EMPLOYMENT TRIBUNALS

Claimant: **Ms A Pullin**

Respondent: **Neovia Logistics Services (UK) Limited**

Heard at: **Nottingham**

On: **Monday 18, Tuesday 19, Wednesday 20 and Thursday 21 January 2021**

Before: **Employment Judge Blackwell**

Members: **Ms D Newton – Home**
Mr A Greenland - Home

Representatives

Claimant: **Ms Davis of Counsel**
Respondent: **Ms Vittorio, Solicitor**

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is as follows:-

1. The claim of constructive unfair dismissal pursuant to section 95(1)(c) of the Employment Rights Act 1996 (the 1996 Act) succeeds.

2. The claim pursuant to section 80H(1)(b) of the 1996 Act also succeeds.

3. By consent the claim pursuant to section 4 of the 1996 Act also succeeds.

4. The claim of indirect discrimination on the basis of the protected characteristic of sex pursuant to section 19 of the Equality Act 2010 (the 2010 Act) fails and is dismissed.

REASONS

1. Ms Davis of Counsel represented the Claimant whom she called to give evidence on her own behalf.

2. Ms Vittorio, Solicitor represented the Respondents (Neovia) and she called Ms H Morgan, Mrs Pullin's Line Manager, Ms K Tsang, an HR business partner, Ms S North who heard Mrs Pullin's grievance and Mr A Phillips who heard Mrs Pullin's appeal against the dismissal of her grievance. There was an agreed bundle of documents and references are to page numbers in that bundle. We are very grateful to the way both advocates presented their cases and throughout adopted a cooperative approach which was extremely helpful to the Tribunal. We are also grateful to both advocates for their helpful written submissions and comments on each other's submissions.

3. The issues to be determined were summarised by Employment Judge Heap in her case management summary beginning at page 45. In short Mrs Pullin brings claims of constructive unfair dismissal, a claim pursuant to section 80H(1)(b) of the 1996 Act alleging that the rejection of her Flexible Working Application was rejected on the basis of incorrect facts, a claim of indirect discrimination, the protected characteristic being sex, and brought pursuant to section 19 of the 2010 Act and finally a claim of a failure to provide a statement of changes pursuant to section 4 of the 1996 Act. The Respondents concede that allegation.

Findings of fact

4. Mrs Pullin was employed by Caterpillar Logistics Services (UK) Limited from 1 August 2011 to her resignation with notice which expired on 28 June 2019.

5. At page 52 in the contract of employment of 21 July 2011 Mrs Pullin's hours of work are described as follows:

> "Normal working hours will be 37.5 hours per week, Monday to Friday inclusive 0800 am to 1600 pm.
>
> As a member of the management payroll these will vary according to the needs to achieve the division's objectives."

6. At paragraph 2 of that contract of employment is the following:

> "Multi shift working
>
> Although initially employed on a specific shift, as outlined in your letter of employment, you must be prepared to work on any other shift as directed by management. This is subject to reasonable notice of the shift change."

7. The Respondents are a large employer and their business was to support clients in respect of warehouse management.

8. As a consequence of a TUPE transfer Mrs Pullin became the employee of Neovia in 2012.

9. At page 71 as a consequence of a Flexible Working Request (FWR) Mrs Pullin's hours were reduced to 22.5 per week working Tuesday, Wednesday and Thursday. She is described as a Product Lifecycle Planner.

10. In 2015 Mrs Pullin gave birth to a daughter who has a disability namely Downs Syndrome.

11. On her return from maternity leave Mrs Pullin joined the P2020 project as Project Lead working 4 days per week.

12. No document in the bundle reflects that change of title or change in hours.

13. At page 72 in August 2016 as a consequence of another FWR Mrs Pullin's hours are increased to 37.5 and she is to "revert to the original contracted terms and conditions of employment".

