EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100068/16

Held in Glasgow on 24, 25, 26 and 30 and 31 October 2017

Employment Judge: **Ms M Robison**
Members: **Ms N Elliot**
Ms M McAllister

Ms Fiona Mair — **Claimant**
Represented by:
Mr K McGuire - Counsel

Chief Constable of the Police Service of Scotland — **Respondent**
Represented by:
Mr R King - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unjustifiably indirectly discriminated against in terms of Section 19 of the Equality Act 2010.

A Hearing to determine remedies will now be set down.

REASONS

Introduction

1. The claimant lodged a claim in the Employment Tribunal on 11 January 2016 claiming indirect sex discrimination. This related to the respondent's refusal to grant the claimant's flexible working application. The respondent resisted the claim.

2. At a Case Management Preliminary Hearing which took place on 11 March 2016, it was agreed that this Hearing would consider liability only, and that the issue of quantum/remedy issues would be considered separately.

3. At that Case Management Preliminary Hearing, attempts were made to focus the issues in dispute. Despite attempts that did not prove possible, and although the claimant did set out PCPs and pools, the respondent did not accept the PCPs or pools proposed by the claimant and proposed alternatives (see pages 30 - 37).

4. In the meantime, the claim was sisted for some considerable time because of the lack of availability of a key witness due to ill health. When it came to this hearing, the evidence of that witness was lodged in the form of an affidavit.

5. At the outset of the Hearing, Mr McGuire stated that he was relying on an alternative PCP, framed slightly differently from the first one initially proposed. This referenced the affidavit evidence of Superintendent Jim Coubrough, that officers making flexible working requests were not normally allowed to work substantially outside their normal shift (see para 34). Mr McGuire said that it was essentially the same as the first PCP set out, and although Mr King did not agree, Mr McGuire confirmed that he was relying on that PCP as an alternative to the first one, and if neither of these, he relied on the other alternatives set out on page 30.

6. At the Hearing, the Tribunal heard evidence from the claimant and from Sergeant Jennie McFarlane, of the Police Federation, and for the respondent we heard from Mrs Carol Thomson, resources manager for the West area, Superintendent Carol McGuire, who at the relevant time was the area commander for the Gorbals and Castlemilk area and who made the original decision regarding the claimant's flexible working application, and Chief Superintendent Hazel Hendron, at that time responsible for HR and resourcing in Greater Glasgow. The Tribunal also took account of the evidence set out in the affidavit of Superintendent Coubrough, who at the relevant time was one of five superintendents for Greater Glasgow, and who heard the appeal against the claimant's flexible working request. The Tribunal was also referred to a joint bundle of documents, referred to in this judgment by page number.

7. During the course of the Hearing (on Thursday 26 October), following the evidence of Sergeant Jennie McFarlane, the claimant sought to lodge additional documents, which were e-mails to which Sergeant McFarlane had been party. Mr McGuire stated that these related to the PCP which he was asserting had been applied in this case. He said that he did not intend to recall any witnesses to speak to these e-mails, but could have no objection if Mr King asked to call an additional witness to speak to them. Mr King objected to these e-mails and was not happy for the Tribunal to see them before making a ruling on whether or not they should be admitted. Although he gave fulsome reasons why they should not be lodged, his objection essentially came down to the fact that they were being lodged very later in the day indeed, after two relevant witnesses had already given evidence. He said that if they were allowed he might have to seek a postponement of this Hearing.

8. The Tribunal retired to consider these objections. While we deliberated without viewing the e-mails, we considered it would not be possible for us to rule on the request for a postponement without seeing the e-mails.

9. We considered that the evidence as described related to the identification of the PCP which was in dispute, and therefore was relevant to the question before the Tribunal, although it was only one element of the test that the claimant had to prove. We accepted that these documents came very late in proceedings. We were of the view that the potential prejudice to the respondent in allowing these to be lodged so late in the day could be overcome by allowing the respondent to call relevant witnesses to speak to the documents. However, we were able to continue to hear the evidence of Superintendent McGuire that day, who was able to give us her views on the e-mails, and we invited Mr King to make any application for a postponement that may still be appropriate when the hearing resumed on Monday 30 October, giving him time to consider his position. As it transpired, Mr King did not find it necessary to renew his application for a postponement.

Findings in Fact

10. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

Background

11. The claimant commenced with the respondent's predecessors, Strathclyde Police, on 30 July 1990, when she was posted as a uniformed police constable in Glasgow City Centre at Cranstonhill, working shifts.

12. She worked in that role until 1999 when she became pregnant with her son, Gregor, who was born on 16 August 2000, who is therefore now 17. The claimant separated from her husband in May 2001 when her son was 9 months old, and she took primary responsibility for his care, with assistance from her husband and a childminder when she returned from maternity leave.

13. Following return from maternity leave, the claimant worked in the crime car at Partick Police Station, one week on day shift, one week on back shift. Then

she worked shifts at Cranstonhill with slight adjustments to her hours to allow her to drop off her son at her husband's house.

14. Between February 2009 and late 2014, the claimant was working in case management at London Road, which involved working 8 am to 4 pm, Monday to Friday with occasional week-end working. This allowed her to manage her caring responsibilities, even after her husband had returned to live in New Zealand in May 2011.

Respondent's policies and procedures

15. The respondent has introduced standard operating procedures (SOP) for Flexible Working for Police Officers and Authority/Police Staff (pages 66 – 95). This clearly has been introduced to comply with the requirements of the Flexible Working Regulations, although the SOP applies to all police officers, authority/police staff (including temporary staff) and cadets, with some differences given the differences between the legislation for the different groups.

16. Paragraph 3.8 is headed up "*Returning to full-time hours/standard working patterns*" and states that police officers have the right to return to full-time duties on the standard shift pattern of their current post following application to the relevant area commander. Paragraph 3.8(c) states that "*officers may wish to submit an additional flexible working request if they wish to return to full time hours but on a flexible working basis*".

17. This apparently relates to return of police officers from maternity leave, but was relied upon to confirm that flexible working on a full-time basis is permitted.

18. Paragraph 5.2 is headed up "*approving a request for flexible working"* and states that resource management will update the SCOPE duty management system to reflect the new flexible working pattern. SCOPE is the HR

information system which includes information about an individual's shift patterns.

19. Paragraph 5.4 is headed up "*refusing a request for flexible working*", and states that an application may be refused on one or more of the following grounds (although not all apply to police officers): burden of additional costs; detrimental effect on the ability to meet customer demand; inability to organize work among existing individuals; planned structural changes; detrimental impact on quality (eg quality of service); detrimental impact on performance; lack of work available during proposed hours; and/or inability to recruit additional staff.

20. At 5.4 (c) it is stated that all flexible working patterns must also be legally compliant, e.g meet working time regulations.

21. The respondent has created an Integrated Service Delivery Model (ISDM) which is the model for managing resource against anticipated demand based on past experience. The operational base level (OBL) is the recognized level of resourcing required against anticipated demand and it represents the minimum for safe policing. This is calculated by reference to a formula that takes into account the number and types of incidents that are likely to occur at certain times of the day or the week or the year. It is based on previous knowledge and is predicated on the assumption that what has happened in the past will normally predict future policing needs.

