EMPLOYMENT TRIBUNALS

Claimant: Ms L Hedger

Respondent: British Deaf Association

Heard at: Watford Employment Tribunal

On: **28, 29 and 31 March and 1 and 4 April 2022**

Before: Employment Judge Quill; Mr D Sagar; Mr D Wharton

Appearances
For the Claimant: Mr A Hedger, husband
For the respondent: Mr R Scuplak, consultant

WRITTEN REASONS

Introduction

1. We gave liability judgment with reasons on 4 April 2022. We gave remedy judgment with reasons the same day. Written reasons were requested during the hearing, and these are those reasons. The written judgment itself (containing both liability and remedy decisions) has been sent separately.

2. Since the hearing both parties have requested reconsideration. This document does not deal with that. That will be addressed separately.

3. I apologise for the delay in sending out these written reasons.

The Claims

4. The Claimant claims direct sex discrimination, indirect sex discrimination, breach of the requirements for handling flexible working requests and constructive unfair dismissal.

The Issues

5. There was a preliminary hearing on 17 March 2020 at which the Claimant was represented by counsel and at which the following the list of issues was agreed. On Day 1 of the hearing the parties each confirmed that it was still accurate and that it was the list of the issues that we needed to determine.

6. That list was as follows, keeping the numbering as per the original.

Time limits/limitation issues

6.1 Were all of the claimant's complaints presented within the time limits set out in the Equality Act 2010. Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a ''just and equitable" basis.

Flexible working - Employment Rights Act s.80(G) and 80(H)

6.2 Did the respondent deal with the claimant's flexible working request in a reasonable manner?

6.3 Did the respondent reject that request based on incorrect facts?

6.4 Has the claim been presented in time and, if not, within such further period as is reasonable if it was not practicable to have presented it in time?

Constructive unfair dismissal

6.5 Was the claimant dismissed, i.e. was the respondent in fundamental breach of the contract of employment? The claimant relies on the implied term of mutual trust and confidence.

6.6 If so, did the claimant affirm the contract of employment before resigning?

6.7 If not, did the claimant resign in response to the respondent's conduct?

6.8 The conduct the claimant relies on as breaching the trust and confidence term is:

6.8.1 The decision made by Damien Barry on 19 December 2018 to refuse the claimant's request for flexible working (as amended to 24 hours over 3 days).

6.8.2 The decision made by Paul Redfern on 21 February 2019 not to uphold the claimant's grievance.

6.8.3 The decision of Agnes Dyab made on 27 March 2019 not to uphold the claimant's grievance appeal.

6.9 If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

EQA, section 13: direct discrimination because of sex

6.10 Has the respondent subjected the claimant to the following treatment?

6.10.1 The claimant relies on the three allegations of conduct set out under the flexible working claim.

6.10.2 Dismissing the claimant

6.11 Was the treatment less favourable treatment, ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? The claimant relies on the following comparator, namely a hypothetical male employee.

(What "not materially different circumstances" have yet to be defined)

6.12 If so, was this because of the claimant's sex?

EQA, section 19: indirect sex discrimination

6.13 Did the respondent have the following PCP:

6.13.1 A requirement that the claimant's role be fulfilled on a full-time basis and/or at least 28 hours per week **over 3 days**.

6.14 Did the respondent apply the PCP to the claimant at any relevant time?

6.15 Did the respondent apply (or would the respondent have applied) the PCP to men?

6.16 Did the PCP put women at one or more particular disadvantages when compared with men in that:

6.16.1 Women are less likely than men to be able to comply with the requirement due to childcare commitments.

6.17 Did the PCP put the claimant at that disadvantage at any relevant time?

6.18 If so, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim?

Remedy

6.19 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

7. The bolding and underlining at the end of item 6.11 is not in the original. It is ours. During closing submissions, the Respondent's representative invited us to decide that the Claimant was (i) seeking to rely on an actual comparator, Mr Justin Smith and (ii) that this was impermissible, given the list of issues stated that the Claimant was relying only on a hypothetical comparator. We will comment on this below.

8. The bolding and underlining at the end of item 6.13.1 is not in the original. It is ours. During closing submissions, the Respondent's representative invited us to decide that the actual PCP was "at least 28 hours per week **over 4 days**", rather than "at least 28 hours per week **over 3 days**", and that the indirect discrimination claim should be dismissed on that basis.

9. This panel is entirely satisfied that there is simply a lack of clarity in the written document and that both parties have proceeded throughout on the basis that the employer's (alleged) requirements for the Heritage Project Manager role meant that (2 or) 3 days per week from the post holder was insufficient, and more than 3 was required.

10. While the original the particulars of complaint did not, in express terms, specify the alleged PCP, it did say – for example – at paragraph 3 that she worked Monday to Thursday (7 hours each day) and at paragraph 16 that the Respondent's position during the grievance was that she had been offered the opportunity to return to working 28 hours per week over 4 days. The particulars of complaint also made clear at paragraphs 8 and 9 that the Claimant had suggested working for 3 days, and the Respondent had rejected that.

11. At paragraph 4 of the Grounds of Resistance, the Respondent noted that the Claimant made a request to reduce "her weekly working days from 4 to 2". There is no dispute between the parties that the Claimant made such a request.

12. Perhaps, the intended meaning of the alleged PCP in 6.13.1 was "at least 28 hours per week **and in excess of 3 days**", or perhaps there was simply a typo by somebody and a "3" was written, instead of a "4". Either way, we have no hesitation in saying that it has always been clear to the Respondent that the Claimant's intention has never been that alleged PCP as per the list of should be interpreted as "at least 28 hours per week **on exactly 3 days**". That would have been 9.33 hours per day and, amongst other things, both sides are aware that one of the disputes between them is that the Respondent rejected a pattern of 24 hours per week, with three 8 hour days, alleging that was too many per day.

13. It has always been clear to the Respondent that the allegation is that the Respondent stated that the Heritage Project Manager had to work no less than 28 hours and no less than 4 days per week, and that is how we will treat item 6.13.1 in the list of issues.

The Hearing and the Evidence

14. The hearing had been due to last 6 days, being Monday to Friday 28 March to 1 April 2022 and Monday 4 April 2022. The panel was unable to sit on Wednesday 30 March 2022 and so the hearing was reduced to 5 days.

15. The Claimant is deaf, and so are two of the Respondent's witnesses (Mr Barry and Mr Redfern). The panel has therefore been assisted throughout by two British sign language interpreters, Ms Hall and Ms Ogborn. On Day 5, the interpreters attended by video, and, on the other hearing days, in person. No-one else attended by video.

16. The Claimant was represented by solicitors at the time she presented the claim and that continued until some time after the preliminary hearing. For this final hearing, she has been represented by her husband who has asked questions and made submissions orally, and made use of the sign language interpretation when receiving responses.

17. We had documents electronically and by paper.

18. The Claimant was the only witness on her side. The Respondent's witnesses were Mr Barry, Mr Redfern and Ms Stolk. Each witness had prepared a written statement and gave sworn testimony and answered questions from the other side and from the panel.

19. The original bundle ended at page 323. This was an agreed item.

20. The Claimant's evidence started on Day 1 and finished before lunch on Day 2. Mr Barry's evidence started and finished on Day 2.

21. Based on what we had heard by the end of Day 2, and based on what was absent from the bundle, we made a case management order for the Respondent to carry out a reasonable search for all contracts, variations to contract, and all covering letters for such items, relating to Justin Smith and to send copies of same to the Claimant and to the Tribunal by no later than 4pm on the following day (30 March 2022, being the Wednesday on which we were not sitting).

22. We stated that we were making this order without deciding, at the time we made it, whether such items ought to have been disclosed in accordance with the orders from the preliminary hearing (which required disclosure of "documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy") or whether such items would necessarily go into the bundle. The Respondent's representative stated that he had anticipated that we might make such an order and had already (earlier the same day, shortly after lunch) sent an email to his client asking them to perform such a search.

23. In compliance with that order, the Respondent supplied 56 pages with a covering email which stated it attached:

> … documents as follows relating to Justin Smith:
>
> - Letter of appointment 13th September 2017
> - Written Statement of Employment Particulars
> - Variation of Contract Letters (nine in total, the last relating to his appointment as Research and Communications Manager).
> - Board Paper – Rationale for Restructure and Redundancies 2020
> - E-mail of 13th August 2020 confirming redundancy.
>
> The final two documents, though not directly necessitated under the Order, may well be of relevance nonetheless.

24. On Day 3, the Claimant's representative stated that all the items should go into the bundle, and expressed the opinion that, in fact, they ought to have been disclosed previously. He agreed to the last 2 items being included, as well as those which we had expressly ordered. The Respondent's representative was content for the items to be added, and these pages were numbered 324 to 379 at the back of the bundle.

25. On Day 3, we heard first Mr Redfern then Ms Stolk, and then each side's submissions. Each side had produced a written document and made some brief oral additions.

26. We informed the parties we would deliberate on Day 4 and told parties to come for 11am on Day 5 for judgment with reasons and, if appropriate, remedy.

27. In the afternoon of Day 4, we were informed by tribunal staff that some further submissions and documents had been submitted. First by the Respondent's representative and then later by the Claimant's representative. We declined to take these into account as we had not given permission – or been asked for permission – for any further submissions. We were satisfied that each side had been given ample opportunity to make their points on the afternoon of Day 3 (they had each

spoken until they themselves said they had nothing more to say; we had not stopped them.)

The findings of fact

28. The British Deaf Association or BDA ("the Respondent") is a charity and company limited by guarantee. It is a membership organisation which campaigns on behalf of deaf people in the United Kingdom. It has a Board of Trustees, composed of lay members elected every three years. The Board is responsible for overall strategic direction. Day-to-day management is in the hands of the Executive Director. At the times relevant to this dispute, that was a post held by Desmond Barry, who held the post between March 2017 and July 2020.

29. At the times relevant to this dispute, the head office was in Holloway, North London, and it employed around 90 staff throughout the country.

30. The Respondent's income comes from a number of sources, including legacies and donations. However, funding is principally from external funding bodies, such as, for example, BBC Children in Need, the National Lottery Community Funds, charitable trusts and commercial companies.

31. The central activities are determined by the Board and funded from our core funds. External funding is time-limited and is directed at the delivery of particular projects. The Respondent is constantly bidding for external funding and does so usually in an environment where it is not the only bidder.

32. Lisanne Hedges ("the Claimant") is deaf. She cannot speak or lipread and she communicates through British Sign Language (BSL), as well as via email, etc. She holds a first class BA degree, also has a Master's degree.

33. The Claimant started employment with the Respondent on 5 March 2014. Her job title was Part Time Project Assistant, Film Heritage and the post was funded by Heritage Lottery Fund. It was for 21 hours per week and for a fixed term to expire 1 December 2016.

34. She was issued with a statement of terms (pages 41 to 63). Clause 13 stated, amongst other things:

> *Should you need to work on a flexible basis as you have young children aged 16 years or under or disabled children aged 18, you can request a more flexible pattern of working hours or working arrangements. The BDA will give serious consideration to any such request and will explore other alternatives. If we have to reject any such request we will provide specific business reasons for this. Please speak to the Managing Director of the BDA for further details on this request.*

35. There were several policies. Pages 64-65 of bundle provide a list. Pages 66-70 are the grievance policy and 103 to 114 are the Flexible Working Policy ("FWP"), for example.

36. The FWP contains a form which must be completed by the employee if they wish to make a request. It states that flexible working is not a contractual right (paragraph

3.1.2). Paragraph 3.4.1 lists the matters which the line manager should take into account prior to forwarding to the director for consideration. Paragraph 3.4.4 lists the reasons for potential refusal (which it states are based on statute).

37. In March 2015, the Claimant and the Respondent agreed to increase her hours to 28 per week because funding had been received to digitise the BDA photo collection.

38. In January 2016, the Claimant made a flexible working request. She was proposing to keep the aggregate number of hours per day and per week the same, but to start at finish 90 minutes later each day. She said that this would help her financially (saving her more than £2000 per year in comparison to a salary of under £15,000) and also because she was suffering exhaustion, and the later starts would help with that. The request was submitted to her then line manager, Jemma Buckley, the Heritage Project Manager at the time.

39. Ms Christie Stolk was the Respondent's Head Office Manager at the relevant times (holding the post until December 2020) and she provided advice and assistance to the Claimant and to Ms Buckley about the request and the requirements of the FWP.

40. At one stage, the Claimant was told that the request could not be granted because she did not qualify. The Claimant supplied details of the changes to the law. A meeting took place on 12 February 2016. Amongst observations made at the meeting, it was noted that the Claimant had moved from London to Kent in around December 2015. Initially this extra journey time had been causing her to be tired at work, but Ms Buckley stated, and the Claimant agreed, that by now, her mood was back to normal and she was happy during the day at work. The Claimant also suggested that an alternative was to reduce her hours to 22, with the 10.30am start. Ultimately, the request was refused and the Claimant continued to work from 9am to 5pm with an hour for lunch, Monday to Thursday.

41. Ms Buckley left the Respondent. After that, and with effect from 20 June 2016, the Claimant's job became Project Co-ordinator, Film Heritage. This was a change of duties and a pay rise. The hours were the same as before. The fixed term was increased to 31 December 2016. As per the job description (page 134):

> The Project Co-ordinator will be responsible for administering the final six months of the project and coordinating Project staff. Their primary objective is to bring the project to its conclusion ensuring that all remaining goals are achieved.

42. The letters about this change were signed by Mr Barry. The same is true of a letter temporarily increasing the Claimant's hours to 30 per week until 30 December 2016 and extending her contract to 28 February 2017.

43. On 15 March 2017 (page 141), Mr Barry wrote to the Claimant about some further changes. The letter stated that the Project Co-Ordinator role had ceased on 28 February 2017, and the Claimant had been appointed to be the new Project Manager, Film Heritage. There was a salary increase, and a fixed term contract to 28 February 2018. The Claimant's acceptance was dated 19 April 2017.