14. At page 77 as a consequence of another FWR Mrs Pullin's hours are reduced to 29 per week.

15. At page 82 dated 28 March 2018 as a consequence of another FWR Mrs Pullin's hours are reduced to 27.75 hours per week with a different work pattern depending on school term and holiday times. Thus that reflects the contractual position at all relevant times up to Mrs Pullin's resignation.

16. In September/October 2018 Mrs Pullin's daughter was not settling at breakfast club. Mrs Pullin therefore made her a request not to work on Fridays and this was accommodated by Mrs Pullin taking various types of unpaid leave.

17. From 18 March to 4 April 2019 Mrs Pullin was signed off work with "none work related stress".

18. On 8 April 2019 there was a return to work interview conducted by Mrs Morgan (see pages 83A and B).

19. Mrs Morgan alleges in her proof of evidence, see paragraph 13 that at that return to work interview Mrs Pullin mentioned her wish to reduce her hours to which Mrs Morgan responded that "that with the US facilities coming up I didn't think I would be able to accommodate her request".

20. Mrs Morgan in cross examination accepted that she did not inform Mrs Pullin that a reduction in hours would not be agreed, nor did she put Mrs Pullin on notice that in fact her intention was to increase Mrs Pullin's hours. Mrs Morgan therefore accepted in cross examination that Mrs Pullin's FWR at pages 83F and G was not made in the knowledge that she knew the company would struggle to support it as claimed in paragraph 14 of Ms Morgan's evidence. We should note at this point that we found Ms Morgan to be a defensive and far from straightforward witness.

21. The latest FWR was designed to reflect the hours, namely 21 that Mrs Pullin was working post October 2018 though it appears from a study of relevant records that Mrs Pullin was actually working about 23 hours per week on average.

22. We accept that all of the FWR's post the birth of Mrs Pullin's daughter were predominantly made to accommodate changes in child care needs and with no other motive or reason.

23. During Mrs Pullin's absence from work she applied for a job with Menphys a charity supporting people with disabilities and special educational needs. Her application is at page 164. She was interviewed on 9 May 2019 and was offered the post on 10 May (see pages 161 and 162). Mrs Pullin requested all the terms and the package etc. There was to be a reduction in salary, the scale of which is in dispute between the parties.

24. On 13 May Mrs Pullin met Ms Morgan and the HR representative Ms Tsang to discuss the FWR and the notes of the meeting are at pages 85 to 87. Although not recorded in those minutes it is common ground that when it became clear that the FWR would be refused Mrs Pullin asked what hours she would be expected to work. The response from Ms Morgan was that her hours were to be increased to 32.5 hours per week and that she would be required to work from 9:30 to 4:30 pm. Mrs Pullin made it clear that her child care responsibilities made it impossible for her to work as late as 4:30 pm.

25. As we have recorded above Mrs Pullin had no notice of the proposed increase in hours and we accept that she was taken by surprise and was shocked at the news.

26. The increase in hours was said to be a requirement. Mrs Pullin is recorded as saying "so we have a constructive dismissal case then? I can't physically do the hours so what options do we have?". Ms Tsang went on to say "we would have had to speak to you about your hours even if you had not submitted this flexible working request because of the 3 new additional markets this year and the associated time difference".

27. At page 90 on 15 May Mrs Pullin wrote a lengthy e-mail to Ms Tsang which was clearly a reaction to the meeting of 13 May. She made the following points:-

27.1 She had been part time since August 2015.

27.2 That the reduction in her hours could be covered by other employees.

27.3 That she had had little work to do between February and August.

27.4 She asked for details of how her role would change.

27.5 She noted that the FWR was simply to formalise the hours that she actually worked.

27.6 She noted that she had declined only one meeting.

28. Ms Tsang did not formally respond to that e-mail; her evidence being that ground would be covered in a further meeting which was in fact held on 22 May.

29. The notes of that meeting are at pages 94 to 97.

30. The requirement to work 9:30 to 4:30 Monday to Friday was reiterated and Mrs Pullin's response remains the same and she indicates that she will be forced to resign.

