THE EMPLOYMENT TRIBUNALS

Claimant Mrs Gemma Dobson

Respondent Cumbria Partnership NHS Foundation Trust

Heard at Manchester Employment Tribunal (via CVP video link)

On 22-24 November 2022 & 21-22 March 2023
2-3 May 2023 (in Chambers)

Before Employment Judge Langridge
Members Mr D Wilson
Ms V Worthington

Representation:

Claimant Ms S Berry, counsel
Respondent Mr S Brittenden, counsel

JUDGMENT

(1) The steps taken by the respondent to apply its PCP that all community nurses work flexibly, including at weekends, were a proportionate means of achieving a legitimate aim for the purposes of section 19(2)(d) Equality Act 2010.

(2) Accordingly, the claimant's claim of indirect sex discrimination under section 19 Equality Act 2010 fails.

(3) The claimant's dismissal for some other substantial reason was fair under section 98(4) Employment Rights Act 1996.

(4) The claimant's claims are dismissed.

REASONS

Introduction

1. This indirect sex discrimination claim was remitted to the Tribunal by the Employment Appeal Tribunal, following a successful appeal on the applicable pool of comparators, and on the question of disadvantage. In paragraph 53 of its judgment dated 24 June 2021, the EAT said of the disadvantage to the claimant:

> "Mr Sutton sought to emphasise that the claimant's difficulties were not insurmountable given that the respondent sought to give her as much notice of changes as possible, and that her husband was available at weekends to help. However, we agree with Ms Darwin that that is to misunderstand what is meant by disadvantage in this context. It does not need to be impossible for an employee to comply with a requirement before there is disadvantage. The fact that compliance is possible but with real difficulty, or with additional arrangements having to be made, or by shifting the childcare burden onto another, can still mean that there is a disadvantage."

2. In paragraph 56 the EAT dealt with group disadvantage:

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

3. The key purpose of this rehearing was for the Tribunal to revisit the respondent's defence of justification under section 19(2)(d) Equality Act 2010. The unfair dismissal claim was also remitted, on the understanding that the fairness of the dismissal may be impacted by an unjustified element of discrimination, in which case

it would likely stand or fall with the indirect discrimination claim. Both parties agreed that this was the correct approach.

Remitted hearing

4. This remitted hearing was heard by CVP video link in November 2022, but the three days allocated proved to be insufficient to conclude the case. The lapse of four years since the original hearing of these claims in October 2018 created some difficulties for the Tribunal. We had to read back into the case and remind ourselves of the evidence (written and oral) given at the previous hearing. The Employment Judge's notes of that evidence were reviewed and relied upon during deliberations in chambers. Nothing in the EAT judgment had disturbed our previous findings of fact.

5. On the first day of this hearing on 22 November, we were told the parties had prepared an agreed bundle comprising over 700 pages, incorporating the bundle from the original hearing with some updated content. The claimant had prepared a supplementary bundle containing a small number of documents and emails, and in addition she presented two further separate documents: details of a Community Nurse vacancy at the respondent's site in Workington, and the respondent's Rostering Policy dated January 2016.

6. The Tribunal had the original written statements of those witnesses who had given evidence in 2018, plus new witness evidence dealing with the issues for the remitted hearing. The claimant provided a second statement on her own behalf and a statement from Jane van Zyl, Chief Executive Officer of Working Families, Intervenor in the appeal to the EAT. For the respondent, new witness evidence was provided from Salli Pilcher, Associate Director of Nursing for Community Services, reflecting the fact that the Tribunal needed to consider the position across the respondent Trust, rather than confine itself to the pool originally relied on, namely the team in Cockermouth in which the claimant worked.

7. The claimant sought also to rely on a supplemental witness statement she said was prepared in response to new evidence in Ms Pilcher's statement. The late production of this supplemental statement (received by the respondent on the day before this hearing) was explained by reference to the claimant's representative's recent illness, but that aside, the respondent objected to some of its contents. Mr Brittenden submitted that it was more than a reply to Ms Pilcher, that the respondent would need to bring rebuttal evidence, and that it was prejudiced. It was agreed that the Tribunal would include the supplemental statement in its pre-reading, and hear arguments about its admissibility at the outset of the second day of the hearing. The remainder of the first day was then spent on reading.

8. The respondent's objections to the claimant's supplemental statement included the fact that it introduced new matters not previously referred to in her evidence in 2018, nor in her second statement for the remitted hearing. She sought to summarise the gist of the oral evidence given by Mr Owens in 2018 which appeared inconsistent with his written statement. The respondent's other key concern was the claimant's reference to the working pattern of another employee, unsupported by any evidence.

9. Ms Berry replied by identifying those parts of Ms Pilcher's statement to which the claimant wished to reply, including a response to her evidence about the introduction of Integrated Care Communities. She said the 2018 hearing dealt with the Cockermouth team in which the claimant worked, whereas Ms Pilcher's evidence dealt with the wider picture, and the claimant was entitled to challenge that. Some references to new documents reflect the fact that the claimant obtained them after the 2018 hearing through Freedom of Information requests.

10. After considering the objections we allowed the claimant's supplemental statement to be introduced in evidence in part. We excluded the paragraph which sought to summarise Mr Owens' oral evidence in 2018. We were not prepared to open up a debate at this late stage about the accuracy of notes of oral evidence, which we did not feel was proportionate or relevant. We excluded the paragraph the subject of the respondent's strongest objection, in which the claimant provided unsupported evidence of a colleague's working pattern, on the grounds that there was no source for the information identified, it was not possible to evaluate the relevance or accuracy of what the claimant said, and there was clear prejudice to the respondent.

11. We allowed other content to be admitted into evidence, despite its unnecessarily late production, while expressing our doubts because its relevance was not clear. It was difficult to see what this content could add to the case. We also noted that these parts of the supplemental statement amounted substantially to points of argument rather than evidence. In one paragraph, the claimant developed a point made in her second statement about the respondent's business case, asserting that "this never mentioned the introduction of ICCs (the reason Ms Pilcher now seeks to rely on)". This point was pursued by the claimant at some length during Ms Pilcher's cross-examination.

12. Before the remitted hearing could begin in November 2022, the Tribunal encountered some other practical and technical difficulties which delayed its start. One of these was the lack of clarity with documents and the absence of a complete hearing bundle due to misunderstandings about uploading a single paginated bundle to the DUC. Several attempts were made to help the solicitors on both sides to resolve this problem, but nevertheless it was not until late in the second day of the hearing that a single combined bundle was available to the Tribunal. We were not prepared to start the hearing without a single paginated bundle, given the inherent difficulties of dealing with a bundle separated into multiple parts and the ensuing confusion over pagination. Both parties' solicitors had been directed to deal with the agreed bundle in February 2022. This and other delays meant that it became inevitable that the November hearing would be part-heard. As a result, we agreed to hear the claimant's evidence on the third day and defer hearing from the respondent's witness until the hearing could be resumed.

13. The claimant's oral evidence was completed on 24 November, and following this the hearing resumed on 21 March 2023 when Ms Picher's evidence was heard. On 22 March, we heard the parties' submissions. After her submissions Ms Berry requested permission to read out a personal submission prepared by the claimant, which we permitted.

14. The overall timetable has been affected by a number of difficulties, including the diaries of everyone involved in relisting the hearing. Unfortunately, due to a number of prior commitments on the part of all members of the Tribunal, it was not then possible to meet for deliberations in chambers until 2-3 May 2023. Following deliberations the Employment Judge's availability has been extremely limited due to other judicial and personal commitments, including some health issues and annual leave. The parties have been updated about the impact of this on the time frame for this judgment to be promulgated.

The Tribunal's approach

15. As stated above, these claims were remitted for a fresh consideration of the question of justification following the EAT's findings that the claimant was disadvantaged by the respondent's application of its PCP, and that group disadvantage was made out by reference to the 'childcare disparity' about which Ms Van Zyl gave evidence. The Tribunal's findings of fact in its original judgment were undisturbed, and indeed no perversity appeal was brought in order to challenge them. For ease of reading, some key findings of fact are summarised below, and further findings are made by way of supplementing them.

16. At the original hearing of this claim, the claimant was represented by different counsel. Her pleaded case and her witness evidence adhered explicitly to the argument that the pool of comparators with whom she should be compared was the small team in which she was employed in the Cockermouth area. One of the factors which influenced our decision then was a distinguishing feature of the claimant's case, as her particular difficulties (compared to that small pool) seemed to arise from the fact of her children's disabilities. While not expressed in terms in the Tribunal's first judgment (given orally), we accept without difficulty that women more than men are likely to be disadvantaged in the workplace by the demands on them for providing childcare in the family.

17. At this remitted hearing we set out to make the comparison between the claimant and the wider pool of community nurses employed by the respondent Trust, and to remind ourselves of the group disadvantage.

18. At the start of this hearing Mr Brittenden for the respondent submitted that the EAT's reasoning for remitting the issues was that it:

    a. accepted that a finding as to justification is a finding of fact that will not readily be disturbed by this appeal tribunal. However, where the analysis of justification is based on an erroneous pool which potentially undermines the conclusion as to the disadvantage in question, then the conclusion on justification cannot be treated as safe. Whilst it is quite possible that the conclusion on justification will remain the same even when scaled up to the entire group to which the PCP was found to apply, this is not something that can necessarily be assumed.

    b. The reason for dismissal here was the inability to comply with the need for all community nurses to work flexibly, and was inextricably linked to the PCP giving rise to the alleged indirect discrimination. If it is indirectly

discriminatory to impose the requirement to work flexibly, then that might provide some support for the contention that dismissal for failing to comply with that requirement falls outside the band of reasonable responses open to the employer.

c. If the PCP was justified in respect of the Cockermouth Team, it is no less likely to be justified in respect of the wider pool.

19. For the claimant, Ms Berry provided written opening submissions, helpfully summarising the key facts, setting out pertinent extracts from the EAT's judgment, and identifying the issues for this hearing.

Issues for determination

20. The EAT's Order sealed on 24 June 2021 set out a List of Issues for the remitted hearing, as follows [same numbering adopted]:

1. **Indirect Sex Discrimination Section 19 Equality Act 2010**

1.1 The respondent applied the following provision, criteria or practice "PCP" namely a requirement that its Community Nurses work flexibly, including at weekends – EAT Judgment paragraph 72. This PCP was applied by R on a Trust-wide basis – EAT Judgment paragraphs 26 to 30.

1.2 The PCP (i) put women at a particular disadvantage compared to men – EAT Judgment paragraphs 52, 57 and (ii) put the claimant at that disadvantage – EAT Judgment paragraph 74.

1.3 Whether R can show that the application of the PCP was a proportionate means of achieving a legitimate aim for the purposes of section 19(2)(d) Equality Act 2010.

Unfair dismissal section 98(4) Employment Rights Act 1996

4. C was dismissed for some other substantial reason for the purposes of section 98(1)(b) ERA 1996 – ET Judgment paragraphs 54 to 55.

5. Whether the dismissal was fair for the purposes of section 98(4) ERA 1996 – EAT Judgment paragraphs 68 to 69.

21. At the outset of this remitted hearing it was agreed with the parties that we would deal only with liability at this stage, such that the remedy issues identified in the List of Issues would not be addressed unless and until the claimant were successful on liability.

22. It was for the respondent to show that it had a legitimate aim and that the steps it took to achieve that were proportionate. The aim pleaded by the respondent in its Amended Response was:

"*the need to provide care to patients in the community, 24 hours per day, 7 days a week and to balance workload amongst the team and reduce the cost of having to use band 6 and 7 registered nurses on a weekend*".

23. The respondent further pleaded that:

"*[h]aving regard to all the alternates suggested to the Claimant, all of which were rejected, dismissal and reengagement was a proportionate means of achieving that legitimate aim*".

24. In the Tribunal's first judgment [paragraph 75] we concluded that:

"… the evidence (as summarised in the respondent's business case) showed clearly that it was pursuing the legitimate aim of achieving flexible working by all community nurses in order to provide a safe and efficient service…"

25. The finding that these were the aims pursued by the respondent, and that they were legitimate, have therefore already been made and remain unchanged by the EAT judgment. The question for this hearing was therefore focussed on the proportionality of the measures taken by the respondent, balanced against the disadvantage to the claimant, and in the context of the Trust-wide pool of Community Nurses.

Relevant law

26. Section 19(2)(d) Equality Act 2010 provides that:

(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.

27. The respondent has already satisfied the Tribunal that it had a legitimate aim and for the purpose of this hearing it bore the burden of establishing proportionality.

28. The Tribunal was directed by both parties to three key authorities on the justification defence.

29. In Hardy v Hansons and Lax [2005] IRLR 726 the Court of Appeal, in holding that section 19(2)(d) requires the employer to show that the proposal is objectively justified notwithstanding its discriminatory effect, gave guidance on the Tribunal's approach to proportionality.

> *"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.*
>
> *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. […] 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."*

30. The qualification of "reasonably" does not permit a margin of discretion or range of reasonable responses. It is also important to assess the impact of the PCP on the particular circumstances of the business, not the individual. In principle, objective justification is possible even if other proposals were possible. The more serious the disparate adverse impact, the more cogent must be the justification for it.

31. The employer does not have to demonstrate that no other proposal is possible. In assessing proportionality, the discriminatory effect should be looked at both quantitively (in terms of the numbers or proportion of persons affected) and qualitatively (in terms of the impact and how long lasting it is).

32. In Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601 the test was articulated by the Supreme Court as follows:

    - Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right?
    - Is the measure rationally connected to that aim?
    - Could a less intrusive measure have been used? and
    - Bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?

