EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MRS J FOLLOWS	V	NATIONWIDE BUILDING SOCIETY

HELD AT: LONDON CENTRAL ON: 7 - 11 December 2020

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MR D CLAY
MR G BISHOP

REPRESENTATION:
FOR THE CLAIMANT Mr M Green (Counsel)
FOR THE RESPONDENT Mr H Zovidavi. (Counsel)

JUDGMENT

1. The claim of unfair dismissal succeeds and is upheld.
2. The claim of direct (associative) discrimination on ground of disability fails and is dismissed.
3. The claim of indirect (associative) discrimination on grounds of disability succeeds and is upheld.

4. The claim of indirect discrimination on grounds of sex succeeds and is upheld.
5. The claim of indirect discrimination on grounds of age fails and is dismissed.

RESERVED REASONS

The Issues

1. The respondent argues that the claimant was fairly dismissed on the ground of redundancy, that it was undergoing a redundancy process in which four employees of her grade, Senior Lending Manager (SLM), were required to be made redundant and, it argues, there was also a requirement for all SLMs to be office-based. The claimant contends she was dismissed because she was employed on a 'homeworker' contract, that the principle reason she needed to work from home was because she was the carer for her disabled mother. She alleges that her dismissal amounted to direct and indirect associative disability discrimination.

2. In October 2020, the claimant applied to amend her claim to include claims of indirect sex and age discrimination. This application to amend was dealt with on the first morning of the hearing. The application was successful, for the reasons set out below.

Unfair dismissal

3. Has the respondent proven that it dismissed the claimant on the ground of redundancy? If not, the claim of unfair dismissal succeeds. If yes:

4. Did the Respondent follow a fair procedure before dismissing the Claimant?

    1. Was the selection criteria fair?
    2. Were the individual and collective consultation processes undertaken fairly?
    3. Was the appeal process fair?
    4. Was the claimant's dismissal otherwise unfair?
    5. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being fairly dismissed at some point? (The *Polkey* issue).
    6. If the dismissal was unfair, did the claimant contribute to her dismissal by way of her conduct, and if so would it be just and equitable to reduce compensation by any extent? (The compensatory fault issue).

Disability

5. The respondent accepts that the claimant's mother was disabled as defined within the Equality Act 2010 during the period relevant to the claim by way of

the condition of Chronic Obstructive Pulmonary Disease, and that it had knowledge of this condition.

Section 13: Direct discrimination on grounds of disability by association

6. Did the respondent discriminate against the claimant because of her role as carer for her disabled mother by subjecting her to the following:
    1. Selecting the Claimant for redundancy
    2. Dismissing her, and
    3. Requiring SLM 's to be primarily office based?

7. Did the respondent treat the claimant less favourably than it treated the claimant's chosen comparator, Mark Allen, a SLM who worked from home, who was not disabled or a carer of a disabled person and who was not dismissed.

8. If so, are their facts from which the Tribunal can properly and fairly conclude that the difference in treatment was because of the protected characteristic of disability by association?

9. If yes, can the respondent prove a non-discriminatory reason for the treatment?

Section 19: Indirect discrimination on grounds of disability (by association) and/or sex and/or age

10. The respondent has accepted that it applied the following provision: a requirement that SLMs could no longer work at home on a full-time basis (paragraph 11.2 amended grounds of resistance).

11. Did the application of the provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not associated with a disabled person by way of caring responsibilities, and/or women and/or under age 50?

12. Did the respondent take such steps as were reasonable to avoid the disadvantage?

13. Did the respondent not know, or could not reasonably be expected to know that the Claimant's mother was disabled and/or the claimant had caring responsibilities for her, or was likely to be placed at a disadvantage? The Claimant says her line managers were aware of her caring responsibilities and she also made this clear to the Respondent during the consultation process.

14. The respondent relies on the following legitimate aim: *"A need to provide effective on-site and managerial supervision and support to more junior staff following a reduction in SLM headcount and the change in the nature of the respondent's CRE lending business".* Was this aim a legitimate aim?

15. If the aim was legitimate, was selecting the claimant for redundancy and dismissing her a proportionate means of achieving the legitimate aim?

The Law

16. Equality Act 2010

s.13 Direct discrimination

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

s.19 indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) It puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

- age;
- disability;

….

- sex;

…

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

17. Employment Rights Act 1996 – Dismissal

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
…
c. is that the employee was redundant…

(3) ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

1. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
2. shall be determined in accordance with equity and the substantial merits of the issue

139 Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

a. …
b. the fact that the requirements of that business—
    i. for employees to carry out work of a particular kind, or

ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

Relevant case law

18. Direct Discrimination

1 It was accepted by both parties that s.13 Equality Act 2010 does not require the protected characteristic to be that of the claimant: the less favourable treatment simply has to be *because of* a protected characteristic, i.e. it was accepted that the claimant could in theory be subject to discrimination because of her association with her mother as her carer.

2 Has the claimant been treated less favourably than a comparator would have been treated on the ground of associative disability? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the disability (*Glasgow City Council v Zafar [1998] IRLR 36)*

3 The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

4 The tribunal has to determine the *"reason why"* the claimant was treated as she was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

5 Was the claimant treated the way she was because of her mother's disability? It is enough that her mother's disability had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [her mother's disability]? Or was it for some other reason..?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL*. "What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained

of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

6 *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

> (1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator
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> (2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37
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> (3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*
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> (4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.
>
> (5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

7 *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

19. Indirect Discrimination

1 *Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27*, *[2017] IRLR 558*: the following points and (points to 2-7) the six "salient features" of indirect discrimination are set out:

1. "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but 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. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'

2. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular

protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

3. The contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but 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. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

4. The reasons why one group may find it harder to comply with the PCP than others are many and various […]. They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in *Homer v Chief Constable of West Yorkshire [2012] IRLR 601*, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

5. There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

6. It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the “particular disadvantage” might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

7. It is always open to the respondent to show that his PCP is justified – in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in *Essop*, 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 achieving the desired result."

2 Provision, Criterion or Practice (PCP): The definition of indirect discrimination within the Equal Treatment Directive 2006/54/EC at art 2(1)(b) refers to 'an apparently neutral provision, criterion or practice…'. The ECJ in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*: C-83/14, *[2015] IRLR 746* agreed with the opinion of the Advocate General that the term 'apparently neutral' can only be interpreted as meaning an ostensibly or prima facie neutral 'PCP'. The court held:

> *"In addition to the fact that it corresponds to the most natural meaning of the term used, that sense is required in the light of the Court's settled case law relating to the concept of indirect discrimination, according to which, unlike direct discrimination, indirect discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that particularly persons possessing that characteristic are put at a disadvantage."*

3 Pool: *Naeem v Secretary of State for Justice [2017] UKSC 27*, *[2017] IRLR 558*: per *Allonby* identifying the pool was not a matter of discretion or of fact-finding but of logic: "There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition." The EHRC *Statutory Code of Practice* (2011), states: "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively." As stated in *Harvey* this requires all the workers affected by the PCP in question must be considered, the comparison can then be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. In general, therefore, identifying the PCP will also identify the pool for comparison.

4 Evidence of disadvantage: *Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15*: statistical evidence is no longer essential in order to show a 'particular disadvantage when compared to other people who do not share the characteristic in question'. *Games v University of Kent [2015] IRLR 202*: where statistics are available, they will remain important material. *R v Secretary of State for Employment, ex p Seymour-Smith and Perez [1997] IRLR 315 ECJ*: 'A persistent and constant disparity [of 10:9] in respect of the entire male and female labour

forces of the country over a period of seven years cannot be brushed aside and dismissed as insignificant or inconsiderable'.