31. A number of the points raised in Mrs Pullin's e-mail of 16 May are discussed but in our view fall far short of either acknowledging the points made by Mrs Pullin or answering her questions. It is made clear that the role is full time but that Neovia have accommodated Mrs Pullin by permitting her to work part time.

32. The meeting concludes with Ms Tsang informing Mrs Pullin that if she does not accept the increased hours then the capability process would have to be invoked.

33. There is no reference to any alternative and there is no reference to home working and it is common ground that it was not discussed.

34. We note that at one point in her lengthy cross examination on being pressed on working from home Ms Morgan answered "not an option". She rapidly corrected that answer but in our view that reflects her mindset. We find that generally she was not in favour of working from home and in particular she did not approve of Mrs Pullin working from home because there had been two incidents when Mrs Pullin had been interrupted by her daughter whilst on business calls at home.

35. Ms Morgan's evidence in chief was exaggerated and she further accepted in cross examination that Ms Pullin had worked successfully from home on Friday evenings and Saturdays during "cut overs".

36. Ms Morgan also accepted in cross examination that it was both unreasonable and unfair to rule out Mrs Pullin working from home without a trial. All of Neovia's witnesses agreed with that proposition.

37. On 22 May at page 98 Mrs Pullin raised a grievance as follows:

> "You are enforcing increased hours to 32.5 hours per week upon myself in 4 weeks' time. Which is a fundamental breach to my contracted hours of 27.75 hours per week.
>
> You have not sought mutual agreement on this or proved where a contracted clause stating you are able to change my hours with limited notice.
>
> Nor have provided significant proof where the role now entails increased hours."

38. The next day at page 99 Mrs Pullin resigned with her last working day being 28 June 2019. She said:

> "I feel that I am left with no choice but to resign in light of the flexible working request outcome meeting held 22 May where you are enforcing my contractual hours to be increased in 4 weeks' time. I consider this to be a fundamental and unreasonable breach of the contract on your part. I cannot carry out these hours due to my child care commitment. I am therefore left with no option but to leave."

39. At page 100 is the written response to the flexible working request in a letter of 24 May. The request was "formally declined".

40. The letter went on:

> "During the meeting it was also communicated to you that a change in hours would be required due to the additional workload which is a 9:30 am start and finishing at 4:30 pm. You have been provided with 4 weeks' notice in which to make any necessary arrangements regarding your personal circumstances. However after this 4 week period your contractual hours will change."

41. On or about 29 May, Mrs Pullin formally accepted Menphys's offer of employment.

42. On 20 June, Ms North wrote to Mrs Pullin with the grievance outcome.

43. At page 111 appeared the following paragraphs:

> "The business is looking to increase your hours from your current contractual hours and you were provided with 4 weeks' notice before this change would take effect. We would therefore not consider this to be an enforcement but an amendment to your contractual terms with the necessary notice period. This notice period, in addition to your previous flexible working meetings was an opportunity for you to discuss the hours in line with both your personal needs and those of the business.
>
> Your contract of employment clearly states, under hours of work, that as a member of the management payroll these will vary according to the needs to achieve the division's objectives and under multi shift working it states "this is subject to reasonable notice of a shift change". A copy of your contract was provided to you. We consider that 4 weeks is reasonable notice for the change and therefore the company has acted in accordance with your contract of employment."

44. Both Ms North and Mr Phillips in cross examination and in reply to the Tribunal accepted that the advice which had led to the drafting of those paragraphs was wrong.

45. On 6 July, Mrs Pullin appealed the outcome of the grievance at pages 120 to 121.

46. On 15 August Mr Phillips in a lengthy letter upheld elements of Mrs Pullin's grievance but not the fundamental elements relating to the rejection of the FWR and the increase in hours.

47. We note at page 130 Mr Phillips responds as follows:

> "I do not accept that Helen does not like or will not accommodate members of her team working from home. Across the business several employees have fixed working from home patterns. However, the business does not accept working from home requests when there is a concern that it is being used as child care for young children because in our opinion, employees are more likely to be distracted and are less efficient. During our meeting an example was made of a telephone call you had taken where your daughter was screaming in the background. I note that you have denied this incident took place but this does not detract from the company's concern about employees working from home with young children present."

