EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Asher Thomson	**v**	**Orlight Limited**

Heard at: Watford **On**: 28-31 January 2019

Before: Employment Judge Henry
Mr D Sutton
Mr P Randall

Representation

For the Claimant: In person

For the Respondent: Miss C Jennings - Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant has not been automatically unfairly dismissed.

2. The claimant has not been subject to discrimination on the protected characteristics of sex.

3. The claimant has not suffered an unlawful deduction from her wage.

4. The Tribunal accordingly dismiss the claimant's claims.

REASONS

1. The claimant by a claim form presented to the Tribunal on the 17 March 2018, following a period of early conciliation between the 26 February 2018 and the 14 March 2018, presents complaints for automatic unfair dismissal pursuant to Section 99 of the Employment Rights Act 1996, discrimination

on the protected characteristics of sex; claiming direct discrimination and indirect discrimination, and a claim for an unlawful deduction from wages.

2. The claimant commenced employment with the respondent on the 8 January 2018. The effective date of termination was the 15 January 2018; the claimant having been employed for 7 days.

The Issues

3. The issues for the tribunal's determination were agreed at the outset of the hearing, as follows:

Direct sex discrimination

3.1. The claimant relies upon the following alleged acts of less favourable treatment, namely:

3.1.1. David Yankey asking questions about the claimant's personal life and circumstances and questioning about her childcare arrangements.

3.1.2. David Yankey being late to work without comment whereas David Yankey would have an issue with the claimant's lateness.

3.1.3. The respondent dismissing the claimant for poor time keeping.

3.2. Did the alleged acts occur?

3.3. If so, did the respondent treat the claimant less favourably than it treated or would treat a man in similar circumstances (David Yankey and/or a hypothetical man)?

3.4. If so, are there facts from which the Tribunal could conclude that the less favourable treatment by the respondent was because of her sex?

3.5. If the burden of proof shifts to the respondent, can it provide a non-discriminatory explanation of the treatment?

Indirect sex discrimination (Section 17 EQA 2010)

3.6. Did the respondent apply the following provision, criterion or practice (PCP);

3.6.1. Requiring an 8am start to the working day

3.7. Would that PCP put women as a group at a particular disadvantage when compared to men?

3.8. Did that PCP put the claimant at that particular disadvantage/those disadvantages?

3.9. Was the PCP a proportionate means of achieving a legitimate aim, namely the running of an efficient business?

Automatically unfair dismissal (Section 99 and Section 57A ERA 1996)

3.10. Were the changes to the claimant's child care arrangements in order to take action because of the unexpected disruption or termination of arrangements for the care of a dependent as set out in S57A(1)(d) ERA 1996?

3.11. If so, was the reason, or principle reason for the dismissal of a prescribed kind, being connected to the claimant's request for time off for a dependent as set out in S57A ERA 1996?

Unlawful deduction of wages

3.12. Is the claimant entitled to a payment of £125 for the one-day induction she attended on 18 December 2017?

Evidence

4. The Tribunal received evidence from the claimant and from the following witnesses on behalf of the respondent:

Ella Hiscott, HR and Operations Co-ordinator, and
David Yankey, Senior Legal Executive

5. The witnesses' evidence was received by written statements upon which they were then cross-examined. The Tribunal had before it a bundle of documents exhibit R1. From the documents seen and the evidence heard, the Tribunal found the following material facts.

Facts

6. The respondent is a company engaged in the construction industry, providing lighting products internationally, in the production and design and manufacturing thereof. The claimant following an application through a Recruitment Agency, for the post of Operations Manager with the respondent, on being unsuccessful therein, was offered an alternative position of Operations Project Manager, which she accepted. The offer of employment correspondence, dated 13 December 2017, stated:

> "Dear Rubi,
>
> I trust this email finds you well.
> I write further to our discussion earlier today in relation to your application for a position within the Operations Team. To reflect, we are impressed with your application on the whole and are keen to bring someone of your talent into the business. However, as explained, we do have some reservations regarding your suitability to the Operations Manager role and I noted that we are ideally looking for someone with more senior experience and qualifications in terms of structuring and expanding key areas of the business.

> I believe the role of Operations Projects Manager is the perfect suit for your current capabilities; as discussed, this role will focus on the maintenance and compliance of areas such as; health and safety, security, space efficiency and training & development, to name a few. Further to this, you will play a key role in bringing about the quality integration and communications departments, as well as, constructing and executing new plans and ideas for the business.
> In doing so, you will gain crucial insight and experience into the business, its industry and what we are trying to achieve. The role will allow you to work closely with the Group Operations Director (more so than the Operations Manager position) and play a key part in the growth of the company.
> Further to our discussion regarding building yourself into the Operations Manager position, this is something which, unfortunately, we cannot put a timescale on. It would involve assessing your input in strategic business critical plans – which, of course, you will know does take time.
> Ultimately, the team and I feel strongly about bringing you on board, as discussed before, the Company is looking for determined, passionate and ambitious individuals. The Company has a massive scope for progression and reward which I am sure you will be able to take full advantage of, should you join us.
> As such, following on from your interview with Wilson Mendes and the Operations Team, we would be pleased to offer you the role based on the following terms:
>
> Subject to satisfactory employment references
>
> Position: Operations Project Manager
> Start Date: Monday 8th January 2017
> Salary: £35,000
> Location: Orlight HQ (*Unit 3, ….. St Albans,* …)
> Hours: 08:00 – 17:30"

7. On the claimant accepting the offer of employment, on 14 December 2017 the claimant was invited to an induction day, the correspondence of invite, advising:

> "We are pleased to see you have accepted our offer and keenly look forward to working with you.
>
> Ella will now forward you all the relevant documentation necessary at this stage.
>
> As previously discussed, please kindly let me know when you will be available next week to meet the team and complete your induction. This will aid in making sure your start with us goes as smoothly as possible.
>
> Congratulations and welcome to Orlight."

8. On the respondent seeking to have the claimant attend an induction, on the 15 December 2017, the claimant informed the respondent *"I can confirm I will have a day off on Monday 18 December but am working the rest of the week. Will this be ok?".* The induction was accordingly arranged for the 18 December 2017; Mr Yankey informing the claimant**:**

> "Please attend our offices at 9:00am and ask for either myself or Ella. Then we will get started".

9. The induction consisted of introducing the claimant to the team with which she would be working, being shown around the premises and given an insight into the operations of the respondent's business. The claimant also attended a contract negotiation meeting with an existing supplier, and was taken to lunch by Mr Yankey, Senior Legal Executive. The day came to a close around 3:30pm, on the claimant having to get away.

10. It is the claimant's evidence that, on attending the induction day she was informed by Ms Hiscott, HR and Operations Co-ordinator, that she would be paid for attending that day; the claimant further stating in cross-examination as to it being assumed that she would be paid, on the claimant stating that it was standard. The claimant further stated that on attending the induction, Ms Hiscott had said "not to worry it will be paid in your next pay roll". The claimant is not certain of the particular terms used, stating that she may have been informed that it would be January or paid in time for the next pay roll. On the claimant being questioned as to the conversation that had taken place, the claimant was unable to state whether the issue was raised by herself or Ms Hiscott; the claimant stating that Ms Hiscott had made it known that she would be paid for attending that day.