5 The use of statistical evidence:

a. *Enderby v Frenchay Health Authority*: *C-127/92*, *[1994] ICR 112 ECJ:* in assessing disparate impact it is for the tribunal to determine whether the statistics cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena and whether, in general, they appear to be significant. In determining whether there is 'a particular disadvantage' the court must assess whether any apparent disadvantage is real and linked to the PCP or ephemeral or some kind of fluke.

b. *London Underground Ltd v Edwards (No 2) [1999] ICR 494, CA*: only a small number of women in the pool and only a slight disproportion in the differences between men and women - 100% of male train drivers could comply with a shift rota and 95% of female drivers, and only one out of 21 female drivers could not comply – this was enough to show a discriminatory effect on the facts of the case and the statistics being considered.

c. *Shackletons Garden Centre Ltd v Lowe UKEAT/0161/10:* It was acceptable for a tribunal to accept “well recognised” facts, in this case that “significantly more women than men” are primarily responsible for childcare, and this “substantially restricts” the ability of women to work particular ours.

6. Justification

a. *Bilka-Kaufhaus GmbH v Weber Von Hartz [1984] IRLR 317 ECJ*: An indirectly discriminatory condition can be justified: ''where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.''

b. *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* C-83/14, *[2015] IRLR 746*: ''assuming that no other measure as effective as the practice at issue can be identified, the referring court will also have to determine whether the disadvantages caused by the practice at issue are disproportionate to the aims pursued and whether that practice unduly prejudices the legitimate interests of [the people affected by it]. The 'concept of objective justification must be interpreted strictly', requiring appropriate evidence, with ‘mere generalisations’ concerning the measure “… do not constitute evidence on the basis of which it could reasonably be

considered that the means chosen are suitable for achieving that aim".

c. *Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] UKSC 15*: 'To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so.'

d. *MacCulloch v ICI [2008] IRLR 846, EAT*, set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in *Lockwood v DWP*:

(1) The burden of proof is on the respondent to establish justification
(2) The tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end". The reference to "necessary" means "reasonably necessary": see *Rainey v Greater Glasgow Health Board* (HL) *[1987] IRLR 26*.
(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardy & Hansons plc v Lax [2005] IRLR 726*
(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: *Hardy & Hansons plc v Lax [2005] IRLR 726, CA*.'

7. Legitimate aim:

a. *Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] UKSC 15*: 'The range of aims which can justify indirect discrimination on any ground … can encompass a real need on the part of the employer's business."

b. *United Distillers v Gordon EAT/12/97*: 'What has to be justified, in terms of the legislation, is the requirement or condition imposed which is said to be discriminatory, judged objectively, and, accordingly, it is wholly inappropriate, in our opinion, to decide the matter by determining the subjective approach in fact of the employer. It is not sufficient in law that the employer be satisfied in his own mind that the decision is justifiable on reasons good to him. A fortiori, the correct issue is not being addressed if all that is being considered are the employer's reasons behind his particular

decision. In general terms, the reasons behind the decision may well be elements in the justification process but, at the end of the day, it is an objective external judgment of those elements that is required to determine the issue in favour of the employer."

c. An aim which in itself is discriminatory will never afford justification.

8. Proportionate means:

a. *Hampson v Department of Education and Science [1989] IRLR 69* CA: Justification requires an requires an objective balance to be struck between the discriminatory effect of the requirement or condition and the reasonable needs of the person who applies it. It is not sufficient for the employer to establish that he considered his reasons adequate.

b. *Hardy & Hansons plc v Lax [2005] EWCA Civ 846*: An objective determination by the tribunal is required not a 'range of reasonable responses' approach. The principle of proportionality requires the tribunal to take account of the reasonable needs of the business, but it is for the tribunal to make its own judgment as to whether the rule imposed was 'reasonably necessary'.

c. *British Airways plc v Starmer [2005] IRLR 862, EAT*: a company rule which required part-time workers to work at least 75 per cent of the normal full-time hours; the EAT accepted that a tribunal was not bound to accept the employer's 'business reasons' on the facts of the case, and was right to have gone beyond identifying the existence of a margin of discretion and instead asked whether the arguments were adequate in themselves. Cf *Birtenshaw v Oldfield [2019] IRLR 946*: in assessing proportionality they should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

d. *Seldon v Clarkson Wright and Jakes [2012] UKSC 16*, the Supreme Court approved the following guidance from the EAT: `Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue.' It is the proportionality of the policy in terms of the balance between the importance of the aim and the impact on the class who will be put at a disadvantage by it which must be considered rather than the impact on the individual. As stated by the SC: 'Thus the EAT would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare. I would accept that where it is justified to have a general rule,

then the existence of that rule will usually justify the treatment which results from it.' *Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918 EAT*: there is a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, and cases where a policy permits a number of responses to an individual's circumstances. In the former the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim. '

e. *Cadman v Health and Safety Executive [2004] IRLR 971* CA: There is no rule of law that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer, however it may be more difficult for an employer to discharge the burden of establishing justification where there is no evidence to show that it ever applied its mind to the question of whether there was another way of achieving the legitimate aim that would avoid or diminish the disparate adverse impact on the protected group.

f. Necessary: *Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority*: : 'To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so.' :

> — part of the assessment involves considering the balance between the importance of the legitimate aim and its discriminatory impact on the persons adversely affected by it, and also that
>
> — part of the answer to the question of whether a discriminatory PCP is reasonably necessary to achieve legitimate aims 'To some extent … depends on whether there were non-discriminatory alternatives available.' She gave the example that in relation to losses of benefits resulting from an employer's actions 'grandfather clauses preserving the existing status and seniority, with attendant benefits, of existing employees are not at all uncommon when salary structures are revised. So it is relevant to ask whether such a clause could have represented a more proportionate means of achieving the legitimate aims of the organisation.'

g. *Disadvantage: Hardy & Hansons plc v Lax [2005] IRLR 726*: It is for the tribunal to weigh the reasonable needs of the employer against the discriminatory effect of the measure, and to make its own assessment of whether the former outweighs the latter. *City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18 (19:* In striking

the balance between the discriminatory effect of a measure and the reasonable needs of the undertaking, it is an error to consider only the impact of the PCP on the individual.

h. *Evidence required to provide justification*: *Chief Constable of West Yorkshire Police and West Yorkshire Police Authority v Homer [2009] IRLR 262* EAT: "… it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions'.' *Seldon v Clarkson Wright and Jakes [2009] IRLR 267* EAT: "We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment." Cf: *Lord Chancellor v McCloud [2018] EWCA Civ 2844*: the employer's justification must amount to more than 'mere generalisations'.

20. <u>Associative indirect discrimination</u>

1. Can a complaint be brought of associative indirect discrimination? *CHEZ RazpredelenieBulgaria AD v Komisia za zashtita ot diskriminatsia [2015] IRLR 746:* In a case where a non-Roma resident in a predominantly Roma area of Bulgaria complained of a practice of placing electricity meters high-up where they could not be read. The claim was one of direct discrimination, the argument being that this was directed at the Roma population, which also affected her as someone associated with Roma by her address. The ECJ stated "*The principle of equal treatment in the Directive is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless* suffer *less favourable treatment or a particular disadvantage on one of those grounds".* The words 'less favourable treatment' refer to what in the Equality Act is termed direct discrimination; the wording 'a particular disadvantage', indirect discrimination.

2. *Chez* was a direct, not an indirect, discrimination claim. However the ECJ held that this practice could constitute indirect discrimination. *Chez* did not go on to consider whether someone not sharing the protected characteristic but who was associated with someone who was, and was thus disproportionally disadvantaged by the PCP, would be within the scope of the indirect discrimination provisions. To quote Harvey: "However, the reference to both 'less favourable treatment' (found in the

definition of direct discrimination) and 'particular disadvantage' (found in the definition of indirect discrimination) suggests that 'associative indirect discrimination' is, as a matter of law, possible. … Whether s19 Equality Act 2010 can be read in a manner consistent with this judgment remains to be seen…"

21. Unfair dismissal - redundancy

1. S.98(4) requires the tribunal to be satisfied that the respondent has acted reasonably in all the circumstances in treating this reason for dismissal as sufficient. There is a neutral burden of proof, and the tribunal must make up its mind whether s 98(4) is satisfied in the light of all the information before it. The Tribunal must consider
   (a) was that redundancy the reason or principal reason for the dismissal and
   (b) if so, was the dismissal fair?