33. The Court reinforced the view that this is not a question of what a reasonable employer might think justifies the measure. 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.

34. The Supreme Court in Essop and others v Home Office (UK Border Agency) [2017] IRLR 558 said that the law of indirect discrimination "aims to achieve a level playing field where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified". It added:

> "It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. A wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while still achieving the desired result".

35. The Tribunal considered all of the points made in the parties' submissions and other relevant authorities including those referred to below.

36. While in Essop it was recognised that statistical evidence might be available to support a justification defence (gleaned perhaps through monitoring), in its 2008 decision in Homer, the EAT expressed the view that 'concrete' evidence is not always required and, in appropriate circumstances, justification can be established by "reasoned and rational judgment". In the later Court of Appeal decision in Air Products v Cockram [2018] IRLR 755 it was held that the detail and weight of the evidence required will depend on what proposition the employer is seeking to establish and "some propositions are so obvious that they barely require evidence at all."

37. Although an employer is not required to prove there was no other way of achieving its objectives, the EAT Birtenshaw v Oldfield [2019] IRLR 946 suggested it is incumbent on a Tribunal to undertake a consideration of whether there were other less discriminatory (or non-discriminatory) ways by which the legitimate aim could have been achieved. The claimant does not have to have suggested particular alternatives expressly. The EAT also held that although there may be evidential difficulties for a respondent in discharging the burden of showing objective justification when it has failed expressly to carry out this exercise at the time, the ultimate question for the tribunal is whether it has done so. The EAT said that the Tribunal's consideration of that objective question "should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly". Furthermore, whilst justification has to be established at the time when the unfavourable treatment was applied, the tribunal when making its objective assessment may take account of subsequent evidence.

38. In Pitcher v University of Oxford, University of Oxford v Ewart (EA-2019-000638-RN, EA-2020-000128-RN), the EAT stated that:

- Some matters will be so obvious (*Cockram*-obvious) that they will barely require evidence
- While the requirement to objectively justify the discriminatory measure arises from the start of its application, evidence of impact on legitimate aims may sometimes be hard to come by soon after the implementation of a particular measure or, more generally, it may be the case that causative effect is genuinely difficult to isolate.
- A Tribunal should not require evidence from an employer which it cannot reasonably be expected to produce.
- These observations do not detract from the requirements placed upon the employment tribunal, as laid down in Hardy & Hansons: v Lax: if the Tribunal's assessment is to demonstrate the requisite critical and thorough evaluation, it

will necessarily look for evidence rather than mere assertion (albeit that evidence may take the form of reasoned projection rather than demonstrable result) and will require a degree of cogency in the employer's case.

39. In the more recent case of Heskett v SoS for Justice [2020] EWCA Civ 1487, the Court of Appeal made clear that the justification defence cannot succeed if the aim is no more than a wish to save costs. If it is not, then it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The Court also held that:

> *"An employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books can constitute a legitimate aim for the purpose of a justification defence: that proposition is correct in principle. There is no principled basis for ignoring the constraints under which an employer is in fact having to operate. Almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent; and it is unreal to leave that factor out of account."*

40. Turning to the unfair dismissal claim, aside from the considerations under section 98 Employment Rights Act 1996, the Tribunal was referred to the EAT decision in Market One Europe LLP v Rojas UKEAT/0307/11/LA:

> *"the true reason for the claimant's dismissal […] was because she would not or could not comply with the PCP […]* on the evidence by reason of the application of the PCP she suffered indirect discrimination. That finding obviously supports the finding of unfair dismissal."

41. In this case, if the respondent were unable to justify the PCP, which the dismissal decision, then it would be unsurprising for the Tribunal to find that that decision feel outside the band of reasonable responses due to the underlying discriminatory impact on the claimant of her inability to comply with the PCP.

Findings of fact

42. The most relevant findings of fact from the Tribunal's first judgment can be conveniently summarised in the following paragraphs.

43. The claimant was working for the respondent as a Community Nurse on Band 5, based in a small team of nine women and one man in Cockermouth. Seven of that team were on Band 5 like the claimant, two were on Band 6, and Mr Owens, District Nurse Team Leader, was on Band 7. The three nurses on Bands 6 and 7 were carrying out a mix of clinical and management duties. All members of the team were working flexibly, including the women who had caring responsibilities for their children, though in that group the claimant was the only person caring for children with disabilities.

44. In 2008 the claimant requested flexible working and the respondent agreed to reduce her hours to 15 a week, working Wednesdays and Thursdays only.

45. The findings about the claimant's childcare difficulties were that:

- Her mother-in-law had reduced her own working hours so she could provide childcare on Wednesdays and Thursdays.

- Her husband worked Monday to Friday and was able to help with the care of their children in the mornings and evenings.

- The claimant felt it was unfair to ask her husband to be a weekend carer on his own after doing a full week at work.

46. On a previous occasion, on 30 June 2013 the claimant had been asked to work the occasional weekend to support the team. She "made it categorically clear that [she] had no other options for days to attend work due to [her] caring responsibilities for [her] daughter". The respondent agreed to allow her fixed days to continue due to her difficult domestic circumstances. Working only Wednesdays and Thursdays was not a term of the claimant's contract but rather an accommodation under the Flexible Working Policy which could again be reviewed in the future.

47. In January 2016 the respondent issued a new Rostering Policy under which all flexible working arrangements were to be reviewed across the Trust.

48. At a meeting to review her flexible working on 8 September 2016 with Mr Owens, the claimant was asked to work an occasional weekend, no more than once a month. The majority of the claimant's team worked one weekend per month. The claimant reiterated her position that she "had no other guaranteed childcare for weekends" and "could only work on Wednesday and Thursday". This was because her mother-in-law had no availability to look after her children except on those days. Her union representative recommended she submit a new formal flexible working request. The claimant did not see the need to do this and instead relied on the existing agreement. In a follow-up letter dated 13 September the claimant wrote to Mr Owens saying, "I will not be considering alternative arrangements as I have none available to me".

49. In a grievance raised on 8 November, the claimant relied on indirect sex discrimination, saying that, "as a mother the burden of childcare lies with me". At that time she also felt this was disability discrimination by association. At the grievance meeting with Ms Place on 12 December the respondent accepted that the claimant was facing domestic challenges due to her childcare responsibilities. At this meeting the claimant said she could not work even one weekend in a year, and requested that the issue of flexible working never be raised again.

50. On 15 February 2017 the respondent provided the claimant with a business case with appendices, setting out a number of reasons for the proposed changes to her working pattern, including the cost implications of paying enhancements to Band 6 and 7 staff at the weekends, and the consequences of those staff not being available as often during the working week to attend management meetings and to supervise colleagues in the team. The business case also referred to the impact on other team members, giving the example that others would expect in principle to work one in three Christmases, whereas in the claimant's case it would be one in seven. In practice the claimant never actually did work on a public holiday. Other matters mentioned in the business case included patient-driven changes, such as the earlier

discharge of patients from hospital, and more complex care needs in the community setting.

51. At a sickness review meeting on 23 February 2017 the claimant was again asked to work flexibly, doing her regular days but – provided that several weeks' advance notice was given – sometimes working a different day including occasional weekends.

52. At the ensuing 'options meeting' with Ms Baxter (Community Manager) on 30 March, the claimant rejected being placed on the redeployment register. There was some discussion about the difficulties of her having set working arrangements on others in the team, and on the respondent's ability to cover the rota effectively. The claimant also mentioned redundancy or settlement.

53. On 20 April at a further meeting with Ms Baxter, the claimant was notified of the decision to dismiss and re-hire her on new flexible terms. This would mean working 15 hours a week on Wednesdays and Thursdays, but subject to the respondent giving notice of any different days to be worked.

54. The dismissal letter dated 26 April referred to the increasing pressure on the Trust to have greater flexibility on its rota. It also referred to a full-time vacancy in Workington identified by the claimant, which she felt she could do as a job share. The claimant was advised to apply for the post, but decided not to as she felt discouraged by the respondent's expectation of providing some flexibility.

55. At the appeal hearing on 8 June with Ms Turnbull (Senior Network Manager), she discussed with the claimant the problems caused within the team, without being specific. When asked, the claimant was unable to identify any gaps in the respondent's business case. There was some discussion about the cost implications of leaving the claimant's arrangements unchanged, and the absence of senior staff being available to work on weekdays. As far as the claimant was concerned, the only acceptable outcome was to make no change at all to her working arrangements.

56. The findings of fact which follow reflect the Tribunal's further consideration of the issues at the remitted hearing. As before, these are designed to address the key issues and are not intended to be a recitation of all aspects of the evidence taken into account in making our decision.

57. At the relevant time (October 2016) the respondent Trust employed 5,313 people. Of this number, a total of 278 Band 5 Community Nurses were employed across five areas, of whom 178 were employed on part-time contracts. Beyond those numbers, the respondent was unable to provide the more detailed data requested by the claimant, for example showing the number of Band 5 community nurses who worked set hours and/or days across the Trust. Such detail was either not retained or not available.

58. In a Freedom of Information request raised by the claimant on 16 February 2017, the respondent was asked for a breakdown of the number of patients on the workload within the Cockermouth community nursing team, broken down by year

from 2005 to the end of 2016. The reply dated 2 March 2017 stated that it was not possible to obtain that data because:

- The respondent had moved organisations three times since 2005
- Prior to mid 2014 the district nursing teams moved from one data collection system to another
- The current electronic patient record system did not collect case load data on a formal audit basis, providing only a snapshot of caseload numbers per team on any given day. It was not possible to look at previous caseload numbers retrospectively.

59. The respondent's Electronic Staff records system only records contractual information and works on the premise all staff are available to work 7 days a week. Working patterns are therefore not recorded.

60. An extract from the RCN Employment Survey 2021 survey was produced by the claimant for the remitted hearing. The report was dated dated March 2022 and set out data gathered in 2021, years after the events affecting the claimant, and at the height of the pandemic. The picture presented was a national one and did not show the position in Cumbria. The RCN survey found that:

- Just under two-thirds of nursing staff work full time, 33% work part time and a small number (4%) work occasional hours. The survey clearly shows how working patterns vary over the life course of nursing staff, with well over 90% of those aged under 34 reporting that they work full-time, compared to just under half (47%) of 55-64 year olds.

- In addition, there is a fairly even split between those working either shift patterns or fixed hours. Shift working is most common among those working in hospitals, where just under two thirds (63%) work shift patterns while fixed hours working is most prevalent among those working in community settings (67%). Women are much more likely to work part-time hours than men; 35% of women work part-time compared to 12% of men.

- 74% work in excess of their contracted hours at least once a week, 38% do several times a week and 17% work extra hours on every shift. 49% of all who work additional hours reported that these were unpaid.

61. In her evidence the claimant said that “fixed hours” was the most prevalent type of arrangement. She felt this “could mean” set days as that was how she read it.

62. The claimant also produced limited extracts from a CQC report dated 23 March 2016, following an inspection in November 2015. The respondent was given an overall ‘Good’ rating though safety required improvement. The report said:

> *“Audits had also been undertaken with regards to community nursing staff having sufficient staff to meet patients’ needs and this included the out of hours services. Staffing levels and grades of staff were reviewed in light of these audits and were being monitored.”*

63. When asked about this during cross-examination, it was put to the claimant that there were concerns about whether staffing levels were effective. In reply she said "Not that I was aware of'. In response to the suggestion that the review was an ongoing process, she said, "I'm not sure what you mean" and "It says that, but there is no further information there." The claimant acknowledged that she had not read the report it in its entirety, and had only included the parts which were relevant to her argument. Another part of the report (not in the claimant's supplementary bundle) referred to gaps in service.

Flexible Working Policy

64. The respondent operated a Flexible Working Policy, the relevant version of which was dated October 2015 ('the FW Policy'). It is described as providing "a framework for managing the promotion of flexible work patterns on a consistent basis across the Trust". Its objective is to "provide greater choice or flexible working patterns for staff" in order to:

- encourage recruitment and retention
- reflect good employment practice
- meet requests according to operational requirements

65. Under the FW Policy, "The suitability of working patterns for all staff will be reviewed annually as part of the appraisal process". A statement of intent says: "Although the priority of the Trust must be to ensure service delivery at all times, the Trust will try to offer all staff the opportunity to work flexibly." A process is set out to allow staff to make formal requests under the FW Policy, limited to one per calendar year.

66. Flexible working options include:

- part-time working: "for example: working […] certain days of the week"
- job-sharing one whole time post

67. The FW Policy acknowledges the advantages for the Trust, including:

- flexibility in staff planning to match peaks and troughs in activity
- having a greater range of skills and experience available in the team
- not losing existing staff who cannot continue to work full time

68. The FW Policy outlines the respondent's monitoring arrangements, for example carrying out an "analysis of the equality profile of applicants for flexible working" in order to demonstrate equality of opportunity of staff to apply to work flexibly. The Tribunal was not provided with any evidence that this was in fact being done.

Staff Rostering Policy

69. The respondent's Staff Rostering Policy ('SR Policy') was issued in January 2016. It was a Trust-wide policy and applied to the whole workforce. It led to a review of all flexible working across the Trust. The respondent was unable to provide the claimant with detailed information about the number of individual community nurses

affected by the SR Policy, or how many of those people worked full-time or part-time. Ms Pilcher's evidence was that no community nurses in the Trust were adversely affected by it, and only one other person, a physiotherapist, had to leave due to the increased need for flexible working.

