



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L A Pinder

**Respondent:** The Royal Bank of Scotland PLC

**HELD AT:** Manchester **ON:** 11 and 12 January 2018

**BEFORE:** Employment Judge Sherratt  
Mrs J K Williamson  
Mr S Anslow

## REPRESENTATION:

**Claimant:** Ms A Niaz-Dickinson, Counsel

**Respondent:** Ms G Mair, Solicitor

# JUDGMENT

The judgment of the Tribunal is that the claimant's claims are dismissed.

# REASONS

1. The respondent is a large Bank. The claimant was employed by it in Customer Service dealing with inbound telephony, which involved receiving calls from customers and dealing with them. The claimant mainly worked with the respondent's premier customers and there seems general acceptance that her work was of a good standard and the Bank wanted if possible to retain her in employment. Sadly she resigned. She brought claims to the Tribunal of indirect sex discrimination and constructive dismissal.

2. There was a preliminary hearing before Employment Judge Franey at which he raised with her solicitors some issues as to the nature of the claimant's case as pleaded which led to an amended statement of claim which has in the 13<sup>th</sup> paragraph, "the claimant contends that the respondent's decision to reject her request for flexible working amounts to indirect sex discrimination under section 19 of the Equality Act 2010" for the reasons set out. In simple terms the claimant alleges that there was indirect discrimination in relation to the protected characteristic of sex given the PCP of a requirement to work 35 hours a week between the hours of 08:00 and 20:00 from Monday to Sunday on a rotating shift pattern. Further, the

respondent's position where, in order to meet customer demand, it was difficult to be flexible enough to accommodate requests for a bespoke shift pattern, was a discriminatory PCP in relation to the protected characteristic of sex. Then it is alleged that the PCP puts women at a disadvantage over men by having their flexible working request refused as women are more likely to have primary responsibility for childcare than men, and in the absence of suitable available childcare they would be unable to work the required shift pattern and be at risk of dismissal and/or forced to resign as a result. It then goes on to allege that the claimant was put at the disadvantage in that she has primary responsibility for childcare as outlined above. She does not have any other available childcare with the exception of the days and times the claimant requested to work under the flexible working pattern when her child could be put into nursery, and the claimant was forced to resign as a result of the respondent rejecting her flexible working request as she could no longer work the respondent's shift pattern at times when childcare was unavailable to her. They added to the grounds of claim the pool for comparison being "those employees who are engaged in the respondent's premium lost and stolen department on the shift pattern that was the subject matter of the claimant's request".

3. The claimant contends that the respondent cannot justify the discriminatory PCP as being a proportionate means of achieving a legitimate aim.

4. The grounds of claim go on to contend that the rejection of her flexible working application amounted to a fundamental breach of her contract of employment leaving her with no other option than to resign.

5. The respondent did not accept that it had discriminated against the claimant nor that she had had to resign, and they pleaded that there was a legitimate aim in respect of the indirect discrimination allegations: the legitimate aim being the business need to ensure adequate resourcing levels throughout operating hours to meet customer demand and to ensure that there was a sufficiency of work for employees.

6. The claimant gave evidence to the Tribunal and was cross examined. The respondent called evidence from Sarah Moore who made the initial decision to reject the application for flexible working, and Christopher Hood who dealt with the appeal. There was a bundle of documents contained in excess of 200 pages.

### **The Facts**

7. There is very little, if any, disagreement between the parties on the matters of fact that are relevant to the Tribunal's decision. Very helpfully Ms Mair had prepared in advance of the hearing a written closing submission in which she set out her summary of the facts to be found on the basis of the witness statements and the documents. Counsel for the claimant was in broad agreement with Ms Mair's submission in respect of the facts save as to certain matters that will be dealt with below. We gratefully adopt Ms Mair's statement of the main facts, as follows (using the numbering to be found in her submission):

"3.1 The Claimant was employed by the Respondent from 21 May 2012 until 23 February 2017.