44. The Claimant informed the Respondent that she was pregnant, and that her expected date of confinement was around the end of December 2017. On 12

September (page 146), the Respondent wrote (a letter signed by Mr Barry) to confirm entitlements and arrangements. Amongst other things, the letter stated:

> You have requested to take the full 52 weeks maternity leave and you will return to work 12 months after Monday 27th November 2017, on Monday 26th November 2018. However, as you are employed on a fixed-term contract which expires on Feb 28th 2018, your employment with us (and therefore your period of maternity leave), is expected to end on this date unless your contract is extended. If your employment is terminated on Feb 28th, you will receive the balance of any outstanding SMP, together with any other payments owing to you (such as accrued but untaken leave).

And

> If you return to work after the ordinary maternity leave you have the right to return to the same job. If you return after the additional maternity leave you have the right to return to the same job or to another suitable job if that is not reasonably practicable.
>
> Once your baby is born and you wish to vary your working pattern on return from maternity leave, you will need to put this request in writing, giving the details of the flexible working pattern you are applying for and the date you wish this to start. You also need to explain what effect you believe the new working pattern will have on the Company and how any such effect might be dealt with.
>
> We will then carefully consider this request. However, the Company reserves the right to refuse a request if we believe that there is a clear business ground(s) as to why the application cannot be accepted and you will be provided with the reasons why the ground(s) applies in the circumstances.

45. The Claimant sent an email to Ms Stolk on 31 October 2017 with some questions and also stating: “Also, I think in order to protect women on fixed term contracts the law says that if the job still exists while I am maternity leave (after 28th February 2018), the BDA must have a fair reason not to renew the contract.” On 2 November 2017, Ms Stolk answered the questions, and also confirmed that the Claimant’s understanding of this point was correct. (149-150).

46. The Respondent decided that it should employ someone as maternity cover. In Mr Barry’s statement, exchanged in May 2021, paragraph 12 includes the following:

> Justin Smith was recruited in September 2017, working full time, five days a week. His immediate objective was to work on a funding application for a new and completely different Heritage project, something which was outside of Lisanne's remit. Then there was a handover between Lisanne and Justin and, with Lisanne’s departure on maternity leave, Justin was to bring the project to a satisfactory conclusion.

47. As shown by the documents provided for Day 3 (after Mr Barry’s evidence had already concluded), on 13 September 2017, the Respondent wrote to Mr Smith to confirm that he had been offered and had accepted a post with the title “Deaf Heritage Project (Maternity Cover)”. This was 5 days per week, and was stated to be for a fixed term of 6 months. Paragraph 1 of his statement of particulars specified

an end date of 16 March 2018, and stated that the contract could end early in a variety of circumstances, including "other reason that the BDA deems necessary or appropriate" but without expressly mentioning the Claimant's return to work as being such a reason. Early termination was to be by one month's notice. Paragraph 2 with the heading the job title was:

> Your position with the BDA will be Deaf Heritage Project Manager (Maternity Cover) In addition to your normal duties, the BDA may require you, from time to time, to carry out duties in addition to your normal duties to meet business needs.

48. Thus, one day after writing to the Claimant stating that her employment was due to end on 28 February, the Respondent wrote to Mr Smith confirming that it had agreed with him that he would be employed until 16 March (subject to early termination). Mr Smith started work in September, and there was a handover period prior to the start of the Claimant's maternity leave.

49. Each of the Claimant and Mr Smith were sent letters dated 15 February 2018 extending their respective contracts to 30 April 2018. The stated reasons were so that Mr Smith could finalise the work on the project, including completing the evaluation report.

50. A letter dated 3 April 2018 (page 355 of bundle, and like all other letters to Mr Smith, not part of the bundle until Day 3) was sent to Mr Smith. It was almost identically worded to his 15 February one, and extended him to 30 June 2018. The Claimant got a similar letter, but with the additional sentence "We are also still waiting on a response from the Heritage Lottery for a Grant application."

51. On 14 May, the Claimant sought some information and Mr Barry wrote on 17 May to say that: "BDA was not successful in securing the new Heritage project grant and we have taken their advice to apply for smaller projects and this is something we are working on at the moment." He said he would update her in due course.

52. Letters dated 4 June 2018 (signed by Mr Barry) went to each of the Claimant and Mr Smith stating that their respective contracts had been extended to 31 October 2018, and were being paid for from core funding. The letters stated that Mr Smith was to spend time finalising the current Heritage project, and work on the final evaluation report. He was also to be looking for additional funding opportunities for the Heritage project. As with other letters to him, the letter stated that his job was "Heritage Project Manager (Maternity Cover)" and that other terms and conditions remained the same.

53. Mr Barry's witness statement, at paragraph 14, included the following:

> By the time of the June extension we were aware that we had been unsuccessful in our application. Nevertheless extending Lisanne's contract would be at minimal cost and the longer she remained on the books the better chance there was that an opportunity for continued employment would arise.

54. There was an exchange of emails on 1 and 4 October 2018 (167 and 168) in which the Claimant's return to work was discussed. Mr Barry stated he would arrange a 2 week hand over from Mr Smith to the Claimant, and informed her that on her return, it would be a priority for her to secure funding by March 2019.

55. By email dated 5 October 2018, at 9am, the Claimant said that she would like to defer her actual return to work until 4 February 2019 by taking leave immediately after 26 November 2018, the end of her maternity leave. The Respondent agreed to this.

56. The same email (166-167) also requested a change in working hours from 28 hours / 4 days to 16 hours / 2 days. This email did not state that it was a request under section 80F of the Employment Rights Act 1996 and was not on the Respondent's form. It suggested that one way of accommodating the change would be for her and Justin Smith to job share.

57. On 5 October 2018, at 1334, the Claimant wrote to the Respondent with details of a new address. (Page 169).

58. On 19 October 2018, Ms Stolk wrote about the leave arrangements, and the confirmed return to work date of 4 February 2019, and attached the form for the Claimant to complete, as per the FWP. (165-166).

59. On 19 October 2018, letters were also sent to the Claimant and Mr Smith extending their respective contracts to 31 March 2019. As before, Mr Smith's letter confirmed that he remained on 35 hours per week as Heritage Project Manager (Maternity Cover). Both letters stated that the posts were from core funding and Mr Smith would be looking for additional funding opportunities.

60. By email dated 25 October 2018 (164), the Claimant submitted the completed request form (174 to 179). In the form, the Claimant stated that her proposed new hours would be 9am to 5pm on Monday and Tuesday. She also said, amongst other things:

> My current working pattern is 4 days a week (28 hours) between Monday and Thursday. I would like to request an amendment to 2 days a week (16 hours) on Mondays and Tuesdays every week.
>
> And
>
> There is an option to develop a job sharing position with Justin Smith which is my preferred outcome. Due to childcare arrangements for my daughter I would like to propose Monday and Tuesday as my working days with Justin covering the rest of the week.
>
> Alternatively, if this option is not possible I still would like to keep my proposed working pattern to two days a week and redistribute some responsibilities to Emily Crowe. Potentially this also brings an opportunity to promote Emily's role as a Project Coordinator to carry out her new responsibilities.

61. The Heritage Project team consisted of two posts, that of Project Manager and Project Co-ordinator.

62. On 31 October 2017, Ms Stolk pointed out, and the Claimant agreed, that her suggested start and finish times would amount to 14 hours per week. (163-164). On Thursday 8 November 2018, Ms Stolk wrote to say Mr Barry was on leave the next week and would be in touch after his return. (163).

63. On 29 November 2018, the Claimant sent an amended form to Mr Barry and Ms Stolk. The covering letter explained that she needed to work at least 16 hours to benefit from help with childcare funding, and that she had checked the timetable for trains from her nearest station (given her change of home address) and therefore:

> Because of those two points I would like to make a small amendment with my working hours to 8.45am - 5.15pm with a 30 minutes lunch break (8 hours each day). This arrangement works really well with childcare support and train times in the long term. You'll find the attachment below, I amended the details under Section 2 on the form and the rest remains the same.

64. The same day there was a further exchange in which the Claimant (copying in Mr Barry) confirmed the hours mentioned above, and that it was 16 hours per week in total. Ms Stolk suggested that there would be a meeting in December between the Claimant and Mr Barry. (160-162).

65. The meeting took place on 14 December 2018. The notes are 183-186. Ms Stolk attended with Mr Barry, and also a BSL interpreter.

    65.1 In the meeting, Mr Barry stated that no decisions would be made that day. He asked the Claimant if she had discussed job share with Mr Smith and the Claimant said that she had not thought it her place to do so, but would be happy to do so after the meeting. Mr Barry said that he had already done so and Mr Smith was not interested. This was the first time that the Claimant was given this information. (If the grievance appeal outcome letter is accurate, this conversation was on 12 October 2018, but the Claimant was not told that in this meeting, and the panel has seen no contemporaneous documents about what was discussed with Mr Smith, or when. As mentioned above, he was extended on a 5 day per week contract to 31 March 2019 by letter dated 19 October 2018).

    65.2 The Claimant said that in that case, perhaps some of her duties could be passed to the co-ordinator. Mr Barry replied to say that the co-ordinator had been made redundant, and her last day would be 31 December 2018. This was the first time this had been mentioned to the Claimant. We have seen no documents about this.

    65.3 Mr Barry stated that the Claimant had right to come back to same job, but the role had changed, and stated that the co-ordinator was completing digitising and uploading.

    65.4 The Claimant suggested that if there were numerous small projects, then potentially she and Mr Smith could divide those up between them. Mr Barry said that he could talk to Mr Smith, but he already knew that Mr Smith was not interested. Our finding is that he did not put the Claimant's 14 December suggestion to Mr Smith.

    65.5 The discussions continued. The Claimant suggested that if 2 days per week was agreed, then she could potentially resume 4 days per week at a later date, possibly the January following her return to work (so January 2020) when her daughter started school. There was also a discussion about the Claimant's transferrable skills, with a view – as far as Mr Barry was concerned, at least –

to seeing if there were any other jobs for which 2 days per week could be accommodated. Mr Barry suggested that there was a lot of work for the Heritage Project Manager to do in order to secure funding.

66. After the meeting, on 17 December 2018, the Claimant sent an email to Mr Barry (187). She suggested that if Mr Smith would not job share, then why not someone else (Option 2). She offered to work three 8 hour days, each from 8.45am to 5.15pm with 30 minutes for lunch (Option 1). She said she was content to receive information about other vacancies (Option 3).

67. Following the meeting, and having read the 17 December email, Mr Barry wrote to the Claimant by letter dated 19 December 2018 (201-203) which was emailed to the Claimant by Ms Stolk on 20 December (197). Mr Barry and Ms Stolk each told the hearing that the decisions were Mr Barry's and that he asked Ms Stolk to create a letter. His opinion was that she had done so. She told us that, in fact, she had had external assistance from external advisers. We were supplied with no documents containing Mr Barry's instructions to Ms Stolk, or the correspondence in relation to the drafting.

68. The letter correctly noted the Claimant's existing contractual hours in the second paragraph. On page 3, he offered the option of "Return to your original post of Heritage Manager, working 28 hours per week at 4 days per week being, Monday to Tuesday until the 31st March 2019." (This is a typo; we are satisfied he meant Thursday in that sentence).

69. The other options mentioned were voluntary redundancy or a move to an entirely different, and lower paid, post. In terms of the latter, we are satisfied that the only reason for making that offer was that it was something that could be done for 14 hours per week. It was not done with the intention of insulting the Claimant or suggesting that she was not capable of doing the Heritage Project Manager role.

70. In giving his reasons for rejecting the reduction of hours, on page 2 of the letter, Mr Barry wrote:

> I regret to inform you that, after careful consideration, we have decided that your request cannot be accommodated. Our rejection of your request to alter your working arrangements to the Heritage Manager position at 14 hours per week is based on the following business grounds:
>
> • The inability to reorganise your work within our available staffing levels.
>
> • Detrimental impact on quality.
>
> These grounds apply in the current circumstances as outlined below in more detail.
>
> Considerations:
>
> 1. In respect of your request to return to work in your current role as Heritage Manager at a reduced rate of 14 hours per week, our conclusions are as follows;

Your current role of Heritage Manager has changed since you commenced on maternity leave. The role needs to filled on a full time capacity, to allow the BDA to source and secure funding for specific small projects as set out in the review that was carried out at the end of the Heritage project. As the Heritage team are currently being paid from core budget, which is not sustainable long term.

You have also offered to work 24 hours per week over 3 days per week being 8.45am and finish at 5.15pm with 30 minutes lunch break (8 hours each day). The BDA have a responsibility for the wellbeing of staff, and I believe you would not be able to work this pattern in a on-going situation before burning out. With your additional 7 hrs return journey per day (according to google Travel). Also, as stated we do require the role to be filled on a full time capacity with the three days not being feasible.

2. In respect to the job sharing

As a direct result of the evaluation of the Heritage project, it was identified that the BDA now have to secure funding for the multiple small projects for the in-going needs of the Heritage project.

The job Share opportunity with Justin was discussed with Justin, and he does not feel that this a positive outcome for funders as it has been proven when trying to obtain funding, potential funders need consistency and stability when giving consideration for offering grants.

You have also stated that there would be a opportunity to employee a new member of staff if Justin did not want to job share. The BDA have limited time to secure this funding, and we believe that we do not have the time to recruit and capacity to train a new member of staff in a short period of time.

71. We will discuss these stated reasons in more detail. However, our findings of fact are:

71.1 It is incorrect that the Claimant's aggregate journey would be 7 hours per day (presumably being two 3.5 hour trips). We accept the Claimant's account that it would have been 2 hours 15 minutes in each direction. When Mr Barry was asked where he got the figure from, he said he had seen no documentary evidence of it, but Ms Stolk had communicated it to him. When Ms Stolk was asked, she said she had looked it up on Google, but had not taken a screenshot, or printed it. She said that it was possible that, on the day that she looked, there was some disruption and so it might not have been typical.

71.2 It is incorrect that the Claimant had requested 14 hours per week. On 29 November, the Claimant had made clear that the amended request was for two 8 hour days.