70. The SR Policy states in its introduction:

> *"Staff rosters are one of the fundamental systems used to plan the delivery of care. It is essential that rosters are prepared in a way that maximises the benefits for patients by utilising the staffing resource is that we have as efficiently as possible.*
>
> *In order for staff to be able to achieve a work life balance, rosters must be drawn up giving sufficient notice, and taking reasonable account of the needs and wishes of individual members of staff."*

71. The SR Policy cross-refers to the FW Policy. One if its objectives is to provide the principles upon which all working patterns must be based. These are:

- To minimise clinical risk associated with sub-optimal skill mix and/or staffing levels
- To ensure safe / appropriate staffing for all departments using fair and consistent rosters
- To improve the utilisation of substantive Trust staff and reduce bank, agency and overtime spend
- To improve planning of clinical and non-clinical non-effective working days (eg annual leave, sickness and training)

72. The claimant relied heavily at the 2022 hearing on the SR Policy, and specifically the following parts:

> ***Paragraph 3.2*** "Managers have a responsibility to ensure that rosters are produced and worked in accordance with this policy."
>
> Detailed points are then set out in support of this general principle, and include agreeing safe staffing levels and the skill mix required for each shift.
>
> ***Paragraph 5.1*** Flexible working:
>
> "The Trust supports the principle regarding work life balance and flexible working. However, this should be set against the need to ensure a safe levels of staffing to maximise the quality of patient care and reduce clinical and non-clinical risk. …"
>
> ***Paragraph 5.3*** Skill mix and staffing levels:

> "Minimum safe staffing levels and skill mix […] for each ward/team/unit, must be agreed and reviewed in light of any significant change […]. Changing patient acuity levels/clinical risk must be taken into consideration when setting budgets and staffing levels/skill mix.
>
> The off duty of senior staff must accommodate both ward/team and management requirements, eg need to attend meetings etc.
>
> Consideration should be given to flexible working; however, this needs to be fair and equitable to all staff.
>
> All staff are expected to work a variety of shifts and shift patterns at managers discretion that have been specifically designed to meet individual service/ward need. Any exception to this is to be formally considered in accordance with the appropriate Trust policy, eg […] eg Promote Flexible Working Policy."

73. The claimant's working pattern was agreed in 2008 to be limited to 15 hours per week on Wednesdays and Thursdays. She was later rostered to work some later shifts on those same days, which in practice happened around 25% to 50% of the time. In her evidence in 2018 the claimant accepted that the needs of the service have to be balanced against personal needs. She also conceded that under the FW Policy, where agreement cannot be reached, service delivery is the primary need. However, her request had been accepted in the past, had not been reviewed and she wanted it left in place. This was at the heart of the claimant's stance in 2016/17 in response to the respondent's attempts to achieve agreement on more flexible arrangements.

The business case

74. The respondent's business case was prepared by Sandra Eagles, a member of the HR team, specifically for the claimant in the context of the discussions in 2016 about changing her working hours. Ms Eagles spoke to Mr Owens and Ms Baxter to obtain some of the information provided. The business case was a short and fairly generic summary of the increase in community nursing team hours since 2012, and referring to the changes in the complexity of care needs in the community. At the claimant's appeal hearing she was unable to give any examples of why she felt it was too generic, and likewise in the Tribunal proceedings she was unable to explain adequately what further information she needed about the context for the respondent's request for her to work more flexibly. Her objection boiled down to the fact that she could not see any reason why the changes in the service should mean changes to her hours.

75. The following extracts from the business case summarise the Trust's position:

> "Currently there are 11 registered community nurses at Cockermouth Cottage Hospital who work a total of 310 hours per week on a variable basis […] in order to ensure the provision of 7 days a week care for patients in a community setting which includes private and residential homes.

In 2008 [the claimant] asked for her hours to be reduced as part of the flexible working policy of the Trust from 20 hours per week to 15 hours per week. There is no flexible working request on file, but a change form reducing her hours confirms that this was authorised. […].

In 2013 there was a review and at that time, taking account of the staffing levels and provision of services, it was agreed that [the claimant] could continue to provide her services over two days per week. Those days have been a Wednesday and Thursday up until November 2016 when [the claimant] was given notice under the Organisational Change and Pay Protection Policy that in future and following 30 days' notice she would on occasion be required to work a shift outside of a Wednesday and Thursday to provide cover for operational reasons. This would not be a regular shift and [the claimant] would be given several weeks' notice of any such change as the rota is always drawn up in advance.

The community nursing staff is required to work flexibly over 7 days a week on a rota basis where prior warning of several weeks from provision of the rota to actual operation is applied. Staff can then request changes to the rota and things like annual leave are taken into account.

To cover this situation currently the financial implication is that the Trust has to ask band 6 and band 7 staff to cover the shifts working at an enhanced rate in order to provide the service over some weekends and bank holidays. This includes the team leader who has to forgo some of his management responsibilities to cover and to take a day off in lieu during the week - this is no longer operationally or financially viable.

At times this also results in senior nursing staff being absent during the week with insufficient senior cover during the week.

For this reason [the claimant] has been asked for some flexibility in her working arrangements, but not on a regular basis and with sufficient notice to alter her pattern of working. It has been suggested to her that she work an occasional Saturday, but by negotiation this could be in another format provided this results in the required level of service to patients. She has maintained that due to her childcare arrangements she can only ever work a Wednesday and a Thursday.

[The claimant's] inability to be flexible has resulted in unfairness to other staff eg based on current arrangements [the claimant] would only work one in seven Christmas holidays whilst other staff work one in three and there were no bank holidays which fall mid week. In practice [the claimant] has never worked a public holiday.

Whilst the Trust appreciates her difficulties at home the Trust is not asking her to be as flexible as her colleagues, but she is asked for some flexibility to maintain safe and effective service delivery to patients whilst maintaining the health and wellbeing of the other members of the team.

> The general direction of the Trust is that we are moving towards a point where staff will be required to work more flexibly within a challenging financial climate, trying to keep patients out of hospital."

76. The business case attached 5 appendices.

77. **Appendix 1** – Extract from the respondent's Organisational Change and Pay Protection Policy. Under the heading 'Ongoing minor change', it says that "staff are expected to make reasonable changes appropriate to the level of their post" and gives examples including "reasonable changes to core hours and shift patterns to ensure service provision is maintained, that do not result in a fundamental change to terms and conditions of employment."

78. The policy says that the reasons for any changes will be discussed with employees at the earliest opportunity, that they will be given the opportunity to state their views and suggest possible amendments, and that implementation of the change would not usually be expected to take more than 30 days from initial communication, though management discretion may be used to alter the timescale in relation to an individual's personal circumstances where appropriate.

79. The Organisational Change: Consultation Paper explains:

> *ICCs aim to address the challenges of an ageing population and increasing demand on health and care services by providing more out of hospital care and empowering people to take control of their health and wellbeing. This will require new ways of working …*
>
> *Community nursing is a 24/7 service and this will not change. In order to standardise patient care across north Cumbria nursing teams will be flexible in order to meet local need and provide a service up to and after 2000 hours seven days per week.*
>
> *All staff will participate in rotas to cover these core hours.*
>
> *All staff need to be flexible and work with other teams …*
> *All staff will need to be flexible and to work with other teams to provide cover in order to ensure 7 day working in particular to support smaller teams and ensure fairness across North Cumbria.*

80. **Appendix 2** – letter of 3 November 2016, confirming the changes to the claimant.

81. **Appendix 3** – Note on changes in hours and ways of working since 2010. This summarises the position in Cockermouth and the gradual changes to start and finish times in the preceding 6 years. It states: "Due to the increase in complexity and workload, since 2014 there has been a need for three staff on duty each day at weekends, 2 in the morning/afternoon and 1 in the evening. This has meant staff working more weekends, approximately 1 in 3".

82. The note goes on to deal with the increasing complexity of patient care. It states:

"The dependency of patient need is audited by CPFT in the second week of every month using the patient dependency tool developed by Keith Hurst. As this has only been introduced in more recent years there is no data to compare the complexity and dependency of patient need now, compared to then, however the increase in complexity of patient care being delivered at home now, as opposed to a few years ago, has been pointed out" by the Royal College of Nursing and the Department of Health in 2013, as well as the Queen's Nursing Institute in 2009 and 2014. The note quotes from and provides hyperlinks to those sources.

83. **Appendix 4** – Extracts from the Trust's Business Plan 2016/17. This refers to the provision of seven day services in different areas of the Trust, with general community nursing providing services 24/7. It states: "We recognise the ambition set out in the NHS Forward View to expand the range of seven day services and deliver better integrated services to enhance the patient offer and will use our strategic partnerships to develop a safe, affordable and risk-based approach to the expansion of seven day services across Cumbria."

84. In the summary of Trust Objectives included in this appendix, one of the community objectives was identified as: "Develop and agree place based population health plans to deliver more care outside hospital aligned with success regime and better care-together programmes through Integrated Care Communities (ICCs).

85. **Appendix 5** – Blog addressed to staff, in which the Trust's CEO acknowledged the impact of the transformation programmes and the associated uncertainty. The CEO referred to the business objectives having been set for 2016/17 and the fact that all staff should now have received a booklet explaining these. He directed everyone to look at resources available online and talk to colleagues about what the new business objectives would mean for them.

86. The respondent's witnesses also gave evidence at the two hearings of this case about the practical difficulties underpinning the issues summarised in the business case. The Tribunal accepted this evidence as reliable and accurate.

87. Giving evidence in 2018, Mr Owens, team leader in the claimant's team, spoke about the team in Cockermouth. He felt there was no need for a Band 7 nurse to work weekends, as the work could be covered by band 5 & 6 nurses. Weekend shifts generally involve more routine cases and fewer patient discharges, with only essential visits being carried out in the case of very ill patients. By contrast, most complex cases arise during the week. It is therefore more efficient to have more senior staff available on weekdays, when they can also supervise more junior colleagues with those cases. Weekend working also reduces the availability of managers to attend weekday meetings. The cost implications of weekend working were such that mangers would receive pay enhancements of 30% for working Saturdays and 60% for Sundays.

88. Patients' needs had become more complex since 2013, and by 2016 they were being sent home from hospital much sooner than previously.

89. Band 6 nurses would work 1-2 weekends per month. Mr Owens felt that working one in four weekends seemed to be acceptable, but the respondent did not have enough band 5 nurses to cover that, especially after factoring in annual leave and sickness. There was a detrimental impact on the Cockermouth team, and some expressed their discontent with other managers. He did not tell the claimant about that, as the main reason for the review was about management efficiency and managers working weekends.

90. During the consultation with the claimant Mr Owens spent time explaining how the demands of the service had changed, which was the point of their meeting on 8 September 2016. He explained the need for flexibility, though he did not have any particular documents to refer to. He did not have local evidence in front of him, but said it was evidenced by the Department of Health and the RCN. The claimant acknowledged issues about managers working weekends but told the respondent that "that was not her concern" and said she felt she was being harassed.

91. In her oral evidence the claimant agreed that the respondent's questions about her mother-in-law and husband were about them trying to explore options. She said it was not her mother-in-law's responsibility to look after her children. "As a mother and a nurse I was more capable than anyone else."

92. Salli Pilcher's evidence in 2023 came from from a broader perspective, in relation to the Trust as a whole. As Associate Director of Nursing for Community Services, a post she has held since 2014, Ms Pilcher's role is a strategic one with oversight of all community nursing services across Cumbria. She has been actively involved in the general changes affecting the Trust, including the drive for flexibility. The main changes which evolved over a 15 year period included a rise in complexity and patient numbers coupled with 24/7 care. The former Primary Care Communities gradually evolved into 8 Integrated Care Communities ('ICCs') which now deliver all community services. During 2016-17 many workshops took place with stakeholders about the introduction of ICCs, and largescale employee consultations followed in 2018. The changes evolved steadily over that 15 years. The respondent's aim was to achieve a seamless and patient-centred service. The focus of the strategic direction was to achieve higher levels of the population being treated closer to home, and reduce the number of beds taken up in acute hospitals. These changes were happening on both a national and regional level.

93. The introduction of ICCs was a gradual change. The Organisational Change consultation paper was the conclusion of work started in 2016. It was looking ahead, but building on what was already in place. It was the 1st phase of ICCs but there had been consultation prior to that.

94. The respondent was aware of gaps in community services for many years, such as the period between day and twilight and night nurses. This was a live issue in 2016-17. Gaps in service meant some patients were waiting in discomfort or pain, for example with blocked catheters or end of life syringes bleeping with errors. Some patients would be admitted to hospital unnecessarily. The changes towards flexibility have eradicated this, and the respondent achieved around the clock continuity of services in 2018 as a result. It continues to seek improvements in the care provision at evenings and weekends so that resources are spread more evenly. Ongoing

changes to increased weekend working are expected to take place so that this is far more regular.

95. These changes to the rota have affected not only community nurses but also support staff, who have had to increase their flexibility to provide administration services 7 days a week. The same applies to therapeutic services. Across the whole Trust, no other community nurses experienced the same difficulties as the claimant to the point where they left their employment. One physiotherapist resigned in 2018 because of childcare difficulties, and she later took up bank work. There are approximately 550 clinical nursing and therapy staff in the ICCs across bands 2-7. Every Trust has or is moving to the same level of care, reducing the footfall at emergency departments and also hospital admissions, giving more options for patients to be cared for at home.

