EMPLOYMENT TRIBUNALS

Claimants: (1) Mrs K Ahmed
(2) Mrs E McMillan

Respondents: (1) Bristol City Council
(2) Mrs A Farmer
(3) Ms F Tudge

Heard at: **Bristol** **On:** **21, 22, 23 and 24 August 2023**

Before: Employment Judge Livesey
Mrs S Maidment
Mrs G Meehan

Representation:
Claimants: Both in person
Respondents: Mr Small, counsel

JUDGMENT

The Claimants' claims of detriment on the grounds of public interest and health and safety disclosures, discrimination on the grounds of disability and race and unlawful deductions from wages are all dismissed.

REASONS

1. Claim

1.1 By a Claim Form dated 31 December 2020, the Claimants brought complaints of discrimination on the grounds of race and disability, detriment on the grounds of public interest and health and safety disclosure, unlawful deductions from wages and a failure to provide updated written terms and conditions of employment.

2. Evidence

2.1 We heard oral evidence from the First and Second Claimants and Ms McLeod. We read the further witness statement of Ms Neufville which was not challenged by the Respondents.

2.2 The Second and Third Respondents gave evidence. Mrs Laing, an HR Business Partner, and Miss Comley, an HR Consultant, also gave

evidence.

2.3 We were provided with an agreed bundle of documents (R1) and the Claimants' closing written submissions (C1).

3. Issues

3.1 The issues in the case had been discussed, agreed and recorded by Employment Judge Dawson at a Case Management Preliminary Hearing which took place on 16 August 2022.

3.2 In relation to the public interest disclosure claim, the Claimants relied upon one disclosure, their grievance of 22 October 2020, and asserted that they had suffered four detriments (paragraph 2.1.1 to 2.1.4 of the Case Summary). Both at the start and during the hearing, the Respondents made a number of important concessions in respect of several elements of those claims, which have been addressed below. Similar concessions were made in respect of the health and safety claim under s. 44 of the Act.

3.3 Both Claimants brought complaints under s. 13 of the Equality Act in relation to their redeployment (paragraph 5.1.1 of the Case Summary). Those claims were of direct associative discrimination on the grounds of disability. They also brought indirect associative discrimination claims on the grounds of disability on the basis of a provision, criterion or practice (a 'PCP') which was the requirement to work in the office (paragraph 6.1.1 of the Summary). The First Claimant brought a separate and distinct indirect discrimination claim on the grounds of race, based upon her Bangladeshi ethnicity.

3.4 The unlawful deductions from wages claim concerned the Claimants' losses between the date of their alleged redeployment on 11 December to their actual increase in pay on 29 December.

4. Hearing

4.1 On the second day of the hearing, additional documents were disclosed by the Respondents which concerned the Claimants' comparator, Ms McLeod. They were clearly relevant and Mr Small stated that the failure in disclosure had occurred because of an oversight. The Claimants were understandably unhappy by the Respondents' conduct but they did not identify any prejudice caused by the late disclosure and we admitted the documents.

5. Facts

Introduction

5.1 We reached the following factual findings on a balance of probabilities. References to page numbers within these Reasons are to pages within the hearing bundle, R1.

5.2 The First Claimant was employed by the First Respondent from 18 November 2014 and the Second Claimant, who worked part-time (2.5 days per week), started on 21 September 2011. They both worked as Business Support Officers but, in 2017, they became Unit Coordinators in the East/Central Area of the First Respondent's Children and Families Service. They were based at the First Respondent's Welsman offices in St

Paul's, Bristol. Their jobs were paid at BG7 grade.

5.3 Their role was to support Social Workers, both operationally and administratively. They were typically the first point of contact with social services for families, schools, or other agencies. The full job description was set out in the First Respondent's manual [76-86] and their key tasks were helpfully summarised within paragraph 6 of the Response.

5.4 The First Respondent operated the 'Unit Model' for its provision of social services, a common model used nationally. This was through the use of small, locally based units which increased Unit Coordinators' contact with service users, both by phone and face-to-face, and involved a shared level of knowledge of service users within each unit.

5.5 There were eight units at the Welsman in late 2020, typically comprising three Social Workers, one Consultant Social Worker and a Unit Coordinator. The First Claimant worked within Unit 2 and was line managed by Mr Asghar. The Second Claimant worked within Unit 1 and was line managed by Ms Hines.

5.6 The Second Respondent was the Service Manager and the Third Respondent was the Head of Service, Safeguarding and Area Services, although her title has since changed.

5.7 It was accepted that the First Claimant's parents in law and the Second Claimant's mother were disabled under the Equality Act at the relevant time.

Covid-19

5.8 When the pandemic started in March 2020, the First Respondent designated people in the Claimant's role as 'key workers'. Nevertheless, they worked from home at the outset and much of their work was to facilitate meetings and support in an online setting.

5.9 It was clear that there was a vast, citywide redeployment exercise which started at the beginning of the pandemic because many non-urgent, non-critical services closed entirely (for example, libraries).

