EMPLOYMENT TRIBUNALS

Claimant:	**Mrs C. Daly**
Respondent:	**BA Cityflyer Ltd**
Heard at:	**East London Hearing Centre**
On:	**19-21 August 2020, 14 September 2020 and 11 December 2020 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Ms T. Jansen Mr L. O'Callaghan**

Appearances

For the Claimant:	Mr P. Powlesland (Counsel)
For the Respondent:	Mr B. Randle (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that: -

1. **the Claimant's claim of indirect sex discrimination succeeds in relation to the first and second PCPs, but not the third;**

2. **the Claimant's application to amend the first claim form to include the substance of the second claim form is refused;**

3. **the Tribunal lacks jurisdiction in respect of the Claimant's claim of unfair (constructive) dismissal, because it was presented outside the statutory time limit, in circumstances where it was reasonably practicable to present it in time; the claim is dismissed.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face to face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing.

Procedural history

1. By a claim form presented on 20 December 2017, after an ACAS early conciliation period between 20 October and 20 November 2017, the Claimant alleged that the refusal of her application for flexible working was an act of indirect sex discrimination.

2. On 28 February 2018, the case was listed for a hearing over two days on 10 and 11 May 2018. The parties were ordered to produce an agreed schedule of issues and send it to the Tribunal by 23 March 2018. A preliminary hearing to clarify the issues, listed for 19 March 2018, was vacated on the application of the parties.

3. On 26 March 2018, the Claimant's representatives made a further application to postpone the May hearing; this was granted on 10 April 2018. The case was relisted for 12 and 13 July 2018. In early July 2018, another application to postpone was made by the Claimant's representatives, which was not opposed by the Respondent; that request was refused on 6 July 2018. The Claimant then explained that she was in the process of issuing a further claim, and the postponement application was granted on 10 July 2018.

4. The second claim form was presented on 15 November 2018. The Claimant claimed unfair (constructive) dismissal. She had resigned on 8 May 2018, giving as her reason the refusal of her flexible working request. The second claim was not initially linked to the first and, by Notice of 10 December 2018, it was listed for hearing separately, on 5 April 2019. On 7 January 2019, the Respondent applied for a postponement of that hearing, and gave its dates to avoid.

5. The two cases were consolidated on 31 January 2019. In the same Order, the Judge confirmed that a three-day listing for both claims seemed appropriate, and the consolidated cases were listed for hearing on 29 to 31 May 2019. On 11 April 2019, the Respondent applied for a postponement of that hearing on the basis that it had previously told the Tribunal that it was not available on those dates. On 2 May 2019, the case was postponed to a three-day listing between 29 and 31 October 2019.

6. On the first day of the hearing, the Claimant was unwell and her representatives sought an adjournment, which was not opposed by the Respondent. The case was relisted for three days on 19 to 21 August 2020.

7. On 7 March 2020, the Tribunal gave both parties permission to serve supplemental witness statements before 24 April 2020.

8. On 19 June 2020, a preliminary hearing was listed to decide whether the case was suitable to be heard by CVP. Both representatives confirmed that the

case was ready for hearing, and agreed that the case was suitable for hearing by CVP.

The Respondent's application to postpone

9. By letter dated 13 August 2020, the Respondent applied to postpone the hearing, because one of its witnesses, Mr Gary Reid, had been signed off work by his GP with stress. There was a brief letter from the GP. The Respondent explained that it would be prejudiced, if it was not able to call Mr Reid, because he took the decision not to uphold the Claimant's appeal against the decision of the Respondent's other witness, Ms Julie O'Neill.

10. The Claimant opposed the application, which came before EJ Russell, who refused it:

> 'having regard to the age of the case, further delay will significantly affect the quality of the evidence. Mr Reid is not certified as unable to work on 20 and 21 August 2020 (day two and three of the final hearing), nor does the medical evidence support the assertion that he is not able to participate in the CVP hearing. The Tribunal at the final hearing will consider any adjustments to avoid undue stress to Mr Reid.'

11. The Respondent renewed its application on 17 August 2020, and submitted further medical evidence, which stated as follows:

> 'Mr Reid is currently on sick leave due to ongoing mental health issues. During a telephone consultation today, 17 August 2020, Mr Reid reports that he is due to appear in front of the Employment Tribunal later this week via video link. Throughout the conversation Mr Reid was obviously distressed, tearful and the prospect of this appearance has resulted in a significant, acute stress reaction. Mr Reid reports that he is unfit to appear at this Tribunal, and following his consultation today I would agree. As I am not Mr Reid's usual general practitioner, I am unable at this point suggest a day when Mr Reid will be fit to appear in person or through video link at a Tribunal sitting.'

12. The Claimant's representatives were asked for their comments, which were as follows: the claim was issued in January 2018; any further delay was likely to affect the quality of the evidence, and may mean a fair hearing is not possible; the previous adjournment was required because of the same witness's unavailability; the Claimant does not consider the witness adds much to the proceedings, given that he was an appeal manager, and simply upheld the original decision; the Claimant and her witnesses had made arrangements to ensure their availability, and it will impact on their income, if they need to take further time off; Counsel had already been instructed, and his brief fee incurred; the whole process has been stressful for the Claimant, and it would be unfair for her to have to continue to wait for the resolution of a claim she began over two years ago.

13. The renewed application came before EJ Russell again, who ordered that the postponement application be considered afresh by the judge hearing the case at the beginning of the hearing, further medical evidence having been produced by the Respondent.

14. On the first day of the hearing, the renewed postponement application, alternatively an application that the Tribunal go part-heard to hear Mr Reid's evidence later, were refused. The Tribunal's reasons were as follows.

15. This is a case which relates to matters which occurred in 2017. The case was presented in December 2017, and has already been subject to long delays; it has been postponed on four occasions. We did not consider that a further postponement was in accordance with the overriding objective. It would lead to a further delay of up to a year. The Tribunal agreed with EJ Russell, that it would be likely to have a damaging effect on the cogency of the evidence. Although there is prejudice to the Respondent in not being able to call live evidence from one of its witnesses, the Tribunal took the view that that prejudice can be mitigated in a number of ways.

16. Firstly, Mr Reid's evidence overlapped to a great extent with that of Ms O'Neill. Secondly, his evidence largely reflected the content of a meeting, for which notes exist, and reflected an outcome, which was also a matter of record. He amplifies his reasoning in his witness statement, to which the Tribunal can have regard in his absence. Where a witness fails to attend without good reason, little weight is likely to be given to his statement. That is not the case here: Mr Reid has provided a good explanation, supported by medical evidence, for not attending.

17. We did not consider that going part-heard, and listing a further day, would be appropriate: there was no prognosis as to when Mr Reid would be well enough to attend, indeed, the medical evidence suggested that the prospect of the hearing was itself a cause of the stress.

18. We considered that the Claimant would be prejudiced in other respects: both solutions would give rise to additional expense being incurred: her Counsel's brief fee has already been incurred, and the Claimant and her witnesses have arranged to take time away from work in order to attend the hearing this week. In our view, it would not be just for her to be required to wait for up to year for a resolution of her case, and for a remedy, should she succeed in any part of it.

The hearing

19. We had an agreed bundle running to around 200 pages. We heard evidence from the Claimant; the Claimant's husband, Mr Colm Daly, also provided a statement and attended to give evidence, although the Respondent's Counsel had no questions for him; the Claimant also called Ms Angela Corbett (a former member of the Respondent's Cabin Crew Trainer team). For the Respondent we heard from Ms Julie O'Neill (Manager of the In-Flight Business Managers); and we read a statement from Mr Gary Reid (In-Flight Customer Experience Safety and Standards Manager). Both the Claimant and Ms O'Neill submitted supplementary witness statements.

20. Mr Powlesland (Counsel for the Claimant) made oral submissions. Mr Randle (Counsel for the Respondent) provided a helpful written skeleton argument, which he supplemented with oral submissions. We are grateful to both Counsel for their assistance.

21. The Tribunal apologises to the parties for the delay in promulgating this judgment. This was due to pressure on judicial resources, and the competing demands of other cases.

