EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104370/2016

Held in Glasgow on 21, 22, 23, 24 & 27 February 2017

Employment Judge: Shona MacLean
Members: Mrs L M Millar
Mr A McMillan

Mrs Ann Downie — Claimant
Represented by:
Ms N Braganza
Counsel

Coherent Scotland Ltd — Respondent
Represented by:
Mr F McKay
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The Respondent unfairly dismissed the Claimant and the Employment Tribunal orders that:

    a. The Claimant be reinstated as a HR Manager such reinstatement to take effect no later than 1 May 2017.
    b. The Claimant shall be treated in all respects, including entitlement to holidays, as if she had not been dismissed.
    c. The Respondent shall pay to the claimant arrears of pay of £22,331 if the claimant is reinstated on 1 May 2017 and a further £562.84 for every further week until reinstatement takes place;
    d. The Claimant shall be restored to the Respondent's pension scheme and the Respondent shall pay any employer's contributions necessary to ensure that the Claimant is in the position she would have been in had she not been dismissed (subject to the claimant of making any contributions that she would have made had she not been dismissed).

2. The complaint presented to the Tribunal under section 120 of the Equality Act 2010 is well-founded; and the Claimant is entitled to an award against the Respondent in respect of injury to feelings of £14,966.57 inclusive of interest.

3. The Respondent is ordered to reimburse the Claimant for Tribunal fees amounting to £1,200.

REASONS

Introduction

1. The Claimant presented a claim form to the Tribunal's office on 23 August 2016 in which she complains of unfair dismissal and indirect discrimination. The protected characteristic is sex. The Claimant also made a complaint in relation to the Part Time Workers (Prevention of Less Favourable Treatment) Regulations which was subsequently withdrawn and dismissed on 2 December 2016.

2. The Respondent presented a response stating that the Claimant was dismissed by reason of redundancy and that in all the circumstances it was fair and reasonable. The Respondent denied discrimination as alleged or that the Claimant was treated less favourably and dismissed as a result of being a part time employee.

3. Ms Braganza represented the Claimant at the Tribunal Hearing. Ms Scovell instructed her. Mr McKay represented by the Respondent. He was accompanied throughout the Tribunal Hearing by the Respondent's European HR Director, Markus Schulzke.

4. The Claimant gave evidence on her own account. Ian Perth, Trade Union Representative gave evidence on her behalf. For the Respondent the Tribunal heard evidence from Christopher Dorman, VP and General Manager and Richard Gleeson, VP European Field Operations.

5. The issues to be determined by the Tribunal in relation to the unfair dismissal claim are:

    a. What was the reason for the dismissal?

b. Was the dismissal fair and reasonable in all the circumstances?

c. What remedy, if any should be awarded?

6. Following the Claimant's evidence and before Mr Perth gave evidence, the Respondent conceded as follows:

a. The requirement to work full time hours amounted to a provision, criterion or practice (PCP).

b. That the PCP placed women at a particular disadvantage.

c. The claimant was placed at that disadvantage.

7. The only remaining issue in relation to the indirect discrimination claim was justification: had the Respondent proved to the Tribunal that imposing this requirement amounted to a proportionate means of achieving a legitimate aim? If not what award should be made.

8. The parties lodged a joint set of productions. The Claimant also lodged a separate set of productions comprising documents relating to the attempts that she had made to mitigate her loss following the termination of her employment.

9. Based on the evidence led and the information presented the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

10. The Respondent is a limited company. It is designs, manufacturers and supplies lasers and laser based solutions to commercial and scientific customers. The Respondent's group has offices around the world. Its headquarters are in Glasgow.

11. The Respondent employed the claimant on 26 November 2007 as Human Resources (HR) Manager reporting to Christopher Dorman, General Manager and Vice President (production 45). She was employed on a part-time basis (22.5 hours per week) and worked part-time throughout her employment because of her child care responsibilities.

12. As the business grew the demand for HR services increased. The Respondent employed an HR Administrative Assistant who reported to the Claimant.

13. The Claimant had regular contact with Markus Schulzke, European HR Director. Mr Schulzke is based in Germany. He visited Glasgow around four times a year. Dr Dorman and Mr Schulzke had a good relationship with the Claimant. They were aware of her personal circumstances and the reason why she worked part-time.

14. The Claimant had HR responsibility for approximately 115 employees based in Glasgow along with around 15 employees based in Ely in the South of England. In relation to the Ely employees the Claimant liaised with Richard Gleeson, VP European Field Operations based in London.

15. Of the 115 employees based in Glasgow around 84% were male and 16% were female. The four Directors (Level 6 or above) were male. Of the Senior Managers of which there were six (Level 5) four were male and two were female (including the Claimant). All Managers/Supervisors of whom there were approximately eight were male. There were only two employees working part-time (including the Claimant).

16. Around October 2015 the HR Administrative Assistant went on maternity leave for six months. She returned on 11 April 2016. During her absence temporary maternity cover was put in place. At the beginning of 2016 another HR Administrative Assistant was employed for a two-month temporary assignment for a set project.

17. As part of her appraisal with Dr Dorman in December 2015 the Claimant indicated that there was a need to increase the number of HR administrative staff. Dr Dorman agreed with this but no one was appointed.

18. On 8 March 2016 the Claimant was called to a meeting with Dr Dorman and Mr Schulzke, which she assumed would be a routine update meeting (the 8 March Meeting). The Claimant was told that she would be required to

increase her hours to full-time, without notice of the decision to work full-time or any explanation as to why. The Claimant explained why she would not be able to comply. The reason for which Dr Dorman and Mr Schulzke was fully aware. She also explained why it was a particularly difficult time for her. Mr Schulzke mentioned the possibly working four days in the office and one day from home. The Claimant was asked to think about it and discuss it with her family that night and give an answer the following day (productions 49/51).

19. At a meeting on 9 March 2016 attended by Dr Dorman and Mr Schulzke the Claimant explained she was unable to work full-time due to her family responsibilities (the 9 March Meeting). The Claimant acknowledged there was an HR resource issue which was why there was discussion over the last few months about an additional HR Administrator post. She suggested an extra resource for HR Administrative Assistant. The Claimant explained how the work could be allocated between the Administrative Assistants. The Claimant's role would continue to focus on planning, performance, disciplinary issues, projects, new systems, training, directing and overseeing the policy and training requirements and ensuring that strategic objectives were met. She was told by Dr Dorman and Mr Schulzke that the Respondent wanted a full-time HR Manager. Mr Schulzke referred to a need to supervise the Administration Assistant. The Claimant said her colleague on maternity leave was returning in a few weeks and that she would be able to work unsupervised and that the Claimant was also available if anything was to occur. Mr Schulzke indicated that someone was needed to be there all the time to work at a strategic level. The Claimant's position was an additional HR Administrator would free up more of her time to focus on this. The Claimant said that she regularly worked in excess of her hours to try and clear up the backlog. Mr Schulzke indicated that all that was required was full-time strategic report and the Claimant was confirming that she could not work full-time. Mr Schulzke invited the Claimant to enter into a confidential discussion with a view to reaching a mutual settlement on resolving this. The Claimant declined. She indicated that if the Respondent had identified a need for a full-time post at her level she proposed that it

could be fulfilled with a further part-time appointment or through job share. The Claimant suggested reducing her working hours for a job share with an equal split (productions 49/52-54). Mr Schulzke said that the matter would be considered.

20. Around 15 March 2016 the Claimant had a further conversation with Dr Dorman on HR resourcing. The Claimant reiterated her willingness to reduce her hours to job share to facilitate an HR Manager on a full-time basis. The Claimant also offered to increase her hours to 30 hours per week over a five-day week as an alternative.

21. Without advance notice of the purpose of the meeting the Claimant met with Mr Schulzke and Dr Dorman on 12 April 2016 (the 12 April Meeting). She was told the Respondent proposed to replace the part-time HR Manager role with a full-time HR Manager role. The Claimant was told she was 'at risk' of redundancy. She explained there was no redundancy situation as there was no decrease in work. The Claimant reiterated that she was being asked to vary her contract to full-time which at the moment she could not do for childcare reasons. The Claimant further detailed her proposals to reduce her hours to create an equal job share. Dr Dorman asserted this as not viable. The Claimant sought clarification as to the business needs. She was told that there was a need for strategic support five days a week and for consistency in the HR management function, one person was needed to deal with the issues. She was provided with no information as to the supposed justification (productions 55/56-5).