22. The ISDM will assess the expected demand and match it with the appropriate level of resource that is then deployed under the Variable Shift Agreement (VSA). This is a five shift pattern operated within operational policing over a five week cycle. Taking account of the modeling under the ISDM the start and finish times of the shift patterns in terms of the VSA have been created in order to provide the necessary resources that will meet the anticipated demand at any given time. The five separate shift patterns will often overlap

at key time, so for example on Friday or Saturday nights, double shifts will be deployed to meet peaks in demand.

23. While in general there is some flexibility to vary officers' working hours within the shift patterns contained in the VSA, the respondent entered a Workforce Agreement to comply with the Working Time Regulations (page 96 – 107). That means that early/day shifts will always start between 7 am and 10 am; that late shifts will always start between 12 noon and 6 pm and that night shifts will always start between 6 pm and 11 pm.

Claimant's Flexible Working Application (FWA)

24. In September 2014, the claimant was told that she was to be rotated out of case management at London Road to a uniformed shift. This move was in line with standard practice of rotating officers in order to maintain their skills and gain experience across the range of duties which they may require to perform, particularly in relation to front line operational work.

25. The claimant spoke to her Sergeant, Kenneth McCulloch, since he was aware of her childcare commitments, to ascertain if there could be some lee way to remain in the department until her son was old enough to be left on his own when she could resume night shifts. He spoke to the Inspector, Audrey Hand, and the claimant understood that she had said that was not possible.

26. She was then told by Chief Inspector Hilary Sloan that she would require to do a response shift at Govan Police Office. Because of her childcare commitments, she asked if it was possible for her to go to a community policing shift. Community policing role would mean that she would not be required to do a full night shift (those shifts terminating at 3 am), and she was of the view that she was better able to undertake her childcare commitments in that role, in contrast with a response shift.

27. Chief Inspector Sloan ascertained that there were two posts in community policing, and the claimant was thereafter allocated to a community policing role at Cathcart Police Office, and due to commence in that role on 1 December 2014.

28. The claimant put in a flexible working application on 5 November 2014 in respect of that role (page 127). In that application, she stated that she would like to keep the same shift, with flexibility between 7 am and 6 am. Although she knew that it was highly unlikely that such a shift pattern would be acceptable, in her view it was a "*starting point for negotiation*". She spoke to Inspector Derek Taylor who would have been her line manager on her new shift; he said that her proposal would probably not be accepted but that he would speak to the inspector.

29. In any event, before taking up that role she went off sick on 17 November 2014. She said that she was off because of a combination of factors: the stress of not having child care; she had recently lost her father and was dealing with her elderly mother; she was going through the menopause, as a result of which she was on anti-depressants. While she was off sick, she developed tennis elbow. Her return was delayed because a physiotherapist's report was required.

30. On 18 May 2015, she returned to work, commencing at Cathcart Police Station on recuperative duties, working on the uniform bar, which meant dealing with enquiries from the public at the front desk, which was a day shift, 9 am to 5 pm (page 144). It was intended that she would be on light duties for 12 weeks (page 145), but because her proposal for flexible working was rejected, these duties were extended to allow her to put in an amended application.

31. On 9 June 2015, she sent another Flexible Working application to Sergeant Derek Taylor (page 147-166). This was accompanied by a form setting out her proposed shift pattern over a 10 week period (page 153-155). She

requested adjustments during the night shift and late shift working weeks. In particular, she proposed to work 10.00 to 19.00 (week 2) which allowed her to be home late evening and overnight for her son; and on the late shift proposed 10.00 to 20.00, which although starting four hours before, would mean working 6 hours with her shift (week 3). This was compared with the shift pattern for her normal shift, which was Group 3 community policing (pages 156 to 158).

32. On 10 June 2016, this was reviewed by her line manager, who was of the view that the proposed shift pattern did not allow sufficient time on many of the days with her own group. Nor did he believe that the plan would meet the terms of the scoring matrix, which would mean that it could not be authorised (page 150). The flexible working scoring matrix (FSM) is an analysis of fit of the shifts proposed against demand levels.

33. On 19 June 2016, the form was forwarded to resource management (page 169). It was considered by Colin McCaffer on 7 July 2015 (page 163). He noted that the proposed shift pattern equated to an average working week of 39.2 hours (although it transpired that this was an error on the part of the claimant and subsequently adjusted).

34. He subjected the plan to analysis on the flexible scoring matrix. The plan had a target score of 412. The score returned was 423.This indicated that the hours which the claimant had selected to work included times of high demand, which attracted higher scores (see pages 327 and 328).

35. Mr McCaffer added this information in the appropriate box (page 163) on the application form and also stated:-

"*The negative side of things is that the officer is only with her group for 70% of the time. Divisional Policy in relation to flexible working is that the applicant would start and end their shifts within the core hours. There are days which this plan could restrict colleagues from being granted time off*".

36. He forwarded this form to Inspector Derek Taylor by e-mail stating, "*I have examined the proposed shift pattern on a FSM and surprisingly it passed. I made an entry on the application form. It really is up to the LAC [local area commander, CI McGuire] to decide if she wants to go with this…*" (page 168). This was then forwarded by the claimant's then Inspector, John McQuilter, to CI Carol McGuire on 8 July 2015, with the comment, "*Derek received this today from Colin. He scored it against the matrix and it has passed!!....*" (page 167).

37. In the meantime, the claimant resigned on 23 June 2015, but on advice from friends retracted her resignation on 25 June, and contacted CI McGuire to advise that she wanted to continue with her flexible working application.

38. On 8 July 2015, Carol McGuire sent an e-mail to Kenna Spence (HR) (page 167) in the following terms:-

"*could you please have a look at the attached flexible working plan which I am not of a view to support despite the fact that it meets the scoring. I've asked her line manager to discuss this again with her to see if she wants to make any changes before it is submitted formally to me. Her proposal means that she will be working approximately 1/3 of her total hours when her shift colleagues are not on duty. On most of the late and night shifts she is proposing to start a few hours before her shift and I do not think that there is a business need for an extra officer during these earlier hours. In weeks 2 and 7 she will actually only be on duty for 1 hour with her shift. I would be content to support most of the earlier finishing times (with the exception of weeks 1 and*

7 above) but I don't think she is willing to reduce her hours – hence the much earlier start times too. Can you give me a call when you've had a change to look at this? I want to ensure that my reasons are appropriate prior to meeting with her".