11. It was Ms Hiscott's evidence that, payment on attending induction was not something that the respondent paid, and that she had a standard script for new recruits, one issue being in respect of pay, but that was in respect of when staff would receive pay. Ms Hiscott was further clear that, she would not have given the claimant details of any payment in respect of attending the induction day, as she was not familiar with pay roll to be able to state when she would be paid for attending the induction day, as the claimant states she had been told.

12. On the evidence before the Tribunal, the Tribunal prefers the evidence of Ms Hiscott that, she had not stated that the claimant would be paid for attending the induction and that the discussion as to payment had not been made. In so stating, the Tribunal is mindful that on discussion having been made about payment in respect of salary, the claimant may have assumed that the payment was in respect of her attending the induction, directed by the claimant's assumption that such payment would be made.

13. It is the claimant's further evidence that at the induction, discussion was had, having been initiated by Mr Yankey, as to her having children; being asked a series of personal questions concerning her private life and personal circumstances.

14. It is the respondent's evidence that discussions of a general personal nature had been had on the claimant meeting the team, and on the claimant noting a picture of Mr Yankey's new born child as a screen saver on his computer, for which general discussions were had as to children. It is not however accepted that Mr Yankey asked the claimant a series of personal questions concerning her private life or personal circumstances.

15. On it not being in dispute that Mr Yankey had pictures of his new born on his screen saver, and on the claimant stating that she had seen it and had made reference thereto, the Tribunal on a balance of probabilities prefers the evidence of the respondent that there was general discourse as to children following the claimant making reference to Mr Yankey's screen saver, for which discussions were generally had. The Tribunal does not find as the claimant suggests, there to have been probing questions by Mr Yankey or otherwise, of Mr Yankey making reference to the claimant being too young to have two children as the claimant advances, in any negative manner, or otherwise to show disapproval, and that were statements of that nature made, which the Tribunal notes Mr Yankey vehemently denies, the Tribunal finds that in the circumstances, such comment would have been a product of the social discussions being had for which the malice suggested by the clamant would not have been present.

16. As part of the discussions had at the induction, it was agreed that the claimant would submit a three-week plan to the respondent by the 2 January 2018 for the respondent to review. The claimant duly submitted a plan, stating:

> "As promised, please find attached my three-week plan, as per your request. Feel free to change or add anything you wish and of course, I will be happy to follow whatever induction plan you feel is needed."

17. The claimant's three-week action plan is at R1 page 161.

18. On the 5 January 2018, the claimant was written to by Mr Yankey in respect of her commencing employment, stating:

> "Upon your commencement with operations, you will be given a detailed handover of responsibilities by Simon McGuinness, of these responsibilities you will be given targets and tasks by myself to achieve – some of which will be expected immediately. As such, please ensure you are well-prepared for a swift beginning to your role.
>
> If there are any questions you may have in the meantime, please do not hesitate to contact me to discuss further."

19. The claimant did not respond thereto.

20. In respect of this correspondence, the claimant states that thereby *"there was a change in attitude of Mr Yankey."* Which the claimant clarified to refer to Mr Yankey's tone, in that the previous correspondence from the respondent had been welcoming, whereas, the correspondence of the 5 January 2018, was more businesslike and official.

21. The claimant's contract of employment which is at R1 page 44, was completed and signed on the 18 December 2017. The claimant's employment was stated as commencing on the 8 January 2018.

22. By clause 5 of the contract, the claimant was subject to a period of probation, which provides:

> "Probation (for new employees)
>
> The first three months of employment will be a probationary period, during which time the Employee's performance will be monitored, with feedback and/or coaching provided. At the end of this period, provided a satisfactory standard is achieved and maintained, the Employee's employment will be confirmed. In the event of unsatisfactory progress, the probationary may be extended or the Employee's employment terminated either during or at the end of the probation."

23. By clause 7 of the contract, provision is made as to Pay, which provides:

> "Pay
>
> Payment is at the rate of £35,000.00 Gross per annum and is payable monthly in arrears on the last working day of the month.

24. By clause 12, as to hours of work, the contract provides:

> "The Employee's normal hours of work are 8.00am – 5.30pm Monday to Friday"

25. And by clause 19, the contract provides for notice on termination, that:

> "Notice Entitlement Requirement
>
> If the Employee has one month's continuous service, the Employee must give the Employer one week's notice of the intention to terminate their employment. This period will increase to one month after the probation period (three months from the Start Date).
>
> If the Employee had one month's continuous service, the Employee is entitled to receive one week's notice in the event of termination. This increases to two weeks after two years of continuous service and then by a further week for each complete year of continuous service up to a maximum notice period of 12 weeks.
>
> In the case of gross misconduct, the Employer reserves the right to dismiss the Employee summarily, i.e. without notice and without payment in lieu of notice.
> ….
>
> The Employer reserves the right to pay the Employee in lieu of notice on the termination of employment"

26. On the 8 January 2018, the claimant attended work arriving at approximately 8:40am, which the respondent maintains was late, in that, by the claimant's contract of employment, she was due to start work at 8:00am. It is the claimant's evidence that she was due to start work at 9am, taking the Tribunal to a document from the Recruitment Agency identifying her start time on the 8 January 2018 as that of 9:00am.

27. In respect hereof, the tribunal further heard evidence as to the claimant experiencing difficulty with traffic owing to an accident that morning, and of her texting the respondent at 8:10am to advise that she would be late.

28. The Tribunal, noting the issue raised, does not make a determination thereon as it is not material to the facts upon which the Tribunal makes its determination, infra.

29. On the claimant attending work on the 8 January 2018, she reported as duly instructed to Mr McGuinness, who furnished her with a handover and documentation, a copy of which is at R1 pages 192-268.

30. The claimant was thereby furnished with a target list for the 8 and 9 January, a first week target list, and a first month target list, a copy of which are at R1 page 192-194. A copy of the handover notes is at R1 page 195-196.

31. The claimant has acknowledged receipt of those documents, but states that she had not read all the documents.

32. By the first week's target list, the Tribunal here notes that missing therefrom, which had been identified as part of the claimant's three-week plan, was the task of shadowing Mr Mendes for the first two weeks.

33. In respect thereof, the respondent maintains that, on Mr Mendes being engaged in setting up a new site in Farringdon (London), he then did not have time to give to the claimant, which had been communicated to her and was reflected in the handover, and the weekly target list, by its exclusion.

34. The claimant challenges this evidence, however, it is noted as a fact, that, the claimant was not required to shadow Mr Wilson.

35. It is the claimant's evidence that, on attending the meeting with Mr McGuinness, she had informed him of difficulties she would have in respect of attending work for 8:00am, owing to her childcare arrangements, for which she states, Mr McGuinness stated that, that would not be a problem and that she should inform Mr Yankey.

36. The claimant does not advance that she spoke to Mr Yankey concerning her difficulties in attending work for 8am, on the 8 January 2018, but maintains that on speaking with Mr Yankey about the work allocated to her, he thereon raised issue as to the age of the claimant's children. The claimant states that Mr Yankey stated "oh, so still quite young then?" when she advised that her children were 7 and the other nearly 3 years of age. The Tribunal has not been furnished with any circumstance in which this discussion arose, neither has the tribunal on the evidence before it, been able to find circumstance for which such a discussion would have been had at this point in time, and for which the Tribunal accepts the respondent's evidence that, any discussions as to the age of the claimant's children would have been had on the 18 December 2017, in the general discourse about families, for which there was no reason to raise the matter on the 8 January 2018 as the claimant suggests, being out of the blue.