CONCLUSIONS

Constructive unfair dismissal

48. Section 95(1)(c) of the Employment Rights Act 1996:-

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2):-
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
>
> (c) the employee 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.
>
> (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if:-
>
> (a) the employer gives notice to the employee to terminate his contract of employment, and
>
> (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."

49. It is common ground that it is for the Claimant to prove:-

(a) That there was a fundamental breach of contract on the part of Neovia.

(b) That that breach caused the Claimant to resign.

(c) The Claimant did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

50. Mrs Pullin relies upon the implied term of trust and confidence, thus the Tribunal must ask whether Neovia has "without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".

51. Put another way "to constitute a breach of this implied term" it is not necessary to show that the employer intended any repudiation of the contract; the Tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it.

52. The Tribunal's judgment must be objective.

53. It is clear from Mrs Pullin's letter of resignation at page 99 that she had two matters in her mind. The first was the imposition of an increase in contractual hours from 27.75 to 32.5 hours per week. The second was the rejection of her FWR.

54. As Ms Vittorio correctly submits this case is predominantly about whether Neovia acted with reasonable and proper cause. Dealing with the requirement to work additional hours we have set out above at paragraph 43 the excerpt from Ms North's letter at page 111.

55. The rationale is clearly based upon an interpretation of the hours of work provision at page 52 and the multi shift provision at page 53.

56. In relation to the hours of work provision Mr Phillips accepted that the reference to "the division's objectives" was a Caterpillar term and had no equivalent in Neovia speak.

57. It was also common ground that Mrs Pullin had never been a shift worker and that therefore the multi shift provision could not have applied to her.

58. In the light of that evidence it is clear that Neovia do not have the right to unilaterally increase Mrs Pullin's hours of work. In our view it is irrelevant whether Ms Morgan, Ms Tsang, Ms North and Mr Phillips genuinely believed that that was the position. An employer acting with reasonable and proper cause ought to have sought competent advice.

59. Turning now to the rejection of the flexible working request we are of the view that Neovia's case is based entirely upon the evidence of Ms Morgan. Ms Tsang, Ms North and Mr Phillips generally accepted what they had been told by Ms Morgan and her views were unchallenged throughout.

60. In our view Ms Morgan's mindset was that with the increase in workload which we accept would have occurred because of the coming on line of three US warehouses she needed a full time project leader and one who would be prepared to cover work that would inevitably arise later in the UK day because of the time difference. She was willing to compromise with Mrs Pullin to the extent that she would not require her to work the normal full time hours of 37.5 but would expect an increase to 32.5 and crucially to cover the afternoon up to 4:30 pm.

61. As we have found above she had closed her mind to the option of Mrs Pullin working from home but as did all of the other witnesses she accepted that it was unfair and unreasonable so to do without at least a trial.

62. Ms Morgan's mindset is further evidenced by her statement at page 101 in the FWR outcome letter as follows:

> "I fully understand that your personal challenges restrict the hours that you can work. However you need to appreciate that the unpredictability of your hours poses a problem especially when you appear to change your working pattern on almost a daily/weekly basis."

63. Though we accept that Mrs Pullin made a number of FWR's all but the last of which were accommodated by Neovia there is absolutely no evidence to support that statement.

64. Again on page 101 we have the rationale both for the rejection of the FWR and the requirement to work longer hours as follows:

> "During the meeting we discussed the necessity for the role to work beyond 2:30 pm due to the three additional US facilities coming on to the IPOS system in October and November 2019 but work has started to impact us now. The associated time difference together with the market complexities would mean that there would be calls and meetings needed to be scheduled for later in the afternoon and Fridays."