Respondent's response to FWA

39. A meeting took place on 4 August 2015 between the claimant and CI McGuire to discuss the application at which Jennie MacFarlane was in attendance. A note of the meeting is recorded on the application form (page 178) and sets out the reasons for not approving the initial proposal outlined as follows:-

"*insufficient time between 2 shifts. Weeks 2, 3, 7 and 8 limited hours with shift with duty hours brought forward. Similarly 5 & 10 with limited time working with shift and hours brought forward on to early shift. Total of 30% hours proposed are starting early and not with the shift. ISDM – demand led. Lack of work available during the proposed hours starting early when other groups on duty (on occasions 2 groups). Only 70% with shifts and not at times of high demand (ISDM) therefore detrimental impact on performance and quality of service. PS McFarlane outlined the provisions of the workforce agreement relating to start duty times/variations. I agreed that some shifts with early start could be accommodated but this would be considered in line with overall proposal. Meeting adjourned to allow PC Mair the opportunity to amend her proposal in light of the discussions*".

40. Following that meeting, the claimant submitted an amended shift pattern (page 181A – 181C) setting out proposals for shifts in five week blocks. In weeks 3 and 5, her proposal was to work in line with her shift. In week 4 her proposal was to work with 90% alignment with her shift. In week 1 her proposal was to work from 12.00-21.00, whereas her shift would work 18.00-03.00, which aligned only 33% with her shift. In week 2, she proposed to work

from 11.00-21.00 through the week, while the actual shift was 14.00 to 24.00 (aligning with shift at the week-ends), that is 82% alignment with her shift.

41. On 11 August 2015 the meeting was reconvened, and a note of the meeting was made by CI McGuire in the following terms: "*PC Mair has clearly considered the concerns raised and the new proposal provides 82% of her hours with shift. However two areas of concern remain. Week 2: 11.00-21.00 hrs proposed for midweek late shift (CPT Group are 14.00 – midnight). Content for a start at midday as this is in line with workforce agreement and suggested either an amendment to 12.00-22.00 or reduction of three hours. Week 1: 12.00-21.00 proposed for midweek nightshifts (CPT Group are 18.00-03.00). Same concerns as previous proposal starting 6 hours early and only 3 hours with Group. Other groups already rostered for these hours with 2 groups overlapping between 14.00-16.00hrs on these 4 shifts. Lack of work available during these early proposed hours. C Mair does not feel able to work after 21.00 midweek due to childcare for her son. She is unwilling/unable to reduce her hours*". This decision was confirmed in writing by letter dated 11 August 2015 (page 182).

The Appeal

42. On 14 August 2015, the claimant submitted an appeal asking for a reconsideration and confirming that, as stated to senior management, she was only looking to follow this plan for a 12 month period until her son was 16.

43. On 17 August 2015, the claimant went on sick leave.

44. On 25 August 2015 an appeal hearing took place, chaired by Superintendant Jim Coubrough, who was advised by Kenna Spence (HR). The claimant was represented by Sergeant McFarlane and minutes were taken by Jennie Gillies (pages 190 – 194).

45. During the appeal, Superintendant Coubrough stated that childcare could be accommodated by starting later or finishing earlier within the shift and he asked the claimant if she could reduce her hours. She advised that as a single parent, she could not afford to drop hours due to financial commitments, and nor could she afford the cost of childcare, and she already relied on the goodwill of friends for her week-end shifts, and in any event did not want a stranger in her home.

46. Superintendant Coubrough explained that the planned five shift pattern was designed to match demand to capacity, and that from a business point of view was not best value to have officers on shift outwith the core shift pattern. He stated that it was important to uphold Police Scotland's values to ensure fairness to other officers/staff members (page 191). The claimant pointed out that only four days out of the proposed 5 week plan were at issue, and the proposal was to last only one year. She stated that by beginning before her shift she could carry out tasks which her shift would no longer require to do. Superintendent Coubrough stated that there was no business need for the claimant to work at a time when she was not required.

47. During the course of the appeal hearing, Sergeant MacFarlane asked how it was then possible for a flexible working application working full time to be granted. Kenna Spence was unable to answer this question at this time but said she would look into this query and provide a response. Superintendent Coubourgh stated that flexible working on a full-time basis was possible, but here the issue was that the hours offered were outwith the required shifts, which do not add any value and which creates a burden of costs. The claimant advised in response to a question from Kenna Spence that she had applied for other roles, but this was not discussed further.

48. No response was provided by Kenna Spence to the query regarding FWAs on full-time hours.

49. By letter dated 26 August 2015, Superintendent Coubrough advised the claimant that her application could not be accommodated. He stated that the consequence of her working outwith her group shift for 24 hours in week 1 and 9 hours in group 2 was "*a burden of additional costs, a detrimental effect on the ability to meet customer demands and overall performance; an inability to organise work among existing individuals; lack of work consistently available*". He advised that the proposals for week 4 could be accommodated because "*the Sunday midday start would provide for the cumulative issues which often arise at that specific time of day which include standing by loci, prisoner/hospital watch, preparation of custody cases and significant events held across the city*".

50. On 1 September 2015, the claimant tendered her resignation, effective 1 October 2015.

51. On 3 September 2015, (p212) HR queried this decision, stating "*after 25 years service that seems a bit drastic – did anyone speak to her about applying for a career break*". By e-mail dated 3 September, CI McGuire asked Derek Taylor to remind the claimant that she did have the option of taking a career break. The claimant confirmed that she did not wish to take up that option.

52. On 28 February 2017, in response to an application for flexible working from a police officer, Neil Buchan, of Greater Glasgow Resource Management, stated that "*the current divisional policy for flexible working requests made by those attached to local policing is that applicants propose times whereby they either start or (sic) finish with their own shift*" (page 361). Sergeant McFarlane, in her role as Police Federation rep, sought further information from him about this "*divisional policy*". She was advised that "area commanders are aware of this preference to have officers start or finish with their shift but hone have claimant responsibility or ownership of this working practice" (page 358) and that "*any individuals I previously spoke to are aware of this practice but are unable to identify a source for this. I think it is safe to say that this is most*

definitely not a policy and would appear to me more of a preference" (page 356).

The relevant law

53. Section 19(1) of the Equality Act, headed indirect discrimination, when applied to the protected characteristic of sex, states that "*A person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to [B's sex]"*. Section 19(2) states that:-

> "*a provision criterion or practice is discriminatory in relation to [B's sex] if (a) A applies, or would apply, it to persons with whom B does not share the [sex], (b) it puts, or would put, persons with whom B shares the [sex] 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*".

Claimant's submissions

54. Mr McGuire prepared written submissions which he supplemented with oral submissions. First, he set out the essential facts, upon which he submitted that there was no dispute. He confirmed that the claimant understood that she was being rotated to community policing which would involve shift working, and she accepted that and did not expect to get the day shifts she had initially requested. While she was willing to work week-ends, she was not able to work until 3 am on the night shift for childcare reasons.

55. Mr McGuire also set out the relevant law. Relying on ***BA v Starmer [2005] IRLR 862 EAT***, he submitted that "*provision, criterion or practice*", is very widely defined. He submitted that we could rely on judicial knowledge (***London Underground v Edwards (No.2) 1999 ICR 494***). The claimant also

relies on national statistics, because it has not been possible for statistics to be produced regarding the workplace. In particular, the claimant relied on ONS Statistics lodged, particularly at page 114/115 which sets out the position regarding lone parents. In ***West Yorkshire Police v Homer [2012] ICR 704***, Lady Hale makes the general point [14] that the new formulation was not intended to make it more difficult to establish indirect discrimination, but rather the reverse. He relied on [19] of Homer which sets out the correct test to justification, and argued that costs alone was not enough to justify a discriminatory PCP (relying on ***Cross v British Airways [2005] IRLR 423*** and ***Woodcock v Cumbria PCT [2012] EqLR 463***).

