evidence about the Claimant's particular difficulties in complying with the PCP. The Tribunal was entitled, in those circumstances to approach the evidence, such as it was, in the way that it did, with there being more analysis of the impact on the Claimant. Short of that approach being perverse, which is not alleged, no error of law arises.

22. None of this detracts from what was said about group disadvantage in *Dobson I*. The EAT there concluded that whilst taking judicial notice of the childcare disparity did not invariably result in group disadvantage being made out, the Claimant's case was one where the PCP was "inherently more likely to produce a detrimental effect which disproportionately affected women": *Dobson I* at [51] and [52]. The Tribunal clearly accepted that conclusion and took group disadvantage as read, saying as follows at [15]:

"15. As stated above, these claims were remitted for a fresh consideration of the question of justification following the EAT's findings that the claimant was disadvantaged by the respondent's application of its PCP, and that group disadvantage was made out by reference to the 'childcare disparity' about which Ms Van Zyl gave evidence..."

23. Further, at [16], the Tribunal stated:

"While not expressed in terms in the Tribunal's first judgment (given orally) we accept without difficulty that women more than men are likely to be disadvantaged in the workplace by the demands on them for providing childcare in the family."

24. These passages rebut Mr Sethi's suggestion that the Tribunal failed to give effect or have regard to the EAT's conclusion on group discrimination. Of course, in determining the question of justification, the Tribunal is required to balance the *extent* of that disadvantage against the needs of the employer. In doing so, the analysis is not undermined by considering the impact on the individual:

“... The industrial tribunal is required to determine the discriminatory effect of the requirement. That seems to me to require the industrial tribunal to ascertain both the quantitative effect, i.e., how many men and women will or are likely to suffer in consequence of the discriminatory effect, and, also, what is the qualitative effect of the requirement upon those affected by it, i.e., how much damage or disappointment may it do or cause and how lasting or final is that damage?

I therefore do not agree that it is improper in the balancing exercise to take into account the particular hardships which have lain in the way of the particular applicant provided that proper attention is paid to the question of how typical they are of any other men and women adversely affected by the requirement. ...”. (per Ralph Gibson LJ in *University of Manchester v Jones* [1993] ICR 474 at 497G-498A) (Emphasis added)

25. An approach that takes account of the impact on the individual as well as on the affected group more generally is consistent with the legislative provisions and accords with common sense. Section 19, EqA requires both that those sharing the protected characteristic are put to a particular disadvantage and that the Claimant is put to “that disadvantage”. Those are the preliminary requirements under the second and third limbs of s.19 (the first being the application of a PCP to a wider group) even before one gets to the fourth requirement under s.19, EqA that justification is shown. It cannot be right that in considering justification, it is necessary for the Tribunal to disregard or pay less attention to the very disadvantage to the Claimant that was found to exist under the third limb of s.19. Given that the disadvantage suffered by the Claimant, namely the childcare disparity, is that to which other women community nurses were also put, it is logical to consider, so far as is possible on the evidence, the impact of the PCP both on the individual and the group. Indeed, the claim of indirect discrimination could not be made out if there was no impact on the individual, irrespective of the impact on the wider group. What is not permissible is an analysis solely of the impact of the PCP on the individual as that would be to “negate the purpose of having a [PCP] and justifying the [PCP] in the particular circumstances of the business”.

26. The passage in *Harvey’s* on which the Claimant places reliance provides:

[352.04] Where the PCP is a general policy which has been adopted in order to achieve a legitimate aim, it is the proportionality of the policy in terms of the balance between the importance of the aim and the impact on the class who will

be put at a disadvantage by it which must be considered rather than the impact on the individual. In *Seldon v Clarkson Wright and Jakes* the EAT said: ‘Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue.’ This was approved by the Court of Appeal and by the Supreme Court ([2012] UKSC 16, [2012] IRLR 590), where Lady Hale commented on the passage just quoted: ‘Thus the EAT would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it.’