37. On the 9 January 2018, the claimant attended work at 8:20am, arriving after the contractual start time of 8:00am. It is the claimant's evidence that, having attended work and reported to Mr Yankey to receive her health and safety training, having completed the same, she then raised the issue as to her start time, asking for flexibility for a week or two while she finalised her new childcare arrangements. The claimant states that she assured him that the change would be temporary, and that she would resume an 8:00am start within a week or two at the most. The claimant further states that she thereon advised that, she would work through her lunch periods and stay late to evince her being committed to the respondent and being in a position to manage her workload. The claimant states that Mr Yankey authorized that request.

38. The respondent does not accept these events. They acknowledge that discussion was had as to the claimant starting late, but state that agreement was had for the claimant to start work at 8:10am. The respondent here maintains that, the claimant having advised of her difficulty attending work for 8:00am, raised issue as to the cause being the fact that she no longer wished to use the childminder she had engaged in order to save money, and instead was continuing to use the breakfast club attached to her youngest child's nursery.

39. The claimant denies having informed the respondent as aforesaid.

40. In respect hereof, the Tribunal was taken to correspondence dated the 9 January 2018, from the claimant's prospective childminder, which states:

> "I write with regard to your recent message cancelling childcare services with Bumble Tots. We have approached our legal advice team and have been informed that you are indeed, in breach of the contract you signed back on the 22 December 2017 and that the full months fee of £1040 is payable by you for the spaces of L and J for 4 weeks starting 8th January 2018.
>
> The terms of the contract is that you have agreed that the children will start on Monday 8th January 2018 and that this is at a cost of £260.00 weekly. The terms of the contract also states that should you not wish to continue with the contract that 4 weeks' notice should be given and this does NOT include whilst any party is on holiday. Therefore, your spaces for L and J are still available at Bumble Tots. Sending a text message on 4 January 2018, we were still officially on holiday and therefore, this does not form part of your termination period.
> …"

41. On a balance of probabilities, the Tribunal prefers the evidence of the respondent that, the claimant had advised that she had cancelled her childminder and was reverting back to the breakfast club for which she then could not attend work for 8:00am.

42. The Tribunal further, preferring the evidence of the respondent, finds that in respect of the above, the respondent agreed to the claimant's start time being changed from 8:00am to 8:10am.

43. With further regard to discussions had as to the claimant's children and childcare, the Tribunal was further taken to correspondence via WhatsApp messaging, between the claimant and Mr Yankey on the 11 January 2018, which is here set out in detail, as the claimant states thereby, that, Mr Yankey had inappropriately been questioning her as to her childcare arrangements. It is also pertinent in that, it further addresses the issues as to the claimant's attendance. The WhatsApp correspondence was as follows:

"Boo (claimant): About getting in on time, if it's a real issue and working shorter lunch or later won't cover it, I will look into alternatives for the morning.

Obviously I don't want people to think I'm taking the piss either at work, and keen to do a great job. Was tad nervous today but was focusing all my energies in completing what I set for the day.

So probs came across aloof as had my head down, I'm usually much more relaxed.

Mr Yankey: Ok cool, you know what it is – the morning is probably the most crucial part of our day and when you come in later the team effort is disjointed.

Like for example, today I was crazy late
And it put Simon behind on completing the drives task.

Boo: Yeah I get that. Il sort it out in that case and sort something more suitable, might take a few days tho! Hope that's ok?

Mr Yankey: Ok cool, yeah jus try and be as early as possible.

What's the sitch tho – does your hubs/partner work early or..

You don't have to say…

Boo: I honestly have been, it's coz breakfast club don't accept them any earlier. But I know that's not you guys problem, so I will sort it.

Yeah he works early leaves at 5.30am

So its me who has to drop them. But il have to look for a childminder who can start earlier than breakfast club.

Mr Yankey: ohhh I see ok cool

Yeah it's difficult

Because I can't really say ok come later just yet, u see what I mean?

Boo: I know that's true and its fine, il see if I can get one asap don't worry.

	I'm sure il find one before the weekend is up
Mr Yankey:	See what you can do but keep it within reason – if it is difficult, come and tell us so we can see what to do
Boo:	Yeah I will do that
Mr Yankey:	But you gotta communicate lol
	Sometimes you look so scared
Boo:	Yeah you're right. So who should I tell in the morning
Mr Yankey:	Defo Ella
	She's HR so will need to know x
Boo:	So like tomorrow I know Il be there same time ish
	Ok il tell her in that case no probs
David Yankey:	ok cool"

44. For completeness, the Tribunal further notes that by the WhatsApp conversation, there is much discussion had of a very friendly and personal nature evincing a very friendly relationship. However, the extent of such relationship is not material to the issues in this case.

45. From the tenor of the discussions had, the Tribunal does not find any discussions of the nature to call into question Mr Yankey showing any antipathy or otherwise inappropriately questioning or making comment, towards the claimant having childcare responsibility, but to the contrary, appears to be very accommodating.

46. On the clamant commencing work, the claimant maintains that during the first week, the tasks that were asked of her were significant, for which no new recruit could then have completed, which the claimant states, had been placed on her specifically to have her fail.

47. The claimant further submits that on the 10 and 12 January 2018, on there being issues as to IT and the email system which disrupted service, the respondent then failed to take into account such disruption and impact on her time in determining whether or not, she had met targets.

48. With respect tasks, the claimant further submits that, there were tasks allocated to her outside of the task list, namely, being required to carry out property searches for Mr Mendes, which increased her workload, but was unaccounted for.

49. The Tribunal has not been furnished with the claimant's workload, save for the tasks asked of her by the weekly task list, so as to enable the tribunal to determine whether the volume of work was reasonable or not. Despite this,

whether the Tribunal would have been in a position to determine such matters on sight of the claimant's actual work load, the Tribunal does not state further, as the issue upon which the Tribunal's determinations have been made infra, do not turn on the volume of work given to the claimant. The Tribunal accordingly does not comment further thereon.

50. For completeness, the Tribunal here notes the claimant's submission that, in respect of her performance and her failings, she had at no time been advised that she was so failing or otherwise offered assistance and/or training, to enable her to perform the tasks to the required levels.

51. The Tribunal further notes for completeness that, it is the respondent's contention that the tasks with which the claimant was charged, in the first week of employment, were tasks of a straightforward nature and inline with the skills that they had attributed to the claimant following her performance at interview, albeit not successful for the applied for position. The claimant here disputes having advanced that she held such skills; in particular as regard COSHH assessments, as set out in the handover at R1 page 195.

52. On the 12 January 2018, in accordance with procedures, a weekly ops meeting, was held between 2:00 and 3:00pm. The purpose of the meeting was for Senior Officers to prepare and present an update of their weeks work and project work. The meeting was attended by Ms Hiscott, HR and Operations Co-ordinator, Mr Yankey, Senior Legal Executive, Mr McGuinness, Senior Operations Executive, Mr Mendes, Group Operations Director and the claimant. A copy of the outlook diary invite is at R1 page 174a and b.