- 3.2 The Claimant worked as a Customer Service Adviser (Clerical B) in the Premium Lost and Stolen team in the Manchester Credit Card Centre.
- 3.3 She commenced a period of maternity leave on or around 12 May 2016 and on 2 November 2016 submitted a flexible working request **[page 84 – 85]**.
- 3.4 The Respondent has two credit card centres, one in Manchester and one in Southend.
- 3.5 The Southend Credit Card centre is open 24 hours per day, 7 days per week. In late 2016, the Southend Credit Card Centre had three “Premium” teams, eight “Core” teams and seven evening/overnight teams. Premium teams handle premium and core customer calls for all RBS Group brands as well as telephone calls from both credit card and debit card customers who have lost their card and/or had it stolen.
- 3.6 The Manchester Credit Card centre is open between 8am and 8pm, 7 days per week. In late 2016, the Manchester Credit Card centre had two “Premium” teams and five “Core” teams. Core teams handle core customer calls for all RBS Group brands but not premium calls and not calls relating to lost or stolen cards.
- 3.7 The Premium Lost and Stolen team that the Claimant worked on was a Premium team.
- 3.8 Subject to any employees working bespoke shift patterns, employees working in a Manchester Premium team work on a 6 week shift rotation pattern (working 35 hours, Monday to Sunday between 8.00am and 8.00pm). Having employees working on a 6 week rotation allows the Bank to be flexible and split the staffing resource over a 6 week period to meet customer call demand **[page 134A]**.
- 3.9 Subject to any members of staff working on a bespoke shift pattern, members of staff working in a Core team work on an 8 week shift rotation pattern (working 35 hours, Monday to Sunday between 8.00am and 8.00pm). Having employees working on an 8 week rotation allows the Bank to be flexible and split the staffing resource over an 8 week period to meet customer call demand **[page 134A]**.
- 3.10 In October 2016, senior management undertook a project within the Respondent’s Credit Card business called, ‘Delivering Service Excellence’.
- 3.11 The Delivering Service Excellence project was initiated because at that time there were periods of time during the week when Customer Service Advisors were, due to customer demand, taking more than 20 minutes to answer customer calls. The reason for this was because despite the Manchester Credit Card Centre and the Southend Credit Card Centre being correctly staffed for the overall volume of work received within the centre, there were not enough employees working

on shifts at certain times, causing staffing imbalances of over/under supply.

- 3.12 This long waiting time was causing a poor experience for the Respondent's customers and also for those working during these busy times. Dissatisfaction due to these long waiting times had been identified from Customer Satisfaction Index ('CSI') comments which were undertaken via the Respondent's 'Opinion Bank' system. The Respondent's Opinion Bank CSI platform gathers virtual real-time customer satisfaction feedback about staff and credit card teams. Opinion Bank helps the Respondent to understand the things staff and teams working within the centre are doing really well and to support the Bank's understanding of areas for development. Opinion Bank surveys are completed by an automated call back system, which may contact the customer within 30 minutes of their call.
- 3.13 It was also clear from comments made by customers when they were calling back due to being unable to wait long enough when they initially called the Centre for their call to be answered, that customers were dissatisfied with long wait times.
- 3.14 It is extremely important for the Respondent to provide customers with an excellent service to prevent the Respondent losing customers to competitors who can offer a better service.
- 3.15 As a business, headcount within the two centres had reduced over the previous 5 years from 1200 employees to approximately 450 employees. In October 2016, 48% of employees in the two centres were working on flexible full shift rotations. 52% of employees in the two centres were working on fixed bespoke shift patterns.
- 3.16 [ Deleted ]
- 3.17 A heat map was prepared at this time which showed the centres' ability to meet customer demand due to resourcing at different times during the week [page 82C].
- 3.18 In October / November 2016, senior management within the Respondent's Cards business decided to consult with employees about this matter with a view to finding out whether there were any employees working on bespoke fixed shift patterns whose circumstances had perhaps changed and that may be willing to voluntarily change their shift pattern to help the Respondent better serve its customers.
- 3.19 Around early October 2016 all of the employees working within the Manchester Credit Card Centre and the Southend Credit Card Centre were given a copy of the document which appears at **pages 82A – 82D of the bundle**, by their line manager. Various communications were sent to employees at that time.