27. The highlighted words must be read in the context of the whole passage. As the passage goes on to make clear, it is the rule (or PCP) which must be justified as opposed to particular instances of its application to an individual. Read thus, it becomes clear that the highlighted words (upon which the Claimant relies) are not to be interpreted as meaning that little or no consideration is to be given to the impact on the individual, but rather that the focus should be on the PCP and its effect more generally. That will of course include the impact on the individual.

28. Mr Sethi submitted that there was a misdirection of law on the part of the Tribunal at [32] of the Judgment where it was said as follows:

“32. In *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601 the test was articulated by the Supreme Court as follows:

- Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right?
- Is the measure rationally connected to that aim?
- Could a less intrusive measure have been used? and
- Bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?” (Emphasis added)

29. It is said that this test in fact derives from a different case, namely **R (Tigere) v Secretary of State for Business Innovation and Skills** [2016] 1 All ER 191, and is not apt for the present case, which is concerned with indirect discrimination rather than one involving justification for a contravention of Article 2 of the First Protocol to the *European Convention on Human Rights*.

Mr Sethi is undoubtedly correct that the precise formulation as set out in [32] of the Judgment

does not appear in *Homer* as suggested by the Tribunal. However, no criticism can be made of the first two bullet points, each of which do appear in *Homer* in a similar form: see the passages cited above. *Homer* states expressly that a measure may be inappropriate if it goes further than is reasonably necessary in order to achieve a legitimate aim: *Homer* at [23]. One way of testing whether a measure has gone further than reasonably necessary would be to ask whether a less intrusive measure could have been used. In other words, the third bullet point in [32] of the Judgment is also to be found in *Homer* in some form.

30. Mr Sethi's real objection lies, however, with the inclusion of the fourth bullet point and the reference to the balance between the rights of the individual and the interests of the community. That same phrase is used at paragraphs [191] and [228] of the Judgment. However, as Mr Sethi fairly accepted during submissions, the Tribunal's reference to "the community" in its judgment is clearly intended to refer to the Trust and all its employees rather than the wider EU community in any European law sense. As the Tribunal stated at [191]:

"191. The question at the heart of this case is whether the respondent could show that the application of its PCP to all community nurses (including the claimant) employed in the Trust was a proportionate means of achieving a legitimate aim – section 19(2)(d). Put simply, this is to be judged objectively by reference to a number of factors, and requires the Tribunal to carry out a careful evaluation of the evidence, in order to strike a fair balance between the claimant's rights as an individual and the interests of the wider community affected (per Homer). In this case, that community involved the patients for whose care at home the Trust is responsible, the pool of community nurses in Cumbria who provide that service, and the overarching needs of the organisation to provide its services efficiently and in as cost-effective a manner as reasonably possible." (Emphasis added)

31. Viewed thus, the criticisms of the Tribunal's misquote of *Homer* collapse into nothing. In any event, as is apparent from that passage at [191], the Tribunal had in mind precisely the question it had to consider and was not focused solely on the impact on the Claimant. Whilst the Tribunal did give extensive consideration to the impact on the Claimant, it also considered the impact on the group as the following passages in the Judgment demonstrate:

i. At [69] the Tribunal found that:

"The respondent's Staff Rostering Policy ('SR Policy') was issued in January 2016. It was a Trust-wide policy and applied to the whole workforce. It led

to a review of all flexible working across the Trust. The respondent was unable to provide the claimant with detailed information about the number of individual community nurses affected by the SR Policy, or how many of those people worked full-time or part-time. Ms Pilcher's evidence was that no community nurses in the Trust were adversely affected by it, and only one other person, a physiotherapist, had to leave due to the increased need for flexible working. (Emphasis added)

- ii. At [95], the Tribunal found that the “changes to the rota have affected not only community nurses but also support staff, who have had to increase their flexibility”, and that “Across the whole Trust, no other community nurses experienced the same difficulties as the Claimant to the point where they left employment”, although one physiotherapist resigned because of child care difficulties and later took up bank work.