5.10 The First Respondent's Health and Safety team visited the Welshman offices as some return to office work started. The risk assessment was reviewed and the office was certified as having been compliant in terms of the Government guidance which applied at the time [269-280]. The Claimants' case was that recommendations in respect of limits to numbers in rooms, social distancing and the use of face coverings were not uniformly adhered to. They subsequently critiqued the risk assessment, pointing out how they believed that it was being breached [175-180]. We did not need to audit the First Respondent's level of compliance with the guidelines because of the concessions which were made about the reasonableness and genuineness of the Claimants' beliefs in that respect. In closing, Mr Small accepted that their evidence of breach had been well made out.

5.11 In the case of the First Claimant, a personal risk assessment was also completed in June 2020 [103-115]. It recognised her husband's caring

responsibilities for his vulnerable parents and her own ethnicity. Because of the control measures that were in place at the Welsman, it was considered that it was an appropriate workplace without further precautions being undertaken in her case.

September 2020

5.12 By September, of the 9 Unit Coordinators at the Welsman, 4 were still working from home exclusively (including the two Claimants), 4½ were working partly from home and there was a 0.5 employee who worked entirely in the office.

5.13 The Respondents maintained that practical difficulties and delays were being experienced as a result of Unit Coordinators' absence. The specific problems were dealt with within paragraph 4 of the Second Respondent's witness statement and in other documents (for example [139-140] and [347]); calls were not always being answered in the office promptly which, in a child protection context, was potentially harmful. People were thin on the ground to meet and/or deal with service users who attended the office, particularly to attend online meetings or court hearings. Certain jobs in the office, such as photocopying, cash handling and dealing with travel documentation, was not being done on time or at all. Many service users had to come to the Welsman to attend court hearings because of court closures and because they lacked the technology to participate independently at home.

5.14 The Claimants' case was that the tasks which had to be undertaken in the office were either never or rarely actually needed. They thought that the Respondents' case was overstated. More than 90% of their work was electronic. When the First Claimant was cross examined closely about the telephone problems [139-140], however, she candidly accepted that she did not know that such problems had existed. In general terms, she did not deny that the problems had existed, but she had not had them brought to her attention by her manager.

5.15 Ultimately, we could not accept that the Claimants had a better knowledge of the problems that were being experienced at the Welsman than the Respondents. They were not there. We accepted that their managers did not complain about *their* work, but that was not the same thing. Neither the First nor the Second Claimant said that the Respondents' concerns were made up. The Second Respondent's evidence, that the concerns had been repeatedly raised to her by Social Workers, was compelling. There was no better expression of the need for Unit Coordinators on the ground than the recruitment of two more into the Welsman in December 2020.

5.16 On 15 September, the Second Respondent had a meeting with the Unit Coordinators, notes of which were kept by the Claimants [124-6]. She discussed her desire for them to have a greater presence in the office and she wanted staff to return to work to the Unit Model;

> "*her aspiration is for UCs to come in at some point or other, to do the on the spot spontaneous stuff..*
> *She is appreciative of what people are doing from home, and is happy to negotiate, but she wants UC's to come in at some point during the week for some form of office-based work. The Unit model is central to it..*

Unless the UC's are in and working like that or aiming to/aspire to.."

5.17 It was clear from the minutes that some staff, including the Claimants, had concerns, misgivings and questions. The Claimants subsequently sent questions to the Second Respondent.

5.18 A further meeting was held on 7 October by the Second Respondent with the Claimants and another Unit Coordinator, Ms Mcleod, who had expressed similar misgivings. The Claimants was supported by their union representative. Again, they kept their own notes of the meeting [132-6].

5.19 The Second Respondent attempted to address their concerns about returning to work at the Welsman. She said that it was a "*preliminary discussion*" to try to "*move things forward*" to "*explore how they could feel comfortable working in the office*" (paragraph 10 of her witness statement). No specific plans or outcomes were achieved. The Claimants' notes referred to her "*encouraging staff to come into the office" and "looking to develop a rota*" [135].

5.20 From this point on, Ms McLeod dropped out of the picture because she went off work sick. She did not return to work until later in March 2021. It was subsequently discovered that she should have received a shielding letter from the national source of such correspondence [351].

5.21 The Claimants' other comparator, Ms Mason, was the subject of an Occupational Health ('OH') report in November 2020. The report revealed that she too had been in consultation over a return to work at the Welsman but that it had not been recommended to take place before 2021 [203-5]. She therefore continued working from home during that time on OH advice.

5.22 On 12 October, a written response was provided to the Claimants' questions from the Second Respondent [137-142]. She explained why there was a need for a physical presence in the Welsman and the way in which Covid protocols were being applied at work.

5.23 On 19 October, Ms James, the Director of the First Respondent's Children and Families Directorate, wrote to *all* of the Children and Families Teams to advise them that there was an expectation for a return to office working [145-7]. It was recognised, however, that was subject to certain local variations and agreements.

<u>The grievance and redeployment</u>

5.24 On 22 October, the Claimants submitted a grievance in accordance with the First Respondent's policy [311-9]. In it, they stated that they were 'adamant' that the First Respondent wanted Unit Coordinators back in the office, which was contrary to Government and Council guidance. They expressed concern about rising infection rates and that the increased pressure upon them to return to work was adversely affecting their health and well-being [149-152]. In terms of the remedy sought, they said this;

> "*The remedy is very simple.*
> *Please can you ask management to stop pressurising us to return to the office to work during the current pandemic whilst it is against City Council and Central Government guidance.*"

5.25 On 10 November, Mr Martin in the First Respondent's Health and Safety Team, reassessed the Welsman offices. Again, no breaches of Covid safe working arrangements were identified [209].