53. It is the respondent's evidence that the claimant due to report as to her projects and health and safety, had failed so to do, asking for further time, for which arrangements were made for the claimant to then deliver her presentation on Monday 15 January 2018. A copy of which invite is at R1 page 174c and d.

54. The claimant challenges this evidence and states that, at the meeting having made her presentation, whilst it was not acceptable to the respondent, she had presented that which she thought was required, and that it was then unreasonable of the respondent to take issue with her presentation as they had not detailed exactly, on what and how, she was to have made the presentation. The Tribunal notes this, but of relevance is the fact that, the respondent was not satisfied with the claimant's presentation and had advised her so.

55. In respect of the claimant failing to present as requested, and on Mr Yankey having reservations as to the claimant's suitability for the role; in particular the claimant's knowledge of health and safety, - which the Tribunal here notes that the claimant does not dispute having a limited knowledge of health and safety as raised by Mr Yankey, but states that she retains knowledge in a different sector and not familiar with health and safety within the construction industry sector, the sector in which the respondent operated, - following the ops meeting, on Mr Yankey raising his reservations

to the members of the operations team, remaining in the boardroom where the weekly ops meeting had taken place, discussed the concerns he had with the claimant, determining that should the claimant fail to present at the further arranged ops meeting on the 15 January, that consideration should be given to terminating her employment or finding an alternative position within the respondent's employ more suited to her abilities.

56. As above referred, the claimant was invited to the further ops meeting for Monday 15 January 2018, the invite identifying the attendees to be; Mr McGuinness, Mr Yankey, Mr Mendes and the claimant. The subject of the meeting was stated as "a follow-on from today's meeting please ensure to have updates ready for Monday". The meeting was scheduled for 10:00am.

57. The claimant disputes there having been an ops meeting on Monday 15 January 2018. However, on the evidence of the respondent's witnesses and the documentary evidence presented, the Tribunal accepts the respondent's evidence that an operations meeting took place on the 15 January 2018, as scheduled.

58. It is the respondent's evidence that the meeting having been arranged for the claimant to make her further presentation, having failed to do so at the earlier ops meeting and having requested time to prepare, she further failed to present at this rearranged meeting, following which, discussions where had between Mr Yankey, Mr Mendes and Ms Hiscott as to the claimant's performance in role. It was determined that Ms Hiscott hold a review meeting with the claimant, for the claimant to evidence to Ms Hiscott that she was capable of performing the role, otherwise consideration was to be given to terminating the claimant's employment.

59. For completeness, it is here noted that Mr McGuinness was not in attendance at the ops meeting on the 15 January, as he was suspended from duties earlier that morning.

60. Later that day, the claimant was called to a meeting with Ms Hiscott, which the Tribunal notes for clarity, as the claimant takes great exception to these facts, that she was summoned to a meeting without information as to the purpose of the meeting or otherwise offered the opportunity of a representative/companion and submits that the process was unfair. For the purposes of the issues for the Tribunal's consideration, questions of fairness are not matters relevant thereto, and as such, the Tribunal makes no further comment thereon.

61. On the claimant attending the meeting, present was Ms Hiscott and a member of staff, Francesca Leigh as a witness. It is the respondent's evidence that Ms Hiscott addressed the claimant shortcomings in respect of her performance, and further raised the claimant's attendance, noting that the claimant had been unable to attend work at the appointed time and had failed to report the same. The claimant's evidence is not clear in respect of this meeting, her evidence fluctuating from, no discussion being had and only being told that her employment was being terminated, to an account of some discussion being had briefly about her performance and her

attendance, and of Mr Yankey attending the meeting as she was leaving the room with her bag in hand.

62. It is the respondent's evidence that, on addressing the claimant's performance, the claimant became upset, hyperventilating, for which the claimant was taken to a sofa in the room by Ms Hiscott, who then sat down with her attempting to console her. Following cross-examination, the claimant accepts that this indeed took place.

63. The Tribunal pauses here, to note that following the ops meeting that morning, Mr Yankey had discussions with Mr Mendes and considered alternatives to terminating the claimant's employment, for which alternative posts of; Operations Executive, and Procurement Executive, were identified. Mr Yankey immediately thereon went to advise the claimant thereof, at the review meeting being held by Ms Hiscott.

64. Mr Yankey, armed with the offers of alternative employment, attended the claimant's review meeting at the point, where Ms Hiscott was seated with the claimant on the sofa consoling her. On Mr Yankey entering the room, he was advised by Ms Hiscott as to the stage in the process that she had reached, whereon Mr Yankey sat at the end of the sofa and put to the claimant the offers of alternative employment. The claimant does not dispute these facts, but states that Mr Yankey briefly identified the posts without detail for which she asked the salary, which, on being informed that it would be a reduction of approximately £10,000.00, she stated that that would not meet her bills and refused the offer. The claimant further here states that, this offer was made after her employment had been terminated.

65. It is the respondent's evidence that, at the point when Mr Yankey presented the alternative roles, the claimant had not been informed that her employment was terminated, and that on Mr Yankey presenting the alternative roles, he had presented the role of Operations Executive in some detail, which was rejected on the claimant being advised as to the salary reduction, for which Mr Yankey then referred to the second role, that of Procurement Executive, advising that he would need to get further information thereon as to the details. The salary for the role of Procurement Executive was £30,000.00, a reduction of £5,000.00 from the claimant's then salary.

66. The respondent has informed the Tribunal that, the positions were offered to the claimant as it was felt that the claimant would have less time constraints and pressure with her workload, thus allowing her to understand the business and various areas of work clearly, and in effect, become knowledgeable and aligned with their business strategy, eventually allowing her to go back up in position; Mr Yankey's evidence being that, he asked the claimant to give further consideration to the roles, following which he then left the room.

67. The claimant accepts that she was advised by Mr Yankey to give further consideration to the roles, and in respect of which the Tribunal refers infra.

68. It is the respondent's evidence that, on Mr Yankey leaving the room, on the claimant further advising that she was not accepting the roles, Ms Hiscott then advised the claimant that she had no alternative otherwise than to terminate her employment, which she then advised and furnished the claimant with a letter of termination; the correspondence advising:

> "I am writing to confirm the outcome of your review meeting, which was held on 15 January 2018 with myself and Francesca Leigh.
>
> During this meeting, we discussed your overall performance during your employment probation period.
>
> After careful consideration of all the facts presented, the company has deemed that the point listed below has a detrimental impact on the business and as such have decided to dismiss you with immediate effect.
>
> After careful consideration of all the facts presented, the company has deemed you unsuccessful in completing your probation period and as such have decided to dismiss you with immediate effect. The reason for dismissal are listed below:
>
> - Unsatisfactory levels of performance during the probation period.
> - Poor time management.
>
> As a result, your final day of employment shall be 15 January 2018."

69. The claimant was thereon advised of her right of appeal and to do so within 7 days of her receiving the letter.

70. It is Ms Hiscott's evidence that, the letter of dismissal had been prepared prior to the meeting following the operations meeting that morning and had been prepared on the premise that she had two matters for consideration at the review meeting, being; whether the claimant had sufficiently explained her position to events, such that she would be able to perform in her role; or alternatively, dismissal. The claimant here challenges the respondent arguing that, the letter evinces the respondent having determined to terminate her employment and that offers of alternative employment were an afterthought on the respondent conscious of the unfairness of the process, and of a realisation that their reasoning for dismissal, being that of her being a mother with childcare responsibilities, was then evident.