56. Mr McGuire than went on to apply these legal principles to the facts in this case. He submitted that the Tribunal should find that there was a divisional policy to the effect that flexible working applications would be accepted only where the officer started and ended shifts within the core hours.

57. The evidence which he relied on to support that was: 1. the statement from Colin McCaffer, a resource manager who had previously 30 plus years of policy service having retired as a CI; 2. the evidence of Carol McGuire and the fact that she confirmed that there were discussions about the policy but on her own evidence she did not take the opportunity to say there is no divisional policy; 3. the e-mails lodged at 355 to 362 which confirm the existence of a divisional policy as recently as February this year, and show that people in resource management behave as if there is a divisional policy and CI McGuire was not aware of any notification having been made that there was no divisional policy.

58. Further, the refusal of the application is entirely consistent with the existence of a divisional policy that must start and finish within core hours. Carol Thomson accepted in cross examination that if "*policy*" was replaced by "*guidance*", then she accepted that was the guidance despite no formal written policy. CI McGuire's evidence was that it was a preference, which amounts to the same thing.

59. Alternatively, he submitted that, relying on the affidavit evidence of Jim Coubrough, the policy which was applied to FWA was that applicants "*should not work substantially outwith their core hours".* This is consistent with the decision make by CI McGuire.

60. In the alternative, Mr McGuire argued that the claimant was required to work from 6 pm to 3 am in week 1 of her shift pattern, and this was a PCP, even if it was a one off decision that applies only to the claimant (relying on Starmer). Although weaker given CI McGuire's evidence that she could have been flexible about week 2, the claimant was required to work from 12 noon to 10 pm or reduce her hours by 3.

61. Mr McGuire then went on to look at particular disadvantage, and he submitted that any or all of the PCPs referred to create a particular disadvantage for people sharing the protected characteristic of sex. Relying on the ONS report, as well as judicial knowledge, he submitted that a PCP that requires working in the evening into the early hours of the morning will have a disparate impact on women who are the primary carers for children, especially when a relationship has broken down.

62. With regard to personal disadvantage, the personal disadvantage to the claimant was that she could not work the required hours, and that she either had to reduce her hours, employ childcare or resign.

63. With regard to justification, upon which the burden of proof is on the respondent, Mr McGuire submitted that, on the basis of the evidence heard from CI McGuire, that the aim was the reduction of costs, but this cannot be a legitimate aim.

64. On the proportionality question, the focus was on costs, and the arguments regarding health and safety and morale were not made with any real force.

65. The respondent's argument that the claimant would be superfluous to requirements was not proportionate. Even if there was nothing for the claimant to do, CI McGuire was not in fact aware of the cost, even on the basis of an hourly rate. But in any event there was compelling evidence from the claimant and from Sergeant McFarlane regarding meaningful work that the clamant could do. The respondent's evidence was that there was meaningful work, but it was not consistent. Given that, it was not "reasonably necessary" to refuse her application. The Police Service is a sophisticated organisation, and the evidence was that had the claimant's claim been successful, her new shifts would have been inputted into the "Scope" system, which would have allowed her supervisor to see her hours so that they could manage work and expectations, and put her to good use.

Respondent's submissions

66. Mr King essentially did not disagree with Mr McGuire's analysis of the law, but rather he disputed the application of that analysis to the facts.

67. With regard to the PCP, he relied on the EHRC's code of practice, which that it should be construed very widely. That supports the respondent's submission that the PCP was the Flexible Working Policy itself and to look at it any other way would be to take an approach which was too narrow.

68. CI McGuire said that any FWA would be dealt with on its merits, taking account of a variety of components. Those components included the shift patterns designed to manage time of anticipated and unexpected demand based on a sophisticated analysis of past calls; the Workforce Agreement, which sets parameters regarding adjusting the start times of shifts which was the starting point for discussion, although it was accepted that the hours could be outwith these parameters; the comments of the line manager; the comments of the resource manager including the score on the Flexible Matrix scoring, which analysed proposed times against times of high demand and the applicant's core shift; operational demands; cost; managing the *"gap*",

when the hours proposed did not match demand. These all relate to the components set out in the Flexible Working Policy at paragraph 5.4(b).

69. With regard to the claimant's assertion of a divisional policy, the evidence from two senior officers does not support the existence of such a policy, and Mr McGuire is inviting inferences to be made from the reference made by Mr McCaffer and Mr Buchan. Mr Buchan was not in any event able to find the source of any such policy. Chief Superintendant Hendron could not explain the reference to a policy, beyond suggesting that it was a legacy from the practices of predecessor forces. While CI McGuire did not state that there was no such policy, that does not indicate that was because there was a policy, and her approach to the flexible working application does not reflect the existence of such a policy. It was week 1 that was the stumbling block, and CI McGuire's evidence was that she would have allowed the claimant to work the proposed shifts in week 2, starting before the rest of the shift, and therefore she was not applying the policy there. Nor was Superintendent Jim Coubrough applying any purported divisional policy, since in the letter setting out reasons for refusing the appeal [pages 206-207], he stated that he would have accepted the proposals for week 4 which involved a start on Sunday at midday, whereas her shift would start at 2pm.

70. CI McGuire's evidence was that every case was decided on its merits, that there was no requirement for the claimant to work particular hours, and that a FWA could be granted if the hours proposed were at times of high demand. This case can be distinguished from the ***Starmer*** case because here it was not being said that the claimant had to work certain hours, only that the hours had to be at a time of operational demand.

71. With regard to particular disadvantage, he relied on the decision of ***Somerset County Council v Pike [2009] IRLR 870*** to argue that it was only those who applied under the Flexible Working Policy who were in the comparator pool group, although he accepted that no statistics had been produced to show whether that might result in particular disadvantage to women.

72. With regard to the legitimate aim, the claimant accepted that the respondent had identified a legitimate aim (page 37), and for that reason he did not consider that he required to lead evidence to address each part of the asserted legitimate aim, although he submitted that the respondent's witness evidence largely supported it.

73. Relying on the guidance of Eady J in ***Dutton v Woodslee Primary School UKEAT/0305/15***, Mr King argued that the "*real need*" had been demonstrated by the evidence, namely the need to deploy officers where the demand exists identified through the shift modeling scheme. Here the claimant would have added no value during the gaps, and she would be missing out if she had been permitted to work the hours sought not only in respect of briefings but also in relation to being allocated tasks. While he accepted that there was no strong evidence in relation to health and safety or morale issues, he said that these did have to be considered alongside the other factors. All this created the need for the claimant to be dealt with in this way to meet operational and financial requirements.