The highlighted words indicate an acknowledgement that whilst difficulties may have been experienced by other community nurses (consistent with the EAT's conclusion in *Dobson I* that there was group disadvantage), these were not to the same extent as those experienced by the Claimant.

- iii. At [118], the Tribunal noted the evidence of Ms Place, the Respondent's Interim Quality and Safety Lead, who, in the course of hearing the Claimant's grievance, “took into account that all Trust employees are required to be flexible, and she knew of no one working set days [like the Claimant]”.
- iv. See [191] which is cited above and which refers to the need to consider the application of the PCP to “all community nurses (including the claimant)”;
- v. At [192] the Tribunal noted that:

“192. In line with *Essop*, we might have expected the respondent to produce evidence of a statistical nature to support its case. This did not happen, because such evidence as the respondent did gather (produced through the claimant's FOI requests) did not answer the particular questions she wished to address. For example, the available data does not show working patterns, only working hours. What we do know, from Ms Pilcher's evidence, is that the claimant was the only community nurse unable to comply with the PCP and whose employment was terminated as a result.”

vi. At [195], the Tribunal recognised the shortcomings of the Respondent's evidence as to the wider pool of nurses but concluded as follows:

“195. It is correct to say, as the claimant did, that there was a lack of statistical evidence about the wider pool of community nurses employed by the respondent at the relevant time. That said, we did not find that such evidence was necessary in order to evaluate the case. Firstly, the documents produced by the respondent in the form of the business case and appendices depicted clearly the backdrop against which the review of all flexible working across the Trust was being carried out. We found the claimant's evidence about the lack of detail and clarity in the business case to be somewhat disingenuous because that summary, read with its detailed appendices, leaves the reader in no doubt as to the reasons why the PCP was considered necessary.”

vii. At [197], the Tribunal said as follows:

197. For the respondent Mr Brittenden submitted that if the PCP was justified for the Cockermonth team in which the claimant worked, it is no less likely to be justified in respect of the wider pool. We agree. While the statistical data was lacking from the respondent as to the particular working patterns among its 278 band 5 community nurses, we were able to glean from the data available (for example the later RCN survey) that fixed hours working was at that time most prevalent among those working in community settings, and that women are much more likely to work part-time hours than men. It is not therefore difficult to extrapolate the gender balance and working patterns across the Trust. We note also that in the relevant pool of community nurses employed by the respondent, only the claimant was unable to meet the requirements of the PCP. The only other positions where the claimant's fixed working could be accommodated were in other fields of nursing, as seen in the type of work undertaken by the claimant following her dismissal.” (Emphasis added)

viii. At [199], the Tribunal said that:

“199. The business case and appendices, from which we have quoted extensively in our findings of fact, put beyond doubt that the circumstances affecting the claimant were not limited to the team in Cockermonth but affected community nursing across the entire Trust. The business case, read alongside the evidence of the respondent's witnesses, shows that the issues identified were not unique to the claimant and the other members of her small team. In other words, we accept the respondent's submission that if the PCP is justified for the Cockermonth team, it is no less so in respect of the wider pool.” (Emphasis added)

32. These passages, amongst others, indicate that the impact on the group was considered.

The information as to the impact on the group could be summarised as follows:

i. The PCP was applied to them all in that all community nurses (and indeed all

- employees at the Trust) were required to work flexibly;
- ii. No other employee worked set days like the Claimant. (There was a suggestion during Mr Sethi's submissions that this finding was perverse given the absence of any direct evidence on this issue. The contention is unfounded given the evidence of the grievance process during which Ms Place stated that she knew of no other employee working fixed days: see [118] of the Judgment);
 - iii. The Claimant's working pattern adversely affected the ability of others to take leave at e.g. Christmas and/or required more senior community nurses to work at weekends more often;
 - iv. No other community nurse in the Trust experienced the same difficulties as the Claimant to the point where they had to leave their employment.