71. The Tribunal accepts the evidence of Ms Hiscott, that, following the ops meeting, she was then tasked with considering the claimant's further performance in the role of Operations Project Manager or dismissal, and that at that time she was not aware of alternative employment being pursued for the claimant, which was only notified to her on Mr Yankey entering the review meeting as she held it with the claimant. Ms Hiscott's further evidence is that, as is her normal practice in her attending such meetings, that she prepares a draft letter which would be issued if the dismissal ensued, otherwise, had the decision been to retain the claimant in role, the letter would not then be issued. The Tribunal accepts this evidence.

72. For completeness, the Tribunal here records that following the meeting, the claimant was required to sign an "exit form". This was not however a form by which the claimant gave reasons for leaving, but was a form completed by the respondent to identify that the claimant had returned items belonging to the respondent. It is here referenced, as it was an issue raised by the claimant that, she had not completed an exit form and for which she maintained that the meeting had been as she had stated, being a very quick affair, at which she was simply informed that her employment was being terminated. For the reasons above stated, the tribunal does not find this to have been the case.

73. Following the review meeting, on the claimant being in a state of distress and not wishing to return to the office to collect her belongings, and concerned as to meeting colleagues as she left work, Ms Hiscott retrieved the claimant's bag from the office and made further checks of the car park to ensure that the claimant was not exposed to colleagues as the claimant feared. This is not challenged by the claimant.

74. That evening, 15 January, Mr Yankey engaged with the claimant in a WhatsApp conversation, which the Tribunal here sets out in some detail, as it reflects the nature of events on the claimant's termination of employment and the offers of employment made, albeit which, the claimant states were not genuine offers:

"David Yankey:	Hi Rubi, I hope you're ok. Let me know if you would be interested in the other position or if you need any help with anything. I will still draft the letter for you if you wish, just let me know.
Boo:	Hi David, thank you but I'm quite shocked and I can't work out why. As you can image it's the first time I've been without a job in my entire life and it's quite scary when I've got a mortgage etc. Don't worry about the other job, I would not feel comfortable working with you all knowing that you guys think I'm crap. Thanks anyway, don't worry about the letter, it's the least of my concerns, thanks for the offer tho.
David Yankey:	Sorry Rubi but I don't think you're "crap" at all. Quite the contrary, which is why I'd be happy to help you. Did Ella explain to you? Do you want to talk about it? Either way I'm here if you want to discuss
Boo:	Ella said my performance was poor and Time issues and that it wasn't working I can't change anyone's mind but now I'm shocked that after a week that can be decided. I accept it though.
David Yankey:	Can I be honest with you?

Boo: Yes of course why would yo not be honest

David Yankey: How do you feel you were doing in the role?

Boo: Considering I didn't get any kind of handover really and insight into getting to know Wilson I think it was way too soon to tell

I think I did well considering most of the exercise was backtracking and had no time to complete if (sic) just makes sense

I feel like I never got the chance really

I know you guys don't agree but its how I feel

David Yankey: No, no I completely understand

But I want to explain it from our position to kind of give you a fair idea of how we see things?

Boo: Fair enough

I understand

David Yankey: The thing is, with this role – it's so fast paced and results are expected right from the get-go. And we really try hard to impress that when we do interviews because when we say "when you start it's all systems go" it really is all systems go.

With the handover, I don't think it's really fair to say you didn't get a handover because I did spend half a day with you at the beginning and I helped you to understand what we needed

But I do understand

Boo: I was talking about Simon. It's really hard to pick up half way on projects

I don't feel that way but fair enough

It is fast paced but unrealistic. I've done fast paced before but whatever it is, just I'm not right. And I get that

David Yankey: The thing is – we expected the person in this role to come in, take on these projects and know what they're doing, have a plan for how they want those projects to be structured, etc. I felt you more needed guiding to it, which unfortunately what we don't' have the resources as such to provide. I'm sure you've seen myself and Ella engorged in work

Boo: I've only been there a week. But is what it is.

No point if it wasn't working

David Yankey: The reason we offered you the other position was because we felt that you had potential, but maybe needed our guidance and help. And in that position we would be able to do that

I'm not saying I don't agree with you, I'm just trying to explain."

"Boo: who's decision was it? Collective?
Be honest
Just that I'm paranoid now that everyone thought I was doing a shit job

David Yankey: Understandable, but I'm sure you can see the company's ambition and what we have to offer. Also we wouldn't offer it to you unless we thought it was worth doing so. So to say we think you're "crap" isn't really true.

Boo: I know but I've just got sacked.

What am I supposed to think?

David Yankey: Yeah I know, which is why we said to take some time"

Boo: who decided anyway?
Thanks for reaching out. I know you mean well.

David Yankey: You know I can't disclose that, but it wasn't a malicious thing at all

Boo: I know it's not malicious

David Yankey: Like I say I wouldn't reach out unless we thought it was worth it

Boo: The reason I asked was that I can't come back knowing someone thinks I'm bad enough to sack in my first w

Week

Hard to get my head around

I also never knew what Wilson thought of me and all I wanted to do was impress him

David Yankey: But we did offer an alternative. Have to remember that

Take some time to think about what you want

Boo: Ok thanks

David Yankey: If you'd like to meet and talk about it, I can explain what this other role is, let me know

Sorry my battery died"

Boo: I've not stopped crying……Embarrassed enough I couldn't breathe in front of Ella. Felt sorry for Fran!

what dept is the other role

David Yankey: No I do understand honestly

Boo: And who would I be working with?

David Yankey: It's still with Ops. But if you'd prefer a diff department, there's lots of other roles we can discuss to see if you'd be interested.

Boo: What is the role in ops?

My salary would be cut a lot?
You guys don't have to offer me anything tho

David Yankey: It's an ops Executive role

This one is £25k

But again, there are other roles which I can discuss with you if you want to consider

Boo: Look thank you, really appreciate that but it's not enough. What you should do, Is use the budget to get a proper ops manager, especially as I don't think Simon is coming back.

Sorry meant not enough money for me. But thanks anyway"

"David Yankey: Ok no worries, like I say think about it. There's other roles here with a better salary that you might be able to take advantage of

It'd be worth looking into it, it could potentially save you from looking around

Boo: I love the company, I just cabhave (sic) afford to on 25k. If there's anything else going that you think I'd be good at let me know

Can't*

David Yankey: Ok no probs, I'll have a look and put some of the roles to you. They have to be what you want also you know

Boo: Yes true. Luckily I have a few strings to my bow

Lol

David Yankey: Lol see, not so "crap" after all eh"

75. On the 17 January 2018, there were further WhatsApp discussions between the claimant and Mr Yankey, where Mr Yankey canvassed the claimant as to the areas she had an interest in and advised of efforts to find alternative positions, within the company for her.

76. On the 15 February 2018, the claimant wrote to the respondent raising an appeal, claiming unfair dismissal and sex discrimination, for which the respondent replied thereto, giving their explanation for events, denying unfair dismissal and discrimination, which the Tribunal here notes, but does not address further, as it is not material to the issues for the Tribunal's determination. The relevant facts having been set out above.