71.3 Our finding is that the two references to "full-time" under the heading "1" were not simply intended to refer to the Claimant's pre-maternity leave hours of 28 per week. We are satisfied, that, in fact, having had Mr Smith working for 5 days per week since September 2017 (so for 15 months, by this stage), Mr Barry had formed the view that the Heritage Project Manager post should be full-time. That is what he meant by "Your current role of Heritage Manager has changed since

you commenced on maternity leave". It is also why he thought his letter provided an explanation of why 24 hours was not sufficient. In other words, he was deliberately stating that it was his opinion that 35 hours per week was desirable, and so that was part of his reasons for rejecting both 14 and 24.

71.4 For the avoidance of doubt, we are not suggesting that Mr Barry was insincere about his offer that the Claimant could return doing 28 hours per week, doing four 7 hour days. He was not, for example, only making this offer because he was confident that the Claimant would refuse it. However, our finding is that he was making this offer because he was aware that the Claimant had the right to return on such a basis, notwithstanding the fact that he had now formed the opinion that he would prefer the post to be full-time.

72. For completeness, although not relevant to the flexible work refusal, there was another error in the letter. The new job was offered at £24,000 per annum, but that should have been £28,000. (These being the full-time equivalent rates.)

73. The letter had mentioned 14 days in which to appeal (consistent with the FWP). On 1 January 2019, the Claimant emailed to say she could not meet this deadline and was seeking legal advice. On 2 January, Ms Stolk said that the Respondent would give until the end of the week.

74. On 5 January, the Claimant sent a detailed email. (194-196). Amongst other things, she:

74.1 Pointed out the error about travel time

74.2 Pointed out the error in relation to treating the request as being for 14 hours, when it was for 16 hours (or alternatively 24)

74.3 Disputed that there was a genuine redundancy, but expressed willingness to discuss a settlement agreement if the Respondent would not grant the request. She stated she had taken legal advice from "specialists".

74.4 She made some other observations disagreeing with the letter, and said she looked forward to hearing from Mr Barry.

75. On 10 January (194), Ms Stolk replied to say that Mr Barry would reply formally, but asked for confirmation of whether the Claimant was going to appeal, or discuss settlement agreement. The parties have not jointly waived privilege over everything that followed. However, it is common ground that there were settlement discussions which did not result in agreement.

76. On 22 January 2019 (192), Ms Stolk asked the Claimant whether she wanted to appeal, and asked her to confirm by 25 January 2019.

77. On 27 January (191-192), the Claimant said she had been advised to "lodge a formal grievance in response to the outcome of my flexible working request." The reply of 30 January (191) stated that the correct route would be to appeal under FWP and gave the Claimant until 30 January.

78. On 31 January, the Claimant replied, saying (amongst other things):

> I am lodging a formal grievance because I want to highlight matters which do not relate to my flexible working request. My grievance letter is nearly ready to be sent but …

79. The reply contained the paragraph "Thank you for notifying me that you are raising a separate grievance not related to your request for flexible working hours and I will await a copy of your letter". However, it also noted that the Respondent remained unsure as to whether she was seeking to appeal the refusal of the flexible working request and gave her until 10am on 1 February 2019 to appeal under FWP.

80. Also on 31 January, Ms Stolk informed the Claimant that Mr Barry had been signed off on sickness absence.

81. On 1 February, at 9.59am, the Claimant lodged her grievance by email. The email is page 189-190 and the grievance letter is 204-208.

82. 1 February was the Friday before the Claimant was due back at work, which was Monday 4 February. On that day, the Claimant notified the Respondent that she was sick and could not come back on the Monday. The Respondent notified the Claimant that her grievance would be dealt with by Paul Redfern.

83. Mr Redfern, like Mr Barry, is deaf. He was Senior Community Development Manager. He had been told in 2018 that he was being made redundant. The planned end date was extended to 31 January 2019 and again to 31 March 2019. He left the Respondent on 31 March 2019. From around 31 January 2019 until the end of his employment, he acted up into Mr Barry's role of Executive Director because of Mr Barry's sick leave.

84. The Respondent's position in the litigation is that the grievance letter was not an "appeal" within the meaning of sections 80G or 80H the Employment Rights Act 1996. The Claimant's is the opposite.

    84.1 The opening sentence of the letter states it is a "formal grievance because I have been treated unfairly with the ways in which my flexible working request has been handled"

    84.2 Numbered paragraph 2 refers to the timing of her 5 October email, the reply, and the date of lodging the completed form

    84.3 Paragraph 3 alleges delay in arranging the meeting and failure to supply relevant information in advance of the meeting

    84.4 Paragraph 4 states that her revised proposal of 24 hours is only 4 hours less than her contracted hours

    84.5 After the numbered paragraphs, she seems to expressly say that she is lodging a grievance rather than an appeal. She suggests that her and her husband's plans have now changed, and the plan had been for him to work part-time and for her to also work part-time, but he had now gone full-time and would not be able to change back.

84.6 Our finding is that the letter is not stating that the Claimant cannot or will not return. Rather, the letter states that if flexible working is granted (either two 8 hour days, or three 8 hour days) then the Claimant will return, but that would be subject to recovery from her illness and some time to rearrange child care.

84.7 She maintains her request for flexible working to be granted, gives reasons for why she says the refusal reasons were not adequate, and states that it was unfair to refuse her when another employee had been allowed to reduce from 5 to 3.

85. Mr Redfern replied on 4 February 2019 inviting the Claimant to a meeting (210-211). Amongst other things, he noted that her letter: referred to incorrect reasons for rejecting her request; stated that there had been unfairness in rejecting the request, and that her request had not been treated seriously.

86. The Claimant remained on sick leave and did not resume her duties prior to the end of her employment.

87. The meeting took place on 14 February and the notes are 215 to 217. Mr Redfern was accompanied by Ms Stolk. In the meeting, the Claimant made clear that she was disagreeing with the refusal of her request, and putting forward arguments for why it should be approved. She addressed commuting time, pointed out she had done a similar commute previously, said that she thought the funding could be achieved for a part-time role, that serious consideration had not been given to the request, and said the role was not redundant.

88. The outcome letter dated 21 February 2019 is at page 230 to 233. It is signed by Mr Redfern. His evidence to us was very frank and we accept it in full, even where it differs from Ms Stolk's. Mr Redfern did not know the full details of why Mr Barry had refused the Claimant's request and he did not see it was within his remit to challenge that decision. In his opinion, his role was purely a procedural one. He was the acting director and so it was appropriate for him to hold the meeting. However, the actual decisions in the letter were all prepared by other people (Ms Stolk and/or any external HR provider) on behalf of the organisation. Mr Redfern did not regard it as his role to form any independent opinions on the merits of the Claimant's arguments. He read the letter, regarded it as truthful, as far he was aware, and regarded it as his role to put his signature on the letter, as that was what the process required.

89. Mr Redfern did not discuss the matter with Mr Barry for the entirely legitimate and reasonable reason that Mr Barry was unwell. He also did not discuss it with Mr Smith. He did not explore any options for making the flexible working request work.

90. The letter stated that the Respondent accepted in retrospect, that it should have told the Claimant before 19 December 2018 that Emily was being made redundant. It supplied no information about when decisions on that redundancy had been made. The letter stated the opinion (which we accept was Ms Stolk's genuine opinion; Mr Redfern not having the relevant information) that Mr Barry had carefully considered the Claimant's request. It did not address the point that Mr Barry had only referred to the 14 hour (and 24 hour) request, and had not addressed the 16 hour request as per 29 November 2018. It stated that it had been reasonable to reject the request partly on the basis of commuting time, but made no reference to the Claimant's point

that the commuting time alleged in the letter was incorrect. By implicitly accepting that the journey time was 7 hours per day (in aggregate) the letter relied on incorrect facts. Mr Redfern did not view any evidence about the commuting time.

91. The letter also stated, in relation to job share: "Unfortunately this was not a viable option for the organisation to trial as your suggested job sharer, Justin did not agree to this change of working arrangement."

92. On 12 March 2019, Mr Redfern signed the letter on page 361 of the bundle, which was disclosed after Day 2 and before Day 3 of the tribunal hearing. It was a contract variation extending Mr Smith in the role of "Heritage Project Manager (Maternity Cover)" for 35 hours per week until 30 April.

93. On 11 March, he signed a corresponding letter to the Claimant. However, the Claimant's letter, while stating the contract was extended to 30 April, also said

> As you are aware, now you have been employed with the BDA for over 4 years, your employment with the organisation is now of a permanent status. However, due to the nature of your role being dependent on funding, I must make you aware that this variation will mean the BDA will have to review the status of your contract during March and April 2019 to see if we have been successful in the first round of the Heritage Lottery Fund.

94. The "as you are aware" referred to points which the Claimant had raised during the flexible working and grievance process. Mr Redfern did not regard himself as the decision-maker for these two letters. He was informed that the Respondent had decided to extend the respective contracts, and that it fell to him, as the acting Executive Director, to sign the letters. He told us, and we accept, that he believed the information about the need to review the contract was likely to be accurate, taking into account, amongst other things, that his own role was being made redundant and that it was not out of the ordinary for their to be redundancies once earmarked funding for a particular project ran out.

95. By letter dated 27 February 2019 (234), the Claimant appealed against the grievance outcome. She mentioned again that she was taking legal advice. She did not make detailed new submissions in this document, but stated that she wanted Mr Barry (as opposed to Mr Redfern) to reconsider and that she did not think Mr Redfern's letters had addressed what she had put in her 1 February document.

96. The meeting was due to be 7 March. On 5 March, the Claimant supplied additional information being the job description. Our finding is that this was part of her submissions that the job could be done if her flexible working request was granted.

97. For legitimate reasons, the Respondent had to defer the meeting. On 8 March, the Claimant made some additional submissions (245). Her letter makes clear that she is still seeking to have the flexible working request approved and that she does not agree with the reasons in either the 19 December or 21 February letters. Amongst other things, she points out that if the Respondent was treating Mr Smith as if he was in a permanent full-time role, then that was incorrect.

98. The meeting took place on 20 March 2019, and the notes are pages 254 to 258. The meeting was chaired by the chair of the Board, Agnes Dyab, who has not

provided any witness evidence. Ms Stolk was also present. In her written statement, which she confirmed was true at the outset of her evidence, Ms Stolk said that she was closely involved and could therefore comment on what Ms Dyab had done. In answering questions, she said she had had no involvement, barring attending the hearing as a note taker, and the decision letter had been produced by Ms Dyab liaising with external HR advisers. Once the contents of her written statement were drawn to her attention, she was asked whether, as part of the grievance appeal, the Respondent had been considering whether the flexible working request should be granted, she was clear and unambiguous in her answer that that was something that the Respondent was definitely doing.

99. The grievance appeal outcome letter was dated 27 March 2019. It stated that, at Point 3, "the original decision stands". Point 3 was "You were unhappy about the outcome of your flexible working request as you felt that your role could be achieved in part time hours" and Point 4: "You felt that Damian provided incorrect reasons to decline your flexible working request". In each case, these were references the bullet points (the third and the fourth) on page 1 of the 21 February grievance letter, which was where the Respondent summarised the Claimant's points.

100. The letter also gave reasons for upholding the original flexible working decision under the heading "point 4", which stated that there had been no discrimination, that the maternity cover was not being treated preferentially, that the maternity cover had notified the Respondent on 12 October 2018 that job share "would not be an option" and alleged that the Claimant had made no other suggestions for job share. It did not acknowledge that the Claimant had suggested Emily.

101. At point 5, the letter stated that the role could not be done in 24 hours (as opposed to 28). It also said that there would be "additional travel hours" on those 3 days, which is incorrect, as the Claimant's journey time per day was going to be the same whether she did 3 days or 4 days (or 2 days). The letter made no reference to the fact that the Claimant had notified the Respondent on 5 January 2019 that her journey time was 2.25 hours per leg, not 3.5 hours per leg.

102. By letter dated 31 March 2019 (271), the Claimant resigned. We accept that the reasons stated in her letter were her genuine reasons. She resigned because she had exhausted the process for seeking to persuade the Respondent to agree to the flexible working request and she believed that there had been a breach of trust and confidence by failing to address the specific points that she had raised. She also believed that its refusal was discrimination under the Equality Act. Her belief that the Respondent's treatment (being refusal to allow her to reduce her hours and to return to work working either two or three 8 hour days per week) amounted to discrimination contrary to the Equality Act was part of her reason for resigning.

103. On 1 April 2019 (277), the Respondent offered the Claimant the opportunity to change her mind. The letter stated that her contractual role was there for her to return to. It did not say that it would extend the contract past 30 April.

104. The Claimant did not change her mind. On 14 April 2019 (363) Mr Barry signed a letter extending Mr Smith contract in role of Heritage Project Manager to 31 May 2019. 365 is the 22 May 2019 extension to 30 August. 367 is the 7 August 2019 extension to 31 October 2019. All these were 35 hours per week as Heritage

Project Manager and from core funding. None were disclosed by the Respondent until after Day 2, when we ordered it.

105. On 23 August 2019, the Respondent offered Mr Smith the permanent post of full-time Research and Communications Manager. We are told by Ms Stolk that this was funded by ringfenced legacy which only came to the Respondent's attention after the Claimant had left. We accept that point, though we have seen no documentary evidence, about this funding and the timing of it was not alluded to in the witness statements. On the contrary, our reading of Ms Stolk's witness statement (paragraph 17) was that she was implying in there that Mr Smith had ceased to be Heritage Project Manager and moved to the new role by October 2018. We do acknowledge, that on Day 1, the Respondent's representative put questions to the Claimant which were expressly on the basis that he was going to ask his witnesses supplementary questions which would establish that the date was around September 2019.

106. During the Claimant's representative's cross-examination of Mr Barry, on Day 2, it was put to Mr Barry that, in fact, Mr Smith had been in this new post before Mr Barry's 19 December 2018 letter. It was suggest that, since this new post was leading the Visual Language Team, Mr Barry's offer to the Claimant to move to a junior post on that team would have required her to be managed by Mr Smith. Mr Barry stated – and we accept – that he could not remember the date that Mr Smith moved to the new role.