33. Mr Sethi's complaint is that that is not sufficient and that the Tribunal ought to have gone further and inquired as to the specific challenges faced by community nurses as a result of the PCP. I disagree. The disadvantage relied upon by the Claimant was not that she could comply with the PCP with some difficulty or additional cost, but that she could not comply with it at all to the point where her employment had to be terminated. The inference to be drawn from the findings summarised at [32] above is that all other community nurses could comply with the PCP. That is not to say that there was no disadvantage caused by the PCP: clearly there was as the EAT's finding that there was group disadvantage by reason of the childcare disparity dictates. Some may have had to call in help from other family members or incur the expenditure of additional babysitting. The Tribunal implicitly recognised that such steps would amount to a disadvantage when it said at [236]:

“In reaching this conclusion, we do not discount the fact that relying on family members (even her own husband) for such support could amount to a disadvantage.”

34. However, the fact that every other community nurse was ultimately able to comply with

the PCP is relevant in assessing the “seriousness of the detriment” caused to the group: see *Homer* at [20] citing from **R (Elias) v Secretary of State for Defence** [2006] 1 WLR 3213, at [151]. The conclusion, reasonably to be drawn, is that the detriment was at the lower end of the scale, a conclusion that the Tribunal set out expressly in the remainder of [236]:

“But the extent of that disadvantage on an occasional weekend each year has to be weighed against the reasonable needs of an NHS Trust to deliver its care services in a manner which takes account of the requirements of both patients and other community nurses... in the circumstances of this case we conclude that the disadvantage was at the lower end of the scale...”

35. It follows that the disadvantage to the group - none of whom were unable to comply, and for whom the disadvantage may therefore be inferred as being less serious than for the Claimant - is also at the “lower end of the scale”. The disadvantage experienced by others would be of the same *type* as that experienced by the Claimant, namely the need to arrange childcare for those days on which they are rostered for work, the difference in the Claimant’s case being one of degree, given the particular difficulties she faced with (at the time) two disabled children.

36. In any case, there was no evidence as to the specific challenges (short of non-compliance leading to dismissal) faced by other community nurses. No such challenges were alleged by the Claimant. Mr Sethi relies upon the suggestion in *Essop* (citing from the EAT’s decision in *Essop*) at [29] that:

“a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result”

as imposing some sort of requirement on the Respondent to have monitored the precise effects of the PCP on female staff, and submits that the Respondent’s failure to do so and to adduce any evidence in this regard should lead to a conclusion that the burden of justification has not been discharged. However, *Essop* does not establish any such requirement. Indeed, as Baroness Hale also stated in *Essop*, “The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents”. There can be no doubt that a requirement to undertake

a forensic analysis across many thousands of employees at the Trust to whom the PCP was applied as to the myriad ways in which inconveniences might have been suffered or costs incurred in each case would place an unreasonable burden on the Respondent. As stated by Eady P in **Pitcher v University of Oxford** [2022] ICR 338:

“111 ... an employment tribunal should not require from an employer evidence which it cannot reasonably be expected to produce.”

The position might have been otherwise if specific complaint had been made of particular disadvantages suffered other than those suffered by the Claimant, but there was none. It was sufficient in the circumstances of this case for the Tribunal to rely upon the unchallenged evidence summarised at [32] above. No other employee did complain of being unable to comply, nor it seems raise any sort of grievance arising out of the PCP. That evidence, which gave a clear insight into the seriousness of the detriment caused by the PCP, enabled the Tribunal to understand both the quantitative and qualitative effect of the PCP’s impact on the group.

37. I was referred to the decision of Collins J in **G v St Gregory’s Catholic Science College** [2011] EWHC 1452 (Admin), in which the Court considered whether a school uniform policy that forbade the keeping of hair in “cornrows” was discriminatory. The School relied on the fact that no child other than G had complained about the prohibition on cornrows. As to that matter, Collins J said as follows:

“44. The defendants rely heavily on the absence of any complaints about the prohibition of cornrows. Some boys did arrive to start school with cornrows and were told that they must be removed. All, other than the claimant, complied. In addition, since the claimant's case was given publicity, there have been no complaints. Thus it is said that prior consultation would not have resulted in any different approach and the defendants were entitled to regard their policy as proportionate even though one person was adversely affected by it.