77. The claimant engaged ACAS early conciliation on the 26 February until 14 March 2018, and presented her claim to the tribunal on 17 March 2018.

The Law

Direct Sex Discrimination

78. In relation to a claim of unlawful direct discrimination, it needs to be established that there was less favourable treatment and that the reason or an effective reason for the treatment was one of the protected characteristics. Sometimes a claimant is able to point to someone else in the respondent's employment who has been treated differently in the same circumstances as those of the claimant. Indeed, it is a requirement that a comparator must be on the basis of someone else who is in the same or not materially different circumstances. In this instance the claimant relies on Mr Yankey, and/or an hypothetical man, as comparators.

79. It is incumbent on the claimant to show that such persons have been or would have been treated less favourably. At this point the test of comparison starts to merge with the test of motivation. The answer to the question "what is there to show that the comparator has been or would have been treated differently?" becomes almost the same as the answer to the question "what was the reason for the treatment?" Indeed, it is sometimes easier to go straight to the question of what was the motivation for the treatment, rather than take it in the logical order, because if the answer to the question of motivation is answered in favour of the claimant it becomes relatively easy to find that there has been different treatment.

80. Proving unlawful discrimination is a difficult task for a claimant. No employer will admit to it and indeed discrimination is often operating at an unconscious level. Secton 136 of the Equality Act, assists the claimant in this regard. Where the tribunal finds facts from which the tribunal could decide in the absence of any other explanation that a respondent had unlawfully discriminated against them, the tribunal must hold that the contravention of the Act occurred unless the respondent shows that it did not contravene the Act. In this regard, it is for the claimant to show facts from which the tribunal might infer unlawful discrimination. Those facts may emerge either from the claimant's own evidence or from the evidence of the

respondent and is for the tribunal to infer from a consideration of all the facts in the case. If this is not established, the claim fails at that point. If there are such facts, the onus is on the respondent to show that the protected characteristic was not part of their motivation.

81. The tribunal will look mainly for evidence of disparity of treatment and how the respondent dealt with such things, but, can also have regard to other factors. Normally speaking, that the respondent has acted unreasonably in a particular regard does not in itself amount to facts that would raise the inference of unlawful discrimination. It is necessary to state further that, it is simply not enough to show that the claimant was treated in a particular way and that they are of a particular protected characteristic. There are two stages to the test, not only must a claimant suffer less favourable treatment, but there must be sufficient primary facts that, the treatment was because of that protected characteristic, upon which the burden, as above stated, shifts to the respondent.

Unfair dismissal

82. By section 99(1) of the Employment Rights Act 1996 (ERA), where an employer dismisses an employee for a prescribed reason or circumstance, the dismissal is automatically unfair. As a consequence, it is not necessary to establish reasonableness on the part of the employer in dismissing the claimant and is a matter which is not to be taken into consideration in deciding whether the dismissal was unfair.

83. In considering the reason for dismissal, so as to come within section 99, the claimant has to establish that the reason or set of circumstance prescribed, relates to one of a number of matters, one of which is the right to time off for dependent care leave under section 57A, of the ERA,

84. Section 57A (1) of the ERA provides that, an employee is entitled to be permitted to take a reasonable amount of time off doing the employee's working hours in order to take action which is necessary. What amounts to being necessary has been expressed by Mrs Record Cox QC in Qua, referred to infra. The right only applies for the following reasons, namely:

    84.1. (a) to provide assistance on an occasion when a dependent falls ill, gives birth or is injured or assaulted;

    84.2. (b) to make arrangements for the provision of care for a dependent who is ill or injured;

    84.3. (c) in consequence of the death of a dependent;

    84.4. (d) because of the unexpected disruption or termination of arrangements for the care of a dependent;

    84.5. (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an

> educational establishment which the child attends is responsible for them.

85. The right does not however arise unless the employee tells their employer the reason for their absence as soon as reasonably practicable, and except where that is not possible until after the employee has returned to work, the employee tells the employer how long he expects to be absence.

86. A dependent is defined under s57A of the ERA as being related to the employee, as; a spouse or civil partner; a child; a parent; or a person who lives in the same household as the employee otherwise than by reason of being his employee, tenant, lodger or boarder. And in respect of circumstance where the employee takes time off in respect of ill-health or injury of a dependent, a dependent then includes any person who reasonably relies on the employee to make arrangement for the provisions of care.

87. In respect hereof, Mrs Recorder Cox QC, in Qua v John Ford Morrison [2003] ICR 482 EAT, has set out four tests that the tribunal is tasked to ask itself in order to determine whether an employee has been automatically unfairly dismissed for taking time off for dependents, and further sets out the right, that:

> 15. …The statutory right is, in our view, a right given to all employees to be permitted to take a reasonable amount of time off work during working hours in order to deal with a variety of unexpected or sudden events affecting their dependants, as defined, and in order to make any necessary longer-term arrangements for their care.
>
> 16. The right to time off to "provide assistance", etc, in subsection (1)(a) does not in our view enable employees to take time off in order themselves to provide care for a sick child, beyond the reasonable amount necessary to enable them to deal with the immediate crisis. Leave to provide longer-term care for a child would be covered by parental leave entitlement….Section 57A(1)(a) envisages some temporary assistance to be provided by the employee, on an occasion when it is necessary in the circumstances specified. Under subsection (1)(b) time off is to be permitted to enable an employee to make longer-term arrangements for the care of a dependant, for example by employing a temporary carer or making appropriate arrangements with friends or relatives. Subsection (1)(d) would include, for example, time off to deal with problems caused by a child-minder failing to arrive, or a nursery or playgroup closing unexpectedly.
>
> 17. The right is a right to a "reasonable" amount of time off, in order to take action which is "necessary". In determining whether action was necessary, factors to be taken into account will include, for example, the nature of the incident which has occurred, the closeness of the relationship between the employee and the particular dependant and the extent to which anyone else was available to help out.

> ….
> 25. A tribunal tasked to determine this issue should ask itself the following questions: (1) did the employee take time off, or seek to take time off, work during her working hours? If so, on how many occasions and when? (2) If so, on each of those occasions did the employee (a) as soon as reasonably practicable inform her employer of the reason for her absence; and (b) inform him how long she expected to be absent; (c) if not, were the circumstances such that she could not inform him of the reason until after she had returned to work? If on the facts the tribunal finds that the employee had not complied with the requirements of section 57A(2) , then the right to take time off work under subsection (1) does not apply. The absences would be unauthorised and the dismissal would not be automatically unfair. ... (3) If the employee had complied with these requirements then the following questions arise: (a) did she take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paragraphs (a) to (e) of subsection (1)? (b) If so, was the amount of time off taken, or sought to be taken, reasonable in the circumstances? (4) If the employee satisfied questions (3)(a) and (b), was the reason, or principal reason, for the employee's dismissal that she had taken or sought to take that time off work? If the tribunal answers that final question in the affirmative, then the employee is entitled to a finding of automatic unfair dismissal.