107. In its the Grounds of Resistance, the respondent stated:

> She was employed initially as Film Heritage Project Assistant and from 1st March 2017 as Heritage Project Manager, both posts funded through external funding. That external funding came to an end in March 2018. When the Heritage Project came to an end, the Respondent extended the Claimant's contract until 31st March 2019 funded by the Respondent's own funds whilst additional funding opportunities were sought. The Claimant's contract was subsequently extended further until 30th April 2019. The Respondent was unsuccessful in securing additional funding.

108. It is our opinion that documents related to what work Mr Smith was doing from October 2018 to 31 March 2019 were self-evidently relevant and should have been disclosed within the terms of the orders from 17 March 2020, as – at the very least – they related to the reasons for refusing the flexible working request, and matters raised during the grievance process, and matters connected with the Claimant's alleged reasons for resigning. Furthermore, it is our opinion that it is also self-evident that the Respondent was asserting in its witness evidence that Mr Smith had moved on to different roles, rather than just replicating what the Claimant had done prior to the start of maternity leave and that the documents stating what his contract was, and the reasons for extending it, were relevant to that issue also.

109. Furthermore and in any event, on 30 March 2022, the Respondent has put forward documents related to the termination of Mr Smith's employment. We infer that the Respondent's reason for so doing is that they might be relevant to remedy. EJ Alliott's order did require documents relevant to remedy to be disclosed as well.

The Law

Flexible Working Request

110. Part VIIA of the Employment Rights Act 1996 includes the following extracts:

80G Employer's duties in relation to application under section 80F

(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.

80H Complaints to employment tribunals

(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—

(a) that his employer has failed in relation to the application to comply with section 80G(1),

(b) that a decision by his employer to reject the application was based on incorrect facts, or

(c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).

(2) No complaint under subsection (1)(a) or (b) may be made in respect of an application which has been disposed of by agreement or withdrawn.

(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under subsection (1)(a) or (b) may be made until—

(a) the employer notifies the employee of the employer's decision on the application, or

(b) if the decision period applicable to the application (see section 80G(1B)) comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period.

(3A) If an employer allows an employee to appeal a decision to reject an application, a reference in other subsections of this section to the decision on the application is a reference to the decision

on the appeal or, if more than one appeal is allowed, the decision on the final appeal.

(3B) If an agreement to extend the decision period is made as described in section 80G(1C)(b), subsection (3)(b) is to be treated as not allowing a complaint until the end of the extended period.

(3C) A complaint under subsection (1)(c) may be made as soon as the notification under section 80G(1D) complained of is given to the employee.

(5) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the relevant date, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(6) In subsection (5)(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.

(7) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(a).

111. So a claim under section 80H(1)(a) relates to any failure to comply with section 80G(1). Whereas section 80G(1) is comprised of three separate obligations linked by the word "and".

111.1 In section 80G(1)(a), dealing with complaints in "a reasonable manner" refers to the process followed by the Respondent and does not imply that the tribunal should analyse, under Rule 80G(1)(a) whether the actual decision was a reasonable one. We should consider both the employer's own policy (if any) and the ACAS code "Handling in a reasonable manner requests to work flexibly".

111.2 In this case, we are not faced with a particular allegation of failure to comply with section 80G(1)(aa). The mere fact alone that an employee appeals, and/or that the employer organises an appeal meeting, and/or that the employee agrees to attend the appeal meeting does not amount to an agreement – as per 80G(3B) - to extend the decision period. See Walsh v Network Rail Infrastructure Ltd. EA-2020-000724-RN. In that case, the EAT did not decide that the appeal, or the appeal hearing, or the appeal decision were nullities for the purposes of section 80H. The EAT did not decide, for example, that the appeal decision was now irrelevant, that section 80G(1A) did not apply, and/or that section 80H(3A) did not apply. On the contrary, at paragraph 24, the EAT made clear that the appeal outcome was potentially a live issue for the tribunal to consider.

111.3 A tribunal's decision about compliance with section 80G(1)(b) requires analysis of what the actual reasons were, as well as a decision about whether those reasons fall within the categories listed.

112. As per the list of issues, there is a claim before us that the decision was based on incorrect facts (section 80H(1)(b)).

113. In Commotion Ltd v Rutty, UKEAT/0418/05, one of the arguments before the EAT was in relation to the Dispute Resolution Regulations. The employer alleged that the claimant had brought an appeal under the flexible working procedures and not a grievance. To some extent, that is the opposite of the argument before us, in which the Respondent argues that the Claimant has brought a grievance, but not an

appeal against the 19 December 2018 decision to refuse her flexible working request.

> 28 … the Tribunal can be seen to have been saying, in effect, that what Mrs Rutty had done was to put forward a grievance in her application for flexible working and that the Tribunal, did not see why anything more should be necessary. The essential finding is present in paragraph 13 of the Tribunal's judgment when read as a whole and read in context.
>
> 29 The next point is that if the Tribunal did so find, firstly they were wrong in law and secondly, such finding was perverse. It is said that such finding was wrong in law for this reason. Mr Dunn submits that the two sets of procedures, that is to say the procedure for making a flexible working application under Section 80F of the 1996 Act and the procedures by way of presentation of a grievance pursuant to Section 32 of the 2002 Act, together with their accompanying Regulations and procedural requirements are wholly separate and distinct, that Mrs Rutty was obliged by law to go through both procedures separately and that since what she did in August was to make an application for flexible working, she was required at law once that procedure had resulted in failure, then to present a further letter or document to the employers which represented her making a grievance, which she did not do.
>
> 30 We see no reason, in principle, why that should be so; we asked Mr Dunn what would be the position if an employee sent to her employers a letter in which she said "in this letter, I am both making an application under Section 80F of the 1996 Act for flexible working and, presenting to you a grievance about your refusal so far to accord me flexible working pursuant to Section 32 of the 2002 Act, "would not that document satisfy the requirements of both sets of procedures?". Mr Dunn, to do him justice, graciously accepted that such a letter could be regarded as instituting both sets of procedures on the part of the employee. If that is so, it cannot be the case in law that there must be a separate document instituting each of the two sets of procedures. If any doubt about that remained, it is resolved, in our judgment, by paragraph 2(2) of the Dispute Resolution Regulations, which we have already set out, and the effect of which, as we understand it, we have also already set out. That sub-paragraph provides, in effect, that the document which contains or constitutes the presentation of a grievance can also fulfil another function about the same or about different subject matter. It was Mr Carr who took us to that paragraph, to which – and we say this in no critical spirit – Mr Dunn had not drawn our attention. Mr Dunn did not seek by way of reply to propose in respect of it a different meaning from that which we have attributed to it. We reject Mr Dunn's argument in this respect too.
>
> 31 We come next to perversity. Mr Dunn accepts that whether a document does constitute the presentation of a grievance or not, is a question of fact; but he submits that the Tribunal erred in regarding the letter of 28 August as the presentation of a grievance because it was the presentation of an application under the flexible working provisions and Mrs Rutty had not, by that time, exhausted the procedures under those provisions and had nothing to be aggrieved about. … We do not regard it as established at all that the Tribunal were not entitled on the facts to find that there was the presentation of a grievance by the presentation of that document to the employers on 28 August. It was a permissible option for the Tribunal to reach that conclusion. There was material on which they could reach it and, in the circumstances, it was not perverse of them to reach it

114. In summary, the EAT found that there was no reason in principle that the same document could not amount to both a grievance (in that case, a grievance which met the statutory requirements then in force, but the same reasoning would apply to a grievance under an employer's policy or contractual procedure) as well as an appeal seeking a different outcome for the flexible working request. Whether or not a document does, in fact, serve both functions, or either function, is a question of fact

for the tribunal. (See also paragraph 9 of the EAT decision in Walsh as to the current position under the legislation, and that there is now no set procedure to follow for a flexible working request, or for what amounts to an appeal, or "allowing" an appeal.)

115. On the substantive merits of the tribunal claim, the EAT said this in response to a submission that the tribunal must embark on any objective assessment of the assertion which the employer made when rejecting the request:

> 37. … we draw attention to the fact that the 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 facts sections see 80H(1)(b). It must follow that the Tribunal is entitled to investigate the evidence to see whether the decision was based on incorrect facts. There is, we would suggest, a sliding scale of the considerations which a Tribunal may be permitted to enter into in looking at such a refusal. The one end is the possibility that all that the employer has to do is to state his ground and there can be no investigation of the correctness or accuracy or truthfulness of that ground. At the other end is perhaps a full enquiry looking to see whether the employer has acted fairly, reasonably, and sensibly in putting forward that ground. Neither extreme is the position, in our judgment, which applies in the relevant statutory situation. We accept Mr Dunn's submission that the Tribunal is not entitled to look and see whether they regard the employer as acting fairly or reasonably when he puts forward his for rejection of the flexible working request. However, we reject Mr Dunn's submission that the Tribunal is not entitled to examine the facts objectively at all, for if they were not so entitled, the jurisdiction set out or the right to make an application set out by Section 80H(1)(b) would be of no use. The true position, in our judgment, is that the Tribunal is entitled to look at the assertion made by the employer i.e. the ground which he asserts is the reason why he has not granted the application and to see whether it is factually correct. In this case, it does not arise; but another case, it may be for instance that the bona fides of the assertion might have to be looked into.
>
> 38. In order for the Tribunal to establish whether or not the decision by the employer to reject the 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 are entitled to enquire into what would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? and matters of that type. We do not propose to go exhaustively through the matters at which a Tribunal might wish to look, but if the Tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of their powers and they would not be committing an error of law.

Equality Act complaints

116. In the Equality Act 2010 ("EQA"), time limits are covered in s.123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

117. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

118. A leading example of the former was the House of Lords' decision in Barclays Bank plc v Kapur and ors 1991 ICR 208, HL, which involved a pension scheme. The House of Lords found in favour of the employees and ruled that the right to a pension formed part of their overall remuneration and, if this could be shown to be less favourable than that of other employees, it would be a disadvantage continuing throughout the period of employment. The fact that the allegedly discriminatory pension arrangements had first occurred more than three months before the complaint was lodged did not mean the claim was out of time.

119. As the court of appeal reiterated in Parr v MSR Partners LLP, [2022] EWCA Civ 24, the crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy, in which the discretionary decision may sometimes result in an employee getting the desired outcome, and sometimes not. In the latter case, the discretionary decision causes the time to run, regardless of arguments about whether the policy itself is discriminatory.

120. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

121. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

122. The factors that may helpfully be considered include, but are not limited to:

122.1 the length of, and the reasons for, the delay on the part of the claimant;

122.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

122.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

123. S.136 EQA deals with burden of proof. It is applicable to all the Equality Act claims in this section (the claims of harassment, victimisation and direct discrimination).

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

124. S.136 requires a two stage approach.

124.1 At the first stage the Tribunal considers what facts have been proven to the Tribunal (and the findings could be based on evidence from the respondent or evidence from the claimant, it does not matter) and decides whether the tribunal has found facts from which the Tribunal could conclude - in the absence of an adequate explanation from the respondent - that the contravention has occurred. At this stage it is not sufficient for the claimant to prove that what she alleges happened did in fact happen. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention. That being said, the Tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate when deciding whether the burden shifts at Stage 1.

124.2 If the claimant does succeed at Stage 1 then that means the burden of proof does shift to the respondent and that the claim must be upheld unless the respondent proves the contravention did not occur.

125. If the Tribunal is not satisfied on the balance of probabilities that a particular incident did happen then complaints based on that alleged incident fail. S.136 does not require the respondent to prove that alleged incidents did not happen.

<u>Direct Discrimination</u>

126. Direct discrimination is defined in s.13 of the Equality Act.

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

127. It has two elements; firstly whether the Respondent has treated the Claimant less favourably than it has treated others ("the less favourable treatment question") and secondly whether the Respondent has done so because of the protected characteristic ("the reason why question"). So for the less favourable treatment question the comparison between the treatment of the claimant and the treatment

of others can potentially require decisions to be made about the characteristics of a hypothetical comparator. That being said, the two questions are intertwined and sometimes an approach can be taken that the Tribunal deals with "the reason why question" first. If the Tribunal decides that the protected characteristic was not the reason even in part for the treatment complained of it will necessarily follow that the person whose circumstances are not materially different would have been treated the same. That might mean that in those circumstances there is no need to construct the hypothetical comparator.

128. Section 23 Equality Act 2010 provides that, on a comparison of cases in claims of direct and indirect discrimination, there must be no material difference between the circumstances relating to each case. For direct discrimination that means that any comparator relied upon, whether an actual person, or a hypothetical comparator, must be in the same relevant circumstances as the claimant.

129. When considering the reason for the claimant's treatment we must consider whether it was because of the protected characteristic or not. We must analyse both the conscious and sub-conscious mental processes and motivations for actions and decisions and s.136 applies. In other words, if there are proven facts from which the Tribunal could infer that there had been unlawful discrimination then the burden of proof shifts to the respondent and the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of a protected characteristic.

130. In approaching the evidence in a case and considering the burden of proof provisions the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong [2005] ICR 931; [2005] EWCA Civ 142 and Madarassy v Nomura [2007] ICR 867; [2007] EWCA Civ 33. The burden of proof does not shift simply because the claimant proves a difference in sex and a difference in treatment. That only indicates the possibility of discrimination, and that is not sufficient. Something more is needed. The "something more" does not need to be a great deal more; it could, for example, depending on the facts of the case, be an untruthful or evasive answer from the Respondent or a crucial witness.

131. As per Essex County Council v Jarrett EAT 0045/15, when there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one. It should not take a broad-brush approach in respect of all the allegations.

Indirect discrimination

132. Section 19 EQA states, in part:

> **19 Indirect discrimination**
>
> (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.

133. Sex is one of the protected characteristics listed in section 19(3).

134. The phrase "provision, criterion or practice" is commonly abbreviated to "PCP". It is not separately defined in the Equality Act 2010. Tribunals must interpret it in accordance with guidance in the EHRC Code and in appellate court decisions.

135. In Nottingham City Transport Ltd v Harvey UKEAT/0032/12, the EAT held that the word practice has something of the element of repetition about it, and if related to a procedure, should be applicable to others as well as the complainant.