Findings of fact

22. The Respondent is an airline, which is part of the BA group and operates out of London City and Edinburgh airports. At the time, there were around 300 employees working out of City airport.

23. The Claimant commenced employment with the Respondent on 22 September 2008. She was already experienced. Initially, she worked as short-haul cabin crew, but was promoted to senior cabin crew within a year, as well as being given training responsibilities. She married in 2015.

24. In 2015 she successfully applied for a role as an In-flight Business Manager ('IBM'). Her contract of employment provided for 37.5 hours per week 'with a variable shift pattern as required by the business… Your exact working pattern will be agreed with your manager'.

<u>The IBM role</u>

25. IBMs line manage cabin crew. From June 2016 onwards, each of the five IBMs had responsibility for his/her own team of around 45 crew. Part of the purpose of this was to provide a clearer reporting line, and to ensure that line management was more effective.

26. The duties of an IBM included: conducting supernumerary flights, when the IBM would fly in a supervisory capacity, to conduct assessments and ensure high standards of safety and customer service; overseeing the senior crew members, and ensuring they were operating correctly; implementing the safety reporting system; and carrying out briefings with individual crew members. The IBM role also included some operational flying, when the IBM flew as the senior crew member.

27. We were taken to a job description, which was dated April 2017. Although the Claimant contended that this did not apply directly to her, she accepted that it gave a broad overview of the role. The IBMs' office duties included maintaining attendance records; working alongside the Respondent's Policy Casework and Support team to escalate issues as required, to ensure HR-related matters were dealt with in a timely manner; dealing with 'reactionary issues', for example crew who were not answering the phone, while on standby for a flight; and dealing with safety issues raised by members of their team. IBMs conducted appraisals of the team members for whom they were responsible. If there were performance concerns, the IBM dealt with them; however, they did not have responsibility for agreeing annual leave.

28. Initially the role was Monday to Friday, but from January 2016 IBMs were required to work six-day weeks, which included some Saturdays and Sundays. There was no set pattern of work. Generally, the flight and office roster were prepared by the Claimant's line manager, Ms O'Neill, every six weeks. However, the Claimant and the other IBMs could be required to cover a flight at short notice, sometimes even the same day.

29. We heard conflicting evidence as to the IBMs' preference for weekday/weekend working. The Claimant's evidence was that some IBMs were not keen on working weekends. Ms O'Neill accepted that when weekend working was introduced, there was some objection, although she maintained that it became more accepted, that IBMs generally preferred to work weekends. The Tribunal finds that, because the airport closes on Saturday afternoon and reopens on Sunday morning, and there was limited crew reporting on those days, the airport was slightly quieter, and it gave IBMs the opportunity to catch up on other work. That did not mean there was less work to do, simply different work.

The IBMs at London City Airport

30. The Claimant was based at London City airport. Before she went on maternity leave, there were five IBMs based there (including her): three women and two men; none had children.

31. On average, she was required to fly as cabin crew two days a week, although she might fly more if they were short of crew, or less if IBMs were needed in the office. On each day there was a designated IBM who answered the phone and covered reactionary work for all IBMs, including those who were absent that day. Anything that was not urgent would be logged and referred to the relevant IBM, whose team the work related to.

The Respondent's flexible working policy

32. The Respondent's policy sets out eight business reasons why a request may be refused, which reflect the statutory scheme. The three reasons ultimately relied on by the Respondent, in refusing the request, were as follows:

> '*3.2.3 Inability to reorganise work amongst existing staff*
>
> - current vacancies within the team may mean that resources are already 'spread thin' and existing staff would not be able to pick up work without a detrimental impact on quality and performance;
>
> - current flexible working arrangements with the team, mean that another flexible worker would result in an inability to organise staff and result in a detrimental impact on quality and performance.
>
> […]
>
> *3.2.5 Detrimental impact on quality*
>
> - if the individual were to work flexibly certain accountabilities would not be picked up by anyone else and therefore quality would suffer.
>
> *3.2.6 Detrimental impact on performance*
>
> - if a full-time role were to become a job share there may be a negative impact on morale and inconsistency in leadership styles that would result in lower performance levels from staff;

- certain individuals may not be given adequate support to do their jobs as the individual will not be present to the extent that they were before working flexibly.'

33. The policy specifically provides that:

> '*Temporary variations*
>
> Where the Company is unsure whether the arrangements requested are sustainable in the business or about the possible impact on other employees' requests for flexible working, it may agree to a temporary variation or trial period rather than rejecting the request. The Company will confirm to you in writing that the changes temporary and will be subject to review.
>
> […]
>
> *3.1 Agree to a new pattern or trial period*
>
> if the manager is agreeing to a new work pattern this constitutes a permanent change to the employee's contractual terms and conditions. The employee has no right to revert to the previous working pattern. This agreement should be in writing with a start date for the new working arrangement.
>
> If the manager is unsure about the request but a trial period might be beneficial to assess the impact then this can be offered. A maximum trial period of twelve weeks is recommended. This will give both the employee and manager chance to find out whether the chosen pattern of working will really work out well in practice. After the trial period, the manager may agree a permanent change, deny the application or offer a different option.'

34. The accompanying Guidance for Managers provided:

> 'The meeting […] is intended to provide an opportunity to explore the desired work pattern in detail and to discuss how best it might be accommodated. The meeting will also provide the opportunity to consider other possible work patterns should there be problems in accommodating the desired work pattern outlined in the employee's application […]
>
> Managers should give full consideration to the request and must consider a range of factors, bearing in mind that the needs of the organisation must take priority.
>
> […]
>
> More time may be needed to explore an alternative working pattern and time limits can be extended where the manager and employee agree […]'

35. The Claimant made her application long before any flexible working arrangement would need to be implemented, yet the option of taking more time to explore alternatives was not taken up.

36. Where an application was submitted under the policy, a further application could not be made within a period of twelve months, which is consistent with the statutory scheme.

Evidence of the Respondent's approach to flexible working requests more generally

37. The Claimant describes her own experience, in her capacity as a manager, of applying the policy. She stated that the Respondent 'was overall very resistant to granting flexibility', and that the majority of cabin crew who took maternity leave either left immediately after the end of their leave, or shortly after returning on a full-time basis. We accept the Claimant's evidence: witness statements were exchanged in October 2019; the Respondent had been aware for many months that this was the Claimant's case, yet it took no steps to adduce any evidence that any requests for flexible working made by cabin crew returning from maternity had been granted. Ms O'Neill, asked about this in cross-examination, could not say whether there had been any occasions when crew were allowed to return to work part-time after coming back from maternity leave. She thought that 'historically, years back' it might have occurred, but she could not be certain.

38. The only documentary evidence in the bundle relevant to this issue was a table of employees who had flexible working arrangements across the whole business. Although this shows a large number of employees, in a variety of roles, who had been granted flexible working, it does not show when the request was granted (the Claimant suggested that the arrangements may have been put in place some time ago). Nor does it show the reason for granting the request, for example whether any of the requests were related to childcare. Counsel for the Respondent accepted that there was no data anywhere in the bundle demonstrated that the Respondent had granted flexible working by reason of childcare responsibilities. The table does not even show the sex of the employees in question.

39. In his witness statement, Mr Reid accepted that no flexible working requests had been granted in the IBM team. His evidence was that he could only think of one such request being submitted, by a male IBM a few months previously, and this had been denied for similar reasons. It was not in dispute that there had never been a trial period of flexible working within the IBM team.

40. The Claimant also stated that there was 'an unspoken policy of not granting set flying days for part-time workers'. Again, the Respondent led no documentary evidence to rebut this contention. In her oral evidence, Ms O'Neill was able to refer, in cross-examination, to one person in London who had set flying days (cabin crew), although she believed that there were other cabin crew flying out of Edinburgh on a fixed pattern.

41. It was put to the Claimant in cross-examination, and she agreed, that if a staff member was pregnant or suffering from ill health, flexible working request would be accommodated. Further, it was put, and she agreed, that pregnant crew members cannot fly after a certain point, and that those duties would be covered by others. Moreover, it was not in dispute that, when the Claimant was experiencing health difficulties during her own pregnancy, she was treated flexibly, and her hours reduced, and she was allowed to work from home, when her GP so advised.