Indirect discrimination

88. By section 19 of the Equality Act 2010, indirect discrimination occurs when a person "A" applies to another, "B" a provision criterion or practice (PCP), that is discriminatory in relation to a relevant protected characteristic of "B". The following 4 conditions must be met before a successful claim of indirect discrimination can be established, namely:

    88.1. The employer applies or would apply the PCP to persons with whom the claimant does not share the relevant protected characteristic

    88.2. The PCP puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic

    88.3. The PCP puts, or would put, the claimant at that disadvantage, and

    88.4. The employer cannot show that the PCP is a proportionate means of achieving a legitimate aim.

89. By s136 of the equality act, it is for the claimant to show that there is prima facie evidence, from which the tribunal could conclude, in the absence of any explanation from the respondent, that the respondent has committed an act of discrimination. Where this is the case, the tribunal must hold there to be discrimination unless the respondent can show that the protected characteristic was not a consideration for the action taken, for which Mr

Justice Langstaff, then President of the EAT, in Dziedziak v Future Electronics Ltd (EAT) [2012] Eq. L.R. 543, opined:

> "42 …In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged woman generally, and thirdly, that what was a disadvantage to the general creating a particular disadvantage to the individual who was claiming, only then would the employer be required to justify the provision criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification."

90. It is important to note that indirect discrimination can only occur where the PCP is one that the employer applies, or would apply, to people who do not share the protected characteristic i.e. the PCP must be of neutral application.

91. On the claimant bearing the burden of proof in respect of the first three criteria under s19(2), it is for them to identify the PCP capable of supporting their case. Once the PCP is identified it is not a defence for the employer to show, from the same facts, a different and unobjectionable PCP.

92. The terms provision, criterion or practice, are not defined within the Equality Act although the Equality and Human Rights Commission (EHRC) employment code, paragraph 4.5, identifies that the term provision, criterion or practice *"is capable of covering a wide range of conduct", noting; "… it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions*".

93. From this wide construction it is to be noted that a dismissal will not amount to a PCP; the dismissal being more particularly characterised as a disadvantage which results from an employer's application of a PCP. See H Fox (father of see Fox deceased) the British Airways plc UKEAT/0315/14/RN, per Her Honour Judge Eady QC at para 78.

94. In considering the disadvantage of the persons with whom B shares the characteristics being at a particular disadvantage when compared with persons with whom B does not share it, it is necessary to identify the group thereby affected. In addressing this task, it is necessary to first identify the hurdle that has been placed in the way of the complainant and consider the range of persons affected thereby. This will identify the pool for comparison. It is then necessary to consider whether those persons within that pool, who share the relevant protected characteristics, are more likely to fall at that hurdle then those who do not. The tribunal is here guided by the EHRC Employment code, which provides: *In general, the pool should consist of the group which the provision criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively"*, and provides the following example:

> A marketing company employs 45 women, 10 of whom are part-timers, and 55 men who all work full-time. One female receptionist works Mondays, Wednesdays and Thursdays. The annual leave policy requires that all workers take time off on public holidays, at least half of which fall on a Monday every year. The receptionist argues that the policy is indirectly discriminatory against women and that it put her at a personal disadvantage because she has proportionately less control over when she can take her annual leave. The appropriate pool for comparison is all the workers affected by the annual leave policy. The pool is not all receptionists, or all part-time workers, because the policy does not only affect these groups.

95. The pool for comparison must be drawn up in accordance with section 23 (1) of the Equality Act, which states that on a comparison of cases for the purposes of indirect discrimination, there must be no material difference between the circumstances relating to each case.

96. On the pool being determined, it is then necessary to determine whether the application of the PCP to the members of that pool, put them at a particular disadvantage. Whilst the term "particular disadvantage" is not defined by the Equality Act, the EHRC Employment Code at paragraph 4.9 provides that disadvantage could:

> "… Include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that "detriment," a similar concept, is something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently".

97. It is finally then for the claimant to show that the PCP put her at the particular disadvantage being suffered by the group as identified, or otherwise facts from which the tribunal could decide in the absence of any explanation, that she was put at the particular disadvantage.

98. On the claimant establishing the above, it is then for the tribunal to consider whether the PCP is justified in accordance with s19(2)(d), namely that, the employer cannot show it to be a proportionate means of achieving a legitimate aim; that even though a PCP may have had an adverse impact on a particular protected group and prima facie discriminatory, it was implemented for reasons unconnected with the relevant protected characteristic and therefore lawful, for which the tribunal will carry out a balancing exercise, weighing the organisations need to impose the PCP against the PCP's discriminatory effect. It is to be noted that having an apparently sound reason for imposing the relevant PCP will not be enough in itself, it is necessary for the employer to demonstrate that the reasons for its imposition are strong enough to overcome any indirectly discriminatory impact. To this extent, the more discriminatory the PCP, the more difficult it may be for the employer to show that it was justified.

99. The tribunal is provided guidance from the EHRC Employment code, as to objective justification that, the aim pursued should be legal, should not be

discriminatory in itself, and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the code nevertheless state that an employer simply trying to reduce costs cannot expect to satisfy the test. With regards proportionality, the measure adopted by the employer does not have to be the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not have been achieved by less discriminatory means".

100. In Chief Constable of West Yorkshire Police and another v Homer [2012] ICR 704, the supreme court has stressed that, in order to be proportionate, an indirectly discriminatory PCP had to be both an "appropriate" means of achieving a legitimate aim and "reasonably necessary", Baroness Hale making it clear that, it would be a mistake to approach the matter as if the terms "appropriate", "necessary" and "proportionate" were interchangeable, stating at para 22:

> 22. …Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an "appropriate" means of achieving the legitimate aim and (reasonably) necessary in order to do so. Some measures may simply be inappropriate to the aim in question: thus, for example, the aim of rewarding experience is not achieved by age related pay scales which apply irrespective of experience (Hennigs v Eisenbahn-Bundesamt (Joined Cases C-297/10 and C-298/10) [2012] 1 CMLR 484); the aim of making it easier to recruit young people is not achieved by a measure which applies long after the employees have ceased to be young (Kücükdeveci v Swedex GmbH & Co KG (Case C-555/07) [2011] 2 CMLR 703). ….
>
> 23. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. …
>
> 24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer. …"

Unlawful deduction of wages

101. The right not to suffer an unlawful deduction from a wage is provided for by section 13 of the Employment Rights Act 1996, which provides:

> An employer shall not make a deduction from wages of a worker employed by him, unless
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

102. What amounts to a relevant provision, is provided for by sub section (2), which states that a "relevant provision" in relation to a worker's contract, means a provision of the contract comprised:

> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

103. Where the total amount of wages then paid to a worker, on an any occasion by the employer, is less than the total amount of the wage "properly payable" to the worker, the amount of the deficiency is to be treated as a deduction made by the employer from the worker's wage.