2. Polkey: "… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation". *"It is not for the tribunal to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently"*

3. *Langston v Cranfield University [1998] IRLR 172* EAT: The requirements of selection, consultation and alternative employment are so fundamental that they are in issue in every redundancy unfair dismissal case.

4. The Pool: *Capita Hartshead Ltd v Byard [2012] IRLR 814:* in relation to a pool of one, the EAT held that 'It will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem'. That was interpreted as meaning that (a) the tribunal does have the power and right to consider the *genuineness* requirement and (b) ruling against the employer's choice of pool may be difficult *but not impossible*. The applicable principles to be applied are as follows:

   (a) "It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in *Williams v Compair Maxam Limited [1982] IRLR 83*);
   (b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the

redundancies were to be drawn" (per Judge Reid QC in *Hendy Banks City Print Limited v Fairbrother and Others* (*UKEAT/0691/04/TM*);

(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in *Taymech v Ryan EAT/663/94*);

(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "*genuinely applied*" his mind to the issue of who should be in the pool for consideration for redundancy; and that even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

5. The selection criteria: *Eaton Ltd v King [1995] IRLR 75* EAT Scot: it is for the employer to show it had a good system for selection and to have administered it fairly. *British Aerospace plc v Green [1995] IRLR 437* CA: "Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge, namely a swift, informal disposition of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness will have done all that the law requires of him."

6. Individual consultation*: Mugford v Midland Bank [1997] IRLR 208*: "It will be a question of fact and degree for the tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

7. *Rowell v Hubbard Group Services Ltd[1995] IRLR 195* cited and approved the following guidance in the case of *R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72*: '… It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in *R v Gwent County Council ex parte Bryant*, reported, as far as I know, only at *[1988] Crown Office Digest p 19*, when he said:

'Fair consultation means:

(*a*) consultation when the proposals are still at a formative stage;

(*b*) adequate information on which to respond;

(*c*) adequate time in which to respond;

(*d*) conscientious consideration by an authority of the response to consultation."

8. *Hough and APEX v Leyland DAF Ltd[1991] IRLR 194* EAT: while it would be wrong to equate a breach of s 188 TULRRA with unfair dismissal, a tribunal was entitled to find that there had been an unfair dismissal where the employer had failed to consult with the union about whether there was any alternative to redundancy.

Procedural issues

22. On 13 October 2020 the claimant via her lawyers made an application to amend its claim of indirect discrimination as follows:

"The Claimant is female and was 53 years of age at the time of her dismissal. She provided full time care for her elderly mother. Statistically women are more likely to be carers (in particular full time carers), people aged over 50 are more likely to be carers than younger people (in particular full time carers), and 1 in 4 women in the age bracket 50-64 have caring responsibilities compared to 1 in 6 men. The Claimant was therefore more likely than either a male or a younger person to have such caring responsibilities.
"The Respondent provided a provision, criteria and/or practice ('the provision) namely that SLMs could no longer work at home on a full-time basis. The application of the provision put the Claimant at a substantial disadvantage due to those full time caring responsibilities."

23. The claimant's reasons for making the application at this time were as follows:

1. It was a Selkent 'relabelling' amendment which would not require an amended justification defence
2. No witness evidence would be required, documentary evidence would be limited to statistical evidence
3. The respondent had indicated at the last hearing a new argument, that *Chez* could not apply to a claim of indirect associative discrimination in the present case; while this was not accepted, the claimant should not be deprived of a potential remedy as a consequence
4. There was no prejudice to the respondent and little additional preparation time

24. The respondent objected to this application in writing on 19 November, pointing out:

1. The extensive procedural history, including that this was a re-listed hearing, the case was originally listed to be heard in November 2018
2. The claim form explicitly stated the claim was for disability discrimination only
3. The claims were clarified at a preliminary hearing
4. The claimant's lawyers have been on the record since 2018
5. Witness statements have been exchanged
6. The application is 'out of time' raised over 2.5 years after the limitation period (*Patka v BBC* applies)
7. These are new claims, not a relabelling of existing facts, and are not *Selkent* amendments
8. Additional preparation will be required
9. The application is made late without good cause
10. There are inaccuracies in the claimant's account of the *Chez* issue

25. We heard oral arguments on these point. Mr Green made the point that this was a relabelling exercise, the claim is about her role as a carer. The amendment was made in light of the argument on associative discrimination, that the respondent's argument on jurisdiction was raised. Mr Green stated that he was instructed and considered the argument that the claimant's treatment was less favourable as she was a carer – which goes to indirect age and sex discrimination claims.

26. The issue is therefore one of jurisdiction – there is no issue at all with a claim for indirect sex/age under *Chez* principles; the respondent raises the issue of indirect associative discrimination which it says arises from *Chez*.

27. The reason for the delay was the "lack of knowledge, and the jurisdiction issue being raised". Mr Green asked me to consider Eversheds v New Star asset management - this was accepted as a relabelling exercise - even when it was an amendment to add a new whistleblowing claim. "So it's the same facts - less favourable treatment because of carer status." There are no differences to the legal arguments as to whether indirect age sex of associative disability discrimination. And aside statistics on carers, no additional evidence is required.

28. Mr Green also asked us to consider *Ambrose* which underlined the *Selkent* arguments; also "consider the balance of hardship". There is no need for extra evidence, no adjournment, no costs issues for the respondent; contrarily for the claimant she potentially loses without a remedy on a jurisdictional point.

29. Mr Zovidavi for the respondent argued that in fact the claimant is raising two new claims with new issues arising. There is only a "tenuous connection" between the claimant's sex and this claim. The claim rests on the proposition that she is a woman of an age, and so more likely to be a carer. In fact the statistics are 58% of carers are women and 42% men – not a disproportionate difference.

30. Delay is also important argued Mr Zovidavi – "it's been listed for final hearings 4 times now" and the jurisdictional issue was identified in September *2019 - "but this was not a surprise".* It's been over 2.5 years since the claim was issued *"only now is the application made, it's not reasonable to pursue"*. And there's a need to produce statistical evidence which will cause delay.

31. To the point that the respondent had been on notice of this application and had not provided any document Mr Zovidavi argued that the respondent "must be allowed" to adduce new evidence which are not to hand. "So the respondent would need to find evidence. But adjournment is not desirable, but justice may not be done."

32. Mr Green argued that this was "a question of submissions on statistics for which evidence could be easily downloaded. Mr Zovidavi agreed that it was a issue for submissions.

33. After deliberating and considering the legal authorities, the Tribunal concluded that it would allow the amendment to add claims of indirect sex discrimination and indirect age discrimination. The Tribunal concluded that it was "just and equitable" to do so for the following reasons:

    1. This was a labelling amendment. The amendment was adding nothing material to the facts of the claim – the new claims arise from the same facts as pleaded, that the redundancy process was indirectly discriminatory because the claimant is a carer who must work from home a significant part of the week and was unable to comply with the new business requirement to work from the office.
    2. The amendment adds to an already existing claim of indirect discrimination, and is not an entirely fresh head of claim (e.g. automatic unfair dismissal, or harassment);
    3. The amendment arose out of a jurisdictional point raised by the respondent which did not form part of its defence to the claim and which it appears was first identified when the claimant was acting in person. While criticism could be levelled at a failure to raise it earlier, we concluded that it was raised in good time once the implications of the jurisdictional point was understood;
    4. No new witness evidence is required, and the parties agree that the only documentary evidence required is statistical which is already in the bundle;
    5. There is a significant risk of hardship to the claimant if this amendment is not allowed, in that facts may be proven in the claim which give rise to an indirect discrimination claim succeeding, but the associative indirect disability discrimination claim failing on a jurisdictional issue.
    6. The amendment is raised late – only two months before a hearing already postponed several times. However, there is little hardship to the respondent in terms of additional costs or a need for evidence, and the respondent implicitly accepted the hearing could fairly proceed

without the need for an adjournment, in that the only additional factual issue related to the statistics, and it was clear that the respondent was able to run arguments on these statistics, as it did in its response to this application.