96. In her witness statement for the 2018 hearing, the claimant accepted that the respondent had explained to her the increase in the complexity of cases. She did not dispute that more patients were starting to be discharged at weekends, and agreed there was now a requirement to carry out intravenous treatment which did not exist in 2008. Nevertheless, the claimant criticised the respondent's handling of the business case, alleging that it had "failed throughout the process to outline their business case dated February 2017 in any clear and detailed manner, and only broadly and generically referred to the operational requirements and the need for greater flexibility on the rota". She alleged it lacked detail by reference to members of her team who worked weekends, or why it was unsustainable for her not to do that. She criticised the fact that it took six months to produce, asserting (incorrectly) that it never mentioned the introduction of ICCs.

97. The claimant conceded in 2018 that she had not raised any criticism of the business case at the time, the first such criticism being in the appeal letter. On re-examination when asked to explain why not, the claimant said, "I suppose because the meeting was about my sickness, I don't really know. I needed time to process the information". When asked whether she had been shown any evidence about the greater demands on the service, the claimant said she had not been shown any data, "just caseloads etc".

98. Commenting on the respondent's aim of providing a 24/7 service to patients, the claimant said that no such provision existed within her old place of work. She accepted that the respondent had told her at meetings that there would be changes in the service, but she said nothing changed in her time after the hours were previously extended. She disputed that it was going to change going forward.

99. In her oral evidence in 2022 the claimant accepted that the business case applied across the Trust and not just her team. She also accepted that part of the rationale involved the increasing complexity in patient care. While accepting there had been an increase in complexity, she maintained that changes had already taken place prior to 2016, and held to the view that there were no new changes taking place in the future. The claimant also said in evidence that:

'Requiring the other members of the team to work a marginally increased proportion of weekends in order to reasonably adjust to my circumstances is not a major inconvenience or detriment to them'.

100. In her second witness statement prepared for the remitted hearing, the claimant again agreed that there had been changes in the role of community nurses since 2008. She said:

"However, longer working hours, an increased caseload and an increase in clinical skills were changes that had been implemented a number of years prior to my dismissal. My current job role and responsibilities are no different to what they were in 2016."

101. In her oral evidence in 2022 the claimant accepted that Mr Owens as a band 7 nurse was needed in the hospital on weekdays, but she felt there was no need for a band 7 to be on duty at weekends because there were plenty of others to cover. She felt that the two band 6 nurses could share the weekend working, and between them there was ample to cover each weekday. The claimant conceded that if she and Mr Owens were taken out of consideration, that would leave only 9 colleagues available to work weekends in the Cockermouth team, working one in three weekends. If annual leave were factored in, it could occasionally be more than that, but the claimant felt that band 7 nurses could help provide cover.

102. In her second witness statement the claimant expressed the view that band 5 community nurses at Cockermouth were very experienced and required minimum supervision. She challenged the notion that band 6s and band 7s needed to be available to supervise.

103. When asked during evidence whether the respondent was entitled to ensure that work arrangements were fair for other staff, the claimant responded: "It is acceptable to listen to what others have to say but there was nothing about how I felt. I can't understand why others' opinions were more important, given that I had special circumstances". She added "I suppose they have to look at fairness for all staff, including me".

104. When asked about better integrated services as part of a national initiative, the claimant acknowledged that that was the government's plan, but said there was "nothing specific about why they wanted me to do what they wanted". She acknowledged that ICCs were part of the respondent's objectives at that time, but claimed it was not something she was made fully aware of, or how it affected her. The claimant accepted that the Trust objectives for 2016/17 did form part of the business case but said she did not have any specific information about ICCs, and was not part of any consultation about ICCs.

105. The claimant acknowledged she was told there were difficulties covering the rota effectively if she had set days, and that this was not challenged at the time of the 'options meeting' on 30 March 2017 by her or her union representative. The union representative in fact made reference to the effect of ICCs being introduced, as she had been involved in talks about it. She agreed that there did not appear to be any challenge at the time of the discussions to the need for greater flexibility.

106. In her second witness statement, prepared for the remitted hearing, the claimant agreed that changes had been taking place with the service, as part of patients being discharged earlier and requiring more care in the community. She accepted that that was "part of the ever evolving healthcare system." She agreed that:

> *"Patients were being discharged earlier and that administering IV antibiotics became a normal clinical skill in the community setting whereas in the past it was always practised in an acute setting. However the criteria for requiring a community nurse visit became much stricter than before. I would agree that caseload complexity has changed regarding care provided but caseload numbers have not increased".*

Chronology of events

107. The review of the claimant's flexible working was initiated by Gillian Baxter, Community Manager, who asked Michael Owens to carry out the review in light of the latest changes in community nursing. The subject of the claimant's working pattern had recently been raised by a member of the Cockermouth team, who emailed Ms Baxter and Mr Owens on 11 August 2016 requesting a further review of the claimant's hours, which had already been discussed that year. The email identified some difficulties within the team:

> "*It is becoming increasingly difficult to manage the off duty especially during the summer holiday time when we try to ensure people are given weekends off prior to annual leave.*
>
> *Last week there were three people on annual leave and we had a day of sickness and the fact Katy and myself had to work consecutive weekends meant we were missing for four days during the week which proved extremely demanding and stressful.*
>
> *As Gemma never works a weekend others are having to work two per month which seems very unfair.*
>
> *She also only ends up working one in 7 Christmas days while the rest of us is probably every 2/3 years and she is able to have every public holiday off during the year.*
>
> *This is creating resentment from other team members and personally I don't feel it sets a good example of fairness.*
>
> *Whilst I am aware Gemma finds the balance between home and work sometimes difficult to manage this is something she has chosen to do and surely after seven years we need to review things."*

108. The meeting between the claimant and Mr Owens took place on 8 September 2016. The minutes record:

> *"We explored the need, for service reasons, to review your flexible working arrangement which is currently in place and whereby you work Wednesday and Thursday each week. This is open to annual review around appraisal time as per the Flexible Working Policy.*
>
> *As explained, due to service needs, we require you to work the occasional weekend rather than mid-week and anticipate that this will result in weekend working no more than once a month, and in some cases will be less. With the rota being drawn up in advance you will always have plenty of notice."*

109. The claimant responded on 13 September stating, *"I made it clear several times in the meeting that I will not be considering alternative arrangements as I have none available to me"*. She said, *"Weekend working is not an option for me"*.

110. From the point of this meeting onwards, the respondent sought to explore options available to the claimant, and a possible compromise; a theme which appeared consistently in the many subsequent discussions. The respondent's objective was to explore whether or not the claimant could make some arrangements with her mother-in-law or husband to provide childcare on the occasional weekend, with plenty of notice. The claimant had little to say in response to questions, other than to maintain her position that no changes of any kind could be contemplated.

111. Karen Blyth, District Nursing Sister, stood in for Mr Owens in a further discussion with the claimant on 3 November. On this occasion the claimant alleged discrimination on the grounds that she had children who were disabled and there was a discussion about discrimination by association. The claimant felt her existing flexible working arrangement could not be reviewed for the future. She was adamant that even with notice she could not work weekends or any bank holidays. It was not possible to make arrangements for her husband or mother-in-law to look after the children. Whenever Ms Blyth tried to make suggestions about flexibility, the claimant interrupted by saying "No". She did not accept that there was any impact on her colleagues. The claimant acknowledged that the respondent told her it was unfair on other staff for her not to work weekends. Her response at this meeting was that it was not her problem, because she felt her employer should be there to support her as well.

112. The same day, the respondent wrote to the claimant giving notice under the Organisational Change and Pay Protection Policy that she *"could be asked on occasion to work an alternative day of the week, including a Saturday"*. The letter referred to their meeting when the claimant was:

> *"… asked to consider what adjustments you would need to make in order to be available to occasionally work on a day other than a Wednesday or Thursday, no more than once a month and in some cases less with the rota being drawn up in advance to give you plenty of notice."*

113. The claimant did not agree to any such change and in a reply dated 7 November she stated: *"When I am in a position to return to work [from sick leave] I would only be able to do so to my longstanding contractual work pattern"*.

114. In her letter the claimant also expressed concern about being moved to a Stage 2 Sickness Absence meeting, and reiterated her childcare difficulties. She said, *"My husband works some weekends"*. She did not elaborate on how often that happened, or why this meant she would not be available to work any weekends at all. The claimant also said she was feeling harassed by the respondent's questions about her childcare, and why it was not possible to make arrangements with her husband or mother-in-law.

115. At the grievance investigation meeting with Amanda Place (Interim Quality & Safety Lead) on 12 December, the claimant was asked whether her mother-in-law would be able to help out on the occasional weekend. The claimant replied:

> *"The kids aren't in school on a weekend. I can't expect my mother-in-law to give up her weekends so I can go to work …"*

116. At this meeting the respondent again explored what other options might be suitable, by which both parties would demonstrate some movement on their position. For example, the claimant was asked whether she might manage working one in eight Saturdays. She replied:

> *"No, it doesn't matter whether it's every week or once a year it's not necessarily something that is going to be manageable for me and my family. I need to know that things are going to be sustainable and going to work…"*

117. Her union representative twice suggested that the claimant might be able to help out in a couple of months' time. The claimant did not contradict that statement, nor did she elaborate on the possibility of changes in the near future. On the contrary, she wanted her current arrangement to stay in place forever.

118. Ms Place recognised the claimant's difficulties, but could not understand from the claimant why her husband or mother-in-law could not assist at weekends. When discussing the possibility of the claimant working 1 in 8 weekends, the claimant said that not even one weekend a year was manageable. In fact, she wanted written confirmation that she would never again be asked to work flexibly. Ms Place was conscious of the fact that the service required 24/7 care, and that all staff had to work more flexibly than in the past. Reduced staff numbers meant there was no longer the luxury of accommodating personal preferences. Added to this, the demand for the service had also increased. She considered the balance of the claimant's needs against the respondent's, and decided it did not tip in the claimant's favour because it was a reasonable request to work more flexibly. Ms Place took into account that all Trust employees are required to be flexible, and she knew of no one working set days.

119. Ms Place turned down the claimant's grievance and gave her decision in a letter dated 19 December. On 23 December the claimant submitted an appeal.

120. The claimant attended a Stage 3 Sickness Absence Meeting on 23 February 2017 at which the respondent again explained its position:

"We are trying to be about give and take, we don't want to lose you as a member of staff and the Trust would want to be flexible, but this is just why we are looking for a little bit of wriggle room. I appreciate where you are coming from, but there is no movement from you."

121. This reflected the reality of the parties' respective positions, in that the respondent was not seeking to require the claimant to be as flexible as her colleagues, but was prepared to reduce the weekend commitment to a few times a year, with plenty of advance notice. It was correct to say there was no movement from the claimant.

122. The grievance appeal was dealt with by Jennifer Barbour (Community Manager Carlisle) at a meeting on 28 February. Her decision took account of the need to balance the claimant's childcare needs against the respondent's service delivery responsibilities. She felt the claimant did not accept that her colleagues had a problem with her working pattern. The claimant said her husband worked Monday to Friday but could not look after the children on either a Saturday or a Sunday. Ms Barbour determined that the proposed change to the claimant's working pattern was a minor one under the FW Policy. She had knowledge of the changes taking place in the complexity of community care. She was aware from reports provided by district nurses that the acuity of needs had risen, there was an aging population especially in Cumbria, and there were shorter stays in acute hospitals.

123. At this meeting the claimant was asked about the childcare arrangements in place when she worked until 10:30pm. She explained that her mother-in-law picked the children up from school and stayed until her husband returned home. She would help get the children ready for bed. When asked whether her mother-in-law could assist on the occasional weekend, the claimant said: *"… I don't know if I can expect her to look after them on her days off…"*.

124. By a letter dated 7 March the claimant's appeal was turned down. In explaining her decision Ms Barbour referred to the Business Case, which outlined the need for flexibility *"due to the need to deliver patient care 7 days per week"*.

125. The next meeting the claimant attended was with Ms Baxter on 30 March 2017 to discuss the options available ('the options meeting'). The respondent was concerned to ensure a safe, efficient and effective service delivery. The following possibilities were discussed:

- redeployment to a different role more in line with childcare arrangements
- working across different community teams predominantly on a Wednesday or Thursday where possible, but working some other shifts to support the service, with an agreed period of notice
- occasional arrangements for weekend working with an agreed period of notice

126. The claimant neither accepted any of the above options nor put forward any suggestions of her own. She was not prepared to do bank work as this was not guaranteed. She intimated that a Tribunal claim would be made and mentioned a settlement agreement, a suggestion rejected by the respondent.

127. At this meeting the claimant maintained that she could only work Wednesdays and Thursdays as she relied on her mother-in-law. The reason she could not rely on her husband at weekends was that it was "far too much" for him. He worked in an HR role at Sellafield. She also rejected the idea of working over bank holiday weekends, which could give her husband time to recuperate. The claimant explained that her mother-in-law looked after the children during school holidays and said it was "a nightmare".

128. Ms Baxter was aware of some unhappiness in the claimant's team with her set working days. Other team members felt they were taking an undue share of the more unsocial hours, especially weekends and bank holidays. There was also a drive to reduce the cost of Band 6 and 7 staff working weekends, and to ensure they were available for weekday management meetings. Weekend working for those bands sometimes resulted in insufficient senior cover during the week.

129. The claimant had expressed interest in a full-time community nursing role in Workington, providing she could continue working her set days as part of a job share. This would be on the understanding that the other employee would work the remaining weekdays and provide cover whenever needed at weekends and bank holidays. The claimant spoke to Ms Eagles in HR, who explained that the respondent's preference would be for someone who could fulfil the hours full-time, and because the role was a community nursing one, it was likely to have similar requirements for flexibility. She suggested that the claimant contact the relevant manager to see if a job-share could be accommodated, but the claimant neither did that nor applied for the post as she felt discouraged by Ms Eagles' comments.