45. The problem of course is to know why all who conformed and did not complain acted as they did. The school's policy is not one which is applied in some other local schools, as the claimant's experience shows. It may be that those who had the same views as the claimant appreciated that there was no point in applying to the defendants' school. It may be that those who complied were prepared to accept the disadvantage in order to get a place in an excellent academic establishment. While I accept that the absence of any complaints is a material factor, it cannot be determinative. And, as I accept, there may be reasons why there have been no complaints which do not mean that there has not been a particular disadvantage to some who hold similar views to the claimant. Advance

consultation might have painted a different picture.”

38. The Court went on to conclude that the indirect discrimination caused by the prohibition on cornrows was not justified. Mr Sethi submits that, similarly in the present case, too much weight should not be attached to the absence of any complaints or grievances about being required to work flexibly. The first point to note is that the decision in *St Gregory's* was not that the absence of complaints was irrelevant - it was acknowledged to be a “material factor” - but that it was not determinative. Furthermore, the reason that the claimant in that case found it difficult to conform to the uniform policy was that it was his family tradition not to cut his hair and to keep it in cornrows: see *St Gregory's* at [2]. Others might have kept cornrows out of a fashion choice or to make the hair more manageable. In such circumstances, others may have had available to them a choice to conform as their difficulties were of a different nature to those of the claimant, G. In the present case, as stated above, the difficulties that others in the Trust faced in respect of the PCP to work flexibly were of the same type as those faced by the Claimant, namely the need to arrange childcare, the difference being one of degree. They could not simply choose to do without childcare, but would have sought to make such arrangements as they could in order to comply. In such circumstances, the fact that every other person *was* able to comply with the PCP is clearly a highly material factor in assessing the seriousness of the detriment that is to be weighed against the Trust's needs. The decision in *St Gregory's* does not therefore indicate any error on the part of the Tribunal.

39. Mr Sethi (rightly) makes no complaint about the other aspects of the Tribunal's analysis on proportionality, namely the Respondent's needs, the business case for the introduction of the PCP, and whether there was any other measure that could have been adopted to meet those needs thereby rendering the PCP more than was reasonably necessary to do so. There is no basis for any such complaint as much of the evidence going to the issue of business need was unchallenged below, and, to the extent that the Claimant expressed disagreement with parts of it, the Tribunal was able to conclude that such disagreement was unfounded. As to any alternative measure, the

Tribunal recognised that although “the claimant was under no formal obligation to identify to the Tribunal a less intrusive measure... it was nevertheless striking that she had no contribution to make to that”: Judgment at [211]. No alternative measure was suggested in the course of written or oral submissions. That is hardly surprising given that, as the Tribunal found, “the aim of providing 24/7 care through the means of an effective staff rota is a matter of common sense as well as evidence”: Judgment at [202].

40. I turn then to the second aspect of this ground of appeal which is that the Tribunal erred in ‘scaling up’ its conclusions on justification in respect of the Claimant’s team to the whole of the affected group. The impugned conclusions are set out in the Judgment at [197] and [199], both of which are cited at [31] above. Whilst the Tribunal accepted the Respondent’s submission that if the PCP was justified for the Cockermouth team, it is no less likely to be justified in respect of the wider pool, there is nothing in the Judgment to suggest that the Tribunal treated such “scaling up” as determinative in its assessment of proportionality. As the analysis above demonstrates, the Tribunal expressly considered the position of the affected group more widely. As such, any reference to extrapolation from the analysis in respect of the team, which was the analysis undertaken in the First ET Judgment, was merely supportive of the eventual conclusion rather than determinative. This is also demonstrated by the fact that these references to justification in respect of the team appeared under a section of the Judgment with the sub-heading, “Evidential Considerations”, in which the Tribunal considered, amongst other matters, the absence of statistical evidence and the Respondent’s contention about scaling up. However, the Tribunal’s analysis of proportionality proper begins at [202] and/or [203] onwards with the Tribunal reminding itself that it is for the Tribunal to reach its own judgment on the proportionality question. (It would appear that a further intended sub-heading was omitted). Thereafter, the Tribunal made findings as to: the legitimate aim (at [203]); and whether the PCP was rationally connected to the legitimate aim (at [210]); before turning to the “broader aspects of the proportionality issue” from [211] onwards. It is notable that the Tribunal makes no further