74. With regard to the claimant's suggestion that there was meaningful work to be done in the hours proposed, Mr King invited the Tribunal to accept the evidence of the respondent's witnesses that any streams of work that might be available for the claimant to do would not be predictable, meaningful or consistent, especially for week 1. Further, if the PCP did have a discriminatory impact, it was not sufficiently serious because it would not operate as a barrier to her remaining in the force, and options, such as a career break, were open to her.

Tribunal's discussion and decision

Observations on the witnesses and the evidence

75. We found all of the witnesses in this case to be credible and we were particularly impressed with Sgt Jennie McFarlane and CI Carol McGuire, who both gave evidence in a particularly clear and candid way. While at one point it appeared that there may be a conflict in their evidence, as it transpired, there was no conflict about the fact that CI McGuire had brought up the issue of a divisional policy in the meetings regarding the claimant's flexible working application.

76. Indeed, there was little if any dispute regarding any key facts in this case, and the core question for consideration by this Tribunal was the application of the relevant legal principles to those facts.

Indirect discrimination

77. In order to establish indirect discrimination, four requirements must be satisfied (the onus being on the claimant in respect of the first three): i) that a provision, criterion or practice (PCP) is applied (or would be) equally to everyone, including the claimant; and ii) that PCP puts, or would put, those who share the claimant's protected characteristic at a particular disadvantage in comparison with others who do not share the claimant's protected characteristic, iii) that PCP puts, or would put, the claimant at that disadvantage; and iv) the respondent cannot show that the PCP is justified as a 'proportionate means of achieving a legitimate aim'.

(i) Provision, criterion or practice

78. In this case, the claimant has set out four potential PCPs. The focus, and the claimant's primary argument, is that the PCP is that an applicant should start and end their shifts within the actual shift core hours. At the outset of proceedings, Mr McGuire asserted an alternative PCP, relying on the affidavit evidence lodged by SI Coubrough, which he articulated as being not being permitted "*to work substantially outside their normal shift pattern*".

79. Mr King accepted that the PCP is to be very widely construed. Relying on that, he asserted that the Flexible Working Policy itself is the relevant PCP here.

80. We did not accept Mr King's submission in that regard. While a PCP requires to be widely construed, it is not correct to rely on a policy itself as a *"provision criterion or practice*", rather a policy would set out which PCPs are to be applied. It means that a wide variety of factors can qualify as a PCP, not that the policy overall can be categorised as the PCP. In any event, it is for the claimant to identify the PCP, and it does not matter that the respondent could also identify an equally appropriate PCP (see ***Allonby v Accrington & Rossendale College [2001] IRLR 364 CA***).

81. The identification of the PCP is a question of fact for the court (***Jones v University of Manchester [1993] IRLR 218 CA***). A good deal of evidence was led in this case on the question of whether or not there was a "*divisional policy*" that in order to have flexible working applications accepted, officers required to start and end their shifts within core hours.

82. Reference was made by Mr McCaffer to a "*divisional policy that the applicant should start and end their shifts within core hours*". The respondent's witnesses denied such a policy, but Mrs Thomson was prepared to accept that it was "*guidance*" and CI McGuire conceded in cross examination that it was her "*preference*".

83. In his affidavit, Superintendent Coubrough called it a "*general rule",* articulated in paragraph 32 as follows:-

> "*As a general rule it is easier to allow an officer to start later or finish earlier than their normal shift start and finish times, than it is to allow them to start earlier or to finish later than their normal shift start and finish times". He continued at paragraph 34, "Within the VSA framework we have built to meet that demand, we can be flexible but*

that that flexibility does not extend to allowing officers to work substantially outside their normal shift pattern".

84. In the e-mails lodged during the course of the hearing, we noted that Neil Buchan talked of "*a divisional policy*" to "*either start or finish with their own shift"*, and he subsequently referred to it as a "*practice"* and a "*preference*", but said it was not a policy.

85. There is of course no need for the PCP to be explicitly stated; it can be challenged even though it is not of a formal nature or expressed in writing (see ***Caste v Croydon College [1998] IRLR 318 CA***). Further, there is no requirement for it to be an absolute bar and indeed it extends to a discretionary management decision applied only to the claimant (see ***British Airways v Starmer [2005] IRLR 863 EAT***).

86. Thus it is described as "*a preference*", "*a practice*", "*guidance*" and "*a general rule*". Given that a PCP should be widely construed, and that it need not operate as an absolute bar, and could be a one-off decision, and the fact that in this case the claimant's application, which did not comply with that approach, was refused, we took the view this amounted to a PCP.

87. Even if we are wrong about that, we accepted the claimant's alternative submission that the approach articulated by Superintendent Coubrough that officers are not permitted to "*work substantially outside their normal shift pattern*" in order to have their FWA accepted.

88. It was clear from the evidence that such a PCP was applied to the claimant. Although the evidence indicated that CI McGuire would have allowed the proposal in week 2, where the claimant started 3 hours before her colleagues for three out of the five shifts, that start time was within the tolerance allowed in the workforce agreement, and at 82% alignment clearly "not substantially outside the normal shift pattern". Further Superintendent Coubrough stated that he would have permitted the adjustment to week 4, but that involved the claimant starting two hours before her colleagues for two shifts, with 90%

alignment, so again was clearly not substantially outside the normal shift pattern.

89. To the extent that the evidence indicated that there could be some flexibility in the start and finish times, we accepted (in the alternative) that the refusal to permit flexible working "*does not extent to allowing officers to work substantially outside their normal shift pattern*", and amounts to a PCP.

(ii) Comparative disadvantage

90. The claimant must show that those in the group who share the same protected characteristic are put (or would be put) to a particular disadvantage when compared with others. Considering those whose circumstances are materially the same (section 23(1)) (but for their protected characteristic) ('the comparator group'), the question is whether the impact of the PCP puts those sharing the claimant's protected characteristic at a particular disadvantage compared with the others in the comparator group who do not.

91. There are thus three elements to this (which overlap to a certain extent): a) identifying the comparator group b) identifying the particular disadvantage and c) determining whether the protected group is put at a particular disadvantage.

Identifying the comparator group

92. Although under previous legislation claimants would first identify a so-called 'pool for comparison', this is no longer the required approach (although it is still one way of approaching the question (see EHRC Code, paras 4.17-4.18)). It is still necessary to show some disparate adverse impact on the group sharing the claimant's protected characteristic. The choice of pool (or comparator group) is one of logic, not of discretion or fact-finding (Per Sedley LJ in ***Allonby v Accrington and Rossendale College [2001] IRLR 364 CA)***.

The pool must be one which suitably tests the particular discrimination complained of (see ***BA v Grundy [2008] IRLR 74 CA*** and ***MOD v Debique [2010] IRLR 471 EAT***).

93. Mr King argued that the comparator group consisted of only those who had applied for flexible working. The respondent was not however able to produce a gender breakdown of FWAs. In any event, the comparator group need not consist of actual individuals. Hypothetical comparisons are permitted because it is sufficient to show that the PCP *'would put'* those who share the claimant's protected characteristic at a disadvantage.