104. By section 27 of the Employment Rights Act 1996, a wage is defined as being, any sums payable to the worker in connection with his employment, to include:

> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise.
> (b)...(j)

105. With reference to what the term 'or otherwise" refers to, the tribunal is guided by the Court of Appeal in **New Century Cleaning v Church [2000] IRLR 27**, per Morritt LJ, that the term "or otherwise" does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement, Lord Justice Morritt opining, at para 4:

> Thus the question, in terms of s.13(3) , is what was the wage properly payable … The word "payable" clearly connotes some legal entitlement. The adverb "properly" is also consistent with a legal requirement but is not necessarily limited to a contractual entitlement. This is confirmed by the provisions of s.27(1)(a) which show that the wages "properly payable" may not be due under the contract of employment. But the words "or otherwise" do not, in my view, extend the ambit of "the sums payable to the worker in connection with his employment" beyond those to which he has some legal entitlement. With the exception of the "bonus" referred to in s.27(1)(a) all the sub-paragraphs of that subsection refer to sums to which the employee has some legal entitlement. The case of a bonus is specifically dealt with in s.27(3) which provides that the amount of the bonus paid is to be treated "as payable". The bonus is thereby deemed to have been a legal entitlement. In my view the provisions of s.27(1) and (3) confirm that "the wages properly payable by him [i.e. the employer] to the worker" are sums to which the employee has some legal, but not necessarily contractual, entitlement.

106. Finally, a worker is defined by section 230(3) of the Employment Rights Act 1996, as an individual who has entered into, or works under (or, where the employment has ceased, worked under)

    (a) a contract of employment, or

    (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whether the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

Submissions

107. The Tribunal received oral submissions from the parties. The submissions have been carefully considered.

Conclusions

Unlawful deduction from wages

108. On the finding of the Tribunal as set out at paragraph 12 above, there being no agreement of the respondent that the claimant would be paid for the induction day, and on the claimant's employment not commencing until the 8 January 2019, the Tribunal finds that the claimant was not entitled to a wage for attending the induction day on the 18 December 2017. There was no requirement for the claimant to attend the induction day, which induction day was at the claimant's convenience, and were she unable to attend prior to her employment commencing on the 8 January 2018, this would not have affected her employment, the induction then to be held on the first day of employment. The Tribunal does not find that the claimant's attendance at the induction day was in connection with the employment, sufficient for the purposes of Section 27 of the Employment Rights Act, so as to amount to a wage.

Indirect sex discrimination

109. On the claimant unable to identify the provision, criterion or practice on which she relies, having advanced that the PCP was the requirement that she commenced employment at 8:00am, where the respondent has not so required the claimant to attend, instead amending the start time for the claimant on the claimant identifying her difficulties arising out of her childcare responsibilities, i.e. dropping her children to breakfast club of a morning, there was then not a PCP applying generally for which the claimant stated she could not comply.

110. The Tribunal finds no substance to the claimant's claim for indirect sex discrimination.

Unfair dismissal

111. The claimant's claim for automatic unfair dismissal being pursuant to Section 99 of the Employment Rights Act, on the claimant claiming that the reason or principal reason for the dismissal was that she sought time off under Section 57A, where Section 57A of the Employments Right Act gives an entitlement to the employee to be permitted to take a reasonable amount of time off during the employee's working hours, in order to take action which is necessary, for which the claimant advances her claim under sub-section (d), being, "because of the unexpected disruption or termination of arrangements for the care of a dependent",

112. The Tribunal finds that on the claimant having issues arising for childcare, on her cancelling her children's spaces with Bumble Tots childcare on the 4 January 2018 and continuing her children's attendance at the nursery breakfast club, this was a decision of the claimant and was not a circumstance sufficient for the purpose of Section 57A(d), being because of the unexpected disruption or termination of arrangements for the care of a dependent; the termination being at the claimant's behest. The Tribunal has not been furnished with any circumstance relating thereto, for which the claimant was unable to plan for in advance.

113. In these circumstances, the Tribunal finds that there has not been a breach of Section 57A of the Employment Rights Act 1996.

114. The Tribunal accordingly finds that, there has not been a failure to permit the claimant reasonable time off during her working hours because of any unexpected disruption or termination of arrangements for the claimant's children. The tribunal finds no substance to the claimant's contention to found a claim under s99 ERA.

Direct sex discrimination.

David Yankey asking questions about the claimant's personal life and circumstances and questioning her about childcare arrangements.

115. The Tribunal finds that questions were had as to the claimant's personal life and childcare arrangements by Mr Yankey, however, these were part of general discussions being had by the claimant and the team and Mr Yankey, on her attending the induction day, and that further questions being asked of the claimant on the 9 January 2018 were questions naturally arising on the claimant requesting a change to her start time owing to her childcare arrangements.

116. To the extent that the events above referred occurred, namely Mr Yankey asking questions about the claimant's personal life and childcare arrangements, the Tribunal has not found circumstance from which it could infer or otherwise conclude that, the treatment was less favourable than treatment that would be afforded to a man, whether hypothetical or otherwise Mr Yankey. The Tribunal finds that on an individual raising

questions as to a member of staff's children for which there then follows discourse as to children generally, the Tribunal finds that such discussion would have been the same had it been a male or female. Indeed, with regard to Mr Yankey, it is not in dispute that Mr Yankey was asked questions about his child being newly born and was the catalyst for the ensuing discussions of which the claimant complains, and who is male. The tribunal does not find any connection to gender being a factor in the discussions had.

117. With regard to the claimant seeking to amend her start hours of work due to childcare, the discussions thereon had, as to her childcare arrangements, are discussions which this Tribunal finds were discussions that would have been afforded to any male employee who equally sought to amend their start time because of childcare arrangements. The Tribunal does not find the claimant to have been less favourably treated than a man in these circumstances.

118. The tribunal cannot find any basis to support the claimant's contention, that she has been less favourably treated because of her gender, where she had been an active participant raising the subject as to children at the induction, or later on the 9 February 2018, where the claimant's children were the subject of the conversation relevant to the issue being discussed.

David Yankey being late to work without comment

119. On the Tribunal being informed, which has not been challenged by the claimant, that on Mr Yankey being late he informed HR of such lateness in accordance with the respondent's procedures, and on there being no further evidence before the Tribunal, save for comment made by Mr Yankey to the claimant in their WhatsApp conversation on the 11 January 2018, there being no further reference thereto or question thereon from the claimant, the Tribunal finds no evidence on which to support the claimant's contention or from which the tribunal could draw an inference that the conduct of which the claimant complains was because of gender. The claimant has failed to meet the threshold for which the burden shifts to the respondent for an explanation. The tribunal find the claimants contentions unsubstantiated.

The respondent dismissing the claimant for poor time keeping

120. The Tribunal finds that the dismissal of the claimant was for her poor performance and to which, the issue of her poor time keeping was a contributing factor. The Tribunal does not find that the claimant was dismissed for poor time keeping.

121. The tribunal finds that, in circumstances where an individual has failed to comply with reporting procedures on attending for work outside of agreed start times, and where the individual is facing issues as to performance during a probation period, the Tribunal finds that it was reasonable to address all issues arising with that individual during the probation period. Accordingly, on raising the issue as to time keeping, being a consideration in terminating the claimant's employment during the probation period, the

Tribunal finds that such treatment would equally have been afforded a man in such circumstances. The Tribunal accordingly finds that the conduct of which the claimant complains, was not conduct based on considerations of the claimant's sex.

122. For the reasons above stated, the tribunal finds that the claimant has not been automatically unfairly dismissed, and has not been subject to discrimination on the protected characteristics of sex, or otherwise suffered an unlawful deduction from her wage. The Tribunal accordingly dismiss the claimant's claims.

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Employment Judge Henry

Date: ……03.04.19……..

Sent to the parties on: ...09.04.19.....

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For the Tribunal Office