42. In the light of all this evidence, the Tribunal finds that the Respondent was open to flexible working requests when they arose out of medical circumstances, but resistant when they arose by reason of childcare responsibilities.

The Claimant's pregnancy

43. The Claimant became pregnant in late 2016, and was due to go on maternity leave in August 2017. After a certain point she was grounded in accordance with policy. Later, she was permitted to work from home part of the time, and came in an hour later when working from the office, pursuant to advice from a GP, although she continued to work normal office hours. There was no evidence that these changes to her normal duties had a negative impact on performance standards. The Respondent did not employ additional cover until the Claimant started her maternity leave, when an additional IBM was seconded into the Department to cover her duties during her leave.

44. On 9 July 2017, the Claimant's daughter was born six weeks early, and she went on maternity leave immediately. The baby had serious health problems, and this was a stressful time for the Claimant and her husband.

The Claimant's application for flexible working

45. The Claimant was due to return from maternity leave in August 2018.

46. There is no creche at the airport. Neither the Claimant nor her husband have family living locally who can assist with childcare. The Claimant investigated the cost of childcare, and found that the most affordable option was a childminder for five days a week, although even this would have cost in the region of £1,150 per month (the Claimant's salary was an average of £1,900 per month). She could not find a childminder who was willing to be flexible around the variable days the Claimant would have to work under her current shift pattern. We accepted her evidence that affordable, alternative childcare arrangements would not have been available, if the Claimant worked the flexible shift pattern required by the Respondent, full-time.

47. On 15 June 2017, she applied for flexible working. She asked for:

    47.1. an overall reduction of hours by 25%;

    47.2. set days off during the week, preferably two at a time, for example Monday and Tuesday;

    47.3. she was happy to work a set day each weekend, indeed she offered to work more weekends, if needed, because her husband (who is a teacher) was at home at the weekend;

    47.4. she also suggested that she could be more flexible with set days in the summer, when her husband would be on holiday.

48. The proposal included an element of operational flying. It repeatedly emphasised her willingness to be flexible in relation to her request. She proposed a six-month trial period 'to see if it works for both the company and myself'.

49. In her application she was asked to explain the impact of the new working pattern on her employer and colleagues. Although not explicitly stated, the Tribunal finds that the focus of this question was on the potential adverse impact. The Claimant's answer focused more on the positive outcomes for her and for the Respondent.

50. On 23 June 2017, Ms O'Neill wrote to the Claimant inviting her to a meeting to discuss the proposal; this took place on 27 June 2017. At the meeting, the Claimant clarified again that she was not asking to be taken off flying duties altogether: it was part of her job and she enjoyed it. Rather, she suggested (as a possibility only) that her operational flying might be reduced, especially when she needed to be in the office. She made the point that operational flying was extra to the required crewing complement, and a reduction in her doing it would have no operational impact; we accept that evidence.

51. She further stated:

> 'I am really happy to be 100% flexible as long as I know what I am doing. I am happy to cover as necessary. I feel that even though I have had time off, I have managed to keep on top of my workload… I would also be happy to trial different ways of working a 75% roster, this also may work better for the company… In school holidays I would be happy to change my times.'

52. She also explained at the meeting that, part of the reason for her request was that her husband (who was a teacher) was being promoted, and consequently would have less time to dedicate to childcare.

53. She also said in the meeting at one point:

> 'I know that this will be a big impact on the team but I will give 100% of myself to the IBMs. I need to find a work/life balance. Working 100% could possibly make me less flexible, I would rather be more relaxed and organised.'

<u>Ms O'Neill's approach to the application</u>

54. Ms O'Neill appears from the notes scarcely to have engaged with the detail of the Claimant's proposal. She worked through a series of set questions, not asking follow-up questions, or probing the proposal in any depth, other than a single question in relation to weekend working.

55. In response to the discussion with Ms O'Neill at the meeting, the Claimant offered to provide a sample roster for a month, to show how her proposal might work in practice. According to the sample, the Claimant would keep one operational flight during the month, while the other IBMs would be doing either four or five such flights. The Claimant would be working three out of four weekends, while other IBMs might be working one or two weekends. It was put to the Claimant in cross-examination that this was unfair. The Claimant responded that no one had pointed this out at the time and that, if Ms O'Neill had done so, she would willingly have looked at it again. She emphasised that all she was seeking to do was to show herself covering every aspect of her job

56. We find that the Claimant had been explicit at the meeting with Ms O'Neill that this was only one possible illustration. She had confirmed that she would be equally happy to have suggestions from the company. No counter-proposals were made.

57. As for whether Ms O'Neill considered 'other possible work patterns', as the Guidance for Managers suggested she should, Ms O'Neill said in oral evidence that she produced alternative rosters, but did not give them to the Claimant. Asked whether this was in writing and, if so, why they had not been disclosed, Ms O'Neill accepted that she did not put anything in writing. She also said that she had considered whether she might allow the Claimant's request in part, but there was no written record of that either. Absent any contemporaneous evidence of Ms O'Neill considering alternatives proposals, we find that she did not do so: she did not say that she had done so in her outcome letter; nor was there any reference to her having done so in her main or supplementary statements in these proceedings. We considered that an alternative modelling exercise of any substance would have been an intricate exercise; it is difficult to imagine it being carried out in someone's head.

58. Nor did Ms O'Neill make enquiries of other IBMs as to their views of the proposal, and its possible impact on them. That is particularly surprising, given her evidence that she was concerned that, if the Claimant reduced her hours, this would have a negative impact on the morale of other IBMs, as they had to manage situations that might arise in her absence. Nor did the Respondent call any other IBM to give direct evidence to the Tribunal as to any adverse impact, whether practical or in relation to morale.

59. Ms O'Neill eventually accepted that all of her conclusions were based on conjecture; she relied on her experience and knowledge of the Department and her concerns that there was a risk that tasks would not be completed. As a result of this approach, the Tribunal finds that Ms O'Neill gave no proper consideration to the question of how any adverse impact could be minimised, nor as to how the Claimant's request might be beneficial to the Claimant and possibly even to the Respondent.

60. That brings us to the question of Ms O'Neill's view as to what level of adverse impact might be acceptable to the Respondent, given that any move from full-time, fully-flexible working is likely to give rise to challenges of some sort.

61. Ms O'Neill's initial evidence in cross-examination was that, if there was any negative impact at all on the business within any of the relevant areas, she would refuse the application. She then sought to resile from that evidence, saying that it would depend on the 'level of impact'. However, given an opportunity to clarify what she meant, she said that, if the changes had a '2% impact on each individual, and we could manage it, I may consider that'. It was suggested to her that what she seemed to be saying was that unless she thought that any negative impact could be completely eliminated, she would not grant the request, to which she replied: 'yes that's fair.'

62. Ms O'Neill was also asked whether she modified her approach, depending on the reason flexible working was being requested. She stated in cross-examination that she adopted the same approach, regardless of the reason for the application. In doing so, we find that she had no regard to the potential

discriminatory impact of rejecting a request, such as the one made by the Claimant.

63. Ms O'Neill accepted that, although she did not have the sample roster at the meeting with the Claimant, she did have it when she came to give her decision in the outcome letter. She accepted that the points that she made there were 'generalities' and did not deal with the specifics of the Claimant's proposal. Ms O'Neill suggested the Claimant could have proposed alternative rosters at the appeal stage, but that is hardly realistic, given that the Claimant did not know about her specific concerns about the sample roster, as they were subsequently articulated in her witness statement.

64. In short, we find that Ms O'Neill proceeded on the basis of assumptions and generalisations.

Ms O'Neill's decision

65. On 8 August 2017, Ms O'Neill sent her decision to the Claimant. She referred in her introduction to the fact that the Claimant was seeking flexibility to allow her to be at home to care for her daughter, and that, by having set days off each week, she would be able to book her daughter's childcare in advance for her working days. She also referred to the additional flexibility which would be possible during the school holidays.