136. In Onu v Akwiwu; Taiwo v Olaigbe [2016] UKSC 31, the Supreme Court pointed out that a PCP must apply to all employees and that a practice of mistreating workers specifically because of a protected characteristic, or something closely connected to the protective characteristic, would not fall within the definition of PCP because it would necessarily not be applied to individuals who were not so vulnerable. Further, in James v Eastleigh BC [1990] HL/PO/JU/18/250, the policy was, at first sight, neutral between the sexes, but, on proper analysis the qualification criteria was so closely linked to sex that it amounted to direct, rather than indirect, discrimination.

137. The PCP does not have to be a complete barrier preventing the claimant from performing her job for section 19 to be triggered. Furthermore, a PCP might be "applied" even if the employee is not necessarily disciplined or dismissed if they fail to meet the requirement. In Carreras v United First Partners Research, the EAT concluded that an expectation or assumption that an employee would work late into the evening could constitute a PCP, even if the employee was not "forced" to do so.

138. There are two aspects to the "particular disadvantage" limb of the test for indirect discrimination.

138.1 that the PCP puts (or would put) persons who share the claimant's protected characteristic at a particular disadvantage when compared with persons who do not share it. So a female claimant needs to show that the PCP puts women at a particular disadvantage when compared with men. This is sometimes referred to as "group disadvantage".

138.2 that the claimant must personally be placed at that disadvantage.

139. The word "disadvantage" is not specifically defined in the Equality Act 2010. The Code of Practice suggests that disadvantage can include denial of an opportunity or choice, deterrence, rejection or exclusion. A person might be able to show a particular disadvantage even if they have reluctantly complied with the PCP in order, for example, to avoid losing their job. The EAT in XC Trains Ltd v D UKEAT/0331/15/LA held that it was sufficient that the PCP (the employer's rostering arrangements, in that case) caused the claimant "great difficulty" in meeting her obligations.

140. In Dobson v North Cumbria Integrated Care NHS Foundation, UKEAT/0220/19/LA the EAT held (in a case concerning lack of flexibility afforded to a nurse caring for her disabled children) that judicial notice may be taken of the gender disparities

around childcare burdens when deciding on sex discrimination cases in respect of group disadvantage

50. However, taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the childcare disparity and the particular PCP in question. The childcare disparity means that women are more likely to find it difficult to work certain hours (e.g. nights) or changeable hours (where the changes are dictated by the employer) than men because of childcare responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking judicial notice of the childcare disparity. However, if the PCP as to flexible working requires working any period of 8 hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with childcare responsibilities, then it would be open to the Tribunal to conclude that the group disadvantage is not made out. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an "indisputable fact" (of which judicial notice may be taken) to a "disputable gloss" (which may not be apt for judicial notice) …

51. We therefore reject Ms Darwin's contention that taking judicial notice of the childcare disparity should invariably result in the group disadvantage being made out with the question for the Tribunal simply being one of justification. Such a blanket approach could give rise to unfairness and illogical outcomes. Where, for example, an arrangement is, on analysis, generally favourable to those with childcare responsibilities, it would be incongruous to treat that arrangement as nevertheless giving rise to group disadvantage falling to be justified. …

56. In summary, when considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear in mind that particular disadvantage can be established in one of several ways, including the following:

a. There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected *in limine*;

b. Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;

c. The disadvantage may be inherent in the PCP in question; and/or

d. The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken.

> 57. In the present case, the Tribunal did not consider any of (b), (c) or (d) and instead dismissed the claim of indirect discrimination because of the lack of direct evidence of group disadvantage. In doing so, it is our judgment that the Tribunal erred in law. …

141. If the PCP is shown to exist and to place persons with the relevant protected characteristic, and the claimant herself, at a particular disadvantage, the burden of proof switches to the respondent to show that the PCP is nevertheless a proportionate means of achieving a legitimate aim.

142. The "legitimate aim" of the PCP should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

143. Reasonable business needs and economic efficiency may be legitimate aims. However, a discriminatory rule or practice will not necessarily be justified simply by showing that the less discriminatory alternatives cost more.

144. Once a legitimate aim has been established, the tribunal must consider whether the discriminatory PCP is a proportionate means of achieving that aim.

145. In Homer v Chief Constable of West Yorkshire [2012] UKSC 15; at paras 22 - 23 of Baroness Hale's judgment:

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

146. Tribunals considering whether a PCP is a proportionate means of achieving a legitimate aim must undertake a comparison of the impact of the PCP on the affected group as against the importance of the aim to the employer.

147. The tribunal must consider whether there are less discriminatory alternative means of achieving the aim relied upon. However, the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy does not, in itself, make it impossible for the respondent to succeed in justifying a discriminatory PCP. The existence of an alternative is only one factor to be taken into account when assessing proportionality.

148. The tribunal must make an objective determination and not (for example) apply a range of reasonable employers test.

149. For the avoidance of doubt, the analysis which the tribunal must undertake when considering a claim of indirect discrimination (section 19 of the Equality Act 2010) is completely different to the analysis which the tribunal must undertake when considering a claim that the Respondent has breached its obligations under Part VIIIA of the Employment Rights Act 1996.

150. For the indirect discrimination analysis - in contrast to claims under the flexible working provisions - tribunals must actively assess the legitimacy of the employer's reasons for the refusal to see if the reasons can be objectively justified. Having an apparently sound business reason for denying an employee's application to work reduced hours is not sufficient in itself. The issue whether the reasons for insisting on the existing contractual hours are strong enough to overcome any indirectly discriminatory impact. In particular, are there are any alternatives that would achieve the same aim without being as disadvantageous to an individual.

151. In Hardy & Hansons plc v Lax [2005] EWCA Civ 846, the Court of Appeal discussed a case which they introduced as follows: "The scenario is a familiar one. A full-time female employee acquires child rearing responsibilities and applies for a job sharing arrangement in the same employment." In discussing what is now section 19(2)(d), the court said:

> 32. [it] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.
>
> 33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in Allonby and in Cadman, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.

152. The defence to a section 19 claim can, in principle, rely on a legitimate aim which was not in fact the reason for imposing the PCP at the relevant time.

153. In 1994, the House of Lords considered the appeal in R v Secretary of State ex p Equal Opportunities Commission 1994 UK HL2; HL/PO/JU/18/254. We intend to make no reference to the facts and issues save to note that we acknowledge that the decision was given 25 years before the events in the case before us and to mention that Lord Keith stated:

> It is common ground that the great majority of employees who work for more than 16 hours a week are men, and that the great majority of those who work for less than 16 hours a week are women, so that the provisions in question result in an indirect discrimination against women.

154. Section 39 makes it a contravention of the act if (amongst other things) an employer discriminates against an employee. Dismissal is expressly covered under section 39 and section 39(7) reads, as far as is relevant:

> (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
>
> (b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

Constructive Dismissal and Unfair Dismissal

155. For the unfair dismissal claim, the claimant relies on section 95(1)(c) of the Employment Rights Act 1996 ("ERA") to establish that she was dismissed. It reads:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> (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.

156. Section 95(1)(c) is colloquially referred to as constructive dismissal. In order to prove constructive dismissal, the employee must prove

156.1 that the employer has committed a serious breach of contract and

156.2 that the employee resigned because of that breach (or at least partly because of that breach; it does not necessarily have to be the only reason) and

156.3 the employee must also prove they have not waived the breach by affirming the contract.

157. In London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493, the court, at paragraph 14, stated that:

> The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761*

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA [1998] AC 20* , 34H–35D (Lord Nicholls) and 45C–46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666*, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship ...

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer"...

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at paragraph [480] of Harvey on Industrial Relations and Employment Law:

> "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

158. The last straw might be relatively insignificant, but it must not be utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful.

159. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal clarified the analysis in Omilaju and added to it. It reiterated that the last straw doctrine is only relevant to cases where the repudiation relied on by the employee takes the form of a cumulative breach; the last straw doctrine does not have any application to a case where the alleged repudiation consists of a one-off serious breach of contract.

160. In Kaur, the Court of Appeal made clear that in a last straw case the fact that the employee might have affirmed a contract after some of the earlier conduct does not mean that it is not possible for the claimant to rely on that earlier conduct as part of a cumulative breach argument and in paragraph 55 of its decision it summarised the correct approach.

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation ...)

(5) Did the employee resign in response (or partly in response) to that breach?

161. Where the answer at point (4) is "no" (for example the act that triggered the resignation was entirely innocuous), it is necessary to go back and see whether there was any earlier breach of contract that has not been affirmed, and which was a cause of the resignation. See Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT 0108/19.

162. In considering whether a contract has been affirmed after a breach, it is necessary to have regard to the entirety of the circumstances. A gap in time between the act relied on and the resignation is a significant factor but it is by no means the only factor; in other words, a delay is not necessarily fatal to the employee's argument for constructive dismissal. The reasons for the delay would be relevant as would consideration of what had happened in the intervening period, such as was the employee working and receiving pay amongst other things.

163. Where an employee alleges constructive dismissal and succeeds in the argument then the dismissal reason for the purposes of the Employment Rights Act is the employer's reason for the conduct which caused the employee to treat themselves as dismissed.

164. It is open to an employer to argue that the dismissal was for a potentially fair reason and was, in all the circumstances, a fair dismissal.

Reasonable Practicability

165. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact, reasonably practicable or not. The onus of proving that it was not is on the claimant. When doing so, the phrase "not reasonably practicable" should be given a liberal interpretation in favour of the Claimant.

166. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. This does not necessarily mean that the claimant has to have acted as fast as would have been reasonably practicable.

167. The fact that an employee pursued an internal appeals procedure is a relevant circumstance which can, and should, be considered by the tribunal. However, generally speaking, it is not usually enough by itself to make it "not reasonably

practicable" for the complaint to be presented within the prescribed period, even if the employer is slow to announce the outcome. See the Court of Appeal's review in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*.

168. In *Porter v Bandridge Ltd 1978 ICR 943, CA*, the Court of Appeal held that the correct test is not whether the claimant knew of her rights but whether she ought to have known of them.

169. Similarly, when a claimant is ignorant about (or makes a mistake about) a fact which is relevant to the calculation of time limit, the question is whether that ignorance (or that mistake) is reasonable. The assessment of reasonableness has to take into account that a potential claimant ought to be aware of the importance of not missing a time limit. Put another way, even if it is true that the claimant did not know the true facts at the time of the dismissal, then that does not necessarily mean that it was not reasonably practicable to issue the claim in time. The claimant must also show that the ignorance was reasonable and that he could not reasonably have been expected to have discovered the true situation during the limitation period. Furthermore, ignorance of the true facts must be the actual reason for failing to issue the claim sooner.

170. Fault on the part of the claimant's adviser may be a relevant factor when determining whether it was reasonably practicable for the claimant to present the claim within the prescribed time limit. It is important to consider all the circumstances and the type of adviser involved. A mistake made by a solicitor or barrister acting for the claimant is likely to deemed to be a mistake made by the claimant. As per *Wall's Meat Co Ltd v Khan 1979 ICR 52, CA*, ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the claimant or from the fault of his solicitors in not giving him such information *as they should reasonably have given him.*

171. In Marks & Spencer v Williams-Ryan, [2005] EWCA Civ 470, the Court of Appeal reviewed the authorities and concluded that the following proposition was correct.

> What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in Dedman was part of the ratio. There the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment tribunal.

172. In Northamptonshire County Council v Entwhistle UKEAT/0540/09, the EAT noted that there could be some circumstances where, despite having used solicitors to advise her on the matter, a claimant might show that it had not been reasonably practicable to issue the claim on time. In other words, there might be cases where the adviser's failure to give the correct advice was itself reasonable. The authorities, including Dedman and Williams-Ryan make clear that the tribunal's obligation is to have regard to the statutory language and that the question of reasonable practicability is one of fact for the tribunal and is to be decided on the particular circumstances of the case.

Cases which the Claimant has asked us to take into account

173. In submissions, the Claimant's representative mentioned the following additional cases (apart from those alluded to above, which include Woods v WM Car Services (Peterborough) Ltd, for example)

174. Shaw v CCL Ltd UKEAT/0512/06. In this case, the tribunal had found for the employee on both direct sex discrimination (failed to allow her to return to work on a part-time basis) and indirect sex discrimination (imposing a requirement upon her to work full-time on returning to work after maternity leave which could not be objectively justified). The EAT decision did not relate to either such claim. The flexible working claim (Part VIIIA of the Employment Rights Act 1996) had been dismissed as being out of time, and again the EAT decision did not relate to that. On the particular facts of the case, and based on the tribunal's reasoning, the EAT substituted its own decision for that of the tribunal on the unfair dismissal claim. The EAT decided that the only correct conclusion was that the claimant had established that she had been constructively dismissed and (taking account that the employer was not arguing fairness as a separate point) that meant that she had to succeed on the unfair dismissal complaint. In paragraph 18, the EAT commented on the argument (set out at paragraph 12) that any act of discrimination is a breach of the implied term of trust and confidence. It said:

> [that puts the case] too high and in any event we do not need to answer it. We do not need to decide whether in every case a finding of direct or indirect discrimination constitutes a constructive dismissal, that is, an attack on the contract going to its fundamentals. We do not need to decide that bold submission because, applying **Meikle** and **Greenhoff**, the treatment of the Claimant here in the form of direct and indirect discrimination constituted a failure to carry out the duty to maintain trust and confidence between the parties.

175. Visa International Service Association v Paul EAT/97/02/TC EAT/98/02/TC EAT/327/02/TC EAT/1198/01 concerned a decision by the tribunal in which a resignation while on maternity leave was found to amount to a constructive dismissal. The employer's appeal to EAT failed in the particular circumstances of that case. The alleged breach of trust and confidence related to failure to inform the claimant of some vacancies which had arisen while she was on maternity leave. In declining the employer's appeal, the EAT noted that the Respondent's assertion that the Claimant would not have been short-listable did not address the tribunal's reasons for finding that there had been a breach of trust and confidence:

> Her complaint was not that she had not been informed of a job opportunity which turned out to be illusory. It was that she believed that she was suitable for the post and the Respondent's failure to notify her of that opportunity fatally undermined her trust and confidence in the Respondent after twelve years' service. That case, upheld by the Tribunal, was not dependent on her losing the chance, in fact, of successfully applying for the post. The Tribunal's conclusion is, in our judgment, consistent with the formulation of the implied term to be found in the judgment of Browne-Wilkinson P in **Woods -v- W M Car Services** [1981] ICR 666 (EAT) at 670; and by the House of Lords in **Mahmoud -v-BCCI** [1997] IRLR 462 … No reason for not informing the Applicant of the vacancy during her maternity leave was advanced; on the contrary Ms Gardner accepted that she should have been informed. That omission seriously damaged trust and confidence, so the Tribunal held. Constructive dismissal was made out.