reference to scaling up at any point after [203].

41. In any case, even if the Tribunal had relied more heavily upon its findings in respect of the team, there would be no error of law in doing so. The conclusion that justification would be “no less likely” in respect of the wider group would be a reasonable inference to draw from the established facts which are a matter for the Tribunal.

42. The Tribunal carefully explained why it was appropriate to extrapolate from the data relating to the team to that which existed across the Trust. This included the fact that the predominantly female make-up of the Claimant’s team was reflected in the available data as to gender balance across the Trust. Whilst there were no specific figures of the position as at 2016, the Tribunal was able to draw that inference from the available data, including a later survey by the Royal College of Nursing. Furthermore, the Tribunal was firm in its conclusion that the business case “put beyond doubt that the circumstances that affected the claimant were not limited to the team in Cockermouth but affected community nursing across the Trust”: Judgment at [199]. This is an example of the sort of “reasoned projection” which the Tribunal is entitled to make based on the available evidence:

“111 We do not consider, however, that these observations detract from the requirements placed upon the tribunal, as laid down in *Hardy & Hansons* [2005] ICR 1565: if the tribunal’s assessment is to demonstrate the requisite critical and thorough evaluation (per Pill LJ at para 33; Thomas LJ at para 54), it will necessarily look for evidence rather than mere assertion (albeit that evidence may take the form of reasoned projection rather than demonstrable result) and will require a degree of cogency in the employer’s case.” (per Eady P in *Pitcher*). (Emphasis added)

43. Once again, in the absence of a perversity challenge, which is not pursued here, these are matters that are for the Tribunal to determine and with which the EAT will not interfere.

44. For these reasons, it is my view that there was no error of law on the part of the Tribunal, either in its approach to the evidence or in respect of scaling up, in reaching the conclusion that the PCP in this case was justified within the meaning of s.19(2)(d), EqA. Its conclusions in these

respects were largely findings of fact with which the EAT should not interfere. Accordingly, Grounds 4 & 7 of the appeal fail and are dismissed.

Ground 8: Irrelevant Considerations

45. There are two aspects to this ground of appeal: the first is that the Tribunal wrongly took into account the Claimant's unwillingness to modify her stance that she should work only Wednesdays and Thursdays. Mr Sethi submits that the Tribunal erred in treating the Claimant's responses during the consultation and her failure to make any alternative suggestions as relevant considerations in determining the proportionality of the PCP. Reliance was placed on *Homer*, in which it was said that it is "necessary to weigh the [employer's] need against the seriousness of the detriment to the disadvantaged group" (*Homer* at [20]); and on an extract from *Harvey's* which refers to the need for the Tribunal to consider the balance between the discriminatory effect of the measure and the legitimate aim (*Harvey's* at [338.03]).

46. I cannot accept that the Claimant's responses during the consultation or her failure to suggest any alternative measures are irrelevant. No authority was cited in support of such a stark proposition. The authorities that Mr Sethi directed me to do not assist, as any objective analysis of the "seriousness" of the discriminatory effect will almost inevitably involve some investigation of the difficulties caused and the extent of the inability to comply with the PCP. That could include, as it did in this case, whether the Claimant's insistence on being unable to comply was reasonable in the circumstances.