66. Ms O'Neill rejected the application for the following reasons:

> 'I have carefully considered your application as well as the points you raised the meeting regarding your proposed working pattern. Unfortunately we think that agreeing to this change would:
>
> - Have an inability [*sic*] to reorganise work amongst existing staff
>
> The Cabin Crew are split into 5 teams with each team having a designated IBM. The purpose of this structure is to provide the cabin crew with support and have the ability for the IBMs to performance manage the crew efficiently and effectively. By granting your request would mean that your team would not be managed in a similar way to the other teams and the existing IBMs would not be able to pick up work without detrimental impact on the quality and performance of the IBM team in achieving the overall department and Company goals.
>
> - Detrimental impact on quality
>
> Due to the cabin crew community being split amongst the IBM team and each IBM having approximately 40 crew to manage therefore by granting your request there would be certain accountabilities that may not be picked up by the IBM team and therefore the quality would suffer.
>
> - Detrimental impact on performance
>
> There may be a negative impact on morale within the team if they had to manage situations that may arise in your absence in addition to their current workload. Therefore there may not be a consistent approach in performance managing the cabin crew. Also part of the IBM role is to fly operationally which assist [*sic*] with crew engagement and overall

> understanding of the day-to-day cabin crew role. Therefore by not fly operationally [*sic*] may have a negative impact on your duties as an IBM and would not fulfil the role of an IBM as per the current job description.
>
> Following my considerations I have made the decision to deny your application.'

The appeal

67. The Claimant appealed against the decision. She contended that flexible working was permitted elsewhere within the organisation, but not in the IBM team. She argued that the Respondent could not know whether it was possible to reorganise work, without trialing the approach; she pointed out that Ms O'Neill had not referred to the possibility of the trial period in her decision. She went on to say that, because no IBM had ever worked with a reduction of 25%, there was no evidence for the assertion that it would adverse effect quality. She reiterated that she had never said she would not fly operationally as part of her application. She concluded:

> 'Throughout my application and interview stage and indeed now I still am flexible and open to any suggestions that would result in flexible working hours being agreed by the company. Working for BA CityFlyer has been a pleasure and privilege. I hope that what has been put forth in this letter will help you to come to a revisited decision that will enable me to continue my career as an IBM.'

68. On 24 August 2017, Mr Gary Reid wrote to the Claimant, inviting her to an appeal meeting, which took place on 30 August 2017. The outcome of the appeal, which was that it was not upheld, was sent to the Claimant in a letter dated 4 September 2017. Mr Reid rejected the suggestion that flexible working was not recognised within the IBM team, and concluded that Ms O'Neill had considered the application fairly.

69. As for the trial period, Mr Reid addressed this by considering the sample roster which the Claimant had provided, and concluding on his own analysis that it was unworkable. He concluded:

> 'I have also considered, however, that you stated at our meeting that you would be willing to be flexible around this proposed working pattern. To achieve this flexibility other aspects of your role would have to be reduced. Any reduction in your supernumerary flying, in which you assess your team, would have a negative impact on your team's performance. Moreover any reduction in your administration days, in which you arrange to meet your team for attendance and performance reviews would, I believe, also have a negative impact on your team's performance.'

70. Mr Reid effectively concluded (without saying so in terms) that a trial period would be pointless, because there was bound to be some impact on the Respondent's operation, and any impact would be unacceptable.

71. We find that Mr Reid effectively rubber-stamped Ms O'Neill's decision, and did not apply his mind independently to the issues which the Claimant was raising.

72. In the course of the appeal meeting Mr Reid discussed with Claimant a proposed new policy in relation to phased return to work from maternity leave. However, this was a proposal which was still under review.

Ms O'Neill's subsequent contact with the Claimant

73. On 1 November 2017, Ms O'Neill phoned the Claimant to advise her of a role within flight operations for Flight Crew Executive. The Claimant explained in cross-examination that she could not apply for this role because it was a Monday to Friday role, and the same difficulties would arise which had caused her to make her flexible working request.

74. Ms O'Neill stated that, during the call, she explained that the business was growing, and that any further flexible working application would be considered in the light of the expansion. The Claimant denied that this occurred; she said that no one had ever suggested she ought to reapply. We accept the Claimant's evidence, especially in light of Ms O'Neill's oral evidence that she did no more than 'hint' at the expansion of the business, because this was confidential information, which she was not able openly to discuss with the Claimant.

75. The Claimant accepted that she could have made another flexible working request in June 2018. She explained that she did not do so because she did not think the outcome would be any different.

76. On 23 February 2018, Ms O'Neill telephoned the Claimant to discuss her return to work, including explaining the new maternity phased return to work policy, which Mr Reid had mentioned at the appeal hearing, and to discuss the Talent Development Programme that the Respondent was going to be running. Ms O'Neill sent an email to the Claimant on 5 March 2018, forwarding the details of the phased return to work scheme. There were different proposed arrangements for office-based and flying-based roles. The Claimant replied the same day, querying which part of the policy applied to her and she was told that she would come within the latter category.

77. Under this scheme the Respondent offered the first three months on either 50% or 75% hours; the second three months would be either 75% or 100%. These arrangements would be actioned 'as a temporary contractual change'; all benefits for the period would be *pro rata*. At the end of the phased return to work, the individual would be expected to resume their normal contractual duties.

78. The Claimant did not apply under this scheme. She explained that this was in part because it did not provide for set days, as she had requested in her own flexible working request, and in part because it only applied for six months. She would still have had to engage childcare for the whole of the week, because she would not have been able to predict which days she would need it for. We accept that evidence. Moreover, we find that the Claimant felt that she had been treated badly the previous year, and was already thinking about her new business.

The Claimant's investment in a new business

79. In April 2018, about a month before she resigned, the Claimant invested in a training franchise. It was put to the Claimant that she would not have stayed with the Respondent, whatever she had been offered, and that she had decided that a different career would fit better with her family. The Claimant replied that buying into the franchise was her last option, and that she had to take this step when she did in order to beat somebody else to the opportunity. Her evidence was that, if she had gone back to the Respondent, her sister would have taken on the business. The Claimant accepted that she did not apply for the any other jobs during this period; her evidence was that there was nothing for her to apply for as a new mother with a new baby.

The Claimant's resignation

80. The Claimant resigned on 8 May 2018 giving two months' notice. In her resignation letter she wrote:

> 'due to my flexible working request and appeal application being denied by the company, it would make it extremely hard for me to return to my current role full-time, and with no flexibility offered from the company to assist me on my return from maternity leave, it is with great sadness that after giving BACF flexibility, hard work and dedication for ten years that I feel I have been given no option but to resign from my loved role as IBM at London City. I hereby give my two months' notice dated 8 May 2018. I will be in touch very soon to arrange returning my company property.'

81. Ms O'Neill replied on 8 May 2018, acknowledging the Claimant's resignation.

82. We find that the Claimant resigned, in part at least, because her flexible working request had been rejected. We are satisfied that, if a trial period along the lines of the Claimant's proposal had been agreed, she would have returned to work, and would then have taken maternity leave in relation to her second pregnancy. Because the Respondent refused her request, she looked for alternatives.

The Claimant's second pregnancy

83. In December 2018 the Claimant gave birth to her second child. She accepted that she was pregnant in around April 2018, but her evidence was that she was not aware of the pregnancy until late May, which we accept.

84. In early 2019 the Respondent recruited somebody into an administrative position, who would be able to take over some of the more routine duties of the IBMs, enabling them to focus on their core duties.

The law to be applied

Indirect sex discrimination

85. The concept of indirect discrimination is set out at s.19 EA 2010:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**

> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

86. As for the comparative exercise, s.23 EqA provides:

> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

87. The burden lies with the Claimant to establish the first, second and third elements of the statutory definition of indirect discrimination (the application of the PCP, group disadvantage, and individual disadvantage). Only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim (*Dziedziak v Future Electronics Ltd*, EAT 0271/11). It is not necessary to show why the PCP puts people sharing a protected characteristic at a disadvantage (*Essop and others v Home Office (UK Border Agency)* [2017] ICR 640).

Group disadvantage

88. The previous formulation of indirect discrimination, under the Sex Discrimination Act 1975, required an examination of whether the proportion of persons with the protected characteristic in question who could comply with the requirement or condition was considerably smaller than those without the protected characteristic. This led to, firstly, consideration of the correct 'pool' for comparison, and then statistical evidence being adduced to prove disparate impact on those with the relevant protected characteristic.