- 3.20 The Claimant attended a round meeting with Sarah Moore and approximately 45 other members of staff who worked in the Premium teams in the Manchester Credit Card Centre on 17 November 2016. During this meeting, staff were provided with an overview of the resourcing situation within the centres and the heat maps which illustrated the staff and imbalances at certain times during the week in the centres were discussed. Staff were given a form [page 85BB] and asked to return a completed copy of the form to confirm whether they had any flexibility in relation to their own working pattern.
- 3.21 The centres' resourcing team collated feedback from managers about employees working within the centres and a spreadsheet was created by the resourcing team which noted any employees who had volunteered to change their working pattern and it also noted the working pattern that they had requested. Once all of the responses from employees had been collated, the resourcing team made a decision in relation to whether the Respondent would in principle be agreeable to accepting each of the requests which had been made by employees. Their decision was based on whether or not the request helped the overall resourcing position within the centres.
- 3.22 The Claimant attended a flexible working request meeting with Sarah Moore on 22 November 2016 [page 86 – 88]. Sarah Moore confirmed her decision by letter dated 30 November 2016 [page 89 – 90]. She confirmed that:-
- 3.22.1 Having carefully considered matters, she was unable to agree to the specific working pattern that the Claimant had requested (working 8.30am – 4pm (with a 30 minute lunch break) Monday, Tuesday and Thursday) and that granting the request would have a detriment effect on the Respondent's ability to meet customer demand.
- 3.22.2 The Manchester Credit Card Centre is open 8am – 8pm, 7 days per week and the Respondent requires to ensure that it has sufficient staff resources in place to meet customer demand throughout this period. To ensure that customer demand can be met, a 6 week staff rota covering 8am – 8pm Monday to Sunday is in place.
- 3.22.3 At that time however, 52% of the members of staff working within the Manchester Credit Card Centre and Southend Credit Card Centre were working on a bespoke fixed shift, which was making it very difficult for the Respondent to be flexible enough to meet customer demand at certain times during the week.
- 3.22.4 Separate to the Claimant's flexible working request, the senior management team within the Respondent's Card business had already been discussing what could be done to enable the Respondent to better meet customer demand and round meetings had been held with staff working within the

centre, such as the round meeting attended by the Claimant on 17 November 2016.

- 3.22.5 At that time, the Respondent was unable to adequately meet customer demand and a general request was made of staff during these round meetings to consider if they had any flexibility in the hours they worked at that time, to help address this resourcing imbalance. However, taking into account that this request had been made, this resourcing imbalance still existed at certain times during the week.
- 3.22.6 She concluded that the centre was over-staffed during majority of the 22.5 hours per week that the Claimant had requested to work **[page 82C]**.
- 3.22.7 She concluded that it was not therefore possible to agree to the specific working pattern the Claimant had requested.
- 3.22.8 However, as an alternative, she offered the Claimant the option of working 22.5 hours (the number of hours she requested) to include Monday (which she had requested to work) and either:-
- 3.22.8.1 for the other hours to be made up of flexible hours to meet the demand of the business; or
- 3.22.8.2 for her to work fixed hours on a Saturday and Sunday (at which times the centre was significantly under resourced); or
- 3.22.8.3 for her other hours to include a Friday shift which covers the 3.30pm to 5.00pm period (at which times the centre was significantly under resourced).
- 3.22.9 Overall, she concluded that she was unable to agree to the Claimant's specific flexible working request as it would leave the centres further over head count during periods in which the centres already had too many people working and leave fewer staff than required at other times. She did however try to accommodate her request by offering her an alternative working pattern and left the specific details of an alternative 22.5 hours shift pattern open for discussion.
- 3.23 The Claimant appealed against this decision on 13 December 2016 **[page 91]**. She attended an appeal meeting with Chris Hood on 10 January 2017 **[page 94 – 102]**.
- 3.24 Following the meeting, Chris Hood carried out further investigation, which included speaking to the resourcing team (who have overall responsibility for recruiting for and resourcing the different teams within the Manchester Credit Card Centre and the Southend Credit Card Centre) **[pages 103 –**

**105]** and carefully reviewing a copy of the updated heat map which was produced on 31 January 2017 following the conclusion of the Delivering Service Excellence Project **[pages 106C – 106E]**.