130. The claimant's union representative accepted that community nursing had changed in recent years and that the need for flexibility was likely to become greater with the introduction of ICCs, but the claimant wanted to stick to her days and never have the subject of changes to her working days raised again. The meeting therefore ended with an impasse.

131. Ms Baxter's evidence, which we accepted, is that "facts and figures are out there", such as the length of hospital stays and caseload numbers. Such data is held by business analysts. Some would be presented in monthly performance reports. A snapshot could be pulled from the system. However, that level of detail would not normally be provided in a business case about flexible working. In the course of the consultation exercise facts and figures were not referred to, because there was a general acceptance that the changes to community nursing were taking place. There were multiple local and national documents which linked the increasing care in the community, including more complex cases. This was common knowledge.

132. In reaching her decision, Ms Baxter considered that all factors in the case were considered, making it an exceptionally difficult and fine balancing act. The cost saving would have been around £100 for a band 6 and £200 for a band 7, ie around £2,400 over 12 weekends. As a budget holder, she was responsible for delivering the service in the most cost-effective manner. It was only one of several factors. Two members of staff had raised concerns. It being summer holiday time, this was leading to significant gaps in senior cover during the week. There were also possible

safety implications due to the lack of senior staff during the week, for example if complex decisions had to be made.

133. The claimant's concern by this time was the lack of certainty, and being unable to choose her working hours or days. She felt that the respondent was trying to appease one or two other members of the team:

> "*who I believe had raised the issue of me working one Christmas Day in seven years and how they felt this was unfair. When you take into account the reasoning behind my working pattern, which was to guarantee childcare, then I struggle to see without any evidence provided by the respondent the need for the increase in flexibility".*

134. The difficulty of permitting the claimant to work set days was expressed by Ms Baxter when she said, *"set days makes it difficult for others on the team and for covering the rota effectively…"*. The claimant's union representative acknowledged the context, acknowledging Ms Baxter's statement that community nursing had "changed in a major way over the last few years" with a "need for greater flexibility". The union representative said: *"I have been involved in loads of consultations and then there will be the effect of the ICCs coming in."*

135. The claimant was asked about childcare arrangements during school holidays and confirmed that her mother-in-law looked after the children.

136. The full discussion at this meeting again demonstrated that the respondent was seeking to identify a mutually agreeable way forward, recognising the claimant's childcare pressures but looking to her to reciprocate with a little flexibility on an occasional basis, and with plenty of advance notice. Ms Baxter asked the claimant whether she had any support from social workers, to which she replied:

> *"I know where you are coming from but I cannot agree to anything other than working on a Wednesday and Thursday."*

137. By the conclusion of the 30 March meeting, it had become apparent that all options had been exhausted. The respondent had tried to explore a variety of ways to support the claimant in working a little more flexibly, but the claimant remained adamant that she could not agree to any change whatsoever. She did not put forward any other potential solution to the problem.

138. On re-examination the claimant was asked about the 'confusion' she felt about what flexibility was being requested, and how this impacted on her response. She said: "My response was the same all along. I told them I could only work Wednesdays and Thursdays and that was never going to change at that time. Regardless of how many times they changed what they were asking, I wasn't able to do it". She said that if she had had more information from the respondent, the options would be the same. She was prepared to work wherever they could find a role but only on Wednesdays and Thursdays.

139. On 20 April a *"very short and final meeting to discuss your contract"* took place with the claimant and Ms Baxter. When the latter repeated the request for her to be

available at weekends, she "*reiterated that it was not possible due to having to care for my two severely disabled children*". The claimant also emphasised that she had "*repeatedly asked the respondent to stop comparing me to my colleagues as none of them are in a situation like mine*". There being no agreement on the way forward, the respondent terminated the claimant's contract and offered her ongoing employment on new terms which required her to work more flexibly. The dismissal letter dated 26 April recorded the fact that the claimant had decided not to accept the offer of new terms, and so the dismissal took effect.

140. Ms Baxter's letter to the claimant of 26 April 2017 states:

> "*You were advised by [Sandra Eagles] to apply so that follow up could take place with the recruiting manager. The onus would have been on the recruiting manager to consider and decide whether or not these specific days of work could be incorporated. It is acknowledged that, unfortunately, only being able to work on a Wednesday and Thursday was likely to have been a sticking point. The same set of circumstances apply as per the business case already put to you whereby community nursing now needs more flexibility in terms of fulfilling the rota in order to deliver patient care*".

141. In evidence the claimant was asked about the fact that she had never said her mother-in-law had refused to help with the occasional weekend. In reply she said she had discussed it with both sets of parents later on, and all of them said they were not prepared to help at weekends. At the stage of facing a possible dismissal, she had not discussed it with them.

142. Elizabeth Turnbull (Senior Network Manager) dealt with the claimant's appeal against dismissal at a hearing on 8 June. The claimant said she knew that nursing had changed but she did not see why her hours could not be accommodated. She was asked what further detail she expected to see in the business case, and said she felt there were enough staff and hours to cover the workload. The claimant wanted a settlement, or she would go to Tribunal.

143. By this time, numerous meetings had taken place discuss the claimant's working patterns. She acknowledged that she knew dismissal could be an option. She could not identify what other options she believes the respondent should have come up with to avoid this. The claimant did not ask for any further information about the rationale, as she was well aware of the reasoning behind it.

144. At the appeal hearing the respondent said that:

> *"The current situation is no longer sustainable. Although not an ideal position to have less weekend cover from yourself if agreed it would have gone part way to helping the service."*

145. When told that the respondent was looking for ideally one in four weekends with reasonable notice, the claimant replied that she would "*not even work one weekend per year*". She did not by this time wish to return to working in Cockermouth. The claimant explained again that she could not work weekends as it would place too much strain on her husband, she could not change days as it was unfair on her

mother-in-law. She was unable to access other childcare because of her children's medical conditions.

146. Ms Turnbull was aware that safety concerns had been raised about senior staff not being on duty during the week due to providing weekend cover. She believed that the claimant working an occasional weekend would substantially address that. She was mindful of the fact that senior staff cost more at weekends, and an annual cost saving of £2,400 was not a small amount in circumstances where the service was closely monitored on budget, on a weekly basis. Furthermore, senior staff were needed during the week for one-to-one meetings (such as supervision or appraisals), for training, and to handle the normal challenges that arise. These might include clinical meetings, liaison with GPs, or urgent incidents which a more junior employee may not be able to deal with

147. The rationale behind her decision on the appeal included multiple factors, including costs, changes in the caseload across the Trust, the need for flexibility and the role of band 7 nurses. Balanced against this was the fact that she did not consider the claimant's explanation that her husband could not help at weekends to be wholly convincing, nor did the claimant explain why her mother-in-law could not assist on other days. She felt that the information in the business case was sufficient to explain in a condensed way why the changes were required. The balance was tipped in the respondent's favour because of factors set out in that document. The overall context was the knowledge that a lot of change was taking place in Cumbria in relation to service needs, ICCs were being introduced and services were being developed.

148. On 19 June 2017 the claimant's appeal was turned down, bringing the internal procedures to a close. Following her dismissal, the claimant obtained bank work with the Trust working only Wednesdays and Thursdays. In July 2018 she was appointed to a new permanent role at Whitehaven hospital, working the same fixed pattern. This differed from the community nursing role in that it is a service for people having chemotherapy and operates between Mondays and Fridays.

149. By the time of preparing her second witness statement, the claimant was continuing to work bank shifts on Wednesdays and Thursdays with her mother-in-law looking after the children. Although she was previously adamant that this was not an option, in her statement the claimant says:

> *"I have done the odd shift on another day in the week but I have continued to stick with my usual working pattern because of the surety I have with childcare arrangements."*

The claimant's childcare difficulties

150. The claimant was questioned during evidence about the arrangements for caring for her children. She said her husband works at Sellafield as a business analyst, working Monday to Friday 9am to 5pm, "mostly or thereabouts". She said, "My

husband is at work all week, he has to help in the morning and at night. It's 24/7." When asked by the Tribunal what the difficulty was with her husband providing childcare, the claimant said that at the time the children's needs were "too much" for him on his own, largely due to their daughter's severe disabilities. "It was not a safe option. He could not do it for a full day. It was not that he wasn't capable, but they were very dependent. He'd be tearing his hair out."

151. When the Tribunal asked about the claimant's mother-in-law being able to manage the care on her own, the claimant agreed but explained that the children were at school for a portion of that time. From 5pm both her husband and his mother were around. In the school holidays her father-in-law would help depending on his shift patterns. At this stage of the evidence, the claimant said she had discussed weekend caring with her mother-in-law as well as her own mother and they said they did not want to do that. This was the first time the claimant's mother had been mentioned. When asked whether her mother-in-law could recuperate on Wednesday and Thursday if she had provided weekend care, the claimant said she could, but "that was not her choice". She said, "As far as I'm concerned, the children are my responsibility and I can't expect the grandparents to do any more."

152. The claimant was asked about her mother-in-law helping at weekends. She first said that was not correct, though clarified that her mother-in-law did help by providing respite care at the weekend, "maybe once a month". Otherwise, she and her husband managed the children together most of the time.

Submissions for the respondent

153. Mr Brittenden began by submitting that the claimant had focussed on the information she said was not disclosed, but she had not engaged with the evidence of the difficulties faced by the respondent. Her criticisms were abstract, and no solutions were put forward.

154. Following Essop it is a question of fact for the Tribunal whether the justification test is made out. It is for the Tribunal to weigh the reasonable needs of the Trust against the prima facie discriminatory effect of the PCP, and to make its own assessment of whether the former outweigh the latter. The respondent does not have to show it was impossible to accommodate the claimant. He said there are powerful factors in business case and during this hearing the claimant did not identify how they could be overcome. She has not identified any less intrusive measure. Having regard to all the alternatives suggested to the claimant, all of which were rejected, dismissal and re-engagement was a proportionate means of achieving the respondent's legitimate aim.

155. The respondent's business case makes clear that there are two strands to the proportionality exercise:

- The need for community nurses to work flexibly generally; and
- This need, having regard to the circumstances applicable to the Cockermouth Team.

156. Both elements are aligned and featured in the business case, which refers to the needs and requirements of the Cockermouth Team and the need for community nurses to work flexibly. Both are permissible considerations. Although the claimant now seeks to criticise the business case, she never once asked for further information to be provided, or questioned the contents. No criticism of it was made in the witness statement for the substantive hearing in 2018.

157. Applying Hardy and Hansons v Lax, the Tribunal is required to have regard to all of the circumstances, including the reasonable needs of the business, the claimant's response to the application of the PCP, and what was said in consultation.

158. The business case referred in terms to the difficulties affecting the staff in the Cockermouth team. It said that the claimant had been asked for flexibility in order to enable the Trust to provide *"the required level of service to patients"*. There were also considerations of parity and fairness between colleagues. The flexibility was required in order to *"maintain safe and effective service delivery to patients whilst maintaining the health and wellbeing of the other members of the team"*. The Business Case specifically sought to afford the Claimant more favourable treatment than her colleagues – *"… The Trust is not asking her to be as flexible as her colleagues…"*

159. Gillian Baxter referred to the burden of staff working unsocial hours at weekends/bank holidays; the cost of band 6-7 nursing staff working weekend and paid enhancements; the fact that it was not operationally viable for managers not to be present for two days during the week if they worked weekends; and the changes brought about by the ICC model. The business case also refers to wider changes to community nursing, by reference to the increase in complexity of patient care being delivered at home:

    "The general direction of the Trust is that we [are] moving towards a point where staff will be required to work more flexibly within a challenging financial climate, trying to keep patients out of hospital".

160. Salli Pilcher provides further evidence about the general changes, which was a continual process of *"*evolution*"*. The changes were discussed during the consultation process without dissent from the claimant or her union representative. Other contemporaneous documents referred to the introduction of ICCs. The Organisational Change: Consultation Paper explains the rationale and the need for all staff to participate in flexible working arrangements across Cumbria.

161. The central aims are best described in Ms Pilcher's witness statement:

    … achieving a seamless service for patients across all of the ICCs which is patient-centred, provides services without gaps, is equitable for patients and responsive to their needs across a seven day a week service.

162. The Trust's aims are underpinned by the fact that there were *"gaps in services"* for many years resulting in patients suffering at home or being taken to hospital. Gaps in service provision were a real concern in 2016-17.

163. Mr Brittenden submitted that the Tribunal should also have regard to what the claimant said during the consultation process, rather than what has been raised after the event. Ther respondent provided explanations as to why it had a genuine need for greater flexibility. It met the claimant on numerous occasions with the genuine intention to seek agreement. The respondent was not intractable in its position, but sought to reach a workable compromise.

164. The impact on colleagues would be significant, with 8 band 5 nurses in Cockermouth working a weekend around once every 2 weeks, after factoring in annual leave. After some pressing (the question was put 3 times), the claimant accepted that the respondent was entitled to take into account the fair and equitable distribution of work:

"I suppose they look at fairness to all staff, but there should not be anyone prioritised over another".

165. The claimant's position remained intractable. The respondent asked about other childcare options available to her. The claimant did not actually say she had no other childcare options to be able to work an occasional weekend. Even if her husband "worked some weekends", that did not prevent the claimant from working an occasional weekend. The claimant said she "did not know" if she could expect her mother-in-law to look after the children on her days off. She accepted in cross-examination that at no point did she tell the respondent that her mother-in-law had refused to help out at weekends. The answers given by the claimant in response to questions from the Employment Judge showed that her mother and mother-in-law shared the childcare once a month to give her a night off.