65. We accept the position as set out in that paragraph. The letter goes on:

> "I would strongly disagree with your comment in your flexible working request and at the meeting where you state that your change in hours would not have an impact on the business or the team. You currently finishing at 2:30 pm means I have to stand in for you in meetings/calls in the afternoon and also pick up additional work load as required when deadlines dictate. Other members of the team are also fully utilised in other projects and therefore not able to assist long term."

66. With reference to that paragraph Ms Morgan in cross examination accepted that she had not consulted her team or more widely to see whether there was spare capacity.

67. Ms Tsang and Ms North both accepted in cross examination that Neovia should have taken the initiative in discussing alternatives with Mrs Pullin. At no stage did that occur particularly in the meetings of 13 and 22 May. As to those alternatives we have indicated above Ms Morgan's attitude towards Mrs Pullen working at home and plainly it was unreasonable for there not to have been a trial. As to job sharing this was dismissed out of hand on the basis that there would be a lack of continuity. Such an attitude would rule out the entire principle of job sharing.

68. It was acknowledged in cross examination that the increase in workload because of the coming on line of the three US plants was a temporary increase. The alternative of a temporary increase in hours was neither considered nor offered to Mrs Pullin.

69. Another example of Ms Morgan's attitude towards Mrs Pullin is her evidence at paragraph 20j "that she had very limited work between February and April – I had given her work to do before I went to Canada which she hadn't done. There was plenty of work within the team for her to be getting on with but she seemed to be want to be told what to do all the time".

70. In cross examination that boiled down to a single example of Mrs Pullin preparing a document which Ms Morgan said was within the wrong format. It was further accepted that during this period Mrs Pullin had worked on at least one project outside her own team. Neovia generally accepted that Mrs Pullin was a competent and capable employee.

71. It is common ground that Neovia were fully aware of the fact that Mrs Pullin's daughter was disabled with Down's Syndrome. We accept Ms Davis's submission that the evidence shows an overwhelming failure to support Mrs Pullin or attempt to accommodate her flexible working request. We note that Ms North accepted in oral evidence that there was no evidence whatsoever which showed Neovia seeking to support Mrs Pullin.

72. We find therefore overall that Neovia's conduct was such as to the implied term of trust and confidence.

73. We therefore need to determine whether Mrs Pullin resigned at least in part to the fundamental breach of the implied term of trust and confidence.

74. Ms Vittorio forcibly submits that Mrs Pullin in fact resigned entirely because she had accepted employment with Menphys. She points out that the application letter to Menphys (see page 164 and 165) that the charity's objectives were close both to her heart and her family. We accept that the application itself shows care and consideration and indeed is enthusiastic.

75. As we have noted above Mrs Pullin was offered the job on 10 May to which she reacts "that's fabulous news". Again as we have noted above there was further discussion about the terms and conditions and Mrs Pullin did not formally accept the job until about 29 May.

76. Mrs Pullin's evidence was that she would not have accepted the Menphys offer had there not been the breaches of the implied term of trust and confidence which we have found above. She said that the reduction in salary would have been unacceptable. Whilst we note there is a dispute about the extent of that diminution even on the Respondent's figures it is of the order of a reduction of 17%.

77. We found Mrs Pullin to be a straightforward and credible witness. Whilst we note there were considerable advantages to the Menphys job, including a reduction in commuting time we accept Mrs Pullin's evidence that she resigned entirely in response to the repudiatory breach of Neovia.

78. The question of affirmation does not arise. Neovia's position was made clear on 22 May and the resignation followed even on Neovia's evidence some 5 days later. There therefore cannot have been affirmation.

79. We therefore conclude that Mrs Pullin was constructively unfairly dismissed.

Was Mrs Pullin's dismissal nevertheless fair?

80. It is for Neovia to show a potentially fair reason for dismissal. It is clear from the meetings of 13 and 22 May and Ms Tsang's evidence the reason for dismissal was capability. In our view there is not a shred of evidence to support that as a potentially fair reason for dismissal.

81. The definition of capability set out in subsection (3) of section 98 of the 1996 Act reads as follows:

> "(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality."