94. The EHRC Code indicates that in general the pool should consist of all those who are potentially affected by the PCP in issue, either positively or negatively, while excluding workers who are not affected by it, positively or negatively. That means, for example, that if it is argued that a particular job requirement indirectly discriminates against women, resulting in disadvantage to the individual claimant, the comparator group will consist of all those could be qualified for the job, except for the PCP in issue.

95. Applying that rationale in this case that means that the comparator group consists of all those to whom the FWP applies, namely all police officers, authority/police staff and cadets. A comparison is then made between the impact of the PCP on these without the relevant protected characteristic and its impact on those with (see EHRC Code of Practice, para 4.19).

Identifying particular disadvantage

96. The next step is to identify the particular disadvantage suffered. Disadvantage is not defined by the Act. According to the EHRC Code, 'it could include denial of an opportunity or choice, deterrence, rejection or exclusion" (para 4.9). Here the disadvantage (at a minimum) is that an applicant will not be able to avail themselves of the benefits of flexible working.

Determining whether the protected group is put at that particular disadvantage

97. One way of showing disadvantage is by relying on statistics, whether that be workplace, regional or national. Disadvantage can be proved by statistical evidence comparing the proportions of disadvantaged and advantaged people in the relevant comparator group. Here the respondent was unable to supply the relevant specific statistics relating to the workforce.

98. Consequently, the claimant in this case has relied on the national statistics from the ONS statistical bulletin for Families and Households 2015 (pages 108- 125) at section 5, headed up "*lone parents*", states that:-

> "*There were nearly 2.0 million lone parents with dependent children in the UK in 2015, a figure which has grown for 1.6 million in 1996 to 1.9 million in 2005 and then further to 2015. The increase of around 81,000 between 2005 and 2015 is statistically significant. Lone parents with dependent children represented 25% of all families with dependent children in 2015, similar to 2005 and a little higher than 22% in 1996. In 2015, women accounted for 90% of lone parents with dependent children and men the remaining 10%. These percentages have changed little over the 19 years since 1996. Women are more likely to take the main caring responsibilities for any children when relationships break down and therefore become lone parents*".

99. Disadvantage can be proved in other ways, including through judicial knowledge, which the claimant seeks to rely on here. The claimant relies in particular on the dicta of Potter LJ in the Court of Appeal in ***London Underground v Edwards (No.2) [1999] ICR 494*** that "*the high preponderance of single mothers having care of a child is a matter of common knowledge [24]. This is reflective of the national statistics, which indicate that the situation has not changed since 1999".*

100. We accept that such a policy which requires applicants to start and/or finish within their core shift, requiring them to work late into the night, will operate

to disadvantage single parents in particular, and therefore on these national statistics, will have a disparate impact on women.

101. Although we had no workforce statistics presented to us, we were aware that even if the PCP has not disadvantaged others sharing the claimant's protected characteristic, it will be sufficient that the PCP would usually disadvantage that group (***British Airways v Starmer [2005] IRLR 863 EAT***).

(iii) The claimant is put, or would be put at that disadvantage

102. The claimant must then show that the PCP disadvantaged them (or that it was capable of doing so). In this case, the claimant was clearly not able to comply with the PCP and the ultimate consequence for her was that she resigned. However, she was put to disadvantage to the extent, at least, that she would not avail herself of the benefit of flexible working.

103. We were conscious that the focus of this hearing is on liability only, and we considered that the discussions regarding the options for the claimant to be relevant to remedy and quantum and therefore make no further comment at this stage.

(iv) Justifying the PCP

104. Even if the claimant can overcome these first three hurdles to show indirect discrimination, a respondent will not be liable if they can show that the PCP is objectively justified. Section 19 requires a respondent to show that the PCP is 'a proportionate means of achieving a legitimate aim' in order to avoid liability. The test to be applied is an objective one, and not, as in unfair dismissal, a band of reasonable responses approach (***Hardy & Hansons plc v Lax [2005] IRLR 726***). There are two separate elements to the test which must be considered separately ***(MacCulloch v ICI plc [2008] IRLR 846 EAT***).

Legitimate aim

105. Mr McGuire argued that the evidence supported a conclusion that the respondent's legitimate aim always came back to an argument about the cost, and he argued that costs alone will not amount to a legitimate aim.

106. While we accepted that historically costs alone will not amount to a legitimate aim, costs may of course be considered in the balance, when combined with other factors ***(Woodcock v Cumbria Primary Care Trust [2012] IRLR 491 CA***; ***Cross v British Airways plc [2005] RLR 423 EAT***).

107. In any event, we accepted Mr King's argument that the claimant had indicated that they accepted that the legitimate aim put forward by the respondent was valid, namely….:-

> "*to provide a comprehensive and cost effective policing service 24 hours a day, 7 days a week in response to public demand, force objectives and Scottish Government requirements; to do so within the restraints of available human, financial and other resources and by the deployment of officers and civilians with the necessary skills and experience*".

108. We are grateful to Mr McGuire and Mr King for taking the time to consider the implications of the decision of the Court of Appeal in ***Harrod v The Chief Constable of Westminster Police [2017] EWCA Civ 191***, and while we took the view that that case, along with the decision of the EAT in ***HM Land Registry v Benson [2012] IRLR 373***, questions the extent to which a respondent can rely solely on cost as a legitimate aim (or indeed in the proportionality assessment), we ultimately concluded that this was in any event a "costs plus" argument, and we considered that was supported by the evidence, and we concluded that this was a legitimate aim.

Proportionate means

109. The PCP must be proportionate to the legitimate aim pursued. Again, proportionality is not defined in the Act. It involves a consideration of what is appropriate and necessary. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking (see ***Hampson v Department of Education and Science [1989] IRLR 69*** and ***Hardys & Hansons plc v Lax [2005] IRLR 726 CA***).

110. The respondent set out their justification for the application of the PCP at page 34, and we heard evidence to support their submissions.

111. We can deal rather shortly with four of the five reasons set out there. In particular, the respondent argued that the PCP was justified because the request had been considered by management and concessions had been made. We did not consider that to be relevant to the proportionality question; this is simply an essential step in the process of considering the request.

112. Further, the respondent argued that the PCP was justified for reasons of "*health and safety*" because working different patterns from her colleagues on her shift would mean that the claimant would often be left without a neighbour, which meant that she would not have been able to go out "*single crewed*" which was not permitted given the heightened security threat of severe since 29 August 2014.

113. It was not entirely clear to us from the evidence how many police officers were in each operational shift group, although Superintendent Coubrough stated that shifts were staffed by 10 officers and that the claimant's proposal would mean nine on her shift and eleven on another. In evidence, CI McGuire said that at Cathcart there were 12 plus a sergeant, whereas at Gorbals there were two sergeants and 13 or 14 officers. In any event we heard a good deal of evidence about how the actual numbers on any one shift are likely to be less because of annual leave, sick leave and other duties such as court attendance. We noted too that CI McGuire in evidence agreed that an officer

in the claimant's position could pair up with an officer from another shift group. We did not consider that this reason presented sufficient justification.

114. Linked to that is the rationale relating to the requirement to comply with the Workforce Agreement. Initially the claimant had offered shifts without the required breaks between them, but she had altered that in the proposal which was rejected. Further, while this may well have been a factor which was considered by managers dealing with the application, we did not understand the respondent to be relying on this to refuse the application; rather it was raised in evidence as a factor which favoured the claimant, in that her start times requested were within the tolerance agreed in that agreement. We did not consider that this reason amounted to objective justification.

115. The respondent argued that the PCP was justified for reasons of "*supervision and personal development*". This related to concerns that if police officers do not work the same hours as their shift group under the supervision of their line manager they miss out on proper management supervision and missing important briefing and debriefing sessions by their shift sergeant, which occur at the beginning and end of each shift. This would mean that "*an officer who only works a few hours with his/her shift is not being tasked properly and their contribution is difficult to assess*".

116. We heard a good deal of evidence about the importance of officers attending briefing and debriefing sessions, emphasised by the fact that there was a SOP dealing with them. The claimant's position was that the briefings were on a powerpoint and that it was possible to self-brief. As discussed, there were a range of reasons why an officer would not be able to attend either the briefing or de-briefing. Further, we noted that in relation to the occasions when the claimant would not commence shift at the beginning (9 times over the five week shift pattern), she would in fact have been on shift at the time that her colleagues would have been present for the briefing. Although CI McGuire pointed out that she would already have been given tasks at the beginning of her shift, and would be getting briefings later, and was

concerned that she would go two weeks without a proper briefing, given the infrequency of the days on which she would get briefings later, we did not consider that this reason was sufficient to amount to objective justification for refusing the request.

117. With regard to the issue of supervision by her sergeant, the claimant was an officer of 25 years service who would not require to be constantly supervised by her own sergeant and could get any guidance needed from a sergeant on duty. In any event, as Sgt McFarlane pointed out, not working with your own sergeant 18% of your shifts was not unmanageable, and she gave herself as an example (given that she currently works 82% of full-time hours). There was clearly 82% of the time when the claimant would be on shift with her sergeant, so that there would be ample opportunity for the sergeant to deal with the pastoral and personnel side of their role.

118. The key focus in this case was on the respondent's justification that there was no requirement for the claimant to work at the times she sought because of "*Operational need/demand*". Throughout the evidence we heard, including the evidence of Superintendent Coubrough, it was quite clear that the main reason why the claimant's request was refused because she would be attending work when there was deemed to be no demand for her services, in the sense that there was insufficient meaningful police work, or at least that meaningful police work was not consistently available.

119. In particular SI Coubrough explained the need to work within usual start and finish times was because they would still be working at a time of anticipated demand. He stated that:-

> "*starting earlier than or finishing later than their normal shift finish time will mean that they are working at a time when there is no demand for them because another planned shift will already be on duty, which will already be resourced having regard to anticipated demand. Therefore*

they will be superfluous to that demand and their presence will only create additional cost and inefficiency".

120. The respondent's witnesses reached this conclusion based on forecasts of work from patrol plan projections, local knowledge and expected seasonal or one off peaks of demand. They concluded that there was no operational need for the claimant to work at some of the times when she had requested to work. That was either 1. Because there was no anticipated demand and therefore no work scheduled for her or 2. because there was already adequate cover provided by officers on other shifts to meet expected levels of demand.

121. The respondent had a particular problem with her proposal for week 1. This was because there would be 24 hours in one week when it was asserted that there was no operational need for her to be on duty. Superintendent Coubrough stated that this was unsustainable because the respondent could not afford to pay someone to work for the majority of their week when there is no need for them to be at work at the times they propose.

122. We heard a great deal of evidence regarding this question about whether there would be any work for the claimant to do when she was deemed, according to the sophisticated systems in place, and in particular the ISDM, to be surplus to requirements.

123. The claimant explained what tasks she believed she could do at these times. This was based on her experience working at the uniform bar at Cathcart (on recuperative duties). In her view there would be work for her to do, even if she were to come in earlier than her colleagues on the standard shift pattern as she proposed. For example, she noted that there were a good number of outstanding calls on the call logging system (Storm) which she could deal with, and there was frequently a requirement for uniformed officers to cover for those on "*turnkey*" duties, who might be on leave or off sick or absent for other reasons; she also identified that she could attend to the calls which would allow colleagues when they came on shift to get caught up with report

writing given the time constraints for writing these reports. She was an experienced officer with 24 years' service who could be called upon to utilised for a range of tasks.

124. In support of her contention, the claimant relied on operational statistics from June 2015 to August 2016 which had been obtained from the respondent and which were lodged at pages 220 – 222. These showed the number of emergency calls logged on the Storm system, the number of court citations issues in that period, details of front desk duties and officer duties logged onto the Storm system each shift. The Tribunal gained the impression from these statistics and the oral evidence that there were frequently occasions when the claimant's services could have been utilised. For example, and in particular, in response to the forth query, there appeared to us a not insignificant number of occasions at Cathcart and Gorbals when custody duties required to be covered by uniformed officers.

125. We noted in evidence that Sergeant McFarlane commented on the respondent's assertion that there would be no work for the claimant during week 1 that "*in the operating environment in Glasgow, I cannot think of a single day where there is no work to be done, especially at that time of day….*" This included dealing with enquiries, assisting in the custody suit, general office work, dealing with those issues which legally require to be dealt with by a police officer. Of the other times offered, she said that the late shifts were historically always the busiest and they were "*always stretched"* and as a sergeant herself she would always be very grateful for an extra pair of hands.

126. In any event, we considered that the respondent paid too much heed to the numbers which were identified through the ISDM. JM said OBL was the most educated guess at the numbers required for policing. SI Coubrough himself said "*it is never an exact science but based on experience we know that there are certain times of day, days of the week and times of the year when the level of demand is relatively predictable*." We heard evidence that the OBL were now essentially reactive levels, that is the minimum level of staffing for safety, and although they strive to achieve proactive levels budgetary

constraints mean that is increasingly not possible. Sergeant McFarlane said they could rarely now operate at more than the reactive levels, but clearly operating at proactive levels was desirable.

127. Sergeant McFarlane's evidence is supported by the evidence of SI Coubrough who advised that the decision was made in the context of significant savings, and of the need to save additional headcount costs. In repeating SI Coubrough's mantra "*every penny is a prisoner*", CI McGuire sad that "*any [cost] over and above an actual requirement is too much*".

128. Taken in the round, the evidence which we heard did not support the assertion that there would be no work for the claimant to do during the hours when she proposed to work outwith the standard shift pattern.

129. We took the view that the evidence did not support the respondent's contention that there was no work for the claimant to do at certain times, and therefore that to refuse the application on the basis of operational demand was disproportionate.

130. For completeness, we considered whether it could be said that these five factors considered cumulatively could be aid to amount to a proportionate response, but concluded that they could not.

Justification overall

131. When considering the question of proportionality in the round, we considered that there was a failure to consider realistically the impact which the claimant's request would have on the operational efficiency of the police over all. We bore in mind, as an example, the fact that accommodations had been made for the claimant when she was off ill, and would require to be made for other officers similarly off ill. We bore in mind, as an example, the fact that the claimant had commenced at Cathcart on recuperative duties, and that many more officers would require to be similarly accommodated following

injury or illness for example. These types of contingencies can be accommodated by the respondent in respect of the claimant, and would require to be accommodated by the respondent on a large scale across the force, in the context of the ISDM and OBL requirements.

132. Further and in any event, we noted that once the new pattern had been agreed, this would be fed into the computer programme SCOPE, and account would be taken of the new arrangement by the claimant's line manager, and indeed others responsible for resource management. We noted in particular that in the SOP (page 86) resource management are responsible for ensuring that the SCOPE Duty Management (as per SCOPE Flexible Working Process Map) is updated with the approved shift patterns and that they are applied to the individuals duty management record appropriately as well as monitoring the skills and specialism cover that may be affected should a qualified officer be successful in applying for a flexible working pattern. Further the SOP states that the resource planning and co-ordination unit are responsible for monitoring the number of full time equivalent policing officers required to meet policing requirements in line with commitment to Scottish Government.

133. We were troubled by another factor which also appeared to present a contradictory position on the part of the respondent. We heard evidence that human resources had analysed the first proposal on the flexible scoring matrix and that, to everyone's surprise, it had scored high. Although the witnesses we heard from did not appear to understand exactly how this worked, or how the target was calculated, SI Coubrough stated that this analysis focused on whether an application meets times when there is likely to be high demand. He was critical of the fact that:-

> "*the flexible scoring matrix does not actually take any cognisance of someone working when we don't need them because resource has already been deployed. Rather it focuses on whether an application meets times when there is likely to be a high demand. Therefore while you gain points for matching your proposal against times of high*

demand you do not lose points when you propose to work when resource has already been deployed to meet that demand".

134. In this case, we know that the target score was 412, and that the claimant's score (for the first application) was 423. That means that the claimant was offering a good proportion of her shifts at times of high demand, and it should be noted in particular that the claimant was proposing to work alongside her shift at the week-ends (except for one slight adjustment of 2 hours on a Sunday in week 4). She was able to do this because she was relying on the goodwill of her friends to assist her with childcare at the week-ends. In order to score higher, she would have had to have offered yet more anti-social hours, but in any event that did not in fact appear to feature highly in the thinking of the decision-makers.

135. We noted that there was no attempt to re-analyse the second amended application on the FSM, which is the subject of this claim. This indicated to us that the respondent did not take the information obtained from the flexible scoring matrix into account where it did not support their position, and in particular the respondent did not balance the fact that in certain respects the claimant was offering to work at times of high demand, with the times when she was offering to work which were stated to be at times of low demand.

136. Overall, we were of the view that the respondent took a rigid mechanistic approach to the determination of the application by focusing too closely on the information from the IDSM and on OBLs. The evidence indicates that realistically such a model is only an indication of future demand based on past experience, and SI Coubrough himself stated that *"It is not an exact science but it is however based on certain objective data as well as what I would call 'educated professionalism'*".

137. In any event, the evidence from CI McGuire was that they could have tolerated the variations in week 2, and that it was week 1 she had a problem with, not the other proposals. Superintendent Coubrough concluded that he

could have tolerated the variations in week four, which amounted to variations from the standard shift of only four hours.

138. So what the refusal comes down to is the inability of the claimant to work alongside her colleagues for the four shifts of week one, which would occur at most every fifth week. As Mr McGuire pointed out, that amounted to just over 10 weeks a year, not taking account of annual leave entitlement. Even if we were to have accepted that there was no meaningful police work for her to do during these times (which we did not), it was not the case that the claimant would be in that position every week, but only for a relatively small proportion of her time at work.

139. Although CI McGuire said that it was irrelevant that the request was to adjust the claimant's shift times for only one year (because it would have been reviewed anyway), we did not accept that. We considered that it was highly relevant to the proportionality question, particularly when the objective evidence was that her son would be turning 16 after a year whereafter she could do standard shifts.

140. Further, if that same approach is taken for every request, we found it difficult to see how an officer could be granted a flexible working pattern on a full-time basis and indeed no answer was forthcoming when this question was put to HR. This is in light of the statement by SI Coubrough that, "*I was not unhappy for her to start late or finish early, because that would have been within the normal hours worked by a shift. However starting early or finishing late is problematic because there is no need for her to be deployed at those times*". He also appears to conclude that the only option would be to reduce hours, stating, "*there was no need for her to resign and be left with no income. She could have reduced her hours and saved the majority of her income and of course her career, as suggested to her*".

141. A slavish adherence to the ISDM, and the need to be deployed only when "*demand dictated*" would clearly indicate that anything but minimal

adjustments to shifts would not match demand, calculated as OBLs. After all in this case, the claimant was already offering to work as much as she could in times of high demand. It seemed to us that the FSM score would only be a relevant tool for a request for part-time flexible working (as opposed to full-time working).

142. Further, we were struck by the fact that both CI McGuire and SI Coubrough appeared to focus on the business needs of the respondent to the exclusion of the discriminatory impact on the claimant. This may well be explained by the fact that the SOP appears designed to meet the requirements of the Flexible Working Regulations where the test for justifying refusal is different from the test for justifying indirect sex discrimination.

143. It is clear from the case law discussed above that the approach requires an objective balance to be struck between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. SI Coubrough's comment that he was "*fairly surprised that she resigned at the end of this process*" confirms that he failed to appreciate the significance of the discriminatory impact of his decision on the claimant. Further, he appears to have been influenced (as was CI McGuire, although perhaps to a lesser extent) by the need to be "*fair*" to other staff. However, the rationale behind outlawing unjustifiable indirect discrimination is precisely to address the particular disadvantage suffered by the affected group.

Conclusion

144. In conclusion, we found the respondent's decision to be disproportionate. This was on the basis that, even if there was not consistently sufficient meaningful work for her to do when she was working outwith her normal shift pattern, the proposal to work on this flexible shift pattern was to continue for only 12 months during which time she would work 82% of her standard shift pattern. We considered that this was a relatively minor adjustment to make to accommodate the claimant's needs as a single parent, given the resources

of the respondent, particularly in respect of the sophisticated systems which were already in place to manage an extensive and critical workforce.

145. The respondents could have made a slight adjustment which would have pertained for only a limited period of time, and retained a long-serving police officer, who but for the discriminatory impact of the condition, may not have required to resign.

146. We find therefore that the claimant was unjustifiably indirectly discriminated against because of her sex by the respondent contrary to Section 19 of the Equality Act 2012. This case should now be set down for a hearing to determine remedy and quantum.

Employment Judge: Ms M Robison
Date of Judgment: 19 December 2017
Entered in register: 20 December 2017
and copied to parties