5.26 On 23 November, Mrs Laing, an HR Business Partner, discussed the possibility of exploring the Claimants' redeployment with their trade union representative, Ms Sharley. She was very supportive, on a temporary basis [212]. The Claimants, however, indicated to her subsequently that they did not want to re-redeployed. They wanted their grievance heard and not "*swept under the carpet*" (the email of 4 December [217]).

5.27 On 3 December, Ms Comley from HR spoke to both Claimants separately about redeployment, their skills and their preferences. A week later, she emailed the job description for a Finance and Data Officer's role in the Placements Finding Team. This was a BG9 grade post [224].

5.28 On 11 November, both Claimants were offered roles in the Children's Commissioning Service at BG9 level by the Second Respondent [220-3]. This was considered to have been a potential resolution of their grievance;

> "*I'm aware that your grievance resolution is for management to stop putting pressure on you to return to the office. This can be resolved by the offer of a temporary post within the children's commissioning service at a BG9 grade which will enable you to work from home, whilst at the same time be able to work as part of our children's workforce. I understand you are discussing this further with HR and Paula Sharley your trade union rep. This seems to be a positive resolution and an opportunity which should offer you not only development but addresses your key concerns about being office-based. This is a temporary measure and I have arranged for extra resource to cover your role during this time…*
>
> *I apologise if you felt any undue pressure was put on you to return to the office and really hope this now resolves things.*
>
> *Please do contact me if you would like any further discussion; however please be assured I am sympathetic to your concerns and hope the current temporary arrangements can offer a solution to the situation.*"

The extra resource that was referred to was the recruitment of two further Unit Coordinators who took up their roles later that month.

5.29 Ms Sharley then informed Mrs Laing that the Claimants wanted their grievance heard and did not want to be redeployed [230-1]. Mrs Laing then replied on 14 December [229];

> "*This is a bit concerning. Firstly we don't do hearings for grievances, we look at the resolution and work towards that, which I feel we have achieved. We can invite them to a meeting and go through their grievance and or outcomes/report but I am not sure how much this will achieve or who should be at the meeting.*
>
> *I had arranged for a letter to come from Ann F is the outcome of the grievance to say we have found a resolution and an apology - we could meet and go through this?*"

5.30 That, then, is what happened on 22 December. There was a meeting which was chaired by the Third Respondent for that purpose. The

Claimants attended with their trade union representative and there were two HR representatives, Ms Comley and Ms Hunt.

5.31 One of the odd features of the case was that there were no notes of that, or other meetings kept by the Respondents. The First Claimant made it clear that her side (whether her, the Second Claimant or their trade union representative) did keep some notes of the meeting, but they were not disclosed by the Claimants, nor were they sought by the Respondents during the hearing. It was not for the Tribunal to have called for them.

5.32 At the meeting, both Claimants did agree to the temporary redeployment roles which were offered. They asserted that the Third Respondent pressured them to accept. The Second Claimant specifically claimed that Ms Tudge said that she was "*faced with a choice of that post all coming back into the Wells in office*" (paragraph 4.16 of her statement).

5.33 What was clear from the evidence, in our judgment, was that the Respondents avoided being mandatory or directional. They were trying to coax the Claimants to accept the roles on offer or return to the office. They were prepared to consider alternatives but, despite the personnel present (HR and the union), none were proffered.

5.34 In the First Claimant's case, the persuasion did not take long. She left the meeting once the BG9 role had been offered, knowing that she was then able to continue working from home. The Second Claimant, however, was not initially as happy because she did not feel that the role best suited her skills but, once the Third Respondent had assured her that she was to have been kept informed of other positions if they arose and how the circumstances at the Welsman changed over time, she too accepted the offer.

5.35 The Third Respondent told them that they would be kept on the Welsman email circulation list. They were also told that they had a right of appeal, which was repeated to the Second Claimant after the First Claimant had left the meeting.

5.36 Outcome letters dated 23 December were prepared ([345-7] and [248-250]). They were slightly different because of the further assurances given to the Second Claimant. They were not, however, sent out due to an administrative error. As a result of a further error, despite what they had been told at the meeting and what was indicated in the letters, they were removed from the email circulation list. It appears to have been the act by an overzealous business support officer.

5.37 The Claimants did not appeal, but we considered that they ought to have been well aware of their rights because of their understanding of the policy itself, which they had read, and because of the Third Respondent's statement of their rights at the meeting. They were also, of course, supported by their trade union. It was important to note that, in subsequent correspondence, they did not assert that their grievance had not been resolved and/or that they had not been given a right of appeal (for example [257-8]).

5.38 On 29 December, the Claimants' moves took effect and they received their increase in pay from that date. Subsequently, the First Claimant moved to

the role of Licensing Officer in June 2021 and then to the Commissioning Team in early 2022, still at BG9. The Second Claimant moved to the role of Legal Assistant in May 2021 and then to Business Support Officer in June 2021.