Witnesses

34. For the respondent we heard from Ms Lucy Williams a Senior HR Business Partner, Mr Tony Alexander the Director of Commercial and Ms Amanda Beech who undertook the claimant's appeal against dismissal. We heard from the claimant and from a former colleague, David Gregory who was a homeworker dismissed at the same time as the claimant.

35. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

36. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

37. The claimant was employed by the respondent from 1 December 2011, latterly as a Senior Lending Manager (SLM) in the respondent's Commercial Lending team, to her dismissal on the purported ground of redundancy on 15 January 2018. The claimant's work record was good throughout her employment. Mr Alexander agreed in his evidence that she had high ratings and appraisals, accepting the characterisation of her as *"a top performer",* and agreeing with the comments in her appraisal documents, including her *"…relentless focus on optimising the development of the individuals on the team. She has also expanded her network of mentees … she forms strong relationships with individual team members … she is a strong coach and has used this to benefit the wider division often being specifically sought out for the counsel that she provides … she is adept at using adversity to generate positive outcomes .. this sets her apart from her peers …"* (claimant's bundle 122-122a).

38. The claimant's contract was a 'home working contract', i.e. her principle place of work was her home address. Her contract required her to attend the office for meetings, and it required her to work from other locations including permanently depending on the needs of the business. The respondent's *"Homeworking – Employee Guide"*, characterises the claimant's relationship as a *"Formal"* contractual arrangement, (the alternatives being to 'informal', and 'casual' arrangements). The Guide also references policies specific to homeworkers.

39. It was accepted by the respondent's witnesses that the claimant attended the office weekly. It was disputed for how long, with Mr Alexander characterising her weekly attendance as mid-morning one day to mid-afternoon the next. The Tribunal accepted the claimant's evidence that she was usually in the office 2 to 3 days a week, getting the early train day 1 arriving at the office by 8.30am, working office hours and staying overnight and on the day of her return leaving the office around 4.00 for her train. The Tribunal accepted that this was known to the respondent's senior management, if not to Mr Alexander. Certainly no issues had been raised with the claimant about her attendance at the office at any time during her employment.

40. One issue in the case was whether the respondent was aware why the clamant had to work from home, which was because of her caring responsibilities for her elderly and disabled mother. Ms Williams evidence was that she was not aware of the reason, but that she accepted that the claimant had had conversations with local managers about this. The Tribunal accepted that the respondent's management was aware during her employment of the reasons why the claimant worked from home, and this was because she was the primary carer for her elderly mother. This reason was brought up by the claimant in the subsequent redundancy exercise.

41. There was a redundancy exercise titled TEAL 1 involving the Commercial Lending team in Autumn 2016. The reason for this redundancy exercise was accepted by the parties - a decision taken by the respondent to cease new commercial real-estate lending, and to run-off the existing commercial lending book. Over time, with no new business being accepted, the commercial book would gradually reduce. All parties understood and accepted that over time this would lead to a reduction in the number of SLMs required to undertake the role.

42. During Teal 1 the claimant not selected for redundancy. She states that was told that her role would be safe for the foreseeable future, being told also that homeworking contracts would continue, and that her performance as a homeworker was *"proven"*. The Tribunal accepted the respondent's position in relation to these remarks, that whatever may have been said to her, the commercial lending book was in run-off, there was always that prospect of further redundancy rounds, and the claimant would have been aware that her role would not exist indefinitely.

43. TEAL 2 - a further requirement to reduce staff within the commercial lending team - commenced in October 2017. A decision was taken to reduce the number of SLMs from 12 to 8 (answers sometimes refer to retaining 9 from 13, the additional SLM was a Manchester-based SLM role which was not put at risk). A decision was taken at the outset of TEAL 2 - although this was not initially minuted or noted - that all SLMs would need to be based in the office to undertake the role. The respondent's evidence was that there were two main reasons for this: firstly the work had become more transactional and process driven with less emphasis on client relationships, instead a need to implement run-down of the book and the greater need for staff supervision by SLMs to

undertake this; secondly feedback from junior staff received by Mr Alexander, he said, which suggested a dissatisfaction with the level of supervision provided to them. This decision was made by Mr Alexander; the respondent's witnesses accepted that there was no audit trail showing how this decision came to be made.

44. The Organisational Change proposal PowerPoint slides produced for the initial presentation to staff included *"the proposal to remove 2 home working arrangements as it is now essential that the local teams are managed by managers on site"* (104). The reference to removal of homeworking contracts was not included in the final slides shown to staff, instead it was to be discussed with the staff members concerned including the claimant at individual consultation meetings. Staff were to be invited to express a preference for working at either London or Northampton offices, or whether their preference would be to leave the respondent (100i).

45. It was put to Ms Williams that there was *"no link"* between the rationale for reorganisation and the decision to cease home working. Ms Williams disagreed, saying that as far as the business was concerned the role could not be done from home, because the reduction in the numbers of SLMs meant there would be less day to day supervision of junior staff being undertaken by the remaining office-based SLMs, that for example there were less SLMs for junior staff to go and have a work-related chat with: *"This left a gap in the requirement to supervise … the claimant was required in [the office] to supervise"*. She stated that there was not at this time the IT structure in place to communicate remotely, that there was *"a requirement to reduce the number of SLAs - so office and home based SLAs were all at risk"*. In her rationale for why, in order to manage office based staff, the SLAs needed to be in the office, Ms William's answer was that *"this is based on a change in customer behaviour and how managers manage …. Mr Alexander received feedback in team-meetings from Lending Managers regarding the benefits of having on-site supervision. This is part of the thinking."*

46. Mr Alexander's evidence was that the feedback was that there was a requirement to have accessible and visible managers – this was deemed to be *"essential"* (page 104); he stated that *"we believed this based on analysis"* which involved discussions with senior managers, and feedback he had received from more junior staff. And this, plus the requirement to restructure portfolios meant, *"when drafting the job description made us believe that SLMs needed to be on site the majority of the time and least three full days";* he stated that the key issue is the reduction of SLMS, that the business could accommodate homeworking when there were 13, not when 9 *"… and it was not felt we could continue with a home based arrangement"*. He stated that the transactional arrangements with the drawing-down of the book meant *"…more support. Not day-to-day or hour-to-hour observation, but supervision, being able to answer questions multiple times a day… We felt people would not pick up the phone as often to ask questions…"* Mr Alexander accepted that he had not asked staff

whether picking up the phone was an issue, instead that *"we concluded … at least 3 days needed in the office".*

47. Mr Williams evidence was that the issue of supervision arose in *"coffee mornings with junior staff"* that there was a *"general consensus"* that there was more flexible working from home and this was contributing to the issue of supervision. Mr Alexander also accepted that the claimant's appraisal showed that homeworking did not impede her visibility or status within the team, that she was *"highly visible"* when she was working in the office. Mr Alexander's point was that *"we felt strongly we needed a greater presence"* in the office, that *"it's so much better if they are sitting next to each other … the informal day today supervision that was lacking".*

48. It was suggested to Ms Williams that there was no evidence on the thought given to the impact on home workers prior to making the decision to delete the homeworking contracts, a failure to undertake a 'balancing exercise'. Ms Williams evidence was that there were *"business discussions, but these were always verbal and not documented".* She stated that there was a *"conscious decision"* to make the roles office based. Ms Williams agreed in her evidence that prior to this proposed reorganisation, the home-based SLMs were undertaking the same line-management work to the same extent as office-based SLMs.

49. There was a meeting with the staff union on 17 October 2017 at which concern was expressed that formal homeworkers had been placed at risk of redundancy because of a requirement to attend the office, noting that this is not a sufficient reason, and that this would be *"picked up"* with Ms Williams. Ms Williams evidence was that she *"articulated the business rationale and I spoke to the Chair, and the action was closed and no further causes of concern raised about this issue."* We accepted that after detail was provided for the rationale, the union raised no significant objections to the respondent's proposal, that the respondent believed it had the union's *"permission"* (Ms William's evidence) to proceed with its proposals.