166. When asked whether the claimant's mother-in-law could provide childcare on an occasional weekend instead of her normal weekdays, the claimant did not accept this as an option. The answers given to the Tribunal sit uncomfortably with the claimant's intractable position to the effect that: *"No, it doesn't matter whether it's every week or once a year…"*.

167. The Tribunal's first judgment recorded the fact that *"… the Claimant conceded at this meeting that she was generally happy with the level of consultation …"* apart from the final meeting. And the Tribunal found that *"… there was no failure to consult with the claimant; only a failure to agree"*. This rather jars with the suggestion now belatedly made by the claimant that the entire process was a *"sham"* and that she was *"never consulted with in any meaningful way"*, as stated in her witness statement.

168. Perhaps the most significant feature in this case is that at no time did the claimant or her union representative table any practical suggestions or solutions as to how the Trust's needs/concerns could be addressed while enabling her to remain working fixed days. Consultation is a two-way process. If one party offers no suggestions and isn't willing to compromise, applying Hardy and Hansons v Lax, that must be a salient factor in analysing this case.

169. The information in the claimant's witness statement derived from Freedom of Information requests does not assist the Tribunal for the very simple reason that it

does not demonstrate that staff worked set days, or that they did not work weekends. The RCN survey which the claimant introduced in her supplemental witness statement is also bereft of forensic value because it is dated March 2022, and reflects the national position but says nothing about Cumbria.

170. In summary, applying Hardy and Hansons v Lax, the Trust's position is that it had a genuine need both at a Trust level, and in relation to the particular requirements of the Cockermouth Community Nursing Team, for community nurses to work flexibly. The respondent sought to explore every conceivable way of meeting its operational requirements and at the same time tried to make allowances for the claimant's situation, but ran out of options. No alternatives were countenanced or advanced by the claimant or her union representative. The Tribunal was also invited to place significant weight on the fact that although claimant and her union representative had the Trust's business case since 15 February 2017, no real challenge was made to any of its contents. At no point was it ever subject to analysis as to why the facts or assertions were in any way incorrect. In those particular circumstances, the Trust was entitled to proceed on the basis that there was no challenge to it.

171. Given her experience, Ms Pilcher is well-placed to provide useful comment. In response to questions from the Judge about the claimant's requirement to work set days, she provided transparent and truthful evidence. In re-examination, she commented on the points made by Ms Baxter at the appeal on 8 June 2017:

… One of the implications of GD not working weekends is that other staff are having to work additional weekends including Band 6 and 7 which has a cost implication to the trust. We are trying to get away from Band 7's not working weekends to focus on their management role. There are significant periods where we have no staff on during the week because they are on days off due to having to cover weekends. This isn't ideal for safety reasons. …

We would want a senior member of staff on shift but last year it became hard to cover the rota, which leads to safety implications…

172. Ms Pilcher was clear that it was in no sense feasible for the claimant to work fixed days without weekends:

Band 6 and Band 7 have a whole host of nursing responsibilities. They have strategic oversight, manage the caseload and supervise all staff. The management of case loads, the small numbers of the team, and significant gaps in the working week… There is a greater need to collaborate with GPs and social workers. If the impact of the Claimant working fixed days meant that we did not have a Band 6 or 7 during the week that would be a considerable concern.

Unfair dismissal

173. If the Tribunal accepts the justification defence, then the unfair dismissal claim must fail for the reasons already given in the Tribunal's first judgment. It is only if the Tribunal finds that the reason for dismissal amounted to indirect discrimination that

the Tribunal would have to revisit the finding that dismissal fell within the range of reasonable responses. Conversely, if the Tribunal rejects the justification defence, a finding of indirect discrimination does not make a dismissal necessarily unfair: City of York Council v Grosset [2018] IRLR 746.

Submissions for the claimant

174. Ms Berry reminded us that the respondent bears the burden in respect of all four questions in Hardy and Hansons v Lax. The question is whether the rule is justified, rather than its application to an individual. It is important to look at the PCP itself, applicable to all community nurses. She criticised the lack of evidence to support the respondent's aims, and said the PCP cannot be justified on evidence about the Cockermouth team only. No one in the pool of 278 community nurses except the claimant was unable to comply with the PCP. The respondent has not monitored impact in line with Essop.

175. Ms Berry suggested that the respondent had abandoned the aim related to cost savings, though this was still relevant to the proportionality question. As for the Rostering Policy, there is no evidence that "*agreed safe staffing levels*" had been breached to the extent that all community nurses had to work flexibly. It was not stated in the Trust's business case, or by Mr Owens or Ms Baxter in their witness statements. Ms Turnbull's rationale for dismissing the claimant's appeal related to two concerns with managers working the weekend: "*cost, and it is important managers are there, particularly Monday to Friday, to deal with management issues, training issues and the normal challenges that arise*".

176. Ms Pilcher stated in response to the Tribunal's questions that *"in a 24/7 [service] it becomes increasingly difficult to accommodate [flexible working] requests. It is not insurmountable, but depends on pressures and requirements of the team"*. The situation is therefore more nuanced on the Trust's own evidence and the blanket PCP they operated which required all community nurses to work flexibly, including at weekends was too far reaching.

177. Ms Berry's submissions went on to set out in some detail five particular points in support of the claimant's position:

- Incorrect analysis – dismissal and re-engagement
- The pleaded aim of balancing workload amongst the team and reducing the cost of having to use band 6 and 7 registered nurses on a weekend
- The PCP is not appropriate to achieve the legitimate aim of providing care to patients in the community 24/7
- The PCP goes beyond what is necessary to achieve the legitimate aim of providing care to patients in the community 24/7
- Proportionality in the sense of the balance between the discriminatory effect of the PCP and the legitimate aim

178. The first point was that, contrary to the respondent's pleading, the claimant's dismissal and re-engagement is not the PCP. The question is whether it was necessary for all community nurses to work flexibly, including at weekends in order to provide care to patients in the community, 24 hours per day, 7 days a week and to balance workload amongst the team and reduce the cost of having to use band 6 and 7 registered nurses on a weekend.

179. The second point was that respondent's pleaded case referred to the Cockermouth Community Nursing team , but the respondent has failed to lead evidence to support this position in relation to the wider pool. Evidence that relates solely to the Cockermouth Team is insufficient to demonstrate a legitimate aim in respect of a PCP that applied to a far wider geographic area and a far larger section of the workforce. Alternatively, the respondent has not discharged its burden to prove that the PCP goes no further than is necessary to achieve the legitimate aim.

180. If cost considerations are the primary driver of a PCP, the Tribunal needs to "*examine carefully the nature and extent of the financial pressures on which [the respondent] relies as well as the possibility that they could have been addressed in a way which did not have the discriminatory effect*" (Heskett).

181. The third point was that the PCP was not appropriate to achieve the respondent's aim of providing 24/7 care for patients in the community. It was not one of the stated objectives for the respondent's business plan for 2016/17. It was already being done. However, Ms Pilcher's statement states that the respondent is still not providing a truly consistent 7 day a week community nursing service. That is an aspiration which they are now working towards. This evidence undermines the respondent's assertion that the PCP is appropriate to achieve the legitimate aim. If the PCP were appropriate to the aim, it should have resulted in the intervening 6 years in a truly consistent 24/7 community nursing service.

182. The fourth contention was that the PCP goes beyond what is necessary to accomplish the pleaded aim of providing 24/7 care to patients in the community, and cannot therefore be justified. Ms Pilcher's evidence was that *"fixed hours was more common than fixed days"*, therefore fixed days could be accommodated in the community nursing service. She cited community nursing roles in schools, sexual health clinics and diabetes clinics as examples of community nursing roles that could more easily accommodate flexible working arrangements like term time or fixed day working.

183. More detailed submissions were made in support of this argument, relying heavily on the respondent's FW Policy and its SR Policy. The PCP to work flexibly, including at weekends cuts across the FW Policy and would entail that any agreed flexible working arrangements of its community nurses that allowed them to work other than "*flexibly, including at weekends*" be set aside. The clash between the PCP and the FW Policy is the reason why the respondent's SR Policy is so important. Neither Policy was part of the Business Case, and the SR Policy was neither disclosed in these proceedings nor addressed by any of the respondent's witnesses except by Ms Baxter whose 2018 statement referred briefly to it.

184. Ms Berry submitted that the SR Policy did not comply with the Public Sector Equality Duty under section 149 Equality Act 2010, as there was no evidence of an equality impact assessment being carried out.

185. Ms Berry made submissions in some detail about what she characterised as the respondent's requests for flexibility from the claimant changing over time. She referred the Tribunal to the evidence of the respondent's various managers, and the position they adopted in the course of the various meetings with the claimant. The requests changed from the claimant working one weekend a month, "ideally two"; to working "more flexibly which would include some weekend working or working on a Saturday"; to some weekend or bank holiday working, or the same number of hours over three days (with no mention of weekend working). These changing requests demonstrate that the PCP was not necessary to achieve the pleaded legitimate aim, as different decision makers had different views as to the level of flexibility the claimant needed to provide. Neither Ms Turnbull nor Ms Baxter considered that it was necessary for the claimant to comply fully with the terms of the PCP.

186. Ms Berry submitted that the Workington role is important (though no separate claim in respect of this formed part of the claimant's pleaded case). The claimant did not end up making a formal application for the role and felt that Ms Eagles had "discounted" it as an option. The respondent was not actively considering less intrusive and discriminatory measures that would achieve the legitimate aim.

187. The fifth point in Ms Berry's submissions dealt with proportionality in the sense of the balance between the discriminatory effect of the PCP and the legitimate aim. She said that the Tribunal had been presented with such poor and incomplete evidence by the respondent as to the quantitative and qualitative impact of the PCP on the pool of comparison that it cannot properly conduct this assessment.

188. Even where the majority of women working as community nurses have not had to leave their jobs due to the PCP, this does not mean that the PCP's adverse effect is not great – the assessment of a PCP's adverse effect is both qualitative and quantitative in nature (University of Manchester v Jones [1993] ICR 474). She submitted that we do not know how many of the 278 community nurses were women because the respondent had not disclosed that information; however, we know that the Cockermouth team of 10 only had one male member. Further, 178 of the 278 community nurses (64%) were working pursuant to some kind of part-time flexible working arrangement. The Tribunal cannot know or infer from the evidence before it what the full discriminatory impact of the PCP has been. The lack of evidence as to the PCP's actual effect should be held against the respondent in establishing proportionality.

189. The respondent points to increasing complexity in community nursing over the last 14 years, without describing the impact of this on its Cumbrian operations specifically. It mentions gaps in community care in Cumbria at some point within the last decade and half, giving no further details concerning the impact of these gaps on patients, or the period in which they occurred. If hundreds of patients were suffering throughout Cumbria each day due to gaps in community nursing in 2016,

the PCP's proportionality would fall to be judged in a substantially different light than if singular patients suffered slight discomfort on an occasional basis.

Claimant's personal submission

190. The claimant asked permission to have a personal statement read out by Ms Berry at the end of her submissions. The gist of this short statement was to impress upon us the importance of the principle of flexible working. The claimant said the EAT judgment had received significant media attention and was picked up by other organisations such as CIPD, Working Families and the Nursing Times. In July 2022 Jeremy Hunt had referred to better opportunities for flexible working, and the founder of Flex NHS, Kate Jarman, had also tweeted about the case. She referred to a couple of particular cases (in the ET and EAT) which she thought were interesting.

Conclusions

191. The question at the heart of this case is whether the respondent could show that the application of its PCP to all community nurses (including the claimant) employed in the Trust was a proportionate means of achieving a legitimate aim – section 19(2)(d). Put simply, this is to be judged objectively by reference to a number of factors, and requires the Tribunal to carry out a careful evaluation of the evidence, in order to strike a fair balance between the claimant's rights as an individual and the interests of the wider community affected (per Homer). In this case, that community involved the patients for whose care at home the Trust is responsible, the pool of community nurses in Cumbria who provide that service, and the overarching needs of the organisation to provide its services efficiently and in as cost-effective a manner as reasonably possible.

Evidential considerations

192. Before dealing with the proportionality question, there are some evidential considerations on which we have directed ourselves by reference to the relevant authorities. In line with Essop, we might have expected the respondent to produce evidence of a statistical nature to support its case. This did not happen, because such evidence as the respondent did gather (produced through the claimant's FOI requests) did not answer the particular questions she wished to address. For example, the available data does not show working patterns, only working hours. What we do know, from Ms Pilcher's evidence, is that the claimant was the only community nurse unable to comply with the PCP and whose employment was terminated as a result.

193. The claimant expected to see specific evidence supporting the need to be more flexible, such as patient numbers versus hours available, the number of missed visits at weekends, or incidents raised due to unsafe staffing numbers. However, we found that the respondent's witness evidence on these issues was enough. The respondent's heavy reliance on increasing patient complexity was not backed up by specific data, but nor did the claimant challenge that this was the case.

194. Ms Berry submitted that the Tribunal had been presented with such poor and incomplete evidence by the respondent as to the quantitative and qualitative impact of the PCP on the pool of comparison that it could not properly conduct an assessment on proportionality. She referred to the lack of data about how many of the 278 community nurses were women, of whom 67% were working pursuant to some kind of part-time flexible working arrangement. In our view, these figures are consistent with a common sense interpretation of the likely proportion of women and men employed in community nursing across the Trust (if not nationally), given the preponderance of women in part-time roles generally.