89. The current definition of indirect discrimination in s.19(2)(b) EqA simply requires an examination of whether the PCP 'puts or would put' those with the protected characteristic at a 'particular disadvantage' when compared to those who do not have that protected characteristic. That formula does not require statistical proof (although this may be used, where available). As Baroness Hale put it in *Homer v Chief Constable of West Yorkshire Police* [2012] ICR 704 at [14]:

> **'Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But […] the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse […] It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.'**

90. Thus, a claimant is no longer required to use pools to show a 'particular disadvantage', although such an approach is still permissible. Where a pool is relied on, the Supreme Court in *Essop*, at [41] onwards, held:

> **'41. […] the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006 , at para 4.18, advises that:**
>
> > **"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."**
>
> **In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"—ie the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.'**

91. In *London Underground Ltd v Edwards (No.2)* [1999] ICR 494, the Court of Appeal held that, in determining whether a shift system was indirectly discriminatory, it was legitimate for a Tribunal to use their general knowledge and expertise to look outside the pool for comparison and to take into account national statistics. In *Chief Constable of West Midlands Police v Blackburn* [2008] ICR 505 (an equal pay case), Elias P. suggested that a Tribunal was entitled, in considering the disparate impact of a measure, to rely on the 'common knowledge' that women have greater childcare responsibilities than men.

92. There have since been cases where Employment Tribunals, and the EAT, have been less willing to endorse an assumption that full-time working, or certain shift patterns, place women at a particular disadvantage without more. The EAT in *Hacking v Wilson* EATS 0054/09 commented that it was not inevitable that women would be disproportionately adversely affected by a refusal to grant flexible working. Society has changed dramatically; many women now return to full-time work after childbirth and more men take on childcare responsibilities.

Individual disadvantage

93. If the Claimant succeeds in establishing group disadvantage - whether by reference to a pool, to appropriate statistics, to judicial notice, or by a combination - she must go on to show the individual disadvantage caused to her. In *Shackletons Garden Centre Ltd v Lowe EAT 0161/10*, although the EAT held that the ET had been entitled to conclude that a PCP relating to weekend working put women at a particular disadvantage, it had the Claimant had suffered an individual disadvantage, as distinct from a 'self-inflicted detriment', and the case was remitted to a differently constituted Tribunal.

Legitimate aim

94. According to the EHRC Employment Code, a legitimate aim is one that is 'legal, should not be discriminatory in itself, and it must represent a real, objective consideration' (para 4.28). This broadly reflects the guidance in *R (Elias) v Secretary of State for Defence* [2006] IRLR 934:

> **'...the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end.'**

95. As for cost-saving as an aim, the Code at para 4.32 provides:

> **'The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it.'**

Proportionality

96. The proportionality test was summarized by Elias J. in *MacCulloch v ICI* [2008] IRLR 846:

> **'(2) The classic test was set out in *Bilka-Kaufhaus GmbH v Weber Von Hartz* (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or Tribunal must be satisfied that the measures must "correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see *Rainey v Greater Glasgow Health Board* (HL) [1987] IRLR 26 *per* Lord Keith of Kinkel at pp.30–31.'**

97. The correct approach to applying the test was summarized by HHJ Eady QC in *City of Oxford Bus Services Ltd v Harvey*, UKEAT/0171/18/JOJ at [22].

> **'22. Provided a Claimant has established disadvantage, the burden of establishing the defence of justification, on the balance of probabilities, lies squarely on the employer; the assessment of which is for the ET and is objective in nature, see *Singh v British Rail Engineering Ltd* [1986] ICR 22 EAT. As for how the ET is to approach its task in carrying out the requisite assessment, this has been considered in a number of cases, in particular: *Allonby v Accrington & Rossendale College* [2001] IRLR 364 CA; *Hardys & Hansons plc v Lax* [2005] IRLR 726 CA; *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601 SC; and *Seldon v Clarkson Wright & Jakes (A Partnership)* [2012] IRLR 590 SC. From these authorities, the following principles can be drawn:**
>
> **(1) Once a finding of a PCP having a disparate and adverse impact on those sharing the relevant protected characteristic has been made, what is required is (at a minimum) a critical evaluation of whether the employer's reasons demonstrated a real need to take the action in question (Allonby).**
>
> **(2) If there was such a need, there must be consideration of the seriousness of a disparate impact of the PCP on those sharing the relevant protected characteristic, including the complainant and an evaluation of whether the former was sufficient to outweigh the latter (Allonby, Homer).**
>
> **(3) In thus performing the required balancing exercise, the ET must assess not only the needs of the employer but also the discriminatory effect on those who**

> **share the relevant protected characteristic. Specifically, proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (Homer).**
>
> **(4) The caveat imported by the word "reasonably" allows that an employer is not required to prove there was no other way of achieving its objectives (*Hardys*). On the other hand, the test is something more than the range of reasonable responses (again see *Hardys*).**

98. To some extent the answer depends upon whether there were non-discriminatory alternatives available (*per* Baroness Hale in *Homer* at [25]).

The ACAS early conciliation procedure

99. The provisions governing time limits in unfair dismissal claims are set out at section 111 ERA 1996.

100. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, provide at rule 8 that a claim is started 'by presenting a completed claim … using a prescribed form …'

101. Rule 10 is headed 'Rejection: form not used or failure to supply minimum information' and is a mandatory rule that requires a Tribunal to reject a claim if (para (1)(c)) 'it does not contain all of the following information', including '(i) an early conciliation number'. The result is that, if the minimum information is not provided within the form, the Tribunal has no option but to reject the claim unless that omission is capable of being excused by considering some other rule.

102. Rule 12 deals with rejection for substantive defects and sets out (at para (1)) points that may lead a member of staff to refer a claim form to an employment judge, if there are aspects of it that appear to be defective. Rule 12(2A) provides that the claim or part of it shall be rejected, if the judge considers that the claim or part of it is of a kind described in sub-paragraph (e) or (f) of para (1), unless the judge considers that the Claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.

103. Thus, Rule 12(2A) provides an escape route for minor errors in relation to a name or address, both identified as the mandatory minimum information to be supplied under rule 10, failing which a Tribunal will reject the claim. By contrast, a minor error in relation to the early conciliation certificate number itself, if the early conciliation number entered on the claim form is not the same as the early conciliation number on the certificate itself, is not capable of being corrected in the same way under rule 12(2A) (*per* Simler J *in Adams v British Telecommunications plc* [2017] ICR 382 at [9].

Unfair (constructive) dismissal

104. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. S.95(1) ERA provides that he is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances

in which he is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').

105. If there is a constructive dismissal, s.98(1) ERA provides that it is for the employer to show that it was for one of the permissible reasons in s.98(2) ERA, or some other substantial reason. If it was, s.98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

106. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract. The Claimant relies primarily on a cumulative breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards) and *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]).

107. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

108. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* (at [29]).

109. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829).

Conclusions: the Tribunal's jurisdiction in relation to the constructive dismissal claim

110. The Claimant's employment terminated on 7 July 2018. She presented her unfair (constructive) dismissal claim, in a second ET1, on 15 November 2018, over four months later. On that ET1, the Claimant's solicitor entered the ACAS EC number relating to the first ET1: R199336/17/94. However, that certificate was dated 20 November 2017. We accept Mr Randle's submission that the certificate relied on in the ET1 form could not extend time.

111. No evidence was led by the Claimant in support of an argument that time should be extended under s.111(2)(b) ERA 1996, because it was not reasonably practicable for her to issue in time.

112. On 9 January 2019, the Claimant's solicitors disclosed a second EC certificate (R321728/18/95), in which the dates of the conciliation period are 28 September to 15 October 2018. Had that number been entered into the second ET1, the claim would have been in time.