47. Whilst the burden of establishing justification lies with the Respondent, the Tribunal must reach its own view as to whether the PCP is objectively justified. The Tribunal is not bound simply to accept the Claimant's assertions as to the extent of the disadvantage, notwithstanding the starting point that the childcare disparity will mean that there is at least *some* such disadvantage, just as it was not bound to accept the employer's assertions as to business need. In order to assess the seriousness of the detriment - bearing in mind that no other employee in the

group was unable to comply - and whether the PCP was reasonably necessary, the Tribunal was entitled to take account of the Claimant's stance and whether she was able to suggest any alternative.

48. Such authority as does bear on the issue would appear to be against the Claimant.

Baroness Hale in *Essop* stated as follows at [47]:

“47 ... This is a particular and perhaps unusual category of case. The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the employment tribunal it is not for the EAT or this court to do so.” (Emphasis added)

49. Whilst Baroness Hale's observation cannot be read as imposing any sort of legal requirement on claimants to propose alternatives in every case, it is undoubtedly useful guidance, and certainly makes it clear beyond peradventure that whether or not alternatives are suggested may be a material consideration.

50. Mr Sethi's fall back position is that if such matters are not irrelevant then the Tribunal erred in attaching too much weight to them. However, the weight to be attached to relevant evidential matters is for the Tribunal to determine. Short of an allegation of perversity (which, once again, is not alleged), the Tribunal cannot be said to have erred in law in treating the Claimant's stance as a “salient feature of the overall circumstances” to be weighed in the balance. In this case, as the Tribunal found, the Respondent made extensive efforts to reach an accommodation with the Claimant, but she had remained “intransigent”, notwithstanding evidence available to the Tribunal that the occasional weekend or bank holiday working “was in fact manageable” for the Claimant: Judgment at [235]. It was such evidence that led the Tribunal to find as an unchallenged fact that the Claimant “could meet the respondent's requirement to work flexibly, including at some weekends, albeit with difficulty”: Judgment at [241]. That was a finding that the Tribunal was entitled to make and which was pertinent to the balancing exercise that it was required to conduct.

51. The second aspect of this ground of appeal is that the Tribunal wrongly focused on the wrong PCP in that it considered the Claimant's ability to comply with a "diluted" version of the PCP rather than the PCP that was in fact imposed on her and which led to her dismissal.

52. This contention is without merit. The PCP at the heart of this case was that set out at [72] of the First ET Judgment:

"The tribunal finds that the PCP here was the respondent's requirement that its community nurses work flexibly, including at weekends".

53. That PCP does not specify the regularity with which community nurses are required to work flexibly or at weekends. There is no suggestion, for example, that community nurses were required to work every weekend. The Tribunal made a further finding of fact in respect of the PCP at [208] of the Judgment:

"...The aim was to ensure 24/7 cover for the service, but the means of achieving that aim was negotiable to a point..."

54. That of course makes sense: a rigid or fixed approach to the requirement to work flexibly including at weekends would be inconsistent with the desired flexibility inherent in the policy. Within those parameters, a PCP that involved occasional weekend working on notice, is no different in substance from the PCP that community nurses work flexibly including at weekends.

55. In any case, the Tribunal's consideration of the Respondent's efforts to reach an accommodation with the Claimant cannot be said to be wrong: as is clear from *Essop*, that is what a reasonable employer will attempt to do: see *Essop* at [29].

56. Ultimately, the Tribunal concluded at [241] that the Claimant "could meet the respondent's requirement to work flexibly, including at some weekends." That PCP is not materially different to the one referred to at [52] above. In the absence of any precise stipulation as to the frequency of weekend working, the inclusion of the qualifier, "some", does not change the substance of the requirement.

57. For these reasons, Ground 8 of the Appeal also fails and is dismissed.

Ground 11: Unfair Dismissal

58. This ground stands or falls with the grounds relating to indirect discrimination. The Tribunal's finding that the PCP was justified remains undisturbed. As such, Ground 11 also fails and is dismissed.

Conclusion

59. For the reasons set out above, this appeal fails and is dismissed.