- 3.25 Chris Hood wrote to the Claimant by letter dated 13 February 2017 confirming his decision **[page 115 – 118, paragraphs 37 – 66 of Chris Hood’s witness statement]**.
- 3.26 He carefully reviewed the updated heat map generated on 31 January 2017 **[pages 106E]** which took into account the recent exercise in which employees working within the Manchester Credit Card Centre and the Southend Credit Card Centre were asked if they would consider changing their working pattern to help the Bank meet customer demand on the days the Bank needed additional resource. This involved the Bank asking all of the employees working within the Manchester Credit Card Centre and the Southend Credit Card Centre (approximately 450 employees in total) whether they would be willing to voluntarily change their working patterns.
- 3.27 Taking the outcome of this exercise into account, the centre was still significantly over resourced versus customer demand on Tuesdays and Thursdays between 8am and 4pm, and there was not therefore a level of customer demand to provide the Claimant with work on a permanent basis during these days. The two tables which appear at **pages 123E – 123G of the bundle** outline the number of employees by which the centres were over resourced and/ or under resourced at different times during the week (including Tuesdays and Thursdays) as at 13 October 2016 and 13 December 2016 respectively. On Tuesdays, the centres were on average 20 members of staff above the level required to meet customer demand and on Thursdays the centres were on average over 30 members of staff above the level required to meet customer demand.
- 3.28 He concluded that he was unable to agree to the specific working pattern that the Claimant had requested based on insufficient work during the hours proposed on a Tuesday and a Thursday. Changing the Claimant’s working pattern from a flexible 6 week rotation to a fixed bespoke shift would also mean that the Bank would be unable to meet customer demand on the days that the Claimant said that she could not work, particularly on a Friday and Saturday and increase the amount of overtime required to meet the staffing shortfall. There would also be a further detrimental impact to the resource scheduling of additional tasks such as training and coaching by agreeing to the Claimant’s request, as bespoke shifts are by their very nature fixed into place and therefore it can be difficult to arrange for an appropriate number of people to attend these extra sessions at a fixed time without impacting customer demand.
- 3.29 Taking everything into account, he concluded that he was unable to agree to the specific flexible working request that the Claimant had made.
- 3.30 He explained that the Respondent were still able to offer her a bespoke shift of 22.5 hours per week to include a Monday, 8.30 – 4.00pm (as per her request) and working shifts that could include cover for some of the following under resourced periods; between 3pm – 4pm on Fridays and/or

between 9.30am – 1pm on Saturday and/or 10am – 12.30pm on Sundays. Monday is also one of the busiest days within the Credit Card Centres in terms of the number of customer calls received. Members of staff working on the Premium teams take overflow customer telephone calls from the Core teams on Mondays due to the volume of calls.

- 3.31 He explained to the Claimant that if she wanted to discuss this further she should speak to her line manager. He was happy for any dialogue in relation to a possible alternative working pattern totalling 22.5 hours per week to continue.
- 3.32 Also, if, following the recruitment phase in the Manchester Credit Cards Centre, any changes were made to the heat map of 31 January 2017 which positively impacted on the Claimant's original proposal, he advised the Claimant that he would be happy to review any potential adjustments that may become viable at that stage.
- 3.33 The Claimant resigned on 23 May 2017 **[page 119 – 120]**.
- 3.34 A further communication was sent to all staff working within the Manchester Credit Card Centre and Southend Credit Card Centre in March 2017 **[pages 123A – 123D]** confirming the steps that any members of staff who requested changes to their shift pattern should take to find out whether or not their proposal would be accepted. The table which appears at **pages 123AA – 123AD** confirms which of these requests were agreed and which were declined.
- 3.35 The Respondent's witnesses confirmed that every flexible working request that is made by employees is considered on a case by case basis.
- 3.36 A number of flexible working requests have been granted within the centres since November 2016 **[page 123AA – AD]** including two specific requests from female staff working within the Premium teams in the Manchester Credit Card Centre. Both employees requested to change their working hours on their return to work from maternity leave. Their revised working patterns do still include elements of evening and weekend work as these are the times when the Respondent's customer demand within the centres remains most acute. The employee's new respective working patterns are:-
- 3.37 Employee 1: new working pattern – 2 week rota
- 3.37.2 Week 1: Wednesday 10:00am to 19:00pm, Friday 11:00am to 20:00pm and Saturday 10:00am to 19:00pm; and
- 3.37.3 Week 2: Wednesday 10:00am to 19:00pm, Friday 11:00am to 20:00pm and Sunday 10:00am to 19:00pm
- 3.38 Employee 2: new working pattern – 2 week rota



- 3.38.2 Week 1: Monday 12:00pm to 20:00pm, Friday 10:00am to 18:00pm and Saturday 10:00am to 18:00pm; and
- 3.38.3 Week 2: Monday 12:00pm to 20:00pm, Friday 10:00am to 18:00pm and Friday 10:00am to 18:00pm

8. The issues that were not agreed with or commented upon by Ms Niaz-Dickinson for the claimant start with paragraph 3.30, in which we were invited to look at the documents concerning the offer to the claimant of an alternative working pattern, an alternative to the one that she had proposed.

9. In the outcome letter for the initial decision to reject the flexible working application the claimant was offered a pattern which includes a Friday shift which covers the 3.30pm-5.00pm period “when we have a significant shortfall of people”, and in the appeal outcome “we could still offer for you to work a bespoke shift to include Monday as per your request and working on shifts to cover the following periods: between 3-4 on Fridays and between 9.30 and 1 on Saturday and 10-12.30 on Sundays. If you would like to discuss this further please speak to your line manager”.

10. As to those statements, the claimant took it to mean that she was being offered a shift of only 1-1.5 hours on a Friday afternoon: given the wording the Tribunal can well understand why the claimant might have thought that although we accept that the respondent intended that the claimant would perhaps work a longer shift on a Friday afternoon that encompassed those core hours when they had greater need for staff to answer the phones.

11. The other matter was the claimant's resignation. The resignation was simply referred to as a matter of fact, that the claimant had resigned, without including the specific reason for that, and when we look at the letter the relevant words are these:

“Unfortunately I am unable to carry out my career with the Royal Bank of Scotland due to my application of flexible working being declined on two occasions and it has put me in no other position but to resign.”

12. It is important to say the claimant was complimentary as to the way in which she had been treated in her employment with the Bank. She appreciated the training. She had been proud to work there. She wished them continued success. Clearly it was only the difficulties on the flexible working and childcare that caused the claimant to leave what otherwise would have been a promising career for her and we accept that she was an employee that the Bank did not wish to lose.

13. Counsel for the claimant noted that in paragraph 3.34 Ms Mair made reference to various things that were not within the claimant's knowledge, so whilst not actively disagreeing with those statements the claimant is unable to agree with them because she simply was not there at the time.

14. Ms Mair's summary was prepared earlier and therefore did not include anything arising from the cross examination of the witnesses.

15. Looking at the claimant's cross examination, she agreed that Sarah Moore told her that she could work 22.5 hours rather than 35 hours. Chris Hood had also agreed 22.5 hours. The claimant accepted she was not required to work 35 hours per week over a six week shift system working from Monday to Sunday 8.00am-8.00pm.

16. The claimant accepted that other employees had been allowed bespoke shift patterns around the time of her application. There were two in particular that were put to her who were allowed bespoke shift patterns.

17. The claimant agreed she accepted it was not a practice of the respondent not to accommodate bespoke shift patterns. They agreed to her working a bespoke shift pattern but of course it was not the shift pattern that she could do because of the limited availability she had due to the childcare arrangements she had potentially made.

18. The claimant accepted that excellent customer service was important to the Bank, and that the Bank needed the right level of resource to meet the demands of the customers, that demand varying throughout the day as also varied the number of staff on duty at any particular time, but customers, she accepted, were at the heart of the respondent's business.

19. The claimant agreed on the basis of what was called a "heat map" showing the availability of staff compared to the requirements of customers that it was reasonable for the respondent to refuse her suggestion to work on a Tuesday, and she also agreed that on the basis of the heat map it was reasonable to refuse her request to work on a Thursday. The claimant accepted there was insufficient work on Tuesday and Thursday to offer it to her and it was reasonable to decline fixed shifts Tuesday and Thursday, but the claimant did not accept that her particular personal circumstances were taken into account; she did not think they had been taken into consideration. She did agree that there could have been discussion as to how her hours were to be made up but was not aware of it being left over for later discussion.

20. The claimant agreed it was reasonable to disallow the appeal for the times she wanted to work where it was only Monday that seemed to be fitting both parties. She accepted that the respondent was trying to find a solution but she did not think they took into account her circumstances. She did not believe she could have worked with the respondent to try to find a solution.

21. The appeal was declined and the claimant resigned.

22. Looking at Sarah Moore, she said that the claimant had no flexibility therefore she did not offer her a blank page on which to construct hours for the claimant to work. She explained that the "heat map" just referred to applied to the teams working in Manchester and in Southend on both aspects of the business, the core and the premium; although the "heat map" was not broken down as to premium team Manchester and the other teams. Her decision was based upon the "heat map" and what the claimant said to her at the meeting. She did not dispute the claimant's reasons for applying for flexible working, but due to childcare responsibilities the claimant was unable to agree any other hours with the Bank.

23. Flexibility was a major matter in terms of meeting customer demand, and she said this: “as soon as I saw the request all I wanted to do was to be able to honour the request to help a new mum back to work like I was helped when I was in that position”, but she was bound by customer demand. This was not her only consideration. She also took into consideration all the flexibility that was offered by the claimant and others. She saw it like a jigsaw: could she fit the claimant in? But there was no flexibility to do so. She did look at some sort of job share, trying to fit the claimant round other people working there who had their own flexible arrangements, but she did not look at recruiting a job share partner. She was not expecting the claimant to fit her life around customer demand, but the claimant could not work the majority of the hours where the Bank needed someone to work.

24. The second respondent witness was Mr Hood who always had to have in mind customer demand and getting the right numbers of staff to meet that demand. There could be knock-on effects on customer service and the employees if there was an imbalance. Customer demand was a key priority. It was always a key demand for a role involving inbound telephony. They had agreed with the claimant to reduce her hours to 22.5. They had agreed Monday for one of the days but looking to explore other days where there was a shortfall in Bank staffing to meet customer demands. Sadly it was not possible to do that. They were looking at hotspots where they had a particular demand for staff. They accepted the claimant would have worked on periods of little demand had she been on a six week shift pattern. They have agreed maternity returners where shifts were not all in areas of shortfall i.e. where there was perhaps at some stage an excess of staff. There could be potential difficulty with any staff member at the weekends but it all depended on their particular circumstances. For some people working weekends did suit but for others it did not. The Bank wanted the right people in the right place at the right time. Customer demand varies. He accepted it was difficult for people who had childcare needs to have the flexibility. The claimant had told them she could not do any weekend work. As to trying to arrange to fit the claimant in, it was not for want of trying and they did not want to lose her.

25. These are the facts upon which we shall make our decision.

26. We have received and considered both written and oral submissions from both representatives.

### **The Law**

27. In respect of the Equality Act 2010 claim the law is to be found in section 19, indirect discrimination, as follows:

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

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

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

- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- race;
- religion or belief;
- sex;
- sexual orientation.”

28. The first PCP involved the working hours. The PCP that is alleged to be discriminatory in relation to the protected characteristic of sex is “the requirement to work 35 hours a week on the following shift pattern”.

29. The parties accept that when the claimant joined the Bank her contract was to work 35 hours a week on a shift pattern varying over six weeks working between the hours of 8.00am-8.00pm Monday to Sunday.

30. The claimant’s flexible working request was not granted and therefore the claimant’s hours were not officially changed, so the PCP of working 35 hours a week over a six week shift pattern was still being applied to the claimant following the refusal of her application for flexible working. She would have returned from her maternity leave on that contract.

31. As to the second PCP, it refers to the position adopted by the respondent that it