82. We cannot see that Mrs Pullin's refusal to work extra hours can in any way fall into that definition. In that regard therefore any such dismissal would be unfair.

83. Ms Vittorio somewhat half-heartedly also argues some other substantial reason. That is a reason sometimes advanced in cases where employers are seeking to bring about uniformity of terms and conditions for example where there has been a TUPE transfer with sets of employees being on different terms. We do not however consider that the circumstances here establish such a potentially fair reason but if we are wrong about that for the same reasons as we have found in relation to constructive unfair dismissal in summary the failure to consider alternatives, the failure to discuss alternatives with Mrs Pullin, the failure to consider whether there was capacity within Ms Morgan's own team or within Neovia more widely, those facts render the dismissal unfair within the meaning of section 98(4) of the 1996 Act.

84. Neovia ie Ms Morgan had closed its mind to any alternative other than Mrs Pullin accepting an increase in hours or her dismissal.

85. We therefore conclude that Mrs Pullin's dismissal was unfair.

The Flexible Working Claim

86. Section 80G of the Employment Rights Act, subsection 1:-

"(1) An employer to whom an application under section 80F is made:-

(a) shall deal with the application in a reasonable manner,

(aa) shall notify the employee of the decision on the application within the decision period, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies:-

(i) the burden of additional costs,

(ii) detrimental effect on ability to meet customer demand,

(iii) inability to re-organise work among existing staff,

(iv) inability to recruit additional staff,

(v) detrimental impact on quality,

(vi) detrimental impact on performance,

(vii) insufficiency of work during the periods the employee proposes to work,

(viii) planned structural changes, and

(ix) such other grounds as the Secretary of State may specify by regulations.

(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to:-

(a) the decision on the appeal, or

(b) if more than one appeal is allowed, the decision on the final appeal.

(1B) For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is:-

(a) the period of three months beginning with the date on which the application is made, or

(b) such longer period as may be agreed by the employer and the employee.

(1C) An agreement to extend the decision period in a particular case may be made:-

(a) before it ends, or

(b) with retrospective effect, before the end of a period of three months beginning with the day after that on which the decision period that is being extended came to an end.

(1D) An application under section 80F is to be treated as having been withdrawn by the employee if:-

(a) the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the application and the next meeting arranged for that purpose, or

(b) where the employer allows the employee to appeal a decision to reject an application or to make a further appeal, the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the appeal and the next meeting arranged for that purpose, and the employer has notified the employee that the employer has decided to treat that conduct of the employee as a withdrawal of the application."

87. As to case law Ms Vittorio helpfully refers us to the Employment Tribunal decision in the case of **Webster v Princes Soft Drinks** and an EAT decision **Commotion Limited v Rutty** UK EAT/0418/05. Given that the Employment Tribunal decision came before the Employment Appeal Tribunal decision and that it is only persuasive we shall be guided by the EAT decision.

88. The head note records:

"In deciding whether an employer has made out a reason for refusing a request for flexible working falling within one of the specified ground an Employment Tribunal is entitled to investigate the evidence to see whether the decision was based on incorrect facts.

That follows from the wording of section 80H(1)(b) which provides that an employee is entitled to present a complaint to an Employment Tribunal on the basis that the decision to reject his application for flexible working was based on incorrect fact. Although the Tribunal is not entitled to look to see whether the employer acted fairly or reasonably in putting forward his rejection of the flexible working request the Tribunal is entitled to look at the ground which the employer asserts was the reason why the application was not granted and to see whether it was factually correct.

In order to establish whether or not the employer's decision to reject the employee's application was based on incorrect facts, the Tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the Tribunal is entitled to enquire into what the effect of granting the application would have been. For example could it have been coped with without disruption? What did other staff feel about it? Could they have made up the time?