5.39 Finally, we heard evidence about another, unnamed Unit Coordinator who was referred to by the Second Respondent in evidence. Both she and Ms Mason, the Second Respondent said, were medically advised not to return to work at the Welsman. On that basis, their work was adapted so that they could continue to work from home. The rota system that was created after September 2020, gave everyone who came into work their fair share of in-office working, but the sense that we had was that, if there was a medically supported reason *not* to have attended, that would have been accommodated.

5.40 As stated above, in December 2020, the First Respondent appointed two more Units Coordinators to work at the Welsman, Ms Chowdry and Mr Riddett [239]. They were attached to Units 1 and 2, effectively to backfill the absence of the Claimants and other Unit Coordinators.

6. Conclusions

<u>Public interest disclosure; relevant legal principles</u>

6.1 The First Respondent took a pragmatic approach to the disclosure and conceded parts of the relevant statutory test. It was accepted that;

- The disclosure had contained information (s. 43B (1));
- The information tended to show that the of health and safety of someone had been endangered (s. 43B (1)(d));
- The Claimants had held a reasonable belief in the substance of the disclosure (s. 43B (1));
- The disclosure had been made in the public interest (s. 43B (1));
- The disclosure had been made to the employer (s. 43C).

These concessions encompassed all of paragraph 1 of the Case Summary of 16 August 2022 [54].

6.2 We then had to consider whether the Claimants had suffered detriments as a result of the disclosure.

6.3 Detriment was to have been interpreted widely as a concept (*Warburton-v-Chief Constable of Northamptonshire Police* [2022] EAT 42); although the test was framed by reference to a reasonable worker, it was not a wholly objective test. It was enough that a reasonable worker might have taken such a view. That meant that the answer to the question was not dependent upon the view taken by the tribunal itself *only*. The tribunal might have been of one view, and been perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might have taken the view that, in all the circumstances, it was to her detriment, the test was satisfied.

6.4 The test in s. 47B was whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15

and 16 of the decision in *Harrow London Borough Council-v-Knight* [2002] UKEAT 80/0790/01). Section 48 (2) was also relevant;

> "*On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*"

6.5 Section 48(2) was easily misunderstood. It did not mean that, once a claimant asserted that she had been subjected to a detriment, the respondent had to disprove the claim. Rather, it meant that, once all of the other necessary elements of a claim had been proved on the balance of probabilities by the claimant (that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment) the burden shifted to the respondent to prove that the worker was not subjected to the detriment on the ground that she had made the protected disclosure. The test was not one amenable to the application of the approach in *Wong-v-Igen Ltd*, according to the Court of Appeal in *NHS Manchester-v-Fecitt* [2012] IRLR 64). It was important remember, however, if there was a failure on the part of a respondent to show the ground on which the act was done, a claimant did not automatically win. The failure then created an inference that the act occurred on the prohibited ground (*International Petroleum-v-Osipov* UKEAT/0058/17/DA and *Dahou-v-Serco* [2017] IRLR 81).

Public interest disclosure; conclusions

6.6 In general terms, we did not accept that the matters complained of had occurred on the grounds of the disclosure. The First Respondent was trying to get its staff back into the workplace, at least to some extent, and the matters complained of emanated from a series of events which that desire had precipitated.

6.7 We shall nevertheless considered each claimed detriment in turn;

6.7.1 Redeployed from 11 December 2020;

The Claimants were redeployed because they indicated that they did not want to return to work at the Welsman premises, not because they lodged a grievance.

Further, they were not redeployed 'from 11 December 2020'. We did not accept that the letters on that date brought about immediate redeployments. They contained 'offers' of temporary new roles in the 'hope' that they resolved their grievance. Those offers were not initially accepted [230-1] and the matter proceeded to a grievance meeting on 22 December. It was only then that the redeployments were agreed, but the Claimants were then informed that a further meeting would be arranged to discuss their inductions. Accordingly, it could not have been said that they held the roles until they have taken up their positions, following induction, on 29 December. The First Claimant accepted that she did not undertake any work in the new role from 11 December;

6.7.2 Removed the Claimants from the email circulation group for the East Central/Welsman office with immediate effect;

The First Respondent accepted that this occurred, but it was clear that the step had not been intended. It was an administrative error. The grievance outcome letters specifically indicated an intention to retain them on the group [245-250], albeit that those letters were never sent or received;

6.7.3 Failed to follow the grievance process and, in particular, failed to provide the Claimants with a hearing and/or an appeal;

This was a rather counter intuitive argument. It was effectively being contended that the First Respondent had failed to follow the grievance process *because* the Claimants had issued their grievance.

Was there a failure to follow the process? Not technically. The process contemplated the possibility of an initial meeting, an investigation and an outcome meeting in some cases, but not all [315-6]. It did not mandate an investigation.

It did, however, seem that corners were cut. The sense we had was that the Claimants' trade union representative had given a favourable indication to management in November that they were prepared to have been redeployed. There was then some frustration when that was refused. Although there was nothing inaccurate in Mrs Laing's email of 14 December [229], we did sense a degree of annoyance that the anticipated solution was not going to have been achieved as had been expected.

Instead of investigating the matter, a grievance meeting was held which was, in effect, an attempt to re-sell the redeployment offer. Whilst that was not necessarily a wrong approach to the problem faced by the Respondents, we readily appreciated why the Claimants had felt that the process had been truncated and that their concerns were never fully examined. Similarly, the Claimants appeared to want some sort of quasi-public audit of the safety of the Welsman at a grievance 'hearing'. That too was not a correct understanding of the grievance process.

Ultimately though, these things did not happen on the grounds that the grievance had been brought. If the process was truncated, it was through the First Respondent's desire to arrive at its desired outcome in the face of to their reluctance to return to work. As to the question of an appeal, the Claimants well knew, through a reading of the policy and the Second Respondent's statement at the meeting, that that was their right. They simply chose not to exercise it. They did not complain that it had been denied to them in subsequent correspondence;

6.7.4 Failed to provide a statement of changes to the Claimants' particulars of employment;

Again, whilst this was accepted by the First Respondent (see, further, below), this did not occur because of the fact that the

grievance had been issued. This was another administrative oversight following the redeployments.

Health and safety detriment

6.8 This claim mirrored that brought under s. 47B. The Claimants relied upon s. 44 (1)(c). The First Respondent accepted that there was no health and safety committee and that the Claimants' grievance included the relevant subject matter to be covered by the section.

6.9 For the same reasons as those given above, the detriments complained of did not occur on the ground that they had brought their health and safety concerns to their employer's attention by reasonable means.

6.10 Before leaving this part of the claim, however, we should deal with the Claimants' reliance upon the Employment Tribunal decisions in the cases of *Quelch-v-Courtiers Support Services* ET No. 3313138/2020 and *Regnante-v-Essex Cares Ltd* ET No. 1403429/2020 (see their written submissions, C1). Both claims turned on slightly different factual scenarios but were also cases brought under s. 44 (1)(d) and/or (e) involving refusals to return to work in the face of a specific instructions. The Claimants' claims here were much more closely aligned to those under s. 47B since they related to their disclosure and treatment which they maintained had flowed from it.

Direct discrimination by association; relevant legal principles

6.11 One of the Claimants' claims was brought under s. 13 of the Equality Act 2010. The protected characteristic relied upon was disability.

6.12 The comparison that we had to make was that which was set out within s. 23 (1):

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

6.13 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3). In order to trigger the reversal of the burden, it needed to be shown by the Claimants, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might have sufficed. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the relevant protected characteristic.

6.14 The test within s. 136 encouraged us to ignore a respondent's explanation for any poor treatment until the second stage of the exercise. We were

permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, a respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

6.15 If we made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

6.16 Here, the Claimants did not rely upon their own protected characteristics but, those of other family members. It had been recognised, since the decision in *Coleman-v-Attridge Law and Another* [2008] ICR 1128, that a claimant can complain of direct discrimination by association with someone who was disabled.

6.17 As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but *less* favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).

<u>Direct discrimination by association; conclusions</u>

6.18 The disabled status of the Claimants' relatives or 'associates' was not an issue in the case. The First Respondent had accepted that the First Claimant's parents-in-law and the Second Claimant's mother were both disabled for the purposes of the Act.

6.19 The single act of less favourable treatment complained of was their re-deployment (paragraph 5.1.1 of the Case Summary). The Claimants' named comparators were Ms Mason and Ms McLeod.

6.20 The first question that we had to address was whether that constituted less favourable treatment. We were satisfied that it did in the sense that, although both Claimants accepted the offer, they considered that changing roles had been disadvantageous to them. They would have rather continued working from home in their roles as Unit Coordinators.

6.21 The difficulty that the Claimants had with this claim was the fact that the reason for the treatment was not the fact that they were associated with people who were disabled. That association had to have been in the mind of the discriminator for the claims to have succeeded. None of the Respondents' witnesses were cross-examined to that effect. It was never asserted by the Claimants during the grievance process, or otherwise, that that had been the case. In our judgment, the reason why there had been a desire to redeploy them was because of their reluctance to return to work.

They could have been reluctant to have returned for any reason and it would have been fair to assume that redeployment would still have been considered on the basis of the evidence that we heard. This was highlighted when their comparators were considered.

6.22 Ms Mason was not a good comparator. We did not know whether she had been reluctant to return to the Welsman or not. All we knew was that a return had been contraindicated by OH. We did not know whether she was disabled or not.

6.23 Ms McLeod was a better comparator in the sense that she too had been reluctant to return to the Welsman. There was no evidence that she was disabled or associated with anybody who was, but there was evidence that she was treated the same way as the Claimants because she had been called to the meeting on 7 October 2020 when the return to work of all three Unit Coordinators was discussed. It was only when she went off sick, that the matter was not progressed in her case.

6.24 What of the position of a hypothetical comparator, who we considered would have been someone who had been reluctant to return to the Welsman, but for reasons unconnected with their association with a disabled person? An employee might have been reluctant because of childcare needs or because of a personal conflict with a colleague. Given the perceived need to have had Unit Coordinators on the ground, there seemed to have been every likelihood that such comparators would have been treated in the same, broad manner.

<u>Indirect disability discrimination by association; relevant legal principles</u>

6.25 We considered and applied the test in s. 19 of the Act;

"(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."

6.26 We approached the case by applying the *Igen* test to s. 136 (2) and (3), as we had under s. 13.

6.27 First, we had first to consider whether there was a provision, criterion or practice which had been applied (a 'PCP'). Those words were to have been given their ordinary English meaning which was wide (see the EHRC Code). They did not equate to 'act' or 'decision'. In the context of defining a PCP, a 'practice' generally required a sense of continuum. Although it did not need to have been applied before or applied to everyone, a claimant had to demonstrate that it would have been applied or that it was capable of broad application. It was akin to an expectation which applied to other employees or was repeated (*Ahmed-v-DWP* [2022] EAT 107. A PCP connoted a state of affairs.

6.28 We then turned to the question of disadvantage under s. 19 (2)(b) and (c). That required us to ask two questions; first, whether people who were in the same pool as the Claimants were exposed to a particular disadvantage as a result of the PCP and, secondly, whether the Claimants themselves were exposed to that disadvantage. It was permissible for us to take judicial notice of matters which may have led to a conclusion in relation to the group disadvantage (*Dobson-v-North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699) but, in this case concessions were made (see below).

6.29 The word 'disadvantage' set a relatively low threshold. We bore in mind, in particular, the Equality and Human Rights Commission's Code of Practice from 2011 (paragraph 4.9).

6.30 The Claimants' case here was that they had suffered discrimination indirectly by association with their disabled relatives. In Employment Judge Dawson's Case Management Summary of 16 August 2022, he stated that the law in this area was '*best described as unsettled*'. In other words, it was far from clear whether Claimants were able to bring such claims under the terms of the Equality Act.

6.31 The Judge referred to a case decided in the Employment Tribunals in Scotland by Employment Judge Hosie in June 2020 in which the Judge had decided at a preliminary hearing that the Tribunal had jurisdiction to consider a complaint of indirect discrimination by association (*Groves-v-William Walker Transport Ltd* ETS No. 4100338/20). The actual merits of the claim were not determined at that hearing.

6.32 In *Groves,* the Judge determined that, although the wording of s. 19 clearly required the individual (B) to possess the relevant protected characteristic, that requirement was not to be found in the EU Directive which was implemented by the Equality Act.

6.33 The difference between the Act and the Directive had not been highlighted until the case of *CHEZ Razpredelenie Bulgaria AD-v-Komisia Za Zashtita OT Diskriminatsia* [2015] IRLR 746, ECJ in which the Grand Chamber of the Court of Justice suggested that the principle of discrimination by association ought not to have been restricted to cases where there was a close personal link, as in *Coleman*, but extended to cases where unassociated claimants suffered "*collateral damage*". The principle of equal treatment, it found, was intended to benefit people who, although not necessarily themselves in possession of the relevant

protected characteristic, nevertheless suffered less favourable treatment as a result of others who did.

6.34 Employment Judge Hosie in *Groves* concluded that, because the wording in the Disability Directive (No. 2000/78) was practically identical to Article 2 (2)(b) of the Race Equality Directive, which was the focus in *CHEZ*, the same result should have been achieved. It was clear that it was decision which was found to have been "*not..at all* easy" (paragraph 36) and a conclusion which was reached "*with some hesitation*" (paragraph 42). It was not one which was binding on us.

6.35 It was to be noted that much of his Judgment strongly echoed the wording of the *IDS Handbook* on the subject (Vol. 5, paragraphs 16.150-153). *IDS* also referred to the Tribunal decision in the case of *Follows-v-Nationwide Building Society* ET No 2201937/18 in which a manager who worked from home because she cared for her elderly and disabled mother, was required to attend the office more regularly. One of the claims which she brought was of indirect discrimination based upon her association with her disabled mother. Also stating to follow *CHEZ*, the Tribunal allowed the claim and rejected the Respondent's arguments on justification.

6.36 Without any disrespect to the Tribunal in *Follows*, the reasons given for its decision were not as clearly set out as those in *Groves.* There was a short description of the relevant law within paragraph 20 and reference to *CHEZ.*

6.37 Yet more recently, there was the further Tribunal decision in the case of *Rollett and others-v-British Airways plc* ET No. 3315412/2020, decided in the Reading Tribunal on 29 December 2022. Employment Judge Anstis' Judgment is, perhaps, the most thorough examination of the law in this area that we found.

6.38 In *Rollett,* the Judge discussed what were considered to have been two different types of associative discrimination; the *CHEZ*-type and the *Follows*-type.

6.39 A *CHEZ*-type claim involved a claimant who did not have the relevant protected characteristic but who nevertheless suffered the same disadvantage as those who had it. The editors of *Harvey* had suggested that that was not in fact a case of associative discrimination at all (paragraph 8 of the judgment, referring to *Harvey* L [291.03]).

6.40 Before Judge Hosie in *Groves*, the Respondent ran the argument that, following the decision in *Marleasing SA-v-La Comercial Internacional* [1991] 1 CMLR 305, s. 19 could not have been interpreted to include a claim for associative disability discrimination, even if it was at odds with the Framework Directive, since its clear wording did not support such an interpretation. The *Marleasing* principle was only at play if there was some wriggle room in interpretation (see paragraph 23 judgment in *Groves*). Judge Anstis agreed that the wording of s. 19 was "*clear and unambiguous*" (paragraph 21), but he stated that it was equally clear that it did not properly implement the Equal Treatment Directive following *CHEZ.* He had to ensure that the section was interpreted in accordance

with the Directive even if it required the notional addition or deletion of words, following the decision in *Vodafone 2-v-Revenue and Customs* [2009] EWCA Civ 446 (paragraph 21). *CHEZ*-type discrimination remained unlawful.

6.41 The *Follows*-type situation was different. Such cases involved situations where the claimant, who did not possess the protected characteristic, associated with a person who did and suffered a disadvantage which was unique to that association (paragraph 10 in *Rollett*). The person with whom he associated did not suffer the same disadvantage. Judge Anstis rightly indicated that the position was very different (paragraph 28);

> "*Those submissions are helpful, but go nowhere near showing that I am compelled or ought to read into the statute words that are not there, or remove express limits. There is nothing like Chez in this situation that requires me to rewrite the statute in accordance with EU law. I see no basis on which I could properly extend the tribunal's jurisdiction to encompass Follows-type associative discrimination.*"

6.42 The Claimants in this case are in the same factual position as the Claimant in *Follows*. This was not a situation, as in *CHEZ,* in which they were suffering the same disadvantage as people around them who possessed the relevant protected characteristic. This was not a case of collateral damage. Rather, they asserted that the disadvantage was suffered uniquely through their association with their relatives who were not disadvantaged in the same way.

6.43 As stated in *Rollett*, the arguments for treating those Claimants in accordance with the decision in *CHEZ* was not made out. There was already higher court authority for the proposition that s. 20 did not extend to associative claims (*Hainsworth-v-Ministry of Defence* [2014] 3 CMLR 43). Section 19 was, of course, much more strongly aligned to s. 20 insofar as it contained the requirements for a PCP and a substantial (rather than 'particular') disadvantage. In *Follows*, neither *Marleasing* nor *Hainsworth* were referred to. In *Groves*, the *Hainsworth* and s. 20 points were not addressed head on within paragraph 40 of that Judgment.

6.44 Accordingly, s. 19 did not encompass the *Follows*-type associative claims advanced here. This avoided the further practical problem which employers might face; designing policies and practices for their workforce that not only catered for their needs but those who they associated with.

6.45 Nevertheless, if the Claimants were able to demonstrate the essential elements of the test within s. 19 (1) and (2)(a)-(c), the First Respondent had a defence if it could show that the treatment was "*a proportionate means of achieving a legitimate aim*". (s. 19 (2)(d)).

6.46 Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily

render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). The test was not as loose, however, as the range of reasonable responses test (*Scott-v-Kenton Academy Schools* UKEAT/0031/19/DA, paragraph 58).

6.47 If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the defence in the section. In *Buchanan-v-Commissioner of Police of the Metropolis* UKEAT 0112/16 HHJ David Richardson drew a distinction between objective justification for the purposes of s. 15 (2) and justification of the general application of a policy (such as in the case of *Seldon*). HHJ Richardson explained that since the focus must be on "the treatment" by the putative discriminator, it is necessary to start by identifying the act or omission, and asking whether that act or omission in a proportionate means of achieving a legitimate aim. Therefore, there will be some cases where, rather than the act or omission being the application of a general rule or policy, what must be justified is the treatment at each stage in the policy (see paragraphs 42 to 49).

6.48 It was important to remember that justification had to be considered against the PCP's impact upon the business generally, not just the individual employee (*City of Oxford Bus Services Ltd-v-Harvey* UKEAT/0171/18/JOJ) and that the section required a Tribunal to make its own '*critical evaluation*' of the evidence against the statutory test.

Indirect disability and race discrimination (First Claimant); conclusions

6.49 There were two separate cases of indirect discrimination to address; both Claimants' claims of indirect associative discrimination and the First Claimant's separate claim on the grounds of race.

6.49.1 Disability;

For the reasons which we have given, we did not consider that we had jurisdiction to consider the Claimants' claims under s. 19. The section was not broad enough to encompass the *Follows*-type claims that they were seeking to advance.

Even if we were wrong, what of the PCP contended for? The PCP was said to have been the requirement for employees to work at the office (paragraph 6.1.1 of the Case Summary). By 'employees', we took that to mean Unit Coordinators specifically. Had that PCP been applied to them?

On 15 September, the Second Respondent set out her "*aspiration*" that Unit Coordinators would come into the office "*at some point or other* [in the week]" but remained "*happy to negotiate*" [125]. On 7 October, she was recorded as having been "*encouraging staff to come into the office*", that she was "*looking to develop a rota*" [132] and that "*no one had been pressurised to come in but bit by bit, due to the challenges presented to staff, they had felt able to return.*" [136].

In our judgment, there was no 'requirement' for them to have attended the Welsman. There had been no instruction or mandatory direction. No consequences had been set out should they not have attended. The Respondents had steered away from such conflict at that point. We readily accepted that it might have come, but it had not done by the time that they accepted offers of redeployment;

6.49.2 Race (First Claimant only);

The First Claimant's alternative claim under s. 19 was a very different case. It did not fail by reason of its reliance upon an associative element. She relied upon her own protected characteristic, her Bangladeshi ethnicity.

The First Respondent accepted both the group and the personal disadvantages under s. 19 (2)(b) and (c). It did not, however, accept the application of a PCP (s. 19 (2)(a)) and it advanced a justification defence under s. 19 (2)(d) (dealt with separately below).

The PCP point fell to be dealt with as it had been in respect of the disability claims; no requirement had been placed upon her to return to the Welsman. In fact, it was the Second Claimant who came closer to achieving that since she had to be persuaded to accept the offer and claimed that more pressure was brought to bear on her before she ultimately relented and accepted it. The First Claimant, on the other hand, had accepted her offer more readily at the meeting on 22 December and left the meeting early.

6.49.3 Justification;

Although all complaints of indirect discrimination failed for the reasons given above, we considered the First Respondent's justification defence for the sake of completeness.

We were satisfied that the First Respondent was experiencing difficulties at the Welsman, as demonstrated by the Second Respondent's evidence (paragraph 4) and other documents ([139-140] and [347]). We accepted that Social Workers had raised these issues with her and that had caused her to recruit more Unit Coordinators who were prepared to attend the offices. The problems were no illusory.

To remedy them, was it proportionate to encourage staff back to work? We considered that it was. The Second Respondent's evidence was that, if staff had a reason for not attending the office which was medically certified, they would have been left out of the Unit Coordinators' rota for attending the site. Their work would have been adapted so that they could have continued to work at home. That was what happened in respect of Ms Mason and another unnamed Coordinator, she said. It also appeared to have happened in Ms McLeod's case from March 2021 when she

returned to work after illness, albeit for a brief period until her redeployment. In short, therefore, the Second Respondent was prepared to able to adjust the rota to excuse some from attending the Welsman *entirely*.

She was clearly undertaking a balancing exercise; if an employee had been certified as disabled and medically unfit to attend the Welsman because of the Covid-19 risks which attached, the balance would have tipped in their favour. If a relative of an employee was in a similar position, she took a different position (as in the Claimants' cases). If, like the First Claimant, she was of an ethnicity which carried an enhanced risk of serious illness from the disease, a different view was held because the specific risk assessment in her case stated that she was safe to have worked at the Welsman. The Second Respondent concluded that that was sufficient.

Whether her individual judgments were correct or fair was not necessarily the same thing as assessing the question of justification. Making a request, expressing a desire and/or voicing an aspiration was, in our judgment, justified. There was a legitimate aim and those were relatively soft means of attempting to achieve it. But if they had been *mandated* to have returned, our judgment may well have been different. Adaptations could have been, and were, made for certain employees. Matters never got that far though. If the Claimants had refused their redeployment offers and the Respondents had insisted upon a return, we can see that that might have been a difficult position to maintain.

<u>Unlawful deductions from wages; conclusions</u>

6.50 This part of the claim concerned the fact that the Claimants' uplift in pay which attached to their redeployed BG9 roles, did not take effect until 29 December. They maintained that their redeployments had occurred upon receipt of the letter of 11 December 2020 [220-3] and that they ought to have been paid the uplift from that point.

6.51 We did not accept their arguments for the reasons stated above. From the point that they did fulfil their new roles, 29 December, both were paid appropriately and there was no unlawful deduction between the 11th and 29th

<u>Failure to provide undated written terms and conditions of employment; conclusions</u>

6.52 Although not clearly identified in the Case Summary, the claim had been acknowledged to include a complaint that the Claimants' terms and conditions had not been amended upon redeployment. The Respondents had responded to such a claim within the Response [39].

6.53 Mr Small accepted that changes in accordance with s. 4 of the Employment Rights Act were not made to their terms and conditions in relation to pay, title and the period of the redeployment (s. 1 (4)(a), (f) and (g)). However, the Tribunal only had power to make a financial award in respect of such a failure where a claimant succeeded in respect of some or all of their other claims (s. 38 of the Employment Act 2002 and *Advanced Collection Ltd-v-Gultekin* UKEAT 10377114 6 February 2015). Despite the First Respondent's failure in this regard, no compensation was payable.

Concluding comments

6.54 The Tribunal recognised that mistakes had been made by the Respondents; administrative errors concerning the sending of letters, the Claimants' removal from the email circulation list and the updating of their contracts, an important grievance meeting which was not minuted and an approach to it which left them feeling that their concerns had not been heard. At the same time, the country was dealing with the effects of the Covid-19 pandemic. The Respondents had the responsibility of protecting children at a time when they were suddenly confined to their homes with their families. This was hardly 'business as usual'.

6.55 At the same time, we also recognised the very real fear which the Claimants had felt about returning to the Welsman. With Covid in the rearview mirror, it was easy to take a more complacent view of 2020 than had experienced by many at the time. People were anxious and scared. Nothing in this Judgment should be read to suggest that we decried or sought to minimise the Claimants' feelings in that regard.

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Employment Judge Livesey
Dated 29 August 2023

Judgment & reasons sent to the Parties on 18 September 2023

For the Tribunal Office