50. The claimant was written to on 16 October 2017, being told that her role was at risk of redundancy and she was invited to an initial consultation meeting (136). She was on leave when the first consultation meetings took place with staff, and it was agreed that her consultation meeting would take place on 1 November 2017. Prior to the meeting she raised concerns that the organisational structure chart showed that the roles were now office based, and she was informed that *"the proposal is to place the roles that are currently home-based at risk"* (140).

51. On 30 October 2017 the claimant's line manager wrote to her in response to her query about another homeworker who had questions about the new structure. She was told "*…I would expect all the team to be in the office everyday … unless there is a specific business need or benefit to … work[ing] from home on a particular day – I certainly would expect it to be no more than a single day in any week"* (141). The claimant concluded – and the Tribunal considered this

to be a realistic conclusion to draw – that this would apply to her under the new structure. However, the Tribunal also noted that this conflicted with Mr Alexander's clear evidence that he would expect "at least 3 days" in the office under the new arrangements. We found that this requirement, that the proposal in fact required a minimum of 3 days per week in the office, was not communicated to the claimant at any time.

52. The claimant attended the consultation meeting on 1 November. The meeting notes show that her first question was about the decision to remove homeworkers from the new structure and was told … *"…we need office presence and 'it was now better to have office based SLMs'"* (144). In his evidence, Mr Alexander accepted that he had said it was *"better"* rather than 'essential' to have office based SLMs; his evidence was that it was *"significantly better"*, there was a need to provide *"oversight, supervision, advice and guidance"* and that fewer SLMs *"… reduced the opportunity to ask questions"*.

53. The notes of the 1 November 2017 consultation meeting show that the claimant was told *"she can make a counter-proposal if she wants to – i.e. she doesn't think the homeworking contract should be removed."* The notes states that the claimant *"is not making a counter-proposal at this time…"*, Mr Alexander confirmed that *"we cannot consider changing the proposal without a counter-proposal"* (146).

54. The issue of whether or not the claimant had made "a counter-proposal" in the redundancy process and the significance if she had failed to do so took up a significant part of the evidence in the case. The respondent's case is that the claimant failed to engage at the consultation meetings as she failed to make a counter-proposal which could be considered and may have led to her retaining a role. This, says the respondent, is the reason why her selection for redundancy was confirmed. Mr Alexander's evidence was that it was for the claimant to put a counter-proposal to the respondent's proposal, if she had *"… we would have explored how we might have been able to address retaining her. And we tried to encourage this conversation."*

55. On the same day - 1 November 2017 - the claimant sent a formal complaint to Mr Alexander stating that the respondent was *"attempting to change my terms and conditions by asking me to work in an unsuitable location"* and also by not including the Manchester role in the pool. She referenced being a carer for her *"elderly and unwell mother who lives with me. She suffers from a disability…".* She stated that she could not state a preference from the 3 options "*I therefore formally request that my working from home contract continues…",* alternatively that *"Manchester is correctly placed into the pool…"* (142-3). Ms Williams accepted in her evidence the claimant was *"formally raising concerns"* – her response referred to the need for a *"counter-proposal which would have worked"*. For the respondent, as stated by Ms Williams and Mr Alexander, the issue was that all SLMs participated in the selection pool, and that the claimant, when put at risk, was *"invited to talk about a counter-proposal"*.

56. The claimant's case is that her proposal was that she wanted to retain her current arrangements, that she believed she could undertake her role effectively continuing to work from home and attending the office. There was significant evidence on whether this proposal amounted to a counter-proposal. Ms Williams stated she would have *"expected the claimant to put forward a counter proposal".* A email lent to the claimant on 10 November 2017 stated that *"…if you feel your homeworker contact can continue in its current form, please submit your rationale for this by way of a counter-proposal. Which we will of course consider…"* (155-6).

57. The claimant's response on 14 November 2017 made it clear that she considered the decision was predetermined, she referenced caring for her disabled mother, and she referenced the fact that other staff who had indicated they wished to leave had been approached *"… with a proposal which supports them continuing in their role for longer with their redundancy protected…".* She said *"My counter-proposal is to continue on my existing home working arrangement and this is never going to be supported based on unsupported and non-existent 'business needs'…".* She stated *"By setting out the business needs 'to have more SLMs available on site more regularly' and my LM confirming his negative stance on flexible working … you have removed all my options…"* (156-7).

58. The claimant's reference to staff being approached in her 14 November 2017 email is the undisputed evidence that 4 SLMs members of staff were required to be made redundant in Teal 2 and, in the initial redundancy consultation, 6 expressed a preference to leave. Mr Alexander contacted many of them explaining that the respondent could not accommodate all 6 and he proposed that they defer their leaving. The claimant's comparator Mark Allen had volunteered for redundancy, he was approached and he accepted the offer to stay, on the basis he would receive a redundancy payment when he eventually did leave. The claimant was not approached. Mr Alexander's rationale for not approaching the claimant was that *"… I approached those who had preferred to leave to see if they would defer their exit … the claimant had not at this time said she wanted to leave …".* Mr Alexander said that Mr Allen *"was only one who agreed to delay his exit".* His evidence for not approaching the claimant with a proposal was that *"we were struggling to have any dialogue with her … we tried to have many conversations with the claimant who would not engage on these sort of matters."* The Tribunal rejected this evidence. The claimant had clearly expressed a desire to stay in the business. The Tribunal saw no reason why the respondent could not have engaged with the claimant once it became clear that it had enough volunteers for redundancy to achieve in excess of the 4 required redundancies. The reason why it did not, we concluded, was that it wanted to delete the homeworking posts even if it achieved its required reduction in SLM numbers.

59. On 15 November 2017 the claimant had a second consultation meeting and she was that she had not secured a role in the proposed structure; there was to be a further formal meeting in mid-January 2018 (164). Ms Bradbury responded

to the claimant's 14 November email on 20 November, saying *"We have invited you to make a counterproposal if you feel your homeworker arrangements can continue in the proposed structure and acknowledge receipt of the counter-proposal you have made …. We will take this into consideration…"* (159-60).

60. In her response on 21 November 2017 the claimant stated *"You keep suggesting I put forward alternative proposals. I have proposed clearly that my role is workable in the new structure and you have chosen to ignore my proposal. You have made it clear that any proposals would not be supported as you have chosen me, rather than my role specifically, for redundancy*" (167). In her response dated 29 November 2017, Ms Bradbury stated that *"If, following discussions with you, we are able to support your counter-proposal to continue in the role with your home worker contract remaining in place, then those arrangements would continue as they are today"* (165).

61. The respondent's evidence was that a 'counter-proposal' might have been accommodated. Ms Williams evidence was that *"we managed to accommodate 8 out of 11 counter-proposals. So my view we are open to counter-proposals".* She stated that the onus was on the staff-member to *"… raise a counter-proposal to be discussed at organisational change meeting. As a discussion on detail did not occur with the claimant , this was not the direction of travel that she wanted to pursue, so no discussion took place"*. Mr Alexander's evidence was that *"if she had engaged - committed to doing 3 days a week in office - entered into a dialogue with the two of us, flexible, but she did not … She did not want to engage when we tried to"*

62. The Tribunal concluded that the claimant's position throughout the consultation process, made clear to the respondent, was that she wished to work under her current homeworking arrangements, she believed that it was feasible for this to continue under the reduced numbers of SLMs and that this was her formal 'counter-proposal'. The Tribunal concluded that the respondent did not give this request any consideration because it was not, for the respondent, a 'counter-proposal', and its position was that the claimant was therefore not engaging in the process. Repeatedly in its evidence the respondent's witnesses confirmed that the lack of a counter-proposal was the rationale for confirming her redundancy.