113. To that extent at least, the ACAS EC number which had been inserted on the second ET1 was the 'incorrect' number, in the sense that it was not the

number the Claimant may have intended to rely on. The Tribunal canvassed with the parties whether the second ET1 ought to have been rejected by the Tribunal for that reason, having regard to the strict requirements of the Rules, as analysed in *Adams*. Although Mr Randle (understandably) adopted that analysis in his closing submissions, on reflection we conclude that it is not correct. The requirement under the Rules is that the number of the ET1 must *accurately* replicate the number on the certificate. In the *Adams* case an incomplete number had been entered, meaning that it did not contain the minimum information required; the EAT held that that is an absolute requirement, which cannot be waived as a minor error. The position here is different: the ACAS number entered onto the ET1 *accurately* replicated the number on the certificate, and the Tribunal was right to accept the claim form.

114. Mr Powlesland did not seek to rely on the second EC certificate, presumably because, had he done so, he would have faced the opposite difficulty: that its number does not match the number on the claim form. Instead, he made an application at the start of closing submissions to amend the first ET1 to include the substance of the second. He acknowledged that such a late application would not normally be allowed. He accepted that it was a substantial amendment, not a mere relabeling, and that the delay was long, but submitted that the reason for the delay was an error on the part of the solicitor. He also accepted that the timing of the application was late, and that it was made outside the applicable time limits. However, he submitted that there was no prejudice to the Respondent in allowing the amendment: the constructive dismissal claim had already been heard, and there had been no suggestion that the Respondent was disadvantaged in dealing with it.

115. Given the concessions quite properly made by Mr Powlesland, Mr Randle focused on the fact that there was no evidence - only a submission by Counsel - as to the explanation for the failure to insert the correct number. Further, the second ET1 positively asserted that the Claimant was entitled to rely on the first EC certificate, because there was a connection between the matters complained about in the two claims. As Mr Randle rightly points out, that was to ignore the obvious time point. Moreover, the Respondent drew the difficulty to the Claimant's solicitors attention on more than one occasion, yet they took no action. He further submitted that the delay in making the application to amend is inexplicable: the application to amend could have been made at any point, but was left to the last possible moment. As for the balance of prejudice, Mr Randle submitted that, firstly, the Respondent had not been given notice of the fact that there would be an application to amend, and, secondly, that the Claimant had only pursued a part of the pleaded claim contained in the second ET1.

116. The Tribunal sees the force of Mr Randle submissions. We applied the familiar *Selkent* principles: this was a substantial amendment; the delay in making the application was long; the timing and manner of the application could scarcely have been worse; and it was made long out of time, in circumstances where it was reasonably practicable to make it earlier. Turning to the question of the balance of prejudice, we reject Mr Randle's submissions that the Respondent would be prejudiced if the amendment were allowed: it has already incurred the costs of defending claim; the fact that, along the way, it may have defended aspects of the claim which were abandoned by the Claimant is, in

the Tribunal's view, not material. On the other hand, although the Claimant would be prejudiced by not being permitted to seek a remedy in respect of a constructive unfair dismissal, we conclude that the prejudice is relatively slight, given the findings which we will go on to make (at the request of the parties) as to the unmeritorious nature of the constructive dismissal claim.

117. Weighing all these factors in the balance, and having regard to the fact that all of them with one exception favour the Respondent, and the exception (the balance of prejudice) is evenly balanced, the Tribunal concludes that the balance of hardship and injustice favours the Respondent, and the application to amend is refused.

Conclusions: indirect sex discrimination

Did the Respondent apply, or would it apply, the following PCPs to both men and women: a requirement to work full time; the lack of fixed days working each week; and the requirement to fly operationally?

118. Mr Randle submits that PCP 1 (the requirement to work full-time) was not, in fact, applied to the Claimant, because a phased return to work option was introduced in March 2018. The Tribunal rejects that submission. We must consider the position as it was when the Claimant made her flexible working request, and the Respondent rejected it. At that point there was no option for a phased return to work. Moreover, the requirement to work full-time was still in force when the Claimant issued these proceedings, and her claim must be taken to relate to the period pre-dating the ET1. The fact that the phased return scheme was offered later, and the Claimant did not take it up, may be relevant to the issue of compensation.

119. There is no dispute that PCP 2 (lack of fixed working days each week) was applied at the material time.

120. As for PCP 3 (the requirement to fly operationally), the Tribunal is satisfied that the Respondent had a requirement to fly operationally, over and above the regulatory minimum requirement to do so, which Ms O'Neill confirmed in her oral evidence was one flight every 90 days.

Did the application of the PCPs put, or would they put, women at a particular disadvantage when compared with men?

121. The Respondent contended that the issue of group disadvantage ought to be decided by reference to a pool restricted to the Claimant and the single male IBM who requested, and was refused, flexible working. Even if that pool were adopted, we do not accept Mr Randle's submission that it showed that disadvantage was 'evenly matched, with men and women facing the same disadvantage in practice'. The only evidence we heard in relation to the male IBM was a brief reference in Mr Reid's statement that the application was refused 'for similar reasons'. What was missing was any evidence as to what the nature of that application was, i.e. what kind of flexible working he was seeking, whether it was a request for reduced hours (PCP 1) and/or a request to have fixed days off during the week (PCP 2). Even assuming that it included a request to work reduced hours, there was no evidence that the requirement to work full-time put the male IBM *at a disadvantage*. We heard no evidence at all about his circumstances, other than that he had been denied flexible

working and, to that extent at least, had been treated in a similar way to the Claimant (which might assist the Respondent if this were a claim of direct sex discrimination).

122. We also considered whether a wider pool of all the IBMs would be appropriate. Again, since the only person within that group in relation to whom there was evidence of individual disadvantage, by reason of the application of the PCPs, was the Claimant, it appeared that the application of those PCPs to the IBMs put one woman at a disadvantage, and no men.

123. Consequently, if either of these pools were adopted, group disadvantage would be made out.

124. In the event, the Tribunal was not satisfied that either pool properly tested the discrimination complained of, because they were too small to be genuinely illuminating. We also had regard to the evidence we heard about the changing make-up of the group of IBMs. When the Claimant went on maternity leave, there were three female and two male IBMs. None of them had children. There was no challenge to the Claimant's evidence that her maternity cover was a man. When the Claimant left, he was kept on. Another woman left and was replaced by a man. By that point, of the five IBMs, one was a woman (who did not have children) and four were men. We considered that these developments were themselves consistent with the Claimant's contention that the lack of flexible working acted as a disincentive to women with childcare responsibilities from applying for the IBM role.

125. The Tribunal considered it necessary to look outside the pool, in order to determine whether the application of the PCPs put, or would put, women at a particular disadvantage, when compared with men.

126. Drawing on its own experience, the Tribunal takes judicial notice of the fact that part-time working, and a more predictable working pattern, are often of particular benefit to women. Although we acknowledge that there are changes in attitudes towards childcare, and more men take on childcare responsibilities than used to be the case (as the EAT observed in *Hacking*), in the Tribunal's experience, primary childcare responsibility still falls disproportionately on women.

127. The Tribunal finds support for the Claimant's position (and its own experience) in the material from the Office for National Statistics, on which the Claimant relied: 'Families in the labour market, UK: 2019'. Those statistics record the following:

    127.1. 56.2% of mothers said that they had made a change to their employment for childcare reasons, compared with 22.4% of fathers; and

    127.2. 26.5% of mothers with a child aged fourteen years and under said they had reduced their working hours because of childcare reasons, compared with 4.8% of fathers.

128. Mr Randle accepted in his oral closing submissions that the statistics would tend to suggest that more women take on childcare responsibilities than men.

129. We are satisfied that the application of the PCPs, in particular PCPs 1 and 2, created a particular disadvantage for women in comparison with men.

Did they put the Claimant at that disadvantage?

130. We remind ourselves that the statutory test only requires the Claimant to prove a disadvantage; there is no requirement that she must show that compliance with the PCP was impossible.

131. We accepted Mr Randle's submission that there was no evidence that the application of PCP 3, the requirement to fly operationally, put the Claimant at a particular disadvantage, given that she indicated that she did wish to fly operationally, and was able to do so.

132. As to PCPs 1 and 2, Mr Randle's submission was as follows:

> 'As for the requirement to work full-time and the lack of fixed days off each week, these are circumstances that made it more difficult for the Claimant to manage childcare because of the choices that she and her husband have made as a family. In particular, in her oral evidence the Claimant confirmed that her husband had worked as a teacher who could have worked part-time, but ultimately decided to take a promotion which resulted in longer hours. It is submitted therefore that insofar as the Claimant suffers a detriment due to those PCPs it was self-inflicted and cannot meet the requirements of s.19(2)(c) EqA.'

133. We note that there was no challenge in this submission to the Claimant's evidence that PCPs 1 and 2 made it more difficult for her to manage childcare. The challenge was more oblique: that, because she had chosen to take on the lion's share of the childcare responsibilities, any detriment she experienced as a result was 'self-inflicted'.

134. Mr Randle relied on a brief reference in the case of *Ministry of Defence (Royal Navy) v Macmillan*, EATS/0003/04 at [35]. The facts of that case were very different from the present case: the particular disadvantage the Claimant suffered in that case was that she had to travel 120 miles a day to work, but that was because she chose not to move house. We reject the suggestion that the disadvantage experienced by the Claimant in this case was 'self-inflicted'. Setting aside for a moment whether it is appropriate to characterise childcare responsibilities as being 'inflicted' on anyone, if they were inflicted by anyone, they were inflicted by the Claimant's husband, who had accepted a promotion which reduced his ability to do childcare.

135. We conclude that the application of PCPs 1 and 2 put the Claimant at a particular disadvantage: she would not be able to care for her daughter in the way that she considered appropriate, and would not be able to put in place affordable childcare arrangements around the full-time shift pattern required of her by the Respondent, including the refusal to agree to set days off each week, which made it more difficult for her to book childcare in advance.

If so, has the Respondent shown that it applied the PCPs in pursuit of a legitimate aim?

136. The Respondent relied on three legitimate aims:

136.1. the need to organise the work of IBMs efficiently and fairly;

136.2. the preservation of the quality of service expected from the IBMs; and

136.3. the satisfactory performance of the Claimant in her IBM role.

137. Clearly, these aims overlap with each other. The Tribunal is satisfied that they were not discriminatory in themselves, and that they represented real, objective considerations, and were legitimate. Further, we are satisfied that the Respondent applied the PCPs in pursuit of these aims.

Has the Respondent shown that the application of the PCPs was a proportionate means of achieving those aim?

138. We first considered whether the Respondent has demonstrated that there was a real need to apply PCPs 1 and 2.

139. We considered Ms O'Neill's evidence that the flexibility requested by the Claimant would have an unacceptable operational impact. Ms O'Neill referred to tasks, which had specific timeframes. She gave the example in her statement of the need to conduct absence management processes in a timely manner 'e.g. two weeks approximately'. Pressed as to how many absence meetings might take place in a 1- to 2-week period, she replied between 1 and 6; she accepted that the part-time IBM (here the Claimant) could have held some meetings over the weekends; she accepted that the later, more complex stages (for example, Level 4, where dismissal is a possibility), which it might not be possible to conduct at weekends, were much less common; and she accepted that she had not done any exercise to compare the Claimant's proposed roster and the cabin crew's roster to identify whether the proposed pattern would cause problems in terms of dealing with absence management issues.

140. We were not satisfied that the Respondent has shown that a reduction of 25% in an IBM's working hours, and an agreement to set days off during the week, would have had any meaningful impact on the part-time IBM's ability to deal with absence management issues within the applicable timeframes. The Respondent has not established that it would not have been feasible to identify days when the part-time IBM's working hours aligned with those of affected crew members, enabling them to meet and address absence issues. We preferred the Claimant's evidence that this was not as onerous - or time-critical - a task as Ms O'Neill sought to portray it, and she could have carried it out within her proposed pattern of work.

141. Ms O'Neill also referred to safety reporting system reports. Given that the timescales in relation to these were much longer (3 to 4 weeks), we were not satisfied that the Respondent had shown that there would have been a significant impact on a part-time IBM's ability to discharge those duties within a flexible working pattern of the kind requested by the Claimant, especially if she were assigned more weekend working, when there was more time available for office duties such as this.

142. We further accept that a reduction in an IBM's hours would logically have some impact on the days s/he would have been available to do reactionary work, which others would have had to cover. However, we accept the

Claimant's evidence that individual IBMs were often not in the office for a variety of reasons: for example, they might be flying, or on leave. When an urgent safety issue came in, it would be dealt with by whoever was in the office. If the concern was not urgent, but related to the Claimant's team, it could simply wait for her to come back into the office, just as it would do if she were absent for any other reason. There would be some impact on other IBMs, but not as great as the Respondent's witnesses sought to suggest.

143. As for the impact on the part-time IBM's own performance of granting the request, the Claimant accepted in cross-examination that it would mean that her team of cabin crew would not be managed in the same way as other teams, and she would have less time for line-management work. Ms O'Neill contended that the other IBMs would not have been able to pick up the extra 25% line management of the Claimant's team, without a detrimental impact on the quality and performance of their own teams. Again, the Tribunal accepts that there would be some impact but no proper analysis had been carried out as to precisely what it would be. It appeared to us that it would be relatively small (and certainly not the 'big impact', which the Claimant was recorded as mentioning during the process): at worst, around 6% of the part-time team member's line management duties might fall on each of the other 4 IBMs. That is before any consideration is given as to whether that might be mitigated by other means, to which we return below.

144. Ms O'Neill then raised the issue of supernumerary flights. She was concerned that a reduction in an IBM's working hours would mean that the Claimant would do fewer of these flights, which were important in terms of maintaining standards. However, we note Ms O'Neill's own evidence that the Civil Aviation Authority requirement is that every crew member has an in-flight assessment once every eighteen months. The Respondent has built in its own 'buffer' and aims to achieve assessments once every twelve months. The highest Ms O'Neill could put it in her statement was that:

> 'a reduction of allocated days to complete these would mean it would be more difficult, and *may lead* to not achieving it within the twelve months target and *very possibly* the eighteen months legal target [*emphasis added*].'

145. We were struck by the tentative nature of her language.The Tribunal did not find that evidence convincing, especially given the generous buffer which the Respondent had sensibly created.

146. Ms O'Neill accepted in cross-examination that the supernumerary flights were more important (because of the regulatory requirements) than the operational flights; these were not a regulatory requirement. The minimum required of each IBM was to do one operational flight every 90 days. Ms O'Neill acknowledged that, even in her initial sample roster, the Claimant was proposing at least one operational flight per month, so three every 90 days. Ms O'Neill accepted that there would have been no difficulty covering a part-time IBM for operational flights she did not do, given that there were 180 cabin crew.

147. Ms O'Neill said that the main issue with the reduction in the number of operational flights was that they helped to keep the IBMs in touch with crew.

We find that a reduction would have had some impact in that respect, although given the Claimant's offer of greater flexibility during the school holidays, we consider it likely that she would have been able to remedy this to a very great extent during those periods.

148. The focus of much of Ms O'Neill's evidence was on her belief that it would be unfair to other IBMs, if the Claimant were allowed to have two set week days off next to each other, because it would mean that she would work every weekend, meaning others would work fewer weekends. There was no evidence, other Ms O'Neill's assertion, that others would have regarded this as unfair. No enquiries were made of other IBMs when Ms O'Neill was considering the Claimant's flexible working request; no IBMs gave evidence to the Tribunal. The Claimant's evidence, which the Tribunal considered plausible, was that some may have regarded it as an advantage not to have to work so many weekends. Ms O'Neill was asked by the Tribunal whether she was concerned by the very fact of someone doing something different from everyone else; she confirmed that she was. She thought other IBMs might be 'annoyed' by the Claimant 'getting out of' doing something which they did not really enjoy.

149. Similarly, Mr Reid in his witness statement placed great emphasis on the impact of the Claimant's request on the 'morale' of other IBMs, stating:

> 'I believe that by reducing the Claimant operational flights this would also lead to ill feeling within the rest of the team that what would be perceived to be an unfair distribution of workload'.

150. There was no evidence before us that Mr Reid made any enquiries of any of the IBMs, to investigate the issue of morale in relation to operational flights. The Claimant's own evidence was that she enjoyed doing them. We are not satisfied that the Respondent has shown that other IBMs did not feel similarly.

151. On the evidence before us, the Tribunal was not satisfied that the Respondent has shown that the Claimant's request would have had a detrimental impact on morale.

152. Finally, we note that, under the Respondent's policy, the guidance as to when it might not be possible to reorganise work amongst existing staff refers to situations where current vacancies and/or current flexible working arrangements within the team might lead to difficulties. Neither of those factors applied in this case: there was no evidence of vacancies, and none of the team was permitted to work flexibly.

153. Accordingly, we conclude that allowing employees to work part-time/have set days off, along the lines requested by the Claimant, would have had some impact on the Respondent's operation, on the wider IBM team, and on the way in which the individual working part-time organised his/her work. However, we have concluded that that impact would not have been anywhere near as great as was described by Ms O'Neill and Mr Reid.

154. Part of the problem was that no proper analysis was conducted by either manager at the time, or in the course of their evidence, to identify precisely what that impact would be. Not only was their evidence generalised, in the Tribunal's view, they positively overstated some of the potential challenges.

155. We then weighed in balance the discriminatory impact on women of the application of PCPs 1 and 2. We have already identified above the particular disadvantage, to which the application of PCPs 1 and 2 put women generally, and the Claimant individually. In the Tribunal's judgment, a requirement to work full-time in particular, may as a barrier to employment for women with childcare responsibilities, and certainly did so in the Claimant's case.

156. As for PCP 2, we accept that a lack of certainty/predictability as to working days, is likely to present substantial difficulties in terms of making childcare arrangements, and did present such difficulties to the Claimant. It was also likely to act as a barrier to employment, albeit to a lesser extent than PCP1.

157. We conclude that the discriminatory impact on women of the application of PCPs 1 and 2 was very substantial indeed. It is illustrated by the impact it had on the Claimant: it effectively rendered it impracticable for her to discharge her childcare responsibilities to her satisfaction and/or to arrange adequate and affordable childcare, and thus to continue in the Respondent's employment.

158. We then turned to the balancing exercise between the needs of the employer and the discriminatory effect of the measures in question on women. Were the PCPs reasonably necessary to achieve the Respondent's legitimate aims? In carrying out that exercise we considered, among other factors, whether there were non-discriminatory alternatives.

159. One of the principal difficulties the Respondent encountered in seeking to discharge the burden on it to show that it was reasonably necessary to maintain the PCPs was that it had never conducted an analysis of what alternatives might exist, or how any of the difficulties identified by Ms O'Neill and Mr Reid might be resolved.

160. There was little or no meaningful engagement with the Claimant's proposals, which were (the Tribunal reminded itself) only initial suggestions. No counter-proposals were made. There was no attempt to see if the request could be made to work in part at least, or to consider whether adjustments might be made to it, which could allay any operational concerns, as the Respondent's policy and guidance required. The proposal was simply rejected in its entirety. In particular, we conclude that there was no good reason why a trial period could not have been agreed, especially as they had a year in which to work the arrangement out in detail. Ms O'Neill's only explanation for her refusal to contemplate a trial period was that she 'did not feel it would work'. Again, the approach was impressionistic.

161. The Tribunal concludes that the Respondent's statement in its Guidance for Managers (above at para 34) is indicative of its general approach to flexible working requests. It is difficult to reconcile a policy in which 'the needs of the organisation *must take priority'* with the requirement to give due weight to the potential for discriminatory impact on the employee. We conclude that that approach later manifested itself in the way Ms O'Neill dealt with the Claimant's flexible working request: she proceeded on the basis that this was the way things had always been done, without properly reflecting as to whether that approach was still reasonably necessary. In short, she (and Mr Reid) reacted in a knee-jerk fashion.

162. Ms O'Neill's evidence was that it would not be practical to employ someone to cover the 25% reduction in a part-time IBM's hours, as that would not be 'a viable contract'. The Tribunal acknowledges that employing someone on a 0.25 contract was unlikely to be practicable, but that was not the only potential solution. It was put to Ms O'Neill that one or more of the IBMs might consider increasing their hours; she accepted that she did not consider that. She confirmed that she also had the ability to bring in additional administrative cover within the IBM team, to free IBMs up to concentrate on their core duties, and that she could have raised a business case for that; she did not consider that at the time. She agreed that secondees were brought in to cover maternity leave, recruited internally from cabin crew; no consideration was given as to whether a solution might lie there. She also acknowledged that she could have allocated the saving made by the *pro rata* reduction to the Claimant's salary towards achieving a solution. None of those options had been considered at the time.

163. Crucially, from March 2018, not long after it rejected the Claimant's own request for flexibility, the Respondent introduced the phased return scheme, which accommodated employees returning from maternity leave on a 50% basis for the first three months, and then on a 75% basis for the following three months. In the Tribunal's judgment, this fatally undermines its case that it was reasonably necessary to require full-time/fully-flexible working of the IBMs, including the Claimant, at the material time. We were not shown the evidence on which the decision to introduce that scheme had been based, but it seems likely that the Respondent must have done an analysis, and concluded that the business could accommodate part-time working, and indeed actively wanted to do so. In reaching that conclusion, we infer that they must have addressed their minds to, and resolved, the issues of operational impact, which had previously been identified as barriers to flexible working by IBMs.

164. Ms O'Neill stated in oral evidence that, if the Claimant had come back on 75% under the phased return scheme, the Respondent would have kept the secondee/maternity cover on at 100%. Further, the Tribunal notes that additional administrative resource was, in fact, brought into the department in early 2019. From that evidence, the Tribunal infers that cost was unlikely to have been a bar to accommodating the Claimant's request, in whole or in part, at the earlier stage.

165. The Tribunal concludes that the Respondent has failed to satisfy us that the measures contained in PCPs 1 and 2 were reasonably necessary in the circumstances. We have concluded that there were non-discriminatory alternatives to the PCPs, which would have mitigated the impact on the Respondent.

166. The Tribunal is satisfied that the discriminatory impact of PCPs 1 and 2 outweighed the reasonable needs of the Respondent. Consequently, the Respondent has not discharged the burden on it to show that the application of the PCPs was a proportionate means of achieving its legitimate aims, its defence of justification fails, and the claim of indirect discrimination succeeds.

Constructive dismissal

167. Both Counsel invited the Tribunal to make findings in relation to this claim, whether or not it accepted jurisdiction.

168. Had the Tribunal accepted jurisdiction in respect of this claim, we would have concluded that the act of indirect discrimination amounted to a breach of the implied term of trust and confidence, and that it formed part of the reason the Claimant's resignation. However, we would not have upheld the claim, because we accept Mr Randle's submission that the Claimant subsequently affirmed the contract. The last act which relates to the indirect discrimination is the rejection of her appeal which occurred in September 2017. The Claimant resigned in May 2018. In the intervening period, she did not indicate any intention to resign, nor did she expressly reserve the right to resign and claim constructive dismissal. We are satisfied that she waived the breach of the implied term, and affirmed the contract.

Credibility of witnesses

169. Although in our findings of fact the Tribunal has been critical of Ms O'Neill's evidence, we were conscious of the fact that she was operating a system which appears to have been operating across the organisation some time, and adopting an approach which others had adopted before her, including the Claimant (on her own admission), in dealing with flexible working requests by cabin crew. Nor was it Ms O'Neill's responsibility that the Respondent had failed to lead documentary evidence in respect of a number of key matters. We did not consider at any point that Ms O'Neill was seeking to mislead us. In many respects, she was a credible witness, in that she was prepared to make concessions where appropriate.

170. There were also aspects of the Claimant's evidence, which were unsatisfactory. On some issues, she adopted a contrary position, which was almost as extreme as the Respondent's. We have found that the truth lay in between those positions.

Remedy

171. There will be a remedy hearing to determine the compensation to which the Claimant is entitled. Although her constructive dismissal claim failed, the Tribunal canvassed with the parties whether any loss of earnings might be recoverable, as flowing from the discrimination. That will be matter on which we will hear further submissions at the hearing.

172. Unless they are able to resolve the matter of remedy by agreement, the parties shall write to the Tribunal within 21 days, providing their dates to avoid for a one-day hearing. If they consider that more than one day is required, they shall give their reasons. A hearing will then be listed, and case management orders made.

Employment Judge Massarella
Date: 28 December 2020