176. SW Yorkshire Partnership NHS Foundation Trust v Jackson UKEAT/0090/18. The employer's appeal was upheld by EAT. It was, in the EAT's opinion, clear that sending the particular email to the Claimant's work email address while she was on maternity leave was unfavourable treatment. However, the tribunal had not addressed its mind to the employer's reasons for doing that. The appeal succeeded because the tribunal had failed to use the "reason why" test (or other appropriate alternative analysis) and had wrongly used a "but for" test. The claim was one under section 18 EQA, which is not a claim before us in this case.

177. British Airways Plc v Starmer EAT/0306/05. In this case, the female employee had a contract which required her to work full-time (100%) and she sought to reduce to part-time of 50%. The employer said "no" to that, but it did offe part-time of 75%. The employer's attempt to argue that this (minimum of 75%) requirement did not amount to a PCP failed, notwithstanding the fact that the 75% was an offer arising out of the Claimant's specific request for 50%. We note what is said in paragraphs 21 to 30 under the heading of "disparate impact". In summary, the tribunal had some statistical evidence presented to it, some of which was potentially useful/relevant, and some of it was not. The EAT was satisfied that the tribunal had a proper foundation for its decisions in relation to "disadvantage" (as referred to in what is now section 19(2) EQA). In doing so, the EAT took account of what was said in, amongst other cases, Sinclair Roche & Temperley v Heard, London Underground v Edwards (No 2), Briggs v North Eastern Education and Library Board, Allonby v Accrington College, in relation to whether, and in what circumstances, the tribunal can take account of what it regards as "common knowledge" in relation to child care responsibilities of women (compared to men) and how child care responsibilities affect the ability of a worker to comply with particular shift patterns, timing of working hours, full-time rather than part-time, and a larger part-time fraction in comparison to a smaller part-time fraction.

178. Gibbs v Leeds United Football Club. [2016] EWHC 960 (QB). The High Court decided that the claimant was constructively dismissed, by reason of a repudiatory breach of contract. It noted at paragraph 42: "The fact that the Claimant had from time to time expressed the view that he was prepared to leave the service of Leeds if suitable terms were offered is beside the point. It does not prevent the conduct of Leeds being a breach. It was no breach on his part to initiate discussion about possible consensual termination. He remained throughout willing – indeed, keen - to fulfil his contractual duties as Assistant Manager."

179. Chemcem Scotland Ltd v Ure UKEAT/0036/19/SS. On the facts, the employee's constructive unfair dismissal claim had succeeded before the tribunal and the EAT rejected the employer's challenges, which alleged that the tribunal had not properly analysed the alleged breach of contract, and/or the event which terminated the contract.

180. Downie v Coherent Scotland Ltd UKET 4104370/2016. This was a first instance decision in which an employment tribunal found, based on the particular facts and issues, that there was unfair dismissal and breach of the Equality Act.

181. Berkeley Catering v Jackson UKEAT/0074/20/LA. Mr Hedger draws our attention to what was said in paragraph 22 and 25 of the EAT decision, about the need for tribunals to consider (at least when the argument is made) whether an apparent

redundancy situation has been deliberately created as part of a sham pretext for getting rid of a particular employee for a hidden reason.

Submissions

182. Amongst other things, the Respondent says that the only relevant flexible working decision is the one in the letter dated 19 December 2018, sent by email on 20 December 2018 and that – therefore – the time limit for the section 80H ERA complaints expired 1 month from the end of ACAS early conciliation. In other words, the time limit was 25 May 2019 and the claim was about 12 days out of time. The time limit for the indirect discrimination allegation would be the same date. Furthermore, that arguments about Justin Smith were only introduced by the Claimant at a late stage (at the earliest, in May 2021, when witness statements were exchanged) and, therefore, the tribunal should not consider arguments that he is an actual comparator, or draw any adverse inferences from what the witnesses have said about Justin Smith, or the lack of disclosure (before we ordered it part way through the hearing) of documents about his employment situation.

183. Amongst other things, the Claimant says that grievance outcome and grievance appeal outcomes are decisions under the flexible working provisions, and, therefore, the time limit for the section 80H claim should be calculated accordingly. In the alternative, she relied on legal advice that the time limits would be so calculated, and it was therefore not reasonably practicable for her to submit the claim by that date, with the claim form itself being submitted by solicitors acting on her behalf.

Analysis and conclusions

184. In relation to the process for handling the flexible working request the respondent did arrange meetings as per its policy. As per its policy the period for appealing was 14 days. However, the respondent acted reasonably by extending that period.

185. It is our view - taking account of what was said in Commotion v Rutty about the possibility of one document constituting both an appeal under the flexing working request provisions and also a grievance under another policy (and/or about raising complaints about issues other than the flexible working request in an appeal document) - that the document, the claimant submitted at 959 on 1 February 2019 does fall within the meaning of appeal within sections 80G and 80H of the Employment Rights Act.

186. Our reasons for saying that are that she made it clear in the document that she was disagreeing with the respondent's decision on the flexible working request and was asking the respondent to change that decision and to grant her request.

187. The same thing can be said about the appeal against the grievance outcome dated 27 February, together with its follow-ups on 5 March and 8 March 2019, respectively.

188. The respondent was still handling the claimant's flexible working request when it held the meeting on 14 February with Mr Redfern and gave the grievance outcome letter dated 21 February 2019. It was also doing so when it held the grievance appeal meeting on 20 March 2019 and gave the grievance appeal outcome letter dated 27 March 2019.

189. To the extent that the claimant complains about a delay in arranging the initial meeting with Mr Barry, she is wrong to say that she made her request on 5 October 2018.

190. She had previously made a request in 2016 and she was aware of the correct process. The respondent required her to use a form. Even though use of the form is not mandatory in accordance with section 80F of the employment rights act 1996, the claimant's 5 October email did not specify that it was a request under section 80 of the Employment Rights Act 1996.

191. Therefore the earliest date that the request can be treated as having been made is 25 October 2018 when the claimant did email the completed form to the respondent. In actual fact, the claimant changed her request on 29 November 2018 and there was not an unreasonable delay from 29 November to the meeting on 14 December 2018. The Claimant is relying on the 29 November email as being part of her request and the Respondent did not say that it would not consider it.

192. (Of course, if, technically, the 29 November email could not be a request under section 80F, because it was less than 12 months after the 25 October 2018 request, then that cuts both ways. It means that there was a delay of about 7 weeks in arranging the meeting).

193. According to the grievance appeal outcome letter the claimant's 5 October 2018 email led Mr Barry to start thinking about the possibility of flexible working and to speak to Mr Smith with the outcome that, by 12 October 2018, Mr Smith had said that he was not interested.

194. The source of the chair's information on this point is unclear to us. The chair was not a witness. The outcome letter states that she had been unable to speak to Mr Barry and no documentary evidence about discussions between Mr Barry and Mr Smith on any topic have been provided to us.

195. No evidence has been provided to us about whether any discussions were held with the project coordinator, Emily, following the claimant's 5 October 2018 letter. The only information we have about what happened to Emily is that on 14 December 2018, the claimant was told that Emily was leaving with effect from 31 December.

196. The Heritage Project team consisted of two roles, the project manager and the project coordinator. Prior to the claimant's going on maternity leave the project manager worked 28 hours a week. When the Claimant had been co-ordinator, she – as project co-ordinator - had worked 28 hours a week.

197. Mr Smith - according to the documents supplied during the course of the hearing - was working as project manager from September 2017 onwards, all through 2018 and the final extension which was offered to him was an extension taking his contract (in that role) up to 31 October 2019. In each case, the role was 35 hours per week.

198. In Ms Stolk's witness statement at paragraph 15, it is suggested that Mr Smith was recruited as maternity cover to tie up the loose ends of the project. The reference to 4 months in that paragraph is accurate in the sense that the claimant's maternity leave started in late November and Mr Smith's initial contract, was for six months in total, but had started two months before the Claimant's maternity leave.

199. Paragraphs 16 and 17 of Ms Stolk's statement suggest that the claimant's contract was extended, not because there was work for a Heritage Project Manager, but simply because there was no additional cost to the respondent of extending the contract other than holiday pay. In paragraph 17, in particular (and there are similar comments in Mr Barry's statement, as well as his oral evidence), it was suggested that Mr Smith was moved to other duties other than Heritage Project Manager work before the Claimant made her flexible working request.

200. We reject that claim by the respondent's witnesses and it is our finding that Mr Smith was Heritage Project Manager throughout. There is no documentary evidence of any other jobs he might have been doing and the only examples of matters such as digitisation and archiving which were put to the claimant in cross-examination were tasks that were part of the Heritage Project.

201. All of the covering letters sent to Mr Smith (revealed only when the tribunal specifically ordered that they be disclosed), specifically highlighted that the extensions were granted for him to carry on working on the Heritage Project as Project Manager. The respondent's suggestion that the role itself had come to an end is inconsistent with those documents.

202. Furthermore, the respondent's suggestion that extending the claimant's role was simply a paper exercise which cost them no money (rather than an acknowledgment that the role still existed) is inconsistent with the fact that - in fact - they had hired somebody on five days a week to replace her.

203. It is in paragraph 17 of Ms Stolk's statement that she suggests that Emily was in the process of being made redundant; the comment carries with it the implication that this was something that was already in process prior to 5 October 2018. Since the same paragraph contains information about Mr Smith becoming Research and Communications Manager and since that did not happen until around late August 2019, we cannot rely on Ms Stolk's written statement as evidence that the redundancy process for Emily had already commenced prior to 5 October 2018.

204. In any event, upon receipt of the claimant's 5 October 2018 email and particularly upon receipt of her 25 October formal request form, it would have been reasonable for the respondent to supply information in its possession to the claimant prior to meeting her to discuss the proposals. If it had information that Mr Smith was not interested, then it could have easily supplied that information to her by email and likewise if it had information that Emily was in the process of being made redundant, then it could easily have supplied information to the Claimant about that.

205. The claimant's requests for flexible working did comply with section 80F. As was made clear to her on 14 December, that meeting was not a meeting at which the decision would be made. Prior to the decision being made by the respondent, the claimant amended her request – not to withdraw the request for 2 day working, but - to say that she was willing to work three days totalling 24 hours and that was an offer contained in her email of 17 December.

206. To the extent that the claimant offered to move to a new role, that was not a flexible working request.

207. In answering questions during the hearing, Mr Barry suggested that one of his reasons for rejecting the claimant's proposal was that if she came back on 2 days a week, then that would have just been for a total of 16 days. This being because there were eight weeks between 4 February and 31 March 2019 and two days per week for those eight weeks is 16 days in total.

208. To the extent that that was part of these reasons, it is our inference from the facts that it was clear to Mr Barry that there was sufficient funding to go on past 31 March 2019. Mr Smith's maternity cover contract for five days a week did go on past 31 March 2019, and, indeed, ultimately the Respondent decided it would last until 31 October 2019. (It ended because he went into a different role, not because the Respondent decided that funding for Heritage Project Manager had run out). We are satisfied that Mr Barry as executive director was already aware in December 2018 that this extension of the maternity cover could be done from core funding.

209. The decision letter was based on incorrect facts in terms of the claimant's commute. As we have accepted, her commute was about 2 1/4 hours each direction not 3 ½ hours. In other words, Mr Barry's letter suggested that the journey was more than 50% longer than it actually was.

210. The letter does not in express terms say that the journey time would cause a decrease in quality of work. Furthermore, and in any event, the journey time per day would not be affected by the flexible working request. The letter does not say that the 30 minute lunch break in comparison to a 60 minute lunch break would cause the quality of work to be falling. In context, the comments about quality of work are related to the opinion that having somebody available four days a week to liaise with potential funders was what was required. We have seen no specific evidence of the number of hours that was needed for funding applications. Each of the Respondent's witnesses were asked to account for how much time Mr Smith had been spending on it, and none could.

211. The letter was also based on incorrect facts in that it suggested that the claimant's request had been to work 14 hours a week. Actually, as per the 29 November request, she was seeking to work 16 hours per week. She had made that request before the Respondent had made a decision on the 14 hour request

212. The suggestion in the letter that the claimant's flexible working request for 2 days (or 3 days) could not be accommodated from within existing staffing resources is accurate, given that - by 19 December 2018 – the Claimant was proposing a return to work on the new contract on 4 February, which was after the time that Emily would have left.

213. Furthermore, on the assumption that the maternity cover contact would also have ceased with effect from around two weeks after the claimant returned to work (so around 18 February on this hypothesis), it is true that the claimant's proposal would have required the respondent to hire somebody else to do some of the hours as a project manager. That could have been potentially Justin Smith, although Mr Barry says Mr Smith indicated he was not interested. Alternatively, it could have been somebody other than Mr Smith.

214. The respondent had had from 5 October to consider recruitment. However, for the purposes of the flexible working request claims, it is not our role to analyse what the respondent could have done, or when, in relation to recruitment. We simply note that it is factually accurate that it could not be done within existing staffing levels (because "existing staffing levels" does not include both the Claimant and the employee providing maternity cover. Once the Claimant returns to work, to keep "existing staffing levels" the same, the maternity cover has to depart; a decision to retain the services of the person who had been providing maternity cover once the Claimant herself had returned from maternity leave would be a change to "existing staffing levels").

215. As we said in the findings of fact, it is our opinion that part of Mr Barry's reasons for rejecting the 24-hour request was that he had come to the view that the role actually needed 35 hours per week. However, that is contrary to the Respondent's assertions of how the letter should be interpreted.

216. However, if are wrong, and if, as the respondent maintains what Mr Barry meant to say in his letter was simply that the role required a minimum of 28 hours per week (and that was the reason he had to refuse the offer of 24 hours made by the Claimant), then - as far as considering flexible working time claims goes - we must defer to the respondent's judgement on that. We had no specific evidence provided to us about exactly what Mr Smith was doing on a day-to-day basis, but we rejected the respondent's claim that he was doing things which were different to and/or outside the scope of Heritage Project Manager. Therefore we reject any suggestion that Mr Barry was falsely pretending to think that the role needed more than 24 hours per week simply as an excuse for declining the request.

217. However, based on our findings, its not Mr Barry's 19 December letter, which is the crucial one. Ultimately, the legislation requires that we consider the final appeal and that was the 27 March 2019 Grievance appeal outcome letter from the chair.

218. For that reason, we do not need to say great deal about Mr Redfern's 21 February letter. As we mentioned in the findings of fact, Mr Redfern did not independently address his mind to the claimant's request for flexible working. He did know, however (from the fact that he signed the letters), that Mr Smith was working 35 hours per week and he knew (by no later than mid March) that it was not correct that the Heritage Project manager role was coming to an end on 31 March 2019. He did, of course, send letters to extend the Claimant's contract as well as Mr Smith's.

219. However, the main significance of his 21 February letter is that it is his letter which itemises the bullet points on the first page which are then referred to as points 1 through to 7 in the remainder of his letter and that is a numbering system adopted by the grievance appeal outcome letter.

220. The grievance appeal outcome letter rejected the claimant's flexible working request and rejected the Claimant's contentions that the earlier decisions on 19 December and 21 February had been unreasonable or based on incorrect information.

221. To the extent that the grievance appeal outcome letter adopted the reasoning in the 19 December letter, the appeal outcome was based on incorrect facts. The claimant's commute was not seven hours. To the extent it is argued in this litigation

that the claimant failed to raise this properly with the chair, the simple fact is that the claimant had specifically stated that her journey time was 2 hours 15 minutes and if the respondent was not willing to take her word for that then they should have asked her to supply further evidence in support of the contention. We are satisfied that Ms Stolk played an active role in the considerations of the flexible working request and she had received the claimant's 5 January email and specifically replied to it, stating that there would be a formal response to it in due course.

222. The respondent has failed to provide any evidence to support its seven-hour claim and, in fact, in answering questions Ms Stolk accepted that it was possible that the seven hours was wrong and that on the day she had looked at Google, there might have been unusual disruption/delays

223. In any event, on her own account, she did not keep a record of the check that she made prior to 19 December and therefore she cannot have shown any such evidence to the chair in March 2019.

224. The 27 March 2019 outcome letter is also based on incorrect facts in that it suggests that Mr Barry had answered the claimant's request for two days per week. In fact, as we mentioned he treated the request to work two days a week as being to work 14 hours when the claimant had clearly stated and explained why her request was for 16 hours.

225. It is possible to deduce what the respondent's likely decision might have been had it fully considered the 16 hour request. Since 24 hours were not sufficient, then the Respondent presumably would have said that 16 hours were not sufficient either. Further, since it claimed that it could not agree to the compressed hours, including a 30 minute lunch break, because of duty of care, then it might have made that same point about the two day request had the respondent properly understood that the claimant was also suggesting that she work 16 hours over two days with a 30 minute lunch break on each of those two days. However, the fact remains that the respondent at no point actually addressed this 16 hour request head-on.

226. We are also satisfied that the 27 March decision is based on incorrect facts in that the letter suggests that the role had actually ended in March 2018, whereas actually the Project Manager contract – requiring the employee in the role to work five days a week - had already been issued all the way up to 30 April 2019, by 27 March. It was shortly to be extended further, and (we infer in her absence) the chair would have been aware of the likelihood of further extension.

227. For these reasons, the flexible working request claim succeeds.

228. Based on our analysis, the claim is in time because the claimant had three months from 27 March 2019 (plus with any extension for ACAS early conciliation) and the claim form was submitted on 6 June 2019.

229. However, in case we are wrong about that, we also considered the alternative possibility that time started running from 20 December 2018, which was email of the first decision made by Mr Barry (contained in the 19 December letter).

230. We are satisfied that the reason the claimant did not submit the claim form by 25 May 2019, which would have been the deadline on this hypothesis, is the

combination of the fact that she was relying on her solicitors to submit the claim form and that they had advised her that the time limit should be based on the grievance appeal outcome letter rather than Mr Barry's letter.

231. Generally speaking, in accordance with the Dedman principle, as confirmed in Williams-Ryan and other cases, where a claimant instructs solicitors to submit the claim form then an argument that it was not reasonably practicable to meet the deadline is almost inevitably going to fail because an error about the deadline by a qualified legal representative is almost never going to be a reasonable error.

232. However, it is our obligation to make a finding of fact about what was reasonably practicable. On the hypothesis that 25 May 2019 is indeed the correct deadline, then the claimant's solicitors have made a mistake which this employment tribunal has also made, because it is also our opinion that the grievance appeal outcome letter is the correct trigger point within the meaning of the legislation. Therefore, for that reason, we are satisfied that it was not reasonably practicable for the claim to have been submitted by 25 May 2019, given that the claimant's solicitors were making a mistake which was a reasonable mistake.

233. In relation to the indirect discrimination claim, we are satisfied that the respondent did have a PCP which it applied to both men and women. Namely, the PCP that the Heritage Project Manager had to work a minimum of 28 hours per week and a minimum of four days per week.

234. The claimant made clear throughout her correspondence with the respondent that her argument was that this PCP would place her at a disadvantage because of her childcare commitments.

235. It is true, of course, that the claimant - prior to maternity leave - was already working four days a week rather than five, and so when considering whether there is a group disadvantage, we are not considering the simple question of whether full-time working (e.g. five days per week) places women a group disadvantage compared to men because of childcare disparity. Rather we are (specifically) considering whether four days a week does so.

236. We have not been given any statistical evidence by the claimant on this topic.

237. As the EAT makes clear, however, we can and should take judicial notice of the childcare disparity.

238. We have noted what is said in the EOC case and while we take account of the fact that that House of Lords decision was 25 years before the events in question, we are satisfied that there has not been a complete elimination of the factors which, as of 1993 caused the vast majority of people working less than 16 hours per week to be women and the vast majority of those working more than 16 hours per week to be men. There might have been some changes in those numbers, but we regard it as still true that more women than men have to seek jobs with fewer hours because of childcare responsibilities (and indeed other caring responsibilities, although childcare was the cause of the particular disadvantage to the claimant as an individual in this case).

239. We have taken account of the fact that in Starmer there was a decision that a requirement for a minimum 75% of full-time caused a group disadvantage to women. We do not ignore the fact that that was in a specialised industry, namely airline pilots, and we must be cautious about drawing too wide an inference from any one single case, and/or from a specific industry which is quite different to the one in the case in front of us.

240. However, we are satisfied that it is correct for us to deduce that a significantly higher proportion of women would be unable to work four days per week in comparison to the proportion of men who can do so.

241. Further, while we are not suggesting that the respondent should have the burden of disproving the alleged disadvantage, it is nonetheless the case that the respondent has not provided us with any statistical or other evidence to suggest that the alleged group disadvantage did not exist.

242. We are therefore satisfied that the group disadvantage exists: significantly more women than men will be disadvantaged by the PCP.

243. Furthermore, we are satisfied that the claimant was put at the particular disadvantage, and that arranging childcare which was affordable and practicable meant that she faced great difficulties in working four days per week. It is not necessarily the case that it would have been completely impossible for the claimant to work the four days, but, as we say it would have been very difficult for her.

244. The respondent's proposed legitimate aim is as set out in its closing submissions and is said to be the need to secure funding within a small window.

245. There is some inconsistency in the fact that on the one hand, the respondent argues that having the claimant present and working 28 hours per week was essential in order to acquire the funding by the end of March 2019, and on the other hand, up to the end of Mr Barry's evidence (at least) appeared to be seeking to persuade that Mr Smith had not been spending his time doing the Heritage Project role and had been on administrative duties rather than seeking actively funding for 28 hours (or any other number of hours) per week. Secondly in fact there was sufficient core funding for Mr Smith to be paid for five days a week (rather than the Claimant's 4 days) and for that 5 day contract to be extended, past March 2019.

246. Thus we have not been persuaded that the refusal of the request was because of a necessity to get external funding by 31 March 2019, or by 30 April 2019.

247. We do not think in any event that the refusal of the claimant's request was proportionate. The respondent had employed Mr Smith ostensibly as maternity cover, and it was within the respondent's powers to simply say that he was being terminated (perhaps with one months notice) and that he was going to be offered instead a replacement job, be it two days a week, three days a week, or any other number of days per week.

248. Mr Smith might of course have rejected that, but there is no evidence that it was put to him in those terms, i.e. that if he did not accept the new contract he would simply be told to leave the organisation. We are not satisfied that the Respondent tried its

reasonable best to minimise the discrimination to the Claimant by putting it to Mr Smith in those terms.

249. We do not accept that the respondent's witnesses spoke to him in those terms at all. Rather we infer that the choice that had been presented to Mr Smith in a way which led him to believe he was being asked to choose between staying on 5 days per week and reducing to a smaller number of days.

250. Furthermore, to the extent that the respondent argues proportionality on the basis that any replacement arrangements would have only been for a short period of time, in other words, until 31 March 2019, we do not accept that.

251. When considering the proportionality of what it did, we take into account that the respondent was aware that it had sufficient funding in order to pay for 5 days a week until 31 October 2019, at least, and so could have paid for 4 days for at least that long too. Had the Claimant returned to work on 4 February, then the Respondent had from late December to mid February (end of handover period) to arrange for someone else to do 2 days a week (with the Claimant doing 2 days a week and Mr Smith out of the picture) even if Mr Smith was not willing to stay on at all.

252. The discriminatory effect on the claimant was that the PCP made it very difficult to return following to return from 4 February 2019 on four days a week and respondent was aware that least one possibility might be that the claimant would therefore resign from the post. We do not accept that they were trying to force her to resign.

253. The respondent did not adequately consider the possibility of trying to hire somebody else to work the other two days a week.

254. They did not adequately consider the possibility of offering Emily the chance to carry on working after 31 December, whether job share as Project Manager, or as something else.

255. Taking into account the respondent's purported justification, the Respondent has not satisfied us that the outright refusal to consider anything other than 28 hours (4 x 7 hour days) was proportionate.

256. The respondent was not even willing to consider a trial period for the 24 hours and the respondent based its refusal of the 24 hours on false information, namely that it believed the claimant would be travelling for seven hours a day.

257. The respondent provided no explanation (for the purposes of considering proportionality in relation to the indirect discrimination allegation) for why it simply rejected the claimant's account that the commuting hours were much less. It has provided no evidence that anyone even looked into that issue after 5 January 2019. This is despite the commute time having been a significant part of its purported justification for refusing the 24 hours / 3 days offer made by the Claimant.

258. Therefore, the indirect discrimination claim succeeds.

259. In terms of constructive dismissal, the claimant in closing submissions stated that she relied on a last straw argument.

260. Our finding was that the reasons for her decision to terminate given in the claimant's resignation letter were accurate.

261. She did resign because the respondent refused her flexible working request even once it had been pursued via the grievance route

262. It does not inevitably follow that refusal of a flexible working request in circumstances which amount to indirect sex discrimination will inevitably lead to the conclusion that there has been a breach of trust and confidence. Each case turns on its own facts.

263. However, in this case we are satisfied that the claimant was making several points which were ignored, including in relation to the fact that she asked to work 16 hours over two days not 14 hours over and that her commuting time was significantly less than that stated by the respondent in its 19 December letter. She never got any satisfactory acknowledgement that she was making these points, let alone an answer to them.

264. Ultimately, we do not accept the respondent's position that the Heritage Project Manager had to come to an end, from 31 March 2019 or indeed from 30 April 2019. It is true that the funding from external sources had run out for that role, and it is true that the respondent regarded securing replacement funding as being very important. However, in actual fact, the Respondent did have sufficient reserves of core funding to pay for at least five days a week until 31 October 2019. The respondent misrepresented the situation to the claimant. Had the claimant come back (on 4 February) and been unable to secure funding by 31 March or by 30 April then there would still have been the possibility of continuing in that role for several more months. The respondent was aware of that and, in fact, did keep on Mr Smith in the role for several months after 31 March 2019, paid out of core funding.

265. Therefore, it is our decision that the respondent's actions in refusing the flexible working request were conduct, without reasonable and proper cause, which was likely to destroy or seriously damage the relationship of confidence and trust between employer and employee the claimant and the respondent. (We do not think it was “calculated” to do so).

266. The claimant did not affirm the contract. She was told initially that the request had been refused around 20 December, but made clear straightaway by no later than 5 January that she did not agree. During the period between 20 December and 5 January, she was not expected to attend work anyway as she was not due back until 4 February, and so her actions in delaying until 5 January did not affirm the contract.

267. Furthermore, the fact that the claimant was willing to have discussions about a settlement agreement did not mean that she was affirming the contract. We have not seen some of the without prejudice material, but from the material which the parties have agreed we should see - in relation to which they have waived privilege - it is clear that the claimant's position was that she was not redundant, but rather - as she claimed to see it - she had been left with no choice but to enter a settlement agreement. For this point, it does not matter whether or not we agree or disagree with the claimant's position that she had no choice; the simple point is that she was making it clear to the respondent that she was not affirming the contract or waiving any breach.

268. By going through the grievance process in an effort to find a suitable outcome, the claimant was not waiving the breach (refusing her flexible working in December) and in any event, it was her intention to seek a change in the outcome. It is the respondent's position - as confirmed by Ms Stolk in her evidence - that a change in outcome on the flexible working request could hypothetically have been the result of the grievance and grievance appeal.

269. Therefore, our decision is that the claimant was (constructively) dismissed

270. In the circumstances, we find that the dismissal was an unfair one. The claimant was not dismissed because of performance or conduct and she was not redundant given that the role itself was continuing way past 31 March 2019. The claimant's inability to work four days a week may or may not have fallen within the category "some other substantial reason" had there been an actual dismissal rather than a constructive dismissal. However, in that case, we would have been looking at a procedure leading up to such a decision by the Respondent. In this case, the respondent breached the term which requires trust and confidence and in those circumstances we are satisfied that the dismissal was an unfair one.

271. In terms of time limits for the indirect discrimination claim, to the extent that it is the respondent's position that it would have refused anybody - male or female – permission to work less than 28 hours or less than four days per week in the Heritage Project Manager role, if that is correct then the time limit has not been exceeded. In accordance with the Kapur test, that would imply that the respondent has had an invariable rule or policy and the discriminatory act was a continuing one which continued up until the end of employment, on 31 March 2019 and therefore the claimant would be in time on that basis.

272. Alternatively, even if there were discretionary outcomes, the matter was looked at afresh – according to Ms Stolk – on 20 and 27 March 2019, and the claim is in time.

273. However, in the alternative, on the basis that the respondent could in principle have given a different outcome on 20 December, and if the later decisions, did not review that original decision, and did not make a fresh determination, then time starts to run from 20 December 2018. Taking into account early conciliation, it expired on 25 May 2019. The claim was about 12 days late.

274. Balancing up all the relevant factors, to some extent, the claimant has a reasonable excuse for putting in the claim late for the reasons we mentioned when discussing reasonable practicability.

275. However, in terms of the just and equitable test the relevant factors include the fact that the claim was only 12 days late and that the respondent had been aware from the ongoing process between 5 October 2018 and 27 March 2019 that the claimant was challenging its decisions. There would be no reason for the respondent to destroy relevant documents, for example.

276. We do not think that the respondent has been hampered in its defence by the fact that the claim was submitted 12 days late. The hardship to the claimant if we refused to extend time, includes fact that she would be losing a claim which we have found to be meritorious. Whereas there is no particular hardship to the respondent other

than the fact that it would be losing a technical defence to a claim which we have found is merited on the facts.

277. Furthermore, regardless of whether the indirect discrimination claim might hypothetically have been out of time, the respondent would still have required the same witnesses and documents in order to defend itself against the unfair dismissal claim which is in time and the direct discrimination claim arising from the (alleged) dismissal which is also in time and for the direct discrimination claim about the grievance decisions. For these reasons, to the extent that it is necessary, we do extend time in relation to the indirect discrimination claim.

278. Finally, in relation to direct discrimination, taking into account the fact that we found that the claimant has been dismissed, the reason for the dismissal is the conduct which led to the claimant treating herself as constructively dismissed.

279. Even taking into account the burden of proof provisions, however, there are no facts from which we could infer that the claimant would have been treated differently had she been a man in comparable circumstances. Justin Smith is not an appropriate comparator for the direct discrimination allegations because Justin Smith is not somebody who was putting in a request to work two days or three days a week. On the contrary, Justin Smith was working five days a week and wanted to continue to do so, and the respondent agreed to let him do so.

280. The appropriate hypothetical comparator is a man who was in the role of Heritage Project Manager or similar and who was seeking to work fewer than four days a week and fewer than 28 hours a week. We do not think that there are proven facts from which we could infer that the refusal was because of the claimant's sex. Even assuming in the claimant's favour that her argument is true that the Respondent preferred to keep Justin Smith rather than her, a mere difference in sex between the two of them is not sufficient.

281. We are not persuaded that the burden of proof has shifted and this direct discrimination claim is dismissed.

REMEDY

282. Our remedy decision followed on from the liability decision that we made earlier the same day. We had prepared a written draft of our liability judgment and reasons and supplied it to the parties in the morning. At 2pm, the Respondent suggested postponing the remedy hearing, but the Claimant wanted to continue. We declined the postponement.

283. The Claimant was sworn in and was cross-examined. Her initial witness statement dealt with remedy and there was no need for further evidence in chief.

284. By agreement, she gave evidence while seated at the Claimant’s table as this was more suitable for the BSL interpretation which – for unplanned reasons beyond anyone’s control – had to be done by video (CVP) on the final day of the hearing.

285. The Claimant only applied for one job after leaving the Respondent. That was in 2019, and details are in her statement and the bundle. Other than that, she did

regularly check for jobs that she could do, but did not find any, and therefore made no applications. This continued until around February 2020 after which time, because she did not feel well enough to do so, having recently had a second miscarriage, and (shortly afterwards) because of the pandemic. In around April 2020, she found out she was pregnant and did not resume looking for work before r the birth of her second child, in December 2020. In fact, as of the date of the remedy hearing, she has not yet resumed her search.

286. The Claimant was assessed for Employment Support Allowance and started to receive it with effect from April 2019. She was originally placed in the "work-related activity group". In February 2020, she was informed that she had been placed in the "support group". This assessment was backdated, and deemed effective from April 2019.

287. The differences are as follows:

287.1 Being placed in the work-related activity group shows that DWP's assessment has been that the person cannot work now, but can prepare to work in the future, for example by writing a CV

287.2 Being placed in the support group shows that DWP's assessment has been that the person cannot work now and is not expected to prepare for work in the future. It shows that, following assessment, the DWP has been satisfied that the Claimant's disability severely limits was she can do. She was not obliged, by them, to demonstrate that she was actively seeking work, but had a work coach available to provide assistance with the search if she wanted that.

288. There is a schedule of loss is at page 34 of the bundle.

289. It is common ground that the claimant's annual salary was £28,000 a year and that was the pro rata amount which she received for working 28 hours per week.

290. It is common ground that her net weekly pay was £436.15.

291. We pointed out to the parties that there were a couple of errors in the schedule. Firstly basic award is calculated on gross pay, rather than net. Secondly, the relevant weekly cap, for an effective date of termination of 31 March 2019, was £508, not £525.

292. Having heard the evidence and submissions, we deliberated and then resumed and gave our decision. We started off by explaining that the recoupment regulations applied to the unfair dismissal claim, and what the effects of that were, and attempted to answer the queries which were raised. We then gave our remedy decision and reasons, which were as follows.

293. The Claimant's maternity leave ended in November 2018 and she took some authorised leave immediately afterwards. The claimant asked to be allowed to return to work on 4 February 2019, but doing 16 hours a week, two days per week. Had the Respondent agreed to that request, she would have resumed work from 4 February 2019 (and she would not have been on sick leave). Doing a rough and ready calculation, which is the best we can with the information we have available, our decision is that her weekly pay, had the request been approved would have

been in the proportion 16/28 of her previously weekly pay. So £436.15, multiplied by 16/28 comes out at £249.23.

294. The claimant would also have been paying travel costs, had she carried on working for the respondent. Doing the best we can with the limited information in the bundle, including what is written on pages 117-118, her costs for four days a week were around £5000 a year. So we have estimated around £2500 per year for two days a week and that comes out, at approximately £48 a week.

295. Thus, having that lost her job, the Claimant is £201.23 per week worse off. That is, she lost the £249.23 that she would have otherwise received, but out of that money she would have in in any case have been paying £48 a week for travel had she been working (and saved that by not working), so the actual losses from not working at 2 days per week are £201.23 per week

296. It is our decision that she would have carried on working on two days a week until 13 September 2020, but for the discrimination. Had the request been granted her contract would have been permanently reduced to 2 days a week. The Claimant would not have the unilateral right to insist on going back up to 4 days. We accept that there are scenarios in which her days could have increased and/or her hours could have increased, by mutual agreement between her and the Respondent.

297. Had the claimant not been constructively dismissed with effect 31 March 2019 (unfairly and in contravention of the Equality Act 2010) then she would have been working for the Respondent doing two days a week in August 2019 when the Research and Communication Manager job became available. The ending of Mr Smith's contract as Heritage Project Manager appears to have been tied into this new post becoming available. Even if Heritage Project Manager was coming to an end the Claimant could have applied for the new post, either full-time or job share. We obviously had no evidence about whether or not that could have been done as a job share, but we have no reason to think it could not. If it could not be done job share, then the Claimant had a 50:50 chance of getting the full-time post, in the hypothetical scenario that it was ring-fenced to her and Mr Smith. However, if it could have been done job share, then the Claimant would have had 100% chance of *either* doing 2 days a week as Research and Communication Manager or else as Heritage Project Manager.

298. We bear in mind that we are assessing the chances of hypothetical things that did not actually happen and that, in doing so, we should also take into account that, as well as the possibility of the Claimant's hours or days increasing, the opposite is also true; she might have decreased her hours, or decided to leave earlier than September 2020. We are satisfied that the most appropriate estimate of the financial loss is on the basis of treating her losses as they would be compared to the scenario of remaining on 2 days per week throughout, until 12 September 2020. Since the salary is the same, it makes not difference whether she would have stayed two days a week in the research and communication manager job or alternatively in the Heritage Project manager job.

299. Either way, however, by 12 September 2020, her employment would have terminated. We think there is 100% chance it would have terminated on 12 September 2020.

300. So, on the basis that she would have resumed working and earning on 4 February 2019, but for the discrimination (as mentioned, we are satisfied she would have come back to work that day and that her illness was caused by the discrimination), there is 84 weeks between 4 February 2019 on 12 September 2022. 84 multiplied by £201.23 that works out at £16,903.32.

301. There were also employer's pension contributions. That was at 3%. Her annual salary gross would have been £16,000 per annum (if working 16 hours per week). 3% of £16,000 per annum is £480 per year and converting that (x 84/52) means that 84 weeks of the loss is £775.38.

302. So the losses of both earnings and pension when we combined is £17,678.70 and that the prescribed element that we mentioned earlier when giving judgment.

303. We are going to exercise our discretion and award interest on that amount. The midpoint of the period of the losses (so the midpoint of the period 4 February 2019 to 12 September 2020) is Sunday 19 January 2020. We award interest from that date until today (4 April 2022), which is 807 days. The daily rate of interest on £17,678.70 at 8% per annum is £3.87. We multiply £3.87 x 807 days and the interest we award is £3123.09.

304. Basic award is based on the weekly cap applicable at the time. The effective date of termination was 31 March 2019. The correct multiplier is 5 and correct cap is £508. £508 multiplied by five comes to £2540. That is the basic award.

305. For flexible working there is an overall maximum found by multiplying 8 by the maximum weekly cap. So the maximum is £4064. We have taken account of what we decided in the liability decision. The respondent did engage in some discussion, including by email between the claimant and Ms Stolk in October and November 2018. There was a meeting with Mr Barry in December 2018. There was a written outcome. The employer provided an appeal mechanism, and the appeal period was extended for the Claimant. We decided that the grievance and the grievance appeal meetings were part of the flexible working request process, and those meetings did take place with written outcomes given. As per the liability decision, we found defects and we found that the respondent breached the relevant legislation. However, taking into account the things which the Respondent did do, this is not a case where we think it is appropriate to award the maximum amount. It was our finding that the claimant was making certain points clearly about the incorrect facts relied on by the Respondent. Those points, which she made promptly following the 19 December decision, were not properly acknowledged or dealt with during the following parts of the exercise. The further refusals continued to be based on incorrect facts. Weighing up what the Respondent got right, against what it got wrong, we decided that the appropriate amount to award is half of the maximum. In other words, an amount equivalent four multiplied by £508. So we award £2032 for breach of the flexing flexible working request provisions in the Employment Rights Act 1996.

306. In relation to an injury to feelings in relation to the equality act and we take into account the Vento bands and the various uplifts for those including in relation to, for example, Simmons v Castle and we taken into account the Presidential guidance that was in force at the time (for claims issued on or after 6 April 2019) gave the

following bands the lower Vento bands was £900 to £8800; the middle Vento band was £8800 to £26,300 and the upper band was above that.

307. We take into account that all discriminatory conduct is serious and that claimants should be appropriately compensated for the wrong done to them.

308. It is important to take into account the effects on the individual claimant. We have taken into account the fact that the claimant has been caused anxiety, sleeplessness and feelings of loss of self-worth as a result of the respondent's refusal to grant her request and the dismissal (as we found it to be). The discriminatory conduct was not a one off act and not of a short term duration. It is therefore not appropriate for us to award an award in the lower Vento brand.

309. We do think in award and in the middle band is appropriate and we think towards the lower end of that middle band.

310. The claimant in the schedules loss (drawn up by herself assisted by solicitors at the time) suggested a figure of £11,000. That is the approximate figure that we would have come to in any event, and we do think it's appropriate in all the circumstances. We therefore award £11,000 for injury to feelings.

311. We also award interest and the calculation on that follows. The daily rate of interest at 8% is £2.41 per day. The starting point of the discrimination was 20 December 2018 when the Claimant was told that the request had been refused and she could not have the two days a week that she asked for. We award interest,then to the present day. That is 1202 days. 1202 days multiplied by £2.41 per day comes to £2896.82

312. In determining the financial loss, we have taken account of the respondent's arguments that the claimant has not mitigated her losses. We accept that - on her own evidence - from February 2020 onwards, and she is unable to demonstrate that she been looking for work. In fact, it seems that she had not been looking for work.

313. We take into account that, having been assessed by the DWP the Claimant was put into the support group for Employment and Support Allowance and that was backdated to July 2019. She received the conveying that decision letter in February 2020.

314. More importantly, regardless of any arguments about whether the claimant has done enough to look for work and whether she could reasonably have done more to look for work, ultimately the respondent has not proved to us that if she had done more to look for work then she would have been able to find a job

315. We accept what the claimant has said in evidence that an initially at least, during 2019, she was checking for job vacancies and there were no vacancies suitable for her that she thought she could apply for. We accept she needed to work in a supportive environment and that even had she been more actively seeking work there is no evidence that persuades us that she would have found suitable replacement employment any earlier than 12 September 2020. [We are only awarding financial losses up to 12 September 2020, for the reasons mentioned above.] In reaching our decision that it has not been shown that she could successfully have found replacement income from a suitable new job by 12

September 2020 we take into account that, for the last 6 months of that period, the job market was affected by the pandemic. That made jobseeking difficult for everybody March 2020 onwards.

Employment Judge Quill

Date:15 August 2022

REASONS SENT TO THE PARTIES ON
17 August 2022

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FOR THE TRIBUNAL OFFICE