63. The Tribunal also noted that the respondent's redundancy policy, which sets out a detailed process, makes no reference to a requirement to make a counter-proposal as a consideration for being considered for retention in role (86-95)

64. There was a meeting with the claimant and Mr Alexander on 14 December 2017. This was classed as an informal meeting, not minuted (the next formal consultation meeting was diarised for 13 January 2018). There is a dispute as to what is said at this meeting. The claimant understood the meeting to be to discuss her proposal. The claimant was aware of this time of the offer made to Mr Allen to remain in post beyond redundancy despite his expressed wish to leave, *"… he wanted to leave and was being talked to and I had made a counter-*

proposal… so I walked into 14 December meeting hoping/assuming I was in the same position. … So I could only assume that my counter-proposal would be considered as Mark Allen had a preference to leave, and had a proactive conversation to defer his redundancy. … So my interpretation was that I was going along and they were going to talk about what they could do".

65. The claimant's evidence of this meeting, which we accepted, was that she asked *"what are the options as I understand it's 4/5 days in the office and losing homeworking contract … they gave me nothing to work on at that meeting"* Mr Alexander stated that he was there to listen to the claimant's suggestions; he was clear that the claimant stated she did not want to discuss a counter-proposal and that *"we concluded that she did not want to counter-propose … I am categorical she was saying she did not want to counter-propose including things staying as they are; she was saying she did not want to stay with business…".*

66. The Tribunal concluded that there was an impasse at this meeting: the respondent did not engage with the claimant on her staying in role (as it had done with others who had expressed a preference to leave); it did not contradict her view that the only role on offer was 4/5 days a week in the office. The Tribunal concluded that the respondent did not suggest at all that it was prepared to reconsider its new office-based working arrangements and we concluded that the reason for this was because the respondent was not prepared to reconsider its decision to remove homeworking contracts with the expectation SLMs would work full-time in the office, The claimant concluded that there was no point in further engaging in the 'counter-offer'; we accepted her evidence that by this stage she did not consider it would change its position *"… I was saying this is what my understanding is, 4/5 days and I can't do this. And so they say 'you're not counter-proposing', and I was saying 'my proposal is what I can do', and they say 'counter-propose' and I say can't do what you want, so they say 'you're saying no preference', and I say 'I can't do those things'. I did not want to leave but I could not stay."*

67. Notwithstanding a further consultation meeting scheduled for 15 January 2018, the claimant's letter of dismissal was prepared by 21 December 2017 (e.g. 172); while this was not sent until 15 January, the claimant was asked on 28 December to fill in a leavers-form, sent to her at this time in error by HR (187-190).

68. A letter was sent by the claimant, a copy is not in the bundle, the response from Ms Bradbury in HR dated 3 January 2018 is and it states, *"During the meeting we were keen to understand from you the rationale for the counter-proposal …. We had been considering your proposal and were looking for further detail to confirm how your continuing on a home working contract would support the proposed future structure for Commercial … You stated in the meeting that you did not feel able to continue in your role as a result of a lack of support you feel you have received, and your perception that the change programme has been unfair to you. In response to these point, Nationwide denies any accusation of*

unreasonable conduct throughout the process I hope this clarifies our position…." (176).

69. In a letter dated 5 January the claimant described the counter-proposal as *"farcical"* as her proposal was to retain exactly what was being removed – her current homeworking contact. She stated that the *"redundancy process has a prejudiced outcome that provides criteria that places me at a substantial disadvantage as the carer for a disabled person"* (193-4). On 8 January Ms Bradbury sought advice from members of her team. – referencing that the claimant had seemed to raise a counterproposal, was now saying *"categorically"* she did not want to do so, but was referencing *"the need to care for her mother as a reason for needing to maintain her homeworking contract. The homeworking policy clearly states that this is not what the policy is intended for…. Do you have any other suggestions on how to deal with this?"* (191). No response to this query appears in the bundle, however a response to the 5 January letter was sent to the claimant, stating again the rationale for the change – for the *"remaining SLMS to be available and visible to manage their teams providing support… we took into account all the feedback received as well as business needs to arrive at a view that SLMs need to have an office base in order to carry out the key responsibilities moving forward and perform effectively. The proposal is that the role would not be able to be performance effectively from home on a permanent basis for the reasons stated above"* (196-7).

70. On 15 January 2018 the claimant was informed that her role was redundant with effect from that date (199-200 and claimant's bundle document 96),

71. On 20 January 2018 the claimant submitted a grievance stating that she had been unfairly treated and selected for redundancy. The appeal was rejected, one of the reasons being is that she did not raise a counter-proposal to challenge the decision, and she did not provide any suggestions as to how a home-based SLM could provide the required level of support, accordingly the company was *"unable to consider this any further" ;* that there was *a "genuine business reason"* for SLMs to be predominately office based and she had not *"put forward any suggestions …. as to how you could provide the required levels of support to your team whilst also working from home and balancing your caring responsibilities…"*. In her evidence Ms Beech accepted that there was a need to have a two way dialogue, and that there were *"opportunities missed by the claimant to present to us how we could make this work … It felt like a compromise could have been reached had the claimant put forward a counter-proposal. This could have extended her 2-3 days in the office, but this not put to us."*

Closing Submissions

72. Both parties provided written submissions. Mr Green for the claimant's first comments referenced the respondents closing, in particular paragraphs 5, 6, 9, 11, 13, 18 and 19. He argued that contrary to the submission the claimant did

make a counter-proposal. The claimant *"did not close the door on the process… she was in fact getting nothing back"* on her wish to retain her role.

73. On the issue of a comparator, Mr Allen is the suitable comparator, he worked at home and had *"less than a full-time working pattern … a similar working pattern to the claimant … who is not disabled/associated".* Mr Green argued that Mr Allen was not told he had to spend more time in office and he was not dismissed. He argued that if the claimant had not been labelled as carer/homeworker she would not have been treated in this way.

74. Mr Green argued that the claimant's evidence was *"confident"* and Mr Alexander's was *"hesitant with poor recollection".* He stated that there was "an issue" with the reason for dismissal: *"This is not a redundancy. the reason the claimant was dismissed is not because the claimant was redundant. There were two separate dimensions. One was to stop SLMs homeworking and the other reduce the numbers of SLMs. And a month before the claimant was dismissed 4 accepted redundancy, so no diminished requirement …".* He argued that it would be an *"error of law"* to argue that her homeworking role was redundant, in fact the issue was one of a change to the terms and conditions to her role and the requirement to work from the office, *"… this is not a redundancy. So the respondent has not provided the reason for dismissal. In fact it was a decision by the respondent to change the claimant's contractual terms."*

75. Mr Green stated that Mr Alexander had *"admitted there was no change to the role"* to be undertaken, and the decision taken to delete homeworkers *"was on a back of a fag packet - no rationale put forward aside from a coffee morning".* He argued that even if there had been more than one person at a group coffee saying this, *"it was unreasonable to adopt because of the impact on the claimant, there should have been an assessment…"*. There was no balancing exercise – was this an *"essential"* change that was required *"or just better"*? He stated that Mr Alexander had *"admitted"* there was no evidence that the claimant could not continue to be a supportive and effective managers on her current contract.

76. Mr Green argued there was inadequate consultation - one consultation meeting on 1 November - then nothing until 14 December. The claimant was asking for information and then the issue whether she did or did not put in a counter-proposal *"… the notion that the claimant is not doing anything and not bothering and did not want to keep her job is ludicrous … the respondent did not discharge its duty to consider her proposal and to consider alternatives. It is very clear that Mr Alexander seems to think there is no onus on the respondent to put forward any suggestions for alternatives - it was entirely on the claimant and she is blamed for not doing so, shockingly when she has counter-proposed."* He referred to the respondent's arguments on what it characterises as the claimant's lack of a counter-proposal as *"semantic… the respondent does not provide the rationale for its reasoning, how could the claimant put forward a substantive response apart from saying I can do job as I am, which she did?"*

The appeal, he argued made it worse, it was a rubberstamping, with no scrutiny and was *"a breach of natural justice".*

77. Mr Green argued that the decision to dismiss was predetermined, for the following reasons: Mr Alexander *"would not be budged"*; he was not prepared to consider alternatives; the request for leavers to defer *"was indicative that the claimant was left to one side"*; and in fact it was not a redundancy.

78. On direct discrimination, this does not have to be conscious — the issue is less favourable treatment. However the fact that there was no balancing exercise *"is indicative of a dismissive attitude".* The respondent has to show why the claimant treated differently; *"the decision-making process was so flawed as to why homeworkers going to be deleted, a knee jerk reaction with no explanation".* He argued that the claimant was put at risk and dismissed in circumstances were others were approached to stay on after volunteering. *"The difference in treatment is that they are approached and the claimant is not and she is dismissed".*

79. On indirect discrimination – Mr Green argued that the statistics show that 58% of carers are female and 42% men – and therefore women are 38% more likely to be a carer. *"This is more than enough to show disparate effect."* He argued that there is no requirement to construct a pool that the statistics are *"frequently relied on in flexible working cases"*. On the respondent's statistics (table 2) – that 9.3% of men and 12.1% of women are carers – there is a clear difference – 33% more women are carers than men – *"a clear difference between men and women providing full-time unpaid care."* The claimant was put at a disadvantage.

80. Mr Green argued that the respondent's aim was not legitimate: the legitimate aim should ne reasonable supervision. And it is not proportionate to sack the claimant of there was a need to increase supervision, just because there was a need for effective supervision in the office.

81. Mr Zovidavi argued that the *"perfect comparator"* is David Gregory who is on a home-working contract *"… exactly the same contract"* and he was selected and made redundant. He was not disabled. The claim of direct discrimination therefore *"must be doomed to fail"*. By contrast the claimant's comparator Mr Allen was on a flexible working arrangement not a formal homeworking contract and was in the office different hours. Additionally, Mr Allen had a preference to leave, so the any different treatment was not based on the same circumstances.

82. On the indirect discrimination claim and women being *"more likely"* to be carers – *Shackleton*: Mr Zovidavi argued that the statistics for why this is the case and the type of care – caring for children, for elders are not apparent *"… so caution against using this analogy – there is a lack of evidence."* Also, there is no evidence that women are disproportionately affected by the PCP. In any event, *Chez* makes it clear that there can be no claim of s.19 indirect associative discrimination, and this is the claimant's primary claim.

83. On unfair dismissal – Mr Zovidavi argued this was a redundancy, a genuine restructure; it is *"artificial"* to say there was a pool of two homeworkers, all SLMs were treated the same for the newly available SLM roles. The unions accepted the rationale that it was "e*ssential"* that SLMs manage on site and approved the process.

84. In fact, the respondent was waiting for a counter-proposal, and the only logical outcome of the process was the claimant's redundancy because *"…it was the claimant's own doing as she failed to engage".*

85. In his reply, Mr Green argued that Mr Gregory could not be an appropriate comparator because *"he is tainted by the label of homeworker…."*. The test is disparate treatment between the claimant associated with a disabled person by reason of her homeworking; Mr Gregory was also on a homeworking contract and so could not be the correct comparator. On *Chez* Mr Green argued that that AG's opinion was adopted and it is not the case that the indirect claim was contingent on the direct claim; it is possible for the indirect associative claim to succeed alone.

Conclusion on the evidence and law

Unfair dismissal

86. We first asked if the respondent has proven the reason for the claimant's dismissal – redundancy. We concluded not, for the following reason. There was a requirement to select 4 SLMs for redundancy; 6 volunteered to leave and at least one member of staff, Mr Green, was persuaded to stay on beyond the redundancy date. This all occurred before the claimant's formal selection for dismissal. Hence, the numbers to be selected - 4 - had been reached, and there was no further requirement to reduce the number of SLMs to undertake the SLM role. Accordingly the Tribunal concluded that the claimant's dismissal was not wholly or mainly attributable to the requirement to reduce the number of SLMs in the commercial lending department.

87. The Tribunal concluded that the reason why the redundancy process continued with the claimant was because the respondent wished to delete the SLM homeworking positions. This formed part of its explicit rationale. This was not the same as reducing the number of SLMs, as shown by the respondent's successful approach to Mr Green to stay on after he had volunteered to leave. While the decision to delete homeworkers was conducted alongside the redundancy process, during the claimant's consultation it had become clear to the respondent that it did not need to further reduce the number of SLMs because of the number of volunteers in the process.

88. Because the respondent has not proven the reason for dismissal was that the claimant's post was redundant, the claim of unfair dismissal succeeds.

89. The Tribunal next considered the rationale for the reason to delete homeworking posts. The Tribunal noted that there was little rationale given at the time by the respondent to the claimant for the reason to delete homeworking posts. At the Tribunal hearing, Mr Alexander was unable to point to any evidence suggesting that there was, or that there was likely to be, a difference in the size or complexity of portfolios which staff were managing – and this was one of the justifications for deleting homeworking posts. Mr Alexander accepted that the claimant was properly supervising staff from home. He did not dispute that rotas could be drawn up from amongst the remaining 8 (excluding Manchester) SLMs to ensure proper supervision – including on the 2/3 days that the claimant was in the office. He accepted that draft letters could be checked remotely (another of the respondent's justifications for removing the home-based SLM roles. The Tribunal also concluded that Mr Alexander's evidence of concerns from staff about the supervision they were receiving was limited, anecdotal and did not reference the claimant.

90. We concluded that the respondent was unable to show that its rationale for deleting homeworking posts had any basis in evidence; we concluded that it was based on a view amongst senior management that homeworking posts should be deleted, it would be 'better' to do so, rather than based on any analysis of the business need for on-site SLMs or any consideration of an alternative approach. We considered that this decision was taken without any real understanding of the claimant's actual working practice, which was in the office 2-3 days a week. Being careful not to substitute our own opinion for that of a reasonable employer, we concluded that the respondent was unable to provide any evidence to support its view that there would not be enough on-site SLMs to adequately supervise on-site staff once its redundancies had been achieved.

91. If redundancy was the actual reason for dismissal, we concluded that the claimant's selection for redundancy was unfair. Again, being alive to the prospect of 'substitution, the Tribunal considered that the respondent failed to properly consider whether her role could continue to be undertaken under her current contract, particularly based on Mr Alexander's evidence that the job-holder would be required to spend 3 days a week in the office and not at least 4, as the claimant made clear she thought to be the position including in her December meeting with Mr Alexander. This was not discussed with the claimant, and we wondered why, given that the claimant often worked 3 days a week in the office.

92. The Tribunal concluded that the reason why this was not discussed with the claimant was because the respondent did not want to continue employing staff on homeworking contracts. The fact that all redundancies required had been achieved meant that, we concluded, there was little justification for failing to engage at all on the claimant's proposal. This was, we considered far outside of the range of responses of a reasonable employer. We concluded that the consultation process failed at all to engage with the claimant's view that she could undertake her role from home and that she was doing so and her staff

were properly managed and supervised, with excellent feedback. The reason why it failed to engage with the claimant was because the respondent was not prepared to engage with the claimant unless she claimant accepted she would lose her homeworking contract.

93. We accordingly concluded that the consultation stage was conducted well outside of the range of that of a reasonable employer undertaking a redundancy process in which the required number of redundancies had already been achieved.

Direct Associative Discrimination

94. We considered first whether there was "less favourable treatment' of the claimant. She relies on Mr Allen as her comparator. We noted the *Vento* guidance on comparators – that a claimant can rely on a comparator whose circumstances are not quite the same - *"non-identical but not wholly dissimilar cases"*. We accepted the claimant's evidence that Mr Allen worked from home and attended the office on a similar pattern to that of the claimant. There was a difference in treatment between the claimant and Mr Allen, as she was selected for redundancy, and he was not, and we accepted that the reason she why she was selected for redundancy was because she was on a homeworking contract and he was not. Mr Gregory was employed on a homeworking contract, and he was dismissed, and the respondent argues he is the appropriate comparator, because his circumstances are the same as the claimant's and he was dismissed, but is neither disabled nor a carer for a disabled person.

95. The Tribunal noted the *Shamoon* test, that it will sometimes not be possible to decide whether there is less favourable treatment without deciding the reason why the treatment occurred. The Tribunal concluded the following in relation to the comparator. The reason why the claimant was initially selected for dismissal was because of her homeworking status; the same occurred to Mr Gregory, and his witness statement makes clear that his treatment was essentially the same as that of the claimant, for example he was not told of the prospect of retaining his post after the number of redundancies was reached, he was told to submit a counter-offer which would effectively entail losing his homeworker status, he was told he would have to work 4 days in the office. The respondent wanted to remove all homeworkers at SLM level, and it decided to do so as part of a redundancy exercise. Mr Gregory was not disabled, and was not a carer.

96. The Tribunal concluded that the reason why the claimant was selected for redundancy and the dismissal process continued after the number of redundancies was achieved by voluntary selection, was because of her homeworking status. The Tribunal accepted that the reason why the claimant could not move from her homeworking contract was because of her caring responsibilities. However, her caring responsibilities were not the reason why she was selected for dismissal; Mr Gregory's treatment was no different. We did not accept Mr Green's contention that *"she had the label of homeworker due*

to the fact that she was a carer" (written closing paragraph 53). We concluded that the reason why the claimant was selected, and then dismissed, was because she was on a homeworkers contract that she was unable to deviate from, the same as Mr Gregory.

97. We concluded therefore that the claimant has not been able to show that her treatment as an employee on a homeworking contract was any different from a nondisabled employee or an employee who was not associated with a disabled person on the same contract, and on this basis the claim of direct disability discrimination (by association) fails.

Indirect Associative Disability Discrimination

98. We first considered the issue of jurisdiction arising out of *Chez*. The respondent's argument is that this case cannot apply to an indirect associative discrimination claim. The claimant's argument is that set out in *Harvey*, that it is now *"at least arguably the consequence"* of *Chez* that a complaint of associative indirect discrimination is possible.

99. We noted the reasoning in Chez, that the Directive is intended to benefit those who are associated with a protected class who suffer "less favourable treatment or a particular disadvantage on one of those grounds"(our underline). We concluded that s.19 Equality Act 2010 must be read in a manner consistent with this judgment: that s.19 "relevant characteristic of B's" must be read so as to apply to employees who are associated with a person with a relevant characteristic, that the provisions of s.19(2)(a)-(c) are applicable to an associated person.

100. We next considered the nature of the provision relied on by the respondent: a requirement that SLMs could no longer work at home on a full-time basis. We concluded that this provision put the claimant at a substantial disadvantage because of her association with her mother's disability as her principle carer. We accepted as a general proposition and as a self-evident fact that carers for disabled people are less likely than non-carers to be able to satisfy a requirement to be office-based, because of their care commitments.

101. We next considered whether the respondent took such steps as were reasonable to avoid the disadvantage. We concluded not – there was no discussion about alternatives, there was no evidence on which the decision was based, and the claimant's view that the role could continue as she had been doing it was ignored.

102. Did the respondent not know, or could not reasonably be expected to know that the Claimant's mother was disabled and/or the claimant had caring responsibilities for her, or was likely to be placed at a disadvantage? Prior to the redundancy process we concluded that the disadvantage was known to the respondent's managers, and at the outset of the redundancy process she raised it as a particular issue with Mr Alexander, who was fully aware of the

disadvantage the claimant would face, as was explicit in her meetings with him, that she could not put forward any proposal which would satisfy the respondent and also allow her to continue with her homeworking contract.

103. The respondent relies on the following legitimate aim: *"A need to provide effective on-site and managerial supervision and support to more junior staff following a reduction in SLM headcount and the change in the nature of the respondent's CRE lending business".* Was this aim a legitimate aim? We concluded not, as this aim specifies the need for 'on-site' supervision, which necessarily requires SLM staff to be on site and it is this requirement which is alleged to amount to discrimination. Given our findings of fact we concluded that this part of this aim - *"on-site … supervision"* - was in itself an aim which contained a discriminatory element and as such it cannot amount to a legitimate aim.

104. If we are wrong, and the aim was legitimate, was selecting the claimant for redundancy and dismissing her a proportionate means of achieving the legitimate aim? We concluded not. The Tribunal was not satisfied that this measure corresponded to a *"real need"* (per *Rainey*). There was no suggestion by the respondent that it considered the balance between the clearly discriminatory effect of the requirement on the claimant and the commercial department's business needs. We accepted that the respondent made the decision to delete homeworking SLM roles on the basis of some dissatisfaction expressed by some junior staff, and a management view that it would be 'better' to make this change. This was not, we considered, the application of a general rule, but a decision formulated in a specific situation, one where there could have been one of several responses (per *Seldon*). We concluded, (per *Homer*) that this was a subjective view of the respondent, not based on rational judgment or on any reasonable assessment of supervisory requirements once redundancies were achieved. It also failed to take into account the views raised by the claimant in the process that the role could be undertaken from home, or of her history of excellent supervisory work. The claimant's evidence and work record at the very least suggested that any issue with supervision did not lie with staff on homeworking contracts. In other words, the respondent's view was not based on actual evidence or rational judgment and was instead based on subjective impressions. There was no evidence (per *Lax*), this was a *"reasonably necessary"* way of achieving its legitimate aim. The Tribunal concluded that there were other non-discriminatory ways of achieving the aim of high standards of supervision including the claimant working from home and attending the office 3 days a week, as she had been doing, and as was apparently all along the minimum requirement of the respondent under the new arrangements (Mr Alexander's evidence).

105. The claim of indirect disability discrimination (by association) therefore succeeds.

Indirect sex and age discrimination

106. We noted the pool relied on by the claimant – the national statistics. We noted the requirement for evidence of disparate impact to ensure that the statistics show a 'particular disadvantage' which is linked to the PCP and not a fluke (per *Enderby*). We noted that the statistical difference does not need to be large to show a disparate impact and we noted that it is acceptable for a tribunal to accept *"well recognised"* facts (per *Shackletons Garden Centre Ltd*).

107. We concluded that it is evident on the statistical evidence from both the claimant and respondent's evidence that more women than men are primarily responsible for caring responsibilities at home for elderly relatives (claimant's supplemental bundle, a Carers UK August 2019 Policy Briefing, the evidence for which was compiled from sources including the 2011 Census and ONS statistics). The statistics showed the following:

    1. 58% of carers are women and 42% are men
    2. Women make up 72% of the people receiving Carer's Allowance for caring 35 hours or more a week
    3. 1 in 4 women aged 50-64 have caring responsibilities, compared to 1 in 6 men
    4. 50% of women will have provided care by the time they are 59, a far greater proportion than that of men

108. We accepted that this shows a significant disparate effect relating to sex. We also accepted the findings within the Carers UK briefing that services for carers are inflexible and that carers are often at the disadvantage in obtaining and keeping employment.

109. We were not able to determine from the statistics that there was a disparate impact on the claimant based on her age. While we noted that while 1 in 4 women aged 50-64 have caring responsibilities, there was no statistical evidence which we were taken to which suggested that the caring responsibilities were proportionately greater for women in this age bracket in comparison to, say, younger women. As such, the claimant has not provided evidence of a disparate impact related to age. It is for this reason that the claim of indirect age discrimination fails and is dismissed.

110. Did the respondent take such steps as were reasonable to avoid the disadvantage? For the reasons set out above in the associative indirect disability claim, no.

111. Did the respondent not know, or could not reasonably be expected to know that the Claimant's mother was disabled and/or the claimant had caring responsibilities for her, or was likely to be placed at a disadvantage? For the reasons set out above in the associative indirect discrimination claim, the Tribunal concluded that the respondent and its decision makers, including Mr

Alexander, were aware that the claimant was the primary carer for her disabled mother.

112. We again concluded for the reasons set out above that the respondent has not provided a legitimate aim; alternatively we concluded that the respondent's actions were not a proportionate means of achieving that legitimate aim. The claim of indirect sex discrimination therefore succeeds.

Remedy

113. A listing date for a one day remedy hearing will be sent to the parties shortly, to take place no earlier than July 2021.

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EMPLOYMENT JUDGE M EMERY

Dated: DATE 14 March 2021

Judgment sent to the parties
On: 22/03/21

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For the staff of the Tribunal office

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