> In the present case the Employment Tribunal was entitled to find that the evidence did not support the employer's assertion that allowing the Claimant to work a three day week would have had a detrimental effect on performance. In reaching the decision the Tribunal did not stray from assessing the correctness of the employer's assertion into considering whether it was justified. The Tribunal pointed out that no evidence had been put forward to show that it was not feasible for the Claimant to work part time and use their industrial experience to indicate their difficulty in accepting the correctness in fact of the employer's assertion. They pointed out that there was nothing to show that the work could not be done by proper organisation without diminution in the service to customers and that the employers had not carried any enquiries or investigations to see whether they could cope with what the Claimant wanted. Those were legitimate points which the Tribunal was entitled to consider and on which it was entitled to base its findings."

89. The rationale for the refusal we have set out already in paragraph 64. It seems to us that Neovia are relying upon the following provisions of section 80G namely:

- "Detrimental effect on ability to meet customer demand;
- Inability to reorganise work among existing staff;
- Detrimental impact on performance."

90. As we have indicated above Neovia's case relies entirely upon the evidence of Ms Morgan. As we have said we accept that there was going to be an increase in workload because of the bringing on line of the three US facilities. We also accept that there is a time difference. However there is no objective evidence of potential difficulties in meeting customer demands, no evidence as to concerns regarding the wellbeing or workloads of other employees in Mrs Pullin's team, no evidence that the Claimant's colleagues could not assist in carrying the increased workload nor any evidence as to whether there was assistance available from outside Ms Morgan's team.

91. We remind ourselves that we are concerned with the covering of 4.75 hours of Mrs Pullin's time being the difference between her contracted hours of 27.75 and the increased hours of 32.5.

92. We also repeat our finding that Ms Morgan's mind was closed to any alternative and she did not examine any alternative.

93. We therefore find that the rejection of Mrs Pullin's application was based on incorrect facts.

The section 4 claim

94. Mrs Vittorio sensibly states in her closing submissions:

> "It was accepted in the Respondent's evidence the Claimant was not issued with a statement of changes in respect of any amendments to her job title or duties during her period of employment with the business. The last statement of change issued to the Claimant was in respect of her flexible working request in 2018."

95. In our view there are two points at which section 4 should have been complied with. The first being Mrs Pullin's return from maternity leave in 2015 when she joined the P2020 team. Secondly in 2017 there were further changes to her role and at that point she came under Ms Morgan's management.

96. The section 4 claim therefore succeeds in that regard.

Indirect discrimination

97. Section 19:-

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:-
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are:-
>
> age;
> disability;
> gender reassignment;
> marriage and civil partnership;
> race;
> religion or belief;
> sex;
> sexual orientation."

The first requirement is for the Claimant to establish a provision, criterion or practice. The pleaded PCP is "requiring those who work in project lead roles to work on a full time basis".

98. Neovia's position has always been that it did not impose such a PCP. It is common ground that Mrs Pullin was in fact being required to work 32.5 hours per week, 9:30 am to 4:30 pm, Monday to Friday. Ms Davis submits:

> "For intents and purposes this is full time:-
>
> (a) There is no legal definition of full time;
>
> (b) it is overly legalistic to conclude that because the enforced hours were not 37.5 they were not full time for the purposes of the PCP;
>
> (c) it remains the case the Claimant was being made to work Monday to Friday."

99. Ms Vittorio submits as follows:

> "A part time worker is a person who is paid wholly or in part by reference to the time they work, and who is not identifiable as a full time worker having regard to the employer's custom and practice in relation to workers employed under the same type of contract (Regulation 2(ii)) of the Part Time Workers Regulations 2000.
>
> The Claimant accepted in cross examination that the Respondent's custom and practice in relation to full time working hours are 37.5 hours per week."

100. It seems to us that on that evidence the pleaded PCP is not made out because Mrs Pullin was not made to work 37.5 hours per week and the claim of indirect discrimination must fail at that point.

101. We would only add that this is not really a claim about sex discrimination but about disability discrimination. Unfortunately for Mrs Pullin it is impossible to bring an associative claim of indirect discrimination having regard to the wording of section 19.

Employment Judge Blackwell

Date :25 March 2021

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is

presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

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