195. It is correct to say, as the claimant did, that there was a lack of statistical evidence about the wider pool of community nurses employed by the respondent at the relevant time. That said, we did not find that such evidence was necessary in order to evaluate the case. Firstly, the documents produced by the respondent in the form of the business case and appendices depicted clearly the backdrop against which the review of all flexible working across the Trust was being carried out. We found the claimant's evidence about the lack of detail and clarity in the business case to be somewhat disingenuous because that summary, read with its detailed appendices, leaves the reader in no doubt as to the reasons why the PCP was considered necessary. To an experienced community nurse like the claimant, there must have been no doubt about the changing landscape affecting community nursing across Cumbria and indeed nationally. Furthermore, the contemporary meeting notes demonstrate in terms that the claimant's experienced union representative was very familiar with the changes both implemented and planned. This was in the context of the shift towards ICCs, something the claimant alleged she did not know about, though she did concede during this hearing that ICCs were referred to in the business case. Her complaint was that she did not know what this what this meant for her personally, but we do not accept this. Not only did the claimant make no request for further information or clarification, but we find that her position would not have been any different had this happened. In effect, the claimant's stance was that she could see the evolution in the way community nursing was operating, but she did not agree that this should have any bearing on her fixed working pattern.

196. Ms Baxter said in evidence that "facts and figures are out there", though they were not referred to during the consultation exercise given that the changes to community nursing were common knowledge. We accept that evidence. It was not seriously challenged by the claimant then or during this hearing, as is clear from her own contribution to the consultation meetings (along with her experienced trade union representative's).

197. For the respondent Mr Brittenden submitted that if the PCP was justified for the Cockermouth team in which the claimant worked, it is no less likely to be justified in respect of the wider pool. We agree. While the statistical data was lacking from the respondent as to the particular working patterns among its 278 band 5 community nurses, we were able to glean from the data available (for example the later RCN survey) that fixed hours working was at that time most prevalent among those working in community settings, and that women are much more likely to work part-time hours than men. It is not therefore difficult to extrapolate the gender balance and working patterns across the Trust. We note also that in the relevant pool of

community nurses employed by the respondent, only the claimant was unable to meet the requirements of the PCP. The only other positions where the claimant's fixed working could be accommodated were in other fields of nursing, as seen in the type of work undertaken by the claimant following her dismissal.

198. The claimant's interpretation that "fixed hours" "could mean" set days was at odds with Ms Pilcher's view, and it could equally mean that the weekly working hours were capped (as in the claimant's case). We were not persuaded that it meant in reality that most community nurses worked set days only, and indeed the evidence as a whole was to the contrary.

199. The business case and appendices, from which we have quoted extensively in our findings of fact, put beyond doubt that the circumstances affecting the claimant were not limited to the team in Cockermouth but affected community nursing across the entire Trust. The business case, read alongside the evidence of the respondent's witnesses, shows that the issues identified were not unique to the claimant and the other members of her small team. In other words, we accept the respondent's submission that if the PCP is justified for the Cockermouth team, it is no less so in respect of the wider pool.

200. Ms Pilcher referred to the respondent's concerns about gaps in service. The lack of numbers showing how many patients had experienced consequences of gaps in service did not concern us, because examples were given by the respondent and it would not have affected our decision to know exactly how few or how many people might remain unattended for a time due to lack of cover at evenings or weekends. Likewise, we did not feel the respondent's genuine concerns should be disregarded for lack of statistics on unnecessary hospital admissions. Those are clinical decisions which depend greatly on the circumstances, for example whether a patient is recovering from surgery, the nature of their condition, and whether they have other support available to them at home. Having assessed the evidence qualitatively, and with the benefit of the respondent's witness evidence as much as its documents, we found that it was neither necessary nor helpful to review statistics. In any event, statistical evidence would always have been a snapshot lacking background information about the circumstances.

201. Having initially had some concerns about the lack of statistical data from the respondent, we came to the view that the clear (and largely unchallenged) oral evidence of its managers was compelling, even in the absence of such evidence. In particular, we were impressed by Ms Pilcher's evidence at the remitted hearing, which reinforced that which we had been told by Mr Owens and others in 2018. Ms Pilcher was uniquely placed by virtue of her experience and seniority to help the Tribunal understand the issues facing the respondent and the need for continuing changes in its community nursing provision.

202. Following Hardy and Hansons v Lax, it is for the Tribunal to reach its own judgment on the proportionality question, taking into account the various factors identified. Applying also Cockram, we are conscious that "*the detail and weight of the evidence required will depend on what proposition the employer is seeking to establish"* and *"some propositions are so obvious that they barely require evidence at all."* Here, the aim of providing 24/7 care through the means of an effective staff rota is a matter

of common sense as well as evidence. At this stage of the analysis, therefore, we did not feel unable, as Ms Berry suggested, to carry out the task of evaluating the balance of the parties' interests. Acknowledging that this is not an exercise in assessing the respondent's decisions by reference to a range of reasonable responses, we noted the EAT's comment in Birtenshaw, that the Tribunal "*should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly*". We were wary of not accepting mere assertions from the respondent, but felt that their oral evidence was supported by "reasoned projection rather than demonstrable result" per Pitcher. We were satisfied also that the respondent's case was presented with the necessary degree of cogency.

203. The respondent's legitimate aim has already been established, namely:

"the need to provide care to patients in the community, 24 hours per day, 7 days a week and to balance workload amongst the team and reduce the cost of having to use band 6 and 7 registered nurses on a weekend"

204. The next question is whether the PCP that all community nurses work flexibly, including at weekends is rationally connected to that aim. Ms Berry submitted that the Tribunal should ask whether the PCP is appropriate to achieve the legitimate aim, and whether it would in fact achieve the desired objective. Part of her challenge was by reference to the way that the respondent's requests for flexibility from the claimant changed over time.

205. We did not find that this submission was borne out by the evidence. In the notes of the appeal meeting, the claimant referred to the request broadening out from weekend working to showing "any flexibility at all", and questioned why the respondent had moved its position. It was made clear to her by Ms Baxter that this was "all about finding a solution to keep you at work". Ms Eagles explained that, "It was about looking at the occasional weekend or bank holiday working for fairness in rota for all staff. That's where it started and then it moved on from there to see if there was any way we could be flexible." Ms Baxter is recorded as saying

"You keep mentioning that there is an insistence on working weekends. We moved to talking about what flexibility could you give so it's not just an insistence on weekend working. Can you explain […] why you can't work weekends?"

206. None of this evidence pointed to a meaningful shift in the respondent's position, as it clearly reflected an attempt to become more accommodating to the claimant's objections as time went on and her position remained unchanged.

207. When asked about the alleged 'confusion' about this on re-examination, the claimant did not identify any such confusion, saying only that her response was the same all along, and was never going to change regardless of how many times the respondent changed what it was asking. Looking at the evidence more broadly, the Tribunal had no doubt that the claimant well understood the drivers for change in the service, and what the respondent was asking her to consider. Contrary to her pleaded case, the claimant was consulted at length, she was provided with sufficient information to understand the Trust's business case, and she was in no doubt about the potential

implications for her position if she could not accommodate any of the compromise options suggested by the respondent.

208. We do not accept that the respondent's willingness to contemplate different options for the claimant, in an effort to meet her part-way, represents a change of position or an inconsistent stance on its part. The positions adopted by the respondent were consistent in demonstrating that it was seeking to improve flexibility with the claimant as well as other community nurses. The aim was to ensure 24/7 cover for the service, but the means of achieving that aim was negotiable to a point. Its handling of the discussions about the claimant's personal circumstances demonstrates a proportionate response to the situation and reflects its attempts to dilute the requirement and thereby soften the impact on the claimant.

209. On the evidence available to us, our conclusion is that the PCP was apt to achieve the pleaded aim of providing care to patients in the community, 24 hours per day, 7 days a week and balancing workload amongst the team and reducing the cost of having to use band 6 and 7 registered nurses on a weekend. The respondent had been achieving improvements in service provision already, and it was continuing to work towards achieving further improvements. We were not at all persuaded by the argument advanced by the claimant that there were no new changes in contemplation by the time of her dismissal, or that at any time the state of affairs should be viewed as static. It could only ever be a snapshot demonstrating the position at a moment in time.

210. We are therefore satisfied that the PCP is rationally connected to the legitimate aim. The respondent provided us with ample evidence to show that in a stretched NHS Trust, providing a safe, effective and efficient service to patients at home requires a high degree of willingness on the part of community nurses to work at weekends and on bank holidays. While truly 24/7 care might not have been fully realised at the time of the claimant's dismissal in 2016, and may still not have been perfected, there is a rational connection between providing 7 day care through the staff rota, and the requirement for all staff to participate in that rota in a fair and equitable way. The first two parts of the test in Homer are therefore met.

211. This brings us to broader aspects of the proportionality issue. The respondent's proposal that the claimant work more flexibly, including at weekends, need not have been the *only* measure it could have taken to achieve its legitimate aim. In practice, however, it was the only measure it could have taken, because the only alternative was to exempt the claimant from the PCP entirely. She was not being required to comply fully with the PCP, given the respondent's willingness to relax the number of weekends or bank holidays she worked, but the claimant was unable or unwilling to bridge the gap. Although the claimant was under no formal obligation to identify to the Tribunal a less intrusive measure capable of achieving the respondent's aim, it was nevertheless striking that she had no contribution to make to that. Her only ‘solution’ was to retain her fixed working pattern unchanged into the future on an open-ended basis. Such an outcome would have done nothing to help achieve the legitimate aim.

212. The circumstances which prompted the respondent to introduce the PCP form an important backdrop to the case. The respondent has a broad range of duties to its

patients and staff, and seeks to achieve these in an environment which is continuously evolving and constantly under economic pressure. The resources available to the Trust, whether budgetary or through the numbers of available nurses, are extremely constrained. As stated by Ms Place, reduced staff numbers meant there was no longer the luxury of accommodating personal preferences on working patterns. Applying Lax, the Tribunal was asked by Mr Brittenden to consider the claimant's failure to offer any compromise as a salient feature relevant to the proportionality question. We accept that submission, as the claimant's response to the consultation forms a salient feature of the overall circumstances.

213. On the staffing side, the FW Policy and the SR Policy have a part to play. To paraphrase some key elements of the FW Policy:

- The Trust supports a work-life balance and flexible working, but set against the need to ensure a safe levels of staffing to maximise the quality of patient care and reduce clinical and non-clinical risk.

- Minimum safe staffing levels and skill mix must be agreed and reviewed in light of any significant change, such as changing patient acuity levels.

- The off duty of senior staff must accommodate both team and management requirements.

- Flexible working needs to be fair and equitable to all staff.

- All staff are expected to work a variety of shifts and shift patterns.

214. We found that these Policies did not support the claimant's case that due to her particular circumstances, she should be treated as an exception to the general principles. The FW Policy certainly supports the principle of allowing staff to work flexibly, partly to suit their individual needs and preferences, and also in recognition of the benefits to the respondent of retaining a workforce which is able to manage its working patterns and at the same time accommodate a personal life. These aims are widely accepted and welcomed by both parties in a modern workplace. They cannot, however, be applied or interpreted too strictly. The organisation's needs as a whole, especially for an NHS Trust, must sometimes prevail. A rigid application of the principle that a woman with childcare responsibilities may choose a fixed working pattern is liable to lead to problems with the delivery of the service to patients, and in the relationships between colleagues. As happened in this case, where small teams of nurses are sharing the responsibility for covering a flexible rota, including some weekend working, injustice and resentment can arise where a few individuals are carrying the lion's share of the unsocial hours working.

215. Ms Berry submitted that the PCP cuts across the FW Policy and would entail that any other agreed flexible working arrangements be set aside. We do not accept this submission. In our view the FW Policy provides a framework within which employees may request flexible working and, it might be said, are encouraged to do so. But it is made explicitly clear in the terms of the FW Policy, and the SR Policy too, that any such arrangement is liable to be reviewed and is subject always to the needs of the organisation.

216. Ms Berry further submitted that there is a clash between the PCP and the FW Policy, giving the SR Policy some importance. The SR Policy was found in our 2018 judgment to be the starting point for all flexible working arrangements to be reviewed. It was referred to in Ms Baxter's witness statement, but we do not see any particular significance in its not being produced through disclosure by the respondent. The claimant produced the SR Policy for this remitted hearing and placed great emphasis on it. However, its terms do not assist her case because the four core principles identified in it in our view reinforce rather than undermine the aims of the FW policy. These principles were to:

    - minimise clinical risk associated with sub-optimal skill mix and/or staffing levels
    - ensure safe/appropriate staffing using fair and consistent rosters
    - improve the utilisation of substantive Trust staff and reduce bank, agency and overtime spend
    - improve planning of clinical and non-clinical non-effective working days (eg annual leave, sickness and training)

217. Ms Berry's submission also referred to the trigger point for requesting that part time staff increase their hours, where “agreed safe staffing levels” have been breached. However, the claimant was not being asked to increase her hours. Rather, her hours were to remain unchanged and it was only the working pattern that was being reviewed.

218. Mr Brittenden referred to the scope and objectives of the SR Policy, which covered a range of issues including safe staffing levels and skill mix, the need to minimise risk, fair and consistent rosters, and reducing overtime spend. He submitted that it is a refinement, noting changes that are needed and which may or not impact on existing flexible working arrangements. We accept that same interpretation.