22. The Claimant delivered a letter to Dr Dorman and Mr Schulzke on 13 April 2016 explaining again her position and proposals (productions 59-60). She also raised the conduct as being in breach of the EqA. The Claimant provided the Respondent with a copy of a report by the Job share Project (the Report). Dr Dorman did not read the Report.

23. Later that day the Claimant met Mr Schulzke and Dr Dorman. (the 13 April Meeting) (production 63-64). She explained that she had had little sleep; she really wanted to continue working for the Respondent and wished to suggest ways this could be best achieved if the role was to become full-

time. Mr Schulzke indicated that having read he letter he thought that job share was a good idea and consideration would be given to it. Dr Dorman had no suggestions.

24. At the end of the 13 April Meeting the Claimant was handed a letter dated 13 April 2016 inviting her to a "formal redundancy consultation meeting" on 19 April 2016 (production 61). The letter stated:

"*The company has recently reviewed the structure of its HR function. As a result of this review the company has concluded that due to increasing work levels, it is no longer viable to continue to have a part time HR Manager and it is therefore proposing to delete this role and replace it with a full time HR Manager. The rationale for considering replacing the part time position with a full time position is the company that there is an increasing need to have immediate strategic HR advise and that continuity of this is service is important*."

25. The letter stated that no decision had been made. It confirmed that what was set out in the Claimant's letter of 12 April 2016 would be explored during the consultation process and that a meeting had been set out for 19 April 2016. The Claimant was informed that alternative employment and ways to avoid redundancy would be explored. The Claimant was also informed of her right to be accompanied at the meeting.

26. The Claimant's understanding at this stage was although home working had been mooted at the 8 March Meeting this was no longer viable as the Respondent wanted someone on site for five days a week for strategic support and supervision of an HR Administration Assistant.

27. The Claimant wrote to Dr Dorman on 15 April 2016 expressing concern about the appropriateness of the redundancy process and asking that the job share proposal be progressed instead (production 65).

28. At the meeting on 19 April 2016 Ian Perth, Trade Union Representative accompanied the Claimant; Dr Dorman was present and Mr Schulzke

participated by video conference (the 19 April Meeting) (productions 70-71/72a-e).

29. The Claimant again asked that her proposals be considered. She explained how job share best met the business requirements as had been explained by day coverage at a strategic level and consistency could be met by a proper partnership approach. In addition to retaining her skills the other post could be recruited to bring in new skills and expand on the knowledge and skill base of the role. She confirmed that she would continue to be flexible and that she would certainly be willing to come in full-time for a short period to deliver specific projects.

30. It was confirmed that no one was questioning the Claimant's professionalism. It was acknowledged that the Claimant could be relied upon to undertake and deliver what is requested.

31. Mr Perth invited the Respondent to explain what the justification was for needing a full-time post. Mr Schulzke stated that there was clear and significant increase in the strategic workload and that they had to have continuity in its delivery. Dr Dorman said that one person was needed to do the job. Mr Schulzke indicated that an offer of a day home working was still available. When asked to explain why only a day home working was feasible no further explanation was provided.

32. Mr Schulzke indicated that he was happy to consider further proposals but there were no other alternative positions within the United Kingdom or Europe for the Claimant. There was no meaningful consultation: there had been no justification for the full-time post and the need for it to be undertaken by one person.

33. Mr Schulzke sent an email to the Claimant on 20 April 2016 inviting her to a further consultation meeting (production 74). She was advised of her right to be accompanied.

34. On 21 April 2016 the Claimant asked again for justification (productions 75-76) and again on 25 April 2016 (productions 83-84). She reiterated that the

main reason for working part-time was due to childcare responsibilities. She remained flexible and willing to vary her contract both to reduce her hours to allow a job share and to increase her hours up to 30 hours a week to provide daily coverage in a way that would suit her childcare responsibilities. The Claimant said it was difficult to make proposals in the absence of any justification for the full-time post or as to why there was a preference for one person to undertake it. The Claimant maintained that having a full-time post was not the same as having one person working full-time and the requirement to impose full-time working amounted to discrimination.

35. On 26 April 2016 the Claimant endeavoured to speak to Mr Schulzke and Dr Dorman regarding the situation. They indicated that they were not prepared to do so outside the of the meeting scheduled for 28 April 2016 (the 28 April Meeting).

36. At the 28 April Meeting Mr Schulzke and Dr Dorman were present. Mr Perth again accompanied the Claimant. There was no dispute about her performance. The Respondent required her to work full-time. The Respondent was aware that the Claimant was unable to do so because of her childcare responsibilities. There were no other changes required, either the type of work, the place of work or a focus of work or at all. The Claimant simply had to increases her hours. The Claimant reiterated her detailed proposals:

a. Job sharing on a number of different bases.
b. Increasing her hours.
c. Decreasing her hours.
d. Trialling her suggestions of increase hours for the next few weeks.
e. Delegating more administrative tasks so that she could address matters of more strategic nature.

37. No further justification was provided by the Respondent at the 28 April Meeting. It was adjourned for seven minutes. When it was reconvened Dr Dorman advised the Claimant that there had been consideration of the proposals. Although she offered to be flexible and use her own time to

handover it was still not considered that this would meet the business and continuity needs. A full-time role was required and therefore her role was deleted. As there was no alternative work the Claimant was told that she was being dismissed on grounds of redundancy. She did not require to work her notice and she would receive accrued holiday pay and statutory redundancy pay. This would be confirmed in a letter that was likely to be emailed the following day. When asked about an appeal, the Claimant was advised this would be put in the letter. Mr Perth sought clarity about the appeal process. There was a further adjournment for that purpose.

38. During this adjournment the claimant sent the following email to all staff at the Glasgow office (production 105):

"*I have just been made redundant, for not being able to work full time. So much for equality and fair treatment.*
I have really enjoyed me time here, and working with you all, and I am really disappointed that it has ended this way. Will take away many good memories and hope you will be able to join me for a farewell drink to be organised at a future point. For those of you who wish to stay in contact my email address is [ ]."

39. Dr Dorman was aware the email had been sent during the adjournment. When the 28 April Meeting was reconvened Dr Dorman made no comment about the email that had been sent. The Claimant was informed the appeals process would be put in the letter the following day. There was a further adjournment. The Claimant was asked to hand over her telephone and credit card. She was then asked to leave the site.

40. On 29 April 2016 the Claimant sent an email to Richard Gleeson explaining that she had wanted to say goodbye as she had been made redundant the previous day as she was unable to work full-time due to her childcare responsibilities. The Claimant indicated that she was very disappointed and enjoyed working with Mr Gleeson and then went on to give an update on various outstanding HR issues that she had been dealing at Ely with before she had left. Mr Gleeson replied indicating that he had been shocked and

saddened to hear this and that as he had been appointed point of appeal it would not be appropriate to have any ongoing communication.

41. The Claimant was dismissed as she was unable to work full-time. This was confirmed by letter dated 29 April 2016 (production 109). The letter made no reference to work/life balance or the needs and concerns of the Claimant as a full-time working mother. The letter informed the Claimant that she had a right of appeal to Mr Gleeson.

42. The Respondent required the Claimant to work full-time hours. That requirement puts or would put women at a particular disadvantage as part-time work is predominantly carried out by women as women to a greater extent have childcare responsibilities and are primary carers. The Claimant was put at that disadvantage.

43. The Respondent did not give the Claimant's job share proposals any proper consideration. It only repeatedly asserted that working full-time hours and only one person working full-time hours was the requirement and her proposals were not viable. The Respondent did not make any enquiries about the viability of Claimant's job sharing proposal. There was no consideration of trialling any of the Claimant's proposals.

44. The Claimant exercised her right of appeal by letter dated 6 May 2016 (production 113). The Claimant was advised that her appeal would be considered at a meeting on 24 May 2016 (the 24 May Meeting). Mr Gleeson confirmed that he would chair the appeal and that Mr Schulzke would attend to take minutes. The Claimant was also advised of her right to be accompanied.

45. By letter dated 12 May 2016 the Claimant clarified points in relation to her appeal and indicated her objection to Mr Schulzke attending the 24 May Meeting due to his previous detailed involvement in the decision to dismiss her. Mr Gleeson replied Mr Schulzke's involvement to date was purely to give advice from an HR prospective and to take notes at meetings. Dr Dorman had confirmed that the decision to dismiss was taken by him alone. As Mr Gleeson was to take the decision at appeal he did not consider that

Mr Schulzke's attendance would prejudice the fairness or impartiality of the appeal hearing.

46. On 17 and 18 May 2016 the Respondent advertised the Claimant's job on a full-time basis (production 121).

47. Mr Gleeson spoke to Dr Dorman before the 24 May Meeting. There was no record of this discussion.

48. Mr Perth accompanied the Claimant at the 24 May Meeting (productions 129/138). Mr Gleeson and Mr Schulzke were present. The Claimant made an opening statement following which Mr Gleeson asked a number of questions. The appeal was not upheld. The decision letter of 25 May 2016 failed to engage any further with her proposals or grounds of appeal beyond asserting that they were not accepted (production 161).

49. The Claimant sent an email to some former colleagues on 6 June 2016 advising that her appeal had been rejected and thanking them for their support and friendship (production 163).

50. The Claimant sent an email to Dr Dorman on 8 June 2016 asking if he would be willing as her line manager to provide prospective employers with a reference (production 165a). He did not respond

51. The Claimant was distressed and upset from the 8 March Meeting until around August 2016. She had sleep disturbance and weight loss. The Claimant suffered stress and rosacea. She lacked of confidence.

52. At the date of termination, the Claimant was 51 years of age. The Claimant had been continuously employed by the Respondent for eight years. Her gross pay was £2,335 per month which equated to a net pay of £1,748 per month. The claimant also received monthly employee benefits of £104 per month and the value of her pension was £163 per month. She received an annual bonus of £2,306 per annum which equated to £192 per month. On termination the claimant received eight weeks' pay in lieu of notice and redundancy payment of £5,748.

53. The Respondent has a full-time HR Manager who is a man.

Observations on Witnesses and Conflict of Evidence

54. The Tribunal considered that the Claimant gave her evidence in a dignified manner. She had a vivid recollection of events and her evidence was consistent with her contemporaneous notes. The Tribunal found her to be a credible and reliable witness. Despite the upset caused to the Claimant she did not display any animosity during the Tribunal Hearing towards Mr Schulzke, Dr Dorman or Mr Gleeson. Indeed, to the contrary she had enjoyed working with them in the past and looked forward to the opportunity of doing so in the future.

55. In relation to the 8 March Meeting, 9 March Meeting, 12 April Meeting, 19 April Meeting and 28 April Meeting both parties produced contemporaneous notes. Neither were *verbatim*. The Respondent's notes were brief. The Claimant's notes were more extensive. The Claimant was not seriously challenged on the veracity on her notes of these meetings. The Tribunal therefore considered that they were an accurate account.

56. The Claimant was however challenged about her evidence that at the 13 April Meeting Mr Schulzke put his hand on his heart and said that having reflected on the Claimant's letter he thought that job share was a good idea and it would be given serious consideration. The Claimant referred to this in her note of the 13 April Meeting (production 63). She also recorded in her note of the 28 April Meeting that Mr Schulzke denied viewing job share favourablely and it being a possible solution. The Claimant challenged this. Mr Schulzke could not recall. The Claimant referred to her note and reminded Mr Schulzke in considerable detail about what was said by him at the 13 April Meeting. There was no record of his response. Dr Dorman said that given Mr Schulzke's specialisation and understanding he found it had to believe it have been said. It was not a phase that Mr Schulzke used.

57. Although Mr Schulzke was present throughout the duration of the Tribunal Hearing he did not give evidence. He is the Respondent's European HR Director. The Tribunal considered that in that capacity it was highly plausible

that during what the Respondent said was redundancy consultation he would say that he would give job sharing consideration. As indicated above the Tribunal considered that the Claimant was reliable and credible. She was in the Tribunal's making a concession that the Respondent said that consideration was being given to her job sharing proposal. While the Claimant had had little sleep the night before there was no reason for her note of the 13 April Meeting not to be accurate. The Tribunal felt that it was significant that the Claimant recalled not only the words used but Mr Schulzke's gesture which she demonstrated at the 28 April Meeting. If there was any misunderstanding by her she was not disabused of that at the 28 April Meeting. For the reasons explained below the Tribunal did not consider that Dr Dorman was a persuasive witness and therefore preferred the Claimant's evidence on this point.

58. Mr Perth was in the Tribunal's view credible and reliable. The Tribunal had no hesitation in accepting his evidence. The only issue put to Mr Perth in cross-examination was that he was aggressive at the 28 April Meeting. He denied this although he admitted to being assertive given what he considered was the Respondent's dismissive attitude. Dr Dorman described Mr Perth as confrontational. Mr Gleeson said that Mr Perth was "bamboozling" him at the 24 May Meeting.

59. The Tribunal considered that Mr Perth was an experience trade union representative. His relationship with the Claimant was professional. The Tribunal did not consider that he has animosity towards either Dr Dorman or Mr Gleeson both of whom the Tribunal were told were intelligent and were supported by Mr Schulzke at the 19 April Meeting, 28 April Meeting and 24 May Meeting. Mr Perth could not understand the position adopted by the Respondent and therefore sought to explain why the Claimant considered that she was being discriminated against and sought the evidence which if produced might support the assertions being made by the Respondent. He even explored the possibility of there being an underlying reason for Respondent's decision. However, the Claimant's performance was not in issue. Indeed, to the contrary she was held in high regard. The Tribunal considered that it was highly likely that Mr Perth conducted himself in a

professional manner and Dr Dorman in particular was unaccustomed to being challenged when he had made a decision.

60. The Tribunal did not consider that Dr Dorman was a credible witness. When asked questions in examination-in-chief he paused and thought about the answer. In cross-examination he was evasive and tended to answer the question he wanted to answer rather than the question that he was asked.

61. Given Dr Dorman's scientific background the Tribunal found his approach to the Claimant's proposals incredible. The Tribunal was unconvinced that he approached the situation with an open mind or that he genuinely considered the proposals.

62. It was agreed that there was an increasing HR workload. Over recent months the Claimant's HR support was limited to temporary Administrative Assistants: one providing maternity cover and the other working on a specific project for a limited time. The Tribunal's impression from the evidence was neither were particularly effective and the Claimant was covering administrative tasks in addition to her own work. Despite the imminent return of the Administrative Assistant who was on maternity leave and the discussions with the Claimant about recruiting an additional Administrative Assistant Dr Dorman decided on or before the 8 March Meeting that he wanted one HR Manager working full-time. Dr Dorman had not previously raised this with the Claimant. He knew that the Claimant was unable to work full-time because of her child care commitments. The Tribunal reached that conclusion because Dr Dorman was aware of the Claimant's personal circumstances; despite the lack of urgency she was given overnight to consider her position; when the Claimant confirmed the following day that she could not work full-time because of her child care commitments she was immediately offered a confidential discussion to reach a settlement which she declined.

63. Although a month elapsed before the 12 April Meeting when the Claimant was told her job was "at risk" there was scant evidence about what was happening in this period other than the Administrative Assistant returning from maternity leave on 11 April 2016. The only proposed change to the HR

Manager role was the increase in working hours. There was no evidence that the type of work or focus of the work undertaken by the HR Manager was to change. There was no change in reporting structure.

64. Dr Dorman repeatedly said that he listened to the Claimant. That the Tribunal did not doubt. What the Tribunal was unconvinced by was that he considered the Claimant's proposals. The Tribunal felt that it was significant that Dr Dorman did not read the Report. He said that one person was required for continuity reasons. He referred to an example on a handover incident in January 2016. This was not raised with the Claimant at the time or during the internal process. The Tribunal struggled to understand the relevance of the incident given that it related the temporary Administration Assistants failing to bring an accident report to the Claimant's attention on her non-working day. What the Claimant was proposing was a permanent job-sharing partner with equivalent/complementary skills and face to face handover on Wednesdays and telephone handover on Fridays during the Claimant's own time. There was overwhelming evidence of the Claimant's flexible approach to working and willing to work beyond her contractual requirement.

65. The Claimant offered to work 30 hours over five days. The Tribunal was not convinced that this was considered by Dr Dorman. While the Tribunal accepted that the Respondent had indicated that it would be willing to consider the Claimant working full-time with one day per week from home. The Respondent knew that the Claimant could not work full-time. It was difficult to understand why this option was feasible if as the Respondent said that there was a need to be in the office five days per week to supervise staff and give strategic advice. The Tribunal felt that Dr Dorman's reluctance to consider this even on a trial basis was indicative that he had made up his mind, was blinkered and was unwilling to consider any of the Claimant's proposals.

66. The Tribunal's impression was that Dr Dorman had made his decision on or before the 8 March Meeting. The Tribunal did not consider that he had any personal issue with the Claimant. The fact that they had worked well

together for eight years was testament to this. However, having made up his mind, other than agreeing to work full-time, there was nothing that the Claimant could do to persuade Dr Dorman otherwise.

67. Mr Gleeson gave his evidence honestly and candidly. The Tribunal was surprised that on being asked to hear the Claimant's appeal Mr Gleeson's focus was to consider whether someone else would undertake the responsibility. He only reluctantly agreed to do so if he was not under any pressure from Dr Dorman and Mr Schulzke. Notwithstanding this he was content to have Mr Schulzke attend the 24 May Meeting to take notes. He also indicated that he would delay making a decision until after his return from annual leave but in the event the four-page letter setting out the decision was issued the following day.

68. The Tribunal's impression was that Mr Gleeson was out of his depth. He had no proper understanding of his role. He did not consider that it was his role to reopen the discussion about possible job share or the Claimant re-joining the Respondent.

69. To his credit Mr Gleeson had read the Report. However, he focussed on the negative aspect and linked this to his wife's job share experience none of which he raised with the Claimant at the 24 May Meeting.

70. Mr Gleeson was unaware that before the 24 May Meeting the full-time HR Managers position had been advertised. What the Tribunal found more surprising was that Mr Gleeson who was responsible for the Ely office was unaware that a man had been appointed full-time to the role of HR Manager.

Submissions

71. The representatives helpfully provided written submissions which were supplemented with oral submissions. The following is a summary.

Submissions for the Claimant

72. The Claimant brings two claims: unfair dismissal contrary to section 98(2) and (4) of the ERA and indirect discrimination under section 19 of the EqA, read with section 39(2).

73. The Respondent relies on the reason for dismissal as a redundancy or some other substantial reason of a re-organisation The Claimant's claim for unfair dismissal is that the reason for her dismissal: the Respondent's request that she increase her hours to full-time and was then dismissed because she could not comply with this and because her proposals for a job share were rejected does not falls within any of the reasons under section 98(2). It is not a redundancy as defined under section 139 of the ERA and it is not a restructure or reorganisation, nor does it meet the requirements of some other substantial reason. There was no cessation or diminution of work. Further, there is no evidence of any reorganisation. The sole change and requirement imposed by the Respondent was an increase in hours to full-time. In answer to the Tribunal's question whether the Claimant would have remained had she been able to work full-time, Dr Dorman answered "Yes".

74. Further, the process was unfair and wholly unreasonable in all the circumstances, particularly given the size of the Respondent and that its own senior HR Manager and her union representative repeatedly highlighted to the Respondent not simply that the process was unfair but also how that unfairness should be addressed and avoided – all of which was disregarded.

75. In all the circumstances the Respondent acted wholly unreasonably under section 98(4). Fundamental to both claims was the Respondent's abject disregard and lack of engagement with the Claimant's numerous proposals

for a job share and Dr Dorman essentially basing his decision to dismiss on no more than his opinion.

76. In relation to the indirect discrimination claim the Respondent finally conceded as follows:

a. The requirement to work full-time hours amounted to a PCP.
b. That PCP placed women at a particular disadvantage.
c. The Claimant was placed at that disadvantage.
d. The only remaining issue was that of justification: has the Respondent proved to the Tribunal that imposing this requirement amounted to a proportionate means of achieving a legitimate aim?

77. The Claimant was employed as a Senior HR manager by the Respondent for over 8 years. She was dismissed at a meeting on 28 April 2016 and by letter of 29 April 2016. Throughout that time, she was employed on part-time hours of 22.5 hours per week. The reason for her dismissal from the evidence has always been plain: the Respondent required the Claimant to work full-time. Whether it was by an individual decision by Dr Dorman or jointly with Mr Schulzke at some point prior to 8 March 2016, the Respondent decided that the work the Claimant was undertaking was required to be done on a full-time basis rather than on a part-time one. The Claimant was unable to comply, for the same reasons that she had always worked part-time, and so was dismissed.

78. The evidence fails to disclose any justification of the decision that the Claimant could only continue on a full-time basis.

79. This is a textbook example of unlawful indirect discrimination. Mr Perth in the meetings he attended referred to the Respondent's conduct being "incredible in 2016" when the Respondent was making the claim that an HR job on a job share basis would not work, particularly "when Chief Executives of NHS trusts job share" and with so many examples of senior level jobs in the job share report. It is striking and concerning that a company this size and one that suggests it has an understanding of the need for more women in the workplace has conducted itself in this way.

80. The Respondent's attitude throughout in its dealings with the Claimant, with Mr Perth, in reply to the questionnaire and in its response to her claim is to display a striking disregard and absence of any awareness of equal opportunities, any commitment to including and retaining women in the workforce, or any desire to or understanding of the need to combat discrimination.

81. The Tribunal is particularly invited to consider the evidence of Dr Dorman, his evasive answers, his lack of any real knowledge or understanding of equality law and his lack of seeing the need to have ensured that he was informed at the time of the dismissal as to the serious matters of breaches of the EqA that were flagged up to him, repeatedly.

82. Instead, by its conduct, the Respondent effectively drives out women, as it is women who primarily require part-time hours for reasons of childcare responsibilities, and thereby maintains its work gender profile of almost exclusively being an all-men run and male dominated company, with the pyramid structure of exclusively men at all higher levels of management. Discrimination jurisprudence and section 19 of the EqA are specifically targeted at legislating against conduct of precisely this kind.

83. There is no dispute as to the Claimant's performance. There is now no dispute that she worked part-time hours and was unable to do more due to her childcare responsibilities. There is no dispute that part-time employees are predominantly women. To the extent that any explanation is provided as to the requirement to work full-time, the evidence merely discloses repeated bald assertions that this was the requirement: there is no detail, there is no engagement with the Claimant's repeated requests for justification, there is no engagement with her proposals, no reason provided as to why none of these would work even if only on her suggested trial period.

84. The Tribunal is invited to uphold the Claimant's complaints. The Tribunal was referred to Claimant's chronology that cross referred to the productions. The Tribunal was invited to make certain findings in fact.

85. The Tribunal was referred to Sections 139 and 98 of the ERA and Sections 39(2) and 19 of the EqA.

86. The PCP: the requirement that the Claimant work full-time is now conceded.

87. In relation to justification the Tribunal was referred to Harvey refers as follows:

"[352]
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. While domestic legislation uses the word 'proportionate' in preference to the phrase 'appropriate and necessary' which appears in the Equal Treatment Framework Directive (2000/78/EC; see arts 2.2(b) and 6.1), it is considered that the ECJ has used the two terms interchangeably. The more serious the disparate adverse impact on a protected group, the more cogent must be the justification for it. Guidance on the way in which this balancing exercise should be carried out was provided by the Court of Appeal *in Hardys & Hansons plc v Lax [2005] IRLR 726, [2005] ICR 1565* (see para [340]), an appeal relating to a complaint of indirect discrimination on grounds of sex. The court held that it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The court emphasised that there is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal".

88. The Respondent must provide cogent evidence in support of any argument of justification. It is for the Respondent to identify and prove the legitimate aim and that it applied proportionate means of achieving that aim. The Respondent has failed to articulate or prove either (see *R v Secretary of State for Employment, ex p Equal Opportunities Commission [1994] IRLR 176, [1994] ICR 317, HL* where the argument that the additional service requirement for part-timer was justified because otherwise employers would

be disinclined to take them on was rejected by their Lordships as there was a lack of convincing factual evidence.

89. Turning to the unfair dismissal claim under section 98 it is for the employer to establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons. The Respondent can rely upon more than one reason but must specifically make these out. Second, it is necessary for the Tribunal to be satisfied that in the circumstances the employer acted reasonably in treating the reason as a sufficient ground for dismissing the employee. The employer will not be in a position to do this if the reason in fact relied upon (or indeed an important ground constituting that reason) is neither established in fact nor believed to be true on reasonable grounds (*Smith v City of Glasgow District Council [1987] IRLR 326, HL*).

90. There was no cessation or diminution of work in this case: the Respondent has not made out the reason of redundancy or any other substantial reason. Giving the same reason relied on as a redundancy a different label does not constitute some other substantial reason.

91. As to circumstances which genuinely give rise to a redundancy situation: The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.

92. Fair consultation means:

a. consultation when the proposals are still at a formative stage;
b. adequate information on which to respond;
c. adequate time in which to respond;
d. conscientious consideration by an authority of the response to consultation.

93. On remedy, and as to injury to feelings, the Tribunal is invited to consider the following and in particular the evidence of both the Claimant and Dr Dorman:

a. The degree of distress and upset caused and how this manifested itself.
b. How the Respondent dealt with the Claimant's concerns.
c. The seriousness of what happened.
d. That the Claimant suffered stress and rosacea as a result.
e. The Claimant's evidence as to sleep disturbance, weight loss, lack of confidence and its impact on her on her family life and the extent to which she valued and enjoyed her job.
f. The seniority of those who were responsible for her dismissal and having discriminated against her.
g. The lack of any evidence of any commitment to equal opportunities.

94. Given the circumstances, the Tribunal is invited to find that this merits an award at the top end of the middle Vento band: it is a very serious complaint, the Claimant lost a job she loved and had done without complaint for over eight years.

95. The Claimant relies on *Boorman v Allmakes Ltd [1995] IRLR 553* where the EAT held that where the tribunal found that the dismissal was not for the reason of redundancy and a redundancy payment had been made that this was not to be offset against the basic award.

96. The Claimant also asks for reinstatement. The Respondent's evidence from Dr Dorman is that the company is rapidly growing and continues to do so. There is no objective evidence of efforts having been made to genuinely explore the extent to which work is available for the Claimant.

97. For a Respondent of this size and with offices globally to have conducted itself in this way is inexcusable and entirely contrary to section 98(2) and (4) of the ERA, the EqA and the EHRC Code of Practice. It betrays a complete disregard for due process and equality of opportunity.

98. The Tribunal is invited to find the Claimant's claims of both unfair dismissal and indirect discrimination made out and to award compensation as set out within the Schedule of Loss.

Submissions for the Respondent

99. The Respondent agreed with the Claimant's submissions regarding the issues to be determined. The Respondent also agreed with the statutory framework to which the Tribunal had been referred.

100. The Tribunal was referred to the cases of *Murray and another v Foyle Meats [1999] 3 All ER 769* and *Safeway Stores plc v Burrell [1997] IRLR 200*.

101. It being admitted that the Claimant was dismissed the Tribunal must decide:

a. Had the requirements for the Respondent's business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish?
b. If so, was the Claimant's dismissal caused wholly or mainly by the cessation or diminution?

102. The Respondent's submission is that there was a diminution in the requirement for the work of part-time HR Manager. Dr Dorman said that there was a need for the role of HR Manager to be carried out on a full-time basis. The Claimant admitted that she understood this this during the redundancy consultation process and in her evidence before the Tribunal. There was also a material change in the type of work which the Claimant was required to carry out. The Claimant's role had involved a significant amount of HR administration, as acknowledged by the Claimant during the redundancy consultation process and in her evidence before the Tribunal. The Respondent's proposal was that this administrative work would be taken on by its HR administrators. The Claimant's role would then focus on supervising the HR administrators and providing strategic advice to the business. The Respondent submits that this therefore falls within the

definition of section 139 of ERA1996, authority given by Ellis v GA Property Services Limited 13453/89 (not provided).

103. The Respondent submits that the facts support their position that was a genuine redundancy. This was the principal (and only) reason for the Claimant's dismissal. Accordingly, the tests set out at Section 98 (1) and (2) of the ERA are satisfied.

104. If the Respondent has established that the reason for the Claimant's dismissal was for the potentially fair reason of redundancy, the Tribunal should turn to consider whether the Respondent followed a fair process in dismissing her.

105. At the 12 April Meeting the Claimant was advised of the reasons that her role was at risk and that the Respondent would enter into a period of consultation with her. The Respondent then wrote to the Claimant on 13 April 2016 confirming what had been discussed. The Claimant attended the 19 April Meeting at which the Respondent listened to the points she made. The Claimant was invited to a further consultation meeting by letter dated 20 April 2016. In that letter the Claimant was advised that if no ways were identified to avoid her redundancy, the meeting may result in her dismissal on the ground of redundancy. The Claimant attended the 28 April Meeting and was ultimately dismissed.

106. During the consultation process the Respondent considered the Claimant's proposal of a job share but ultimately concluded that this would not provide sufficient continuity of service in the provision of strategic advice and that there were likely to be issues in relation to handovers which would impact on the effectiveness of the HR advice.

107. It also considered that the Claimant's suggestion that she work 30 hours per week and concluded that this would not be sufficient given the significant increase in the workload of the HR Manager and it would not meet the Respondent's need to have immediate HR strategic advice available at all times.

108. The Claimant admitted that she understood why the Respondent required the role to be carried out on a full-time basis. The Respondent suggested to the Claimant that as a compromise, she could work from home one day per week, but she advised the Respondent that she was simply not willing to increase her hours to full-time. Once all ways to avoid the redundancy had been considered, the Respondent then considered whether there were any suitable alternative roles. However, there were not any such roles.

109. The Claimant was given, and exercised, her right to appeal which was heard on 24 May 2016 by Mr Gleeson. Mr Gleeson had not been involved in the process prior to the appeal. Mr Gleeson did not uphold the Claimant's appeal.

110. The Claimant was accompanied at all consultation meetings, other than the initial at-risk meeting, by her trade union representative. The Respondent submits that it was not required to give the Claimant notice of such at-risk meeting. It is common practice not to do so in order to ensure that no undue distress is caused to the employee in the period between receiving notice and the meeting taking place.

111. The Claimant was the only HR Manager at the Respondent. There was therefore no requirement to pool the Claimant with other employees.

112. There were no prescribed timescales within which the Claimant's redundancy consultation should have taken place. In the present case, the Respondent consulted with the Claimant for over two weeks. However, discussions regarding HR resource had been ongoing for some time. The Respondent submits that the length of the consultation process was therefore reasonable in the circumstances. It was clear by the 28 April Meeting that given the Claimant was not willing to increase her hours to full-time and there were no suitable alternative roles, her redundancy could not be avoided. Nothing would have been achieved by extending the consultation process further. The Respondent therefore submits that the process adopted in dealing with the redundancy was fair.

113. As regards reasonableness section 98(4) states that Tribunal must consider whether in the circumstances the employer has acted reasonably in treating the potentially fair reason, in this case redundancy, as a sufficient reason for dismissing the employee. This section expressly provides that the size and administrative resources of the respondent must be considered.

114. The test as to whether the employer acted reasonably is an objective one. The Tribunal has to decide whether the Respondent's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones 1982] IRLR 439*). In the present case it is submitted that the Respondent's decision fell within the reasonable band of responses open to a reasonable employer with the Respondent's resources in the circumstances.

115. *Iceland* (above) provides that the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair. In judging the employer's conduct and employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases, and this the Respondent submits is one of those cases, there is a range of reasonable responses where one employer may take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within this band the dismissal is fair; if the dismissal falls outside this band the dismissal is unfair. This is a different test to the test of whether the dismissal was discriminatory. The application before the Tribunal should therefore be dismissed.

116. In the alternative, if the Tribunal does not believe the Claimant was dismissed on the ground of redundancy, the Respondent submits that the potentially fair reason for dismissal was some other substantial reason of a kind such as to justify the dismissal of an employee, namely, that for

business reasons the role of HR Manager required to be carried out on a full-time basis and the Claimant was unwilling and/or unable to do so.

117. The Respondent would submit that whichever reason the Tribunal considers to be the reason for dismissal, this is simply a label and does not change the facts of the dismissal. It is clear that the Respondent dismissed the Claimant because it required a full-time HR Manager rather than a part-time HR Manager, and followed a comprehensive and fair process in making the decision to dismiss. In particular, it met with the Claimant on several occasions and considered whether there were any ways in which her dismissal could be avoided. The Respondent submits that its treatment of the situation as a redundancy benefitted the Claimant, in that it resulted in it entering into a full consultation process with her and she was paid a statutory redundancy payment.

118. There is no legal definition of what a re-organisation is. The Respondent submits that its requirement for its HR function to be undertaken in a different way is sufficient to amount to a re-organisation. Where there is a re-organisation, the *Iceland* test applies. It is the Respondent's submission that in order to achieve this re-organisation the Respondent needed to have the HR function done on a full time basis and that this is a decision for the Respondent and not one that the Tribunal can determine was right or wrong. It is for the Tribunal to decide whether this was in the range of reasonable responses open to a reasonable employer to adopt. The Respondent's submission is that this was a reasonable response to its HR requirements and was not a decision that no reasonable employer would have come to.

119. Turning to the indirect discrimination claim it is accepted that the Respondent's requirement that the role of HR Manager be carried out on a full-time basis amounted to a PCP. It is further accepted that the PCP was applied to the Claimant and put women at a disadvantage. The PCP put the Claimant at a particular disadvantage. The Respondent submits that the PCP was a proportionate means of achieving a legitimate aim.

120. The Respondent submits that the PCP was objectively justified as it was a proportionate means of achieving the Respondent's legitimate aims. The Respondent submits that the burden is on it to prove that this test is met.

121. The Respondent's legitimate aims must simply amount to a "real business need":

a. there was sufficient HR support available to meet the demands of the Respondent's business, including the provision of immediate strategic HR advice;
b. the Respondent's business was provided with continuity of service in the provision of its HR advice; and
c. the Claimant was not treated unfairly by being required to respond to emails and phone calls out with working hours and deal with an excessive workload.

122. Since the Claimant's role of HR Manager had been created, its workload had increased significantly. The business had expanded over the years. It was also necessary to have strategic HR advice available at all times, and such advice was at a level that it could only be provided by an HR Manager. There was a need to ensure that continuity of service was maintained.

123. Finally, the Respondent recognised that prior to commencing the redundancy consultation process, the Claimant was already working in excess of her contractual hours, frequently responding to emails and phone calls in her personal time. The Respondent considered that this was unfair. Indeed, the Claimant herself accepted that additional resource was needed, and stated that she understood the Respondent's rationale for requiring a full-time HR Manager.

124. The Respondent's decision to replace the Claimant's role with a full-time HR Manager role was in pursuit of legitimate aims.

125. The next step is to consider whether the application of the PCP to the Claimant was a proportionate means of achieving a legitimate aim. There is no general duty on an employer to put forward evidence that it considered

less discriminatory or less onerous alternatives to the PCP. The Respondent submits that in the present case, the PCP was reasonably necessary to achieve its legitimate aims. In reaching the decision that it required a full-time HR Manager, it tried to accommodate the Claimant's preferences by offering her the opportunity to work from home one day per week. Whilst the Claimant would be required to respond to the Respondent's emails or telephone calls during this time, it is submitted that it would nevertheless give her an opportunity to speak to her son when he returned from school. She would also be at home on this day and so it would mean that she did not have any travel time and could thus spend this time with her son. Under this arrangement the Claimant would only be required to work one additional day at the Respondent's office and it is submitted that any disadvantage caused to her would be minimal. However, the Claimant ultimately refused to consider any proposals which required her to work full-time.

126. The Respondent also considered whether it could accommodate the Claimant's proposal of a job share. It ultimately concluded that it could not. Dr Dorman concluded that handovers would be an issue and that there would not be the continuity of service in HR that the business required. The Respondent therefore had legitimate grounds to consider that a job share would not provide the continuity of service it required.

127. To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were "reasonably necessary" in order to achieve the legitimate aims: paragraph 23 of Hardy & Hansons Plc v Lax [2005] EWCA Civ 846, the Court of Appeal held that the objective justification test "requires an objective balance between the discriminatory effect of the condition on the employee and the reasonable needs of the employer." Any disadvantaged caused to the Claimant by reason of the PCP was a proportionate means of achieving a legitimate aim, and not therefore unlawful.

128. The Claimant is seeking an order for reinstatement in terms of section 114 of the ERA. In terms of section 116(1)(b) it must be reasonably practicable for an employer to comply with an order of reinstatement.

129. The Respondent submits that re-instatement is not practicable in the circumstances as on a broad common sense view it is not practicable given the Claimant's feelings.

130. Where there is a breakdown in trust and confidence, the remedy of re-instatement has very limited scope of being practicable. The Respondent submits that the emails sent by the Claimant to all employees in the Respondent's Glasgow office were unprofessional and inconsistent with her role as an HR Manager. It is submitted that by sending these emails the Claimant's reputation amongst the Respondent's employees as a professional HR Manager was irreparably damaged. The Claimant's actions undermined the Respondent's faith in her ability to carry out her role in an impartial and professional matter to such an extent that it resulted in a breakdown in the relationship of trust and confidence.

131. The Claimant's conduct in the course of these proceedings is relevant to the question of reinstatement. It is submitted that the Claimant has demonstrated a clear animosity towards Dr Dorman and Mr Schulzke in the course of these proceedings. The Respondent submits that this would make it very difficult for the Claimant to return to the Respondent.

132. In any event, following the Claimant's dismissal, the Respondent has appointed an HR Manager who undertakes the full time HR role.

133. As regards compensation the Tribunal should have regard to the following when calculating the Claimant's loss:

a. The Claimant received a statutory redundancy payment from the Respondent. She is not therefore entitled to a basic award.
b. Any compensation should be limited to nine months' loss.
c. The Claimant stated that she did not apply for jobs between April and July 2016 because she was suffering from rosacea. The Claimant

has not provided any medical evidence that her rosacea did in fact prevent her from applying for such roles. The Respondent submits that the Claimant's rosacea was not an adequate reason for her not applying for alternative roles during this time period.

134. In relation to the indirect discrimination claim compensation for loss of earnings should be considered in the same way as indicated in respect of a finding of unfair dismissal.

135. It is submitted that any such award for injury to should be based on the lower *Vento* band. This was not a campaign of harassment. Any discrimination was indirect and took place over a relatively short period of time culminating in the Claimant's dismissal. It was essentially one episode of discrimination and falls within the lower band of Vento.

The Law

136. Section 139(1) of the ERA 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

a. the fact that his employer has ceased or intends to cease
   i. to carry on the business for the purposes of which the employee was employed by him, or
   ii. to carry on that business in the place where the employee was so employed, or
b. the fact that the requirements of that business
   i. for employees to carry out work of a particular kind, or
   ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

137. Section 98(1) of the ERA provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:

a. the reason (or, if more than one, the principal reason) for the dismissal, and

b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

138. Section 98(2)(c) of the ERA provides that a reason falls within the subsection if is that the employee was redundant.

139. Section 98(4) of the ERA provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
b. shall be determined in accordance with equity and the substantial merits of the case.

140. Section 39(2) of the EqA provides that: An employer (A) must not discriminate against an employee of A's (B)

a. as to B's terms of employment.
b. in the way A affords B access,
c. or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service…
d. subjecting B to any other detriment.

141. Section 19(1) of the EqA provides that 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. For the purposes of sub-section (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.

Deliberations and Discussion

Unfair Dismissal Claim

142. The Tribunal had to decide firstly whether the Claimant had been unfairly dismissed and secondly, if she was unfairly dismissed, what remedy to award.

143. In reaching a judgment in this case, the critical question for the Tribunal was whether or not the Claimant's dismissal was fair in terms of Section 98 of the ERA.

144. At this point the Tribunal referred back to Section 98 of the ERA which sets out how a Tribunal should assess the question of whether a dismissal is fair. The employer must show the reason for the dismissal and that it was for one of the potentially fair reasons set out in Section 98(2). At this stage the Tribunal noted that it was not considering the question of reasonableness.

145. The Tribunal asked whether the Respondent had shown the reason for the Claimant's dismissal. The Respondent asserted that the reason for dismissal was redundancy or alternatively some other substantial reason which are fair reasons under Section 98(2). The Claimant asserted there was no redundancy situation or business reorganisation. The reason for her dismissal was that she required to work full time and she was unable to do so because of her childcare commitments.

146. The Tribunal referred to the definition of redundancy in Section 139(1) of the ERA. There was no evidence of closure of the Respondent's business or its Glasgow site. The Tribunal considered whether there was a diminishing need for employees to do the work available.

147. The Tribunal found that there was increasing HR workload. The Respondent required that the Claimant increase her hours to full-time. There was no diminution in the in the requirement for employees to carry out work of a particular kind: HR support.

148. From the evidence before the Tribunal it was not satisfied that the full-time HR Manager would be doing work of a different kind to the Claimant. While the Claimant's Administrative Assistant was on maternity leave the Claimant's HR support was limited to temporary Administrative Assistants: one providing maternity cover and the other working on a specific project for a limited time. While the HR Administrative Assistant was on maternity leave the Claimant had been involved covering administrative tasks in addition to her own work. The Administrative Assistant returned to work on 11 April 2016. Had the Claimant agreed to work full-time her role would continue to focus on planning, performance, disciplinary issues, projects, new systems, training, directing and overseeing the policy and training requirements and ensuring that strategic objectives were met. The increase in HR workload was the same kind of work that the Claimant undertook part-time. The Tribunal did not consider that the Claimant was dismissed by reason of redundancy.

149. The Tribunal then turned to the alternative reason asserted by the Respondent: some other substantial reason (SOSR). The Tribunal noted that the Respondent did not require to show that a reorganisation or change in working patterns was essential nor was it for the Tribunal to make its own assessment of the advantages of the Respondent's business decision to reorganise or change.

150. The Tribunal referred to its findings. There was an increase in HR workload. The Respondent decided that the part-time HR Manager post should be replaced with a full-time HR Manager. There was no evidence of reorganisation. The role was the same but for longer working hours. The Tribunal was satisfied that the Respondent had shown that there was a business need for a full-time equivalent HR Manager. However, the Tribunal did not consider on the evidence before it that the Respondent had shown

the what the substantial business needs were for that full-time post being undertaken by one person. The Respondent referred to continuity of strategic advice and supervision. However, during the internal process and at the Tribunal Hearing the Respondent was unable to provide evidence about the advantages and importance of this.

151. If the Tribunal was wrong and the reason for dismissal was SOSR, the Tribunal considered the reasonableness of the Respondent treating the business reason as a sufficient reason to dismiss. This involved considering all the circumstances including the Respondent's size and administrative resources that the dismissal was nonetheless unfair under section 98(4).

152. The Respondent was aware that the Claimant was a long standing employee who was committed to the business and willing to work above and beyond her contractual requirements. Her refusal to work full-time was for genuine family commitments of which the Respondent was aware. The Claimant had put forward a number of proposals including increasing her hours and working over five days and reducing her hours to facilitate an equitable job share. The Respondent failed to seriously consider any of these proposals. It took no steps to explore alternatives. It did not consider a trail period but was prepared to dismiss the Claimant which resulted in there being no HR Manager on site until one was recruited on some unknown date.

153. The Tribunal therefore concluded that the dismissal was unfair. Before considering remedy, the Tribunal discussed the indirect discrimination claim.

Indirect Discrimination Claim

154. Given the Respondent's concessions during the course of the Tribunal Hearing the issue that the Tribunal had to discuss was whether the Respondent had proved that imposing a requirement to work full-time amounted to a proportionate means of achieving a legitimate aim?

155. The Respondent cited business needs. The Tribunal was not satisfied on the evidence that the Respondent has established justification of the decision that the Claimant could only continue on a full-time basis. In reaching this conclusion the Tribunal took into account the following factors.

156. There was no evidence that the Respondent understood that its requirement that the Claimant work full-time had any indirect discriminatory impact let alone that it even considered whether insisting upon it had was a proportionate means of achieving its business needs. The Tribunal was not satisfied that the Respondent conducted a proper assessment of its operational needs. The requirement to work full-time (with possibly one day at home) rather than 30 hours per week over five days with general flexibility was not fully explained. It appeared to the Tribunal that Dr Dorman unilaterally decided that he wanted one HR Manager working full-time reporting to him. This was the business need and that was justification. There was no explanation of any particular strategic projects in the pipeline, how supervision was to be conducted if the HR Manager was working at home or on holiday. The need appeared to be that the HR Manager had to be available just in case strategic advice was required and for consistency only one person could provide it. However, it seemed to the Tribunal that even a full-time HR Manager took holidays, attended meetings off site (possibly in Ely) and was therefore not immediately available and consistency was not guaranteed.

157. The Tribunal was not satisfied that the Respondent gave serious consideration to the Claimant's alternative proposals. The evidence before the Tribunal was that the Claimant working part-time delivered all that was asked of her. She communicated effectively with the Directors. She was flexible and contactable. The Tribunal felt that the Respondent dismissed the proposal for job sharing out of hand. Dr Dorman did not consider whether job share could work in practice. He did not express any concern about the ability to recruit someone to job share or make any enquiries in this respect. The Tribunal did not accept that the Claimant's HR function was incapable of being performed by two individuals. Dr Dorman failed to properly consider the option of the Claimant increasing her hours which

would allow her to remain in her job. There was no proper explanation why this was not feasible when she would be on site five days per week and be contactable. There was no consideration of a trial period especially when the Claimant's inability to work full-time was not indefinite and was likely to change in the next few years. The Respondent did not demonstrate that it explored ways of accommodating the Claimant's request to continue working for it.

158. The Tribunal therefore decided to uphold the Claimant's complaint of indirect discrimination.

Remedy

159. Having found the unfair dismissal complaint well founded and the Claimant having made clear she wished to be re-employed the Tribunal considered whether to make an order for reinstatement.

160. The Tribunal being satisfied that the Claimant wants an order for reinstatement went onto consider whether it was practicable for the Respondent to comply. At this stage the Tribunal has to make a provisional determination based on the evidence before it as to whether it is practicable for the Respondent to reinstate the Claimant.

161. The Respondent's business had grown since the Claimant's appointment in 2007. The Respondent has appointed a full-time HR Manager. The contractual basis of the appointment (other than hours worked) was not disclosed at the Tribunal Hearing. The Tribunal did not know if it was a permanent appointment given at the time of recruiting the Respondent was aware that the Claimant wanted her job back and was pursuing this through legal means. It was not clear to the Tribunal who was providing HR support for the employees in Ely give that Mr Gleeson appeared to have little or no knowledge about the Claimant's replacement. The Tribunal was not satisfied that there would be overstaffing.

162. The Tribunal then considered the personal relationship between the Claimant and her colleagues. The Claimant was a good employee who was highly regarded and well-liked and respected by her colleagues and peers. Dr Dorman dismissed the Claimant not because she was incapable of doing the work but because she could not work full-time. Had she agreed to do so the Tribunal had no doubt that they would have continued with what appeared to be a good working relationship. The Claimant also had a good working relationship with Mr Schulzke and Mr Gleeson. She had no animosity toward then or indeed Dr Dorman. The evidence of Dr Dorman and Mr Gleeson was that the decision to dismiss the Claimant was not personal but a business need. She did not cause or contribute to her dismissal.

163. The Respondent made much of the email sent by the Claimant during the 28 April Meeting and maintained that it had caused a breakdown of trust and confidence. The Tribunal carefully considered the email and the one sent by the Claimant following the 24 May Meeting.

164. The Tribunal noted that throughout the "consultation" the Claimant did not discuss her situation with her colleagues. So far as she was concerned they were unaware of what was going on. Despite her attempts to explain her concerns about the Respondent's approach, the Claimant was told after an adjournment of seven minutes that she was being dismissed and was to leave the premises. The Respondent did not propose any communication strategy to the employees or appear to have any consideration as to who would hear the appeal. While sending the email might be viewed as poor judgment by the Claimant the Tribunal considered that its terms were not unprofessional. There was a certain irony that the individual tasked to ensure that the Respondent met its strategic objective of equality and fair treatment was being dismissed because they could not work full-time. The email did not mention Dr Dorman or Mr Schulzke. Although they were aware that the email was sent neither made reference to it when they reconvened the 28 April Meeting. In the dismissal letter the Claimant was not asked not to communicate with colleagues. Indeed, Mr Gleeson did so from a personal email address. There was no suggestion before or at the 24

May Meeting that having sent the email prevented the decision to dismiss the Claimant being overturned.

165. While the Tribunal did not doubt that Dr Dorman was not best pleased about the email, the Tribunal did not consider that it was any more unprofessional than Dr Dorman not replying to the Claimant's email about the reference. The Tribunal considered that there was no reason why Dr Dorman could not put the email behind him and move on.

166. Contrary to the Respondent's submission the Tribunal did not consider that the way in which the Claimant conducted the Tribunal proceedings soured the relationship. The Claimant disagreed with the decision that had been taken. Her explanation for this had been consistent throughout the internal and Tribunal proceedings. The Claimant has been willing to resolve matters without a Tribunal Hearing. To her credit she continued to have a high regard for Dr Dorman, Mr Schulzke and Mr Gleeson. The Tribunal had no reason to doubt the veracity of that evidence.

167. As the Claimant was a valued and effective employee during her service with the Respondent and as it is evident that the she still has a significant emotional attachment to the Respondent the Tribunal therefore orders that the Claimant be reinstated, such reinstatement to take effect no later than 1 May 2017, and that she to be treated in all respects as if she had not been dismissed. The Tribunal hopes that, with an order for reinstatement being made, all involved will be able to put these unfortunate events behind them and move forward successfully.

168. The order must also specify an amount payable by the Respondent to reflect any benefit (including arrears of pay) that the Claimant might reasonably have expected to have received for the period between dismissal and reinstatement.

169. The Claimant's monthly benefits were as follows:

Monthly pay:	£2,335
Monthly employee benefits	£ 104
Monthly bonus	£ 192

170. All figures are gross and the Respondent will require to make such deductions for tax and national insurance as are required by law.

171. If the Claimant is reinstated on 1 May 2017 the Tribunal has calculated £31,575 as the amount payable from 28 April 2016 to 30 April 2017 which based on an annual salary of £28,023 plus benefits for 12 months (£104 + £192) x 12) that is £3,552. No evidence was led of any pay increases to which the Claimant would have been entitled from her dismissal to date. There was no evidence that the Claimant would not have received her bonus. Therefore, calculations have been made on the basis of the Claimant's salary at the time of dismissal and the benefits including bonus that she received at the time. The calculation of the rate of weekly pay is (£2,335 + £104 x 12/52) that is £562.85.

172. Payments made by the employer in the period after dismissal require to be deducted from the award. The Claimant received eights weeks' pay in lieu of notice and accrued holiday pay. The Tribunal considered that it is the net figure that should be deducted, being the actual net amount received by the Claimant. The final payslip was not produced. The Tribunal calculated the net pay as two months' net pay at £1,748 per month, that is £3,496. Also the payment made in respect of redundancy payment should be deducted: £5,748. The total amount to be deducted from £31,575 is £9,244, leaving a balance of £22,331.

173. The Claimant should be restored to the Respondent's pension scheme and the Respondent shall pay any employer's contributions to ensure that the Claimant is in the same position as she would have been had she not been dismissed.

174. The Tribunal then considered whether to make an award of injury to feelings. The Tribunal reminded itself that when exercising its discretion any award is designed to compensate the injured party not punish the guilty party. Further a Claimant does not need to produce medical evidence of injury to feelings.

175. The Claimant's evidence about feeling distressed, upset, having sleep disturbance and weight loss from the 8 March Meeting until around August 2016 was not challenged on cross-examination. The Tribunal accepted that she suffered stress, rosacea and weight loss. The Tribunal could understand why the experience caused her to lack confidence.

176. The Tribunal took account of the evidence and applying a broad brush approach decided that it was appropriate to award the Claimant a sum that reflects injury to feeling which she suffered as a result of the Respondent's treatment. The Tribunal was satisfied that working was important to the Claimant. To some extent the Claimant felt isolated at home and had taken great pleasure from working with the Respondent. The Claimant was devastated by her dismissal. The Tribunal had no doubt that it impacted on her self-esteem and added further pressure at an already stressful time for her.

177. In light of the guidance of *Vento* and *Da'Bell* the Tribunal had to decide into which category the award of injury to feelings should be made. The Tribunal was satisfied that it would not be appropriate to make an award in the lowest band given the circumstances described by the Claimant.

178. The Tribunal considered whether it was appropriate to place an award in the middle level which is in the range £6,001 to £18,000 as it was invited to do by Ms Braganaza. It was not suggested that the highest level was appropriate.

179. The Tribunal took account of the fact that Dr Dorman and Mr Gleeson both Vice Presidents held the Claimant in high regard and had over eight years valued and followed her HR advice for yet on this occasion they disregarded her advice without due consideration and giving her a proper explanation.

The Claimant was upset by this and the peremptory manner in which the Respondent dealt with her concerns. While this occurred over a few months the Respondent was well aware that it was a particularly difficult time for the Claimant because of family circumstances. The Claimant's colleagues were unaware of the meetings that had taken place and she was asked to collect her coat leave the premises after the 28 April Meeting. She had no opportunity to complete or handover her work and say farewell to colleagues.

180. The Tribunal therefore concluded that it was appropriate to award the Claimant the sum of £14,000. In so doing the Tribunal has fixed that sum that is fair, reasonable and just compensation in this case. The Tribunal concluded that an award at this level is an appropriate sum by way of compensation for injury to feelings in respect of the impact of the Respondent's treatment to the Claimant.

181. Under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 the Tribunal requires to consider whether an award of interest should be made without the need of any application by either party.

182. Under regulation 3 interest is calculated as simple interest which accrues from day to day. The rate of interest is fixed by section 9 of the Sheriff Courts (Scotland) Extracts Act 1892, that is eight per cent.

183. Regulation 6 contains the rules for calculation of interest. There is provision for the Tribunal to depart from the rules where it is of the opinion that a serious injustice would be done if the rules were applied. The Tribunal was not of that opinion here.

184. For injury to feelings the period of an award of interest starts on the date of the act of discrimination complained of and ends on the day that the Tribunal calculates the amount of interest.

185. Regulation 7 provides that written details must be given of the calculation of interest.

186. After careful consideration the Tribunal decided to award interest at the rate of eight percent per annum from the date of dismissal being 28 April 2016 to the date of this judgment being 8 March 2017. So calculated the interest payable is £14,000 x 8% x 315/365 days = £966.57 taken together with the award for injury to feeling the Tribunal has ordered the Respondent to pay the Claimant the sum of £14,966.57 in respect of injury to feelings, inclusive of interest.

187. The Tribunal considered that in the circumstances, the Claimant having been wholly successful it was appropriate to order the Respondent to reimburse the Claimant in respect of the Tribunal fees comprising an issue fee of £250 and a hearing fee of £950, that is £1,200.

Employment Judge: Shona MacLean
Date of Judgment: 08 March 2017
Entered in register: 09 March 2017
and copied to parties