219. The claimant's complaint about the respondent's business case was that it was too generic, but she was unable to explain to the respondent at the time, or to this Tribunal, what further information might have helped her understand the need for more flexible working. Her objection amounted to the fact that she wished her own working pattern to remain unchanged, by having an exception made in her case. This was amply illustrated by the evidence, which demonstrated that the claimant knew of the demands on the service, increasing patient acuity levels, and the introduction of ICCs. She said she had not been shown any data, “just caseloads etc”, and this concession seems to be at odds with the claimant's insistence that she did not understand the need for change.

220. Similarly, when commenting on the respondent's aim of providing a 24/7 service to patients, the claimant said that no such provision existed within her old place of work. This was a somewhat contradictory position. The claimant had accepted that there had been past changes but argued that due to the lack of information on caseload numbers, the respondent was unable to back up its position with data. At the same time as criticising the lack of data on the increase in the complexity of

patient needs, the claimant also said she did not not see that as “having any relevance whatsoever”. When told by the respondent about the impact on colleagues in the team, working 1-2 weekends per month, the claimant showed no recognition of the impact on others.

221. Another aspect of the claimant's evidence which struck the Tribunal was the way she responded to the consultation discussions. She showed little or no understanding of the impact of her not working at weekends and seemed to minimise the impact on colleagues. For example, the claimant felt that band 5 nurses did not need supervision, and said others were always available to backfill managers when they were attending meetings or training. She did concede that colleagues sometimes want a long weekend, and that this can be difficult to accommodate if people are not flexible. She accepted that if band 6 or 7 nurses work weekends they get time off in lieu, which means they are less able to attend meetings Monday to Friday. She acknowledged that the respondent wanted those nurses to work fewer weekends, and that it would be more expensive to have them working weekends partly because of the enhancements paid.

222. On cross-examination during this hearing the claimant agreed it was not unreasonable for the respondent to want to avoid having band 6 or 7 nurses working the weekend or to reduce the cost of that. Her evidence about the aim of providing a 24/7 service to patients was also at times contradictory. She said that no such provision existed within her old place of work, and suggested that any changes were in the past. She criticised the absence of data on caseload numbers or on the increase in the complexity of patient needs in the community, but did not challenge that those complex needs had become part of the role.

223. In her second witness statement the claimant went so far as to allege that the whole process was “a sham from start to finish”. That was not supported by any evidence; and to the contrary, the Tribunal was struck by the time and effort the respondent gave to the consultation process. All the respondent’s decision-makers recognised the claimant’s difficulties and were sympathetic.

224. As stated above, the Tribunal were agreed that Ms Pilcher was an impressive witness demonstrating strong knowledge of the situation and the evolution of changes, as well as the need for them. By contrast, the claimant was unwilling to acknowledge the possibility of colleagues being affected or the service being affected, because she was entirely focused on her own personal circumstances. Her evidence about the impact on colleagues of working additional weekends to accommodate her was that it was “not a major inconvenience or detriment to them”. While acknowledging that the respondent was entitled to ensure fairness for all staff, the claimant said she could not understand “why others’ opinions were more important, given that I had special circumstances”.

225. Although the claimant said the option of job-sharing the vacancy in Workington was dismissed by HR, she made no attempt to explore it by making enquiries of the relevant manager. We find that the respondent did not dismiss the option but that Ms Eagles identified, quite reasonably and properly, the possibility that the claimant's fixed hours may be an obstacle. The respondent advised the claimant to

contact the recruiting manager but she did not do so. It cannot be criticised for not doing more.

226. The saving of staffing costs was a feature of the case, and it is clear that this on its own would not amount to a legitimate aim. Ms Berry submitted that following Heskett, if cost considerations are the primary driver of a PCP, the Tribunal needs to "*examine carefully the nature and extent of the financial pressures on which [the respondent] relies as well as the possibility that they could have been addressed in a way which did not have the discriminatory effect*". In principle we accept that this is correct, but we were not persuaded that the costs savings of band 6 or 7 nurses not working weekends was in any way a "primary driver". It was certainly in the respondent's mind, but formed a relatively small part of the wider considerations affecting service delivery. We take into account also that "*There is no principled basis for ignoring the constraints under which an employer is in fact having to operate*" (Heskett) and conclude that the costs element which contributed to the respondent's decision was proportionate in the overall context.

227. In Homer the court identified some key considerations in assessing the proportionality of a PCP. These include the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, and whether a fair balance been struck between the rights of the individual and the interests of the community. The PCP should go no further than reasonably necessary.

228. The importance of the respondent's legitimate aim has already been addressed above, as has the question whether the PCP was appropriate to contribute to that aim. The next question to be considered is whether a fair balance has been struck between the rights of the claimant and the interests of the community. This includes some analysis of the severity of the impact on the claimant, in light of her childcare difficulties.

229. We accept that the respondent was not asking the claimant to be as flexible as her colleagues, and accept also its submission that it it was wrong to say that the PCP went further than necessary. There was no evidence of this, and in fact, the scope of the PCP was reined in for the claimant, in recognition of her difficulties.

230. When giving evidence at the 2018 hearing, the claimant said she had felt the respondent was "trying to catch her out" by asking questions about her childcare arrangements. She offered no real explanation to the Tribunal at that hearing for her husband's inability to help look after their children on the occasional weekend. She said her husband worked "the odd weekend", but this was unconvincing as we were also told he worked in an office role from Monday to Friday. The claimant was also unclear in her evidence about whether her husband looked after the children on his own after she started working some evenings.

231. In her second witness statement the claimant sought to clarify the difficulties with childcare. Due to her children's disabilities, her father-in-law could not have looked after them on his own. He worked full-time, doing both day and night shifts. He would help when he could, but was not a suitable person to leave her children alone with, because he could not manage their complex care needs by himself. He did help the

claimant's mother-in-law sometimes, depending on his shift pattern. This statement made no mention of the claimant's own mother, who was referred to only in questions from the Tribunal at the end of the claimant's evidence in 2022. Nor did the statement give any explanation for why the claimant's husband could not not look after their children, perhaps with help from his mother, on an occasional weekend with advance notice.

232. Our concern from the 2018 hearing that the claimant had access to childcare from her husband on occasional Saturdays, is superseded by the EAT finding that she did suffer an individual disadvantage. However, we believe this is a relevant factor in our assessment of proportionality.

233. In her evidence at the remitted hearing, the claimant explained that her husband works as a business analyst, working Monday to Friday 9am to 5pm, "mostly or thereabouts". She did not mention him working at weekends. When asked by the Tribunal what the difficulty was with her husband providing childcare, the claimant said that it was "too much" for him on his own, due to the children's medical needs. The claimant agreed that her mother-in-law managed on her own, but that was because the children were at school for much of the day. From 5pm her husband was also there to help.

234. The claimant told the Tribunal that she had discussed weekend caring with her mother-in-law as well as her own mother and they said they did not want to do that, though she also acknowledged that she had not raised that at the time of the consultation meetings with the respondent. This was also, in the final moments of her evidence, the first mention of the claimant's own mother being available to help with child care. She acknowledged the possibility that her mother-in-law could provide weekend cover and recuperate on Wednesday and Thursday that week, but said "that was not her choice". It was not an option because her mother-in-law did not want to give up her weekends on a regular or permanent basis. The claimant (not unreasonably) took the view that she could not expect the grandparents to do any more. She did, however, concede that her mother-in-law provided respite care at the weekend, "maybe once a month", looking after her daughter while her own mother looked after her son.

235. We readily acknowledge the difficulties facing the claimant, especially as two of her children had disabilities (in the case of daughter, these were severe). The claimant felt that as a mother and a nurse the childcare was her primary responsibility. Putting our personal sympathy to one side, we found it difficult to understand why the claimant could not work an occasional weekend, with advance notice, relying on childcare support from a combination of her husband, her mother-in-law, or her own mother. The fact that she worked more flexibly after this employment ended, occasionally working a different day of the week and having respite care from her mother and mother-in-law once a month, demonstrates that an occasional weekend or bank holiday was in fact manageable.

236. In reaching this conclusion, we do not discount the fact that relying on family members (even her own husband) for such support could amount to a disadvantage. But the extent of that disadvantage on an occasional weekend each year has to be weighed against the reasonable needs of an NHS Trust to deliver its care services

in a manner which takes account of the requirements of both patients and other community nurses. If the claimant had no prospects of childcare from any source, that would put the disadvantage at a higher level, but in the circumstances of this case we conclude that the disadvantage was at the lower end of the scale. That is not to pass judgment on the claimant's choices, but rather it supports our view that the discriminatory impact of the PCP was proportionate and justifiable. The disadvantage to the claimant has to be balanced against the respondent's needs, which included providing 24/7 patient care, earlier discharges from hospital, avoiding gaps in the service, operating a staff rota that was fair and equitable to all community nurses, freeing up band 6 and 7 nurses to be available during weekdays, and saving the extra costs of their working weekends.

237. It is also relevant to note that the claimant, who was best placed to do this, did not identify to the respondent or the Tribunal any less discriminatory way that the respondent could have achieved its aim. Her only solution was to be excluded from the flexible rota; a solution for her, but in no way a solution for the respondent. Had the respondent done this, it would have been vulnerable to arguments from other community nurses that their ability to enjoy a good work-life balance was impaired, with the potential for other women with childcare responsibilities to complain about discriminatory treatment.

238. This is not a case where we needed to make findings of fact on the truthfulness of witnesses on either side, but nevertheless we have taken into consideration the responses the claimant provided to the respondent during consultation, and we have had to take a view on her stance in order to weigh up the proportionality question. We make no criticism of the claimant for adhering so firmly to her refusal to change her working hours; she was dealing with very difficult circumstances exacerbated by the disabilities of two of her children. But that stance was unquestionably intransigent, and applying Lax, we agree with Mr Brittenden that we are entitled to weigh this in the balance in our consideration of the impact on the claimant versus the respondent's reasonable needs.

239. We find that the respondent's managers were conscientious in weighing up the issues in 2016-17, and addressed their minds to the options. Each decision-maker had a good understanding based on their role and experience of the reasons for the changes in community nursing, and the difficulties this presented for the claimant. Unfortunately for the claimant, she could not contemplate any form of compromise whatsoever. This is well illustrated by our detailed findings of fact. Even in the face of her dismissal, the claimant could or would not contemplate the option of working “one weekend a year” or any bank holidays. At the two hearings in front of this Tribunal we felt that the claimant was slow to volunteer a full and frank explanation of her difficulties in showing even a little flexibility. Indeed, at the time when the respondent was asking about her childcare arrangements, the claimant resented these questions and said she felt “harassed”.

240. The fact is that the claimant was determined to retain her set days on Wednesdays and Thursdays for life, and did not want her employer ever to reopen that question again. It is not necessary for the respondent to show that it was impossible to accommodate the claimant’s insistence on being excluded from the PCP. It has nevertheless demonstrated to us through its evidence as a whole that its actions

were proportionate and in keeping with its legitimate aim. Weighed against the claimant's intractable position, the reasonable needs of the organisation justified the PCP.

241. The Supreme Court in Essop referred to requirements which many people sharing a particular protected characteristic of them cannot meet. In this case, we find on on the facts that the claimant could meet the respondent's requirement to work flexibly, including at some weekends, albeit with difficulty. That disadvantage needs to be balanced against the respondent's business needs. That the claimant might have had some difficulty or inconvenience in comply with the PCP does reflect the disadvantage she experienced as a working mother, but the degree of disadvantage when weighed up against the respondent's aims and systems of work did not warrant a conclusion that the PCP was unjustifiably discriminatory.

242. For these reasons, we conclude that the respondent acted proportionately in its application of the PCP to the claimant and that it met the burden of establishing it was justified pursuant to section 19(2)(d) Equality Act 2010.

Unfair dismissal

243. Having found that the respondent acted proportionately in deciding to apply the PCP to the claimant, we turn to the question of the fairness of her dismissal for 'some other substantial reason' under section 98(1)(b) Employment Rights Act 1996. The dismissal arose from the application of the PCP, in that the claimant's contract was terminated and re-engagement on new terms was offered. In our first judgment we set out in more detail the reasons why we considered this to be a fair dismissal under section 98(4) of the 1996 Act, taking into account all the circumstances and in accordance with equity and the substantial merits of the case.

244. The task required of us at this remitted hearing was to revisit the question of fairness in light of our conclusions on whether the reason for dismissal was tainted by indirect discrimination. Having found that this was not the case, we remain of the view that the dismissal was fair and reasonable under the 1996 Act.

245. In considering the requirements of section 98(4) we have taken into account all the relevant facts as discussed above. These include, in summary, the fact that the respondent had a cogent business case underpinning the need for change, and carried out an extensive consultation exercise with the claimant. As this progressed, the respondent modified its position repeatedly, in its efforts to find ways of avoiding terminating the claimant's contract. Its compromise proposals were not acceptable to the claimant, but it made a sincere attempt to enable her to continue in her role. The result of the failure to reach an agreement meant that no step other than dismissal could have achieved the change to the claimant's contract that was needed.

246. It is also relevant to note that all the other band 5 community nurses employed by the respondent could comply with the requirement to work flexibly. We are satisfied that the respondent could not reasonably have made an exception for the claimant by exempting her from the requirement to participate in a flexible working

arrangement. The decision to dismiss therefore fell squarely within the range of reasonable responses.

Employment Judge SE Langridge

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 10 August 2023

JUDGMENT SENT TO THE PARTIES ON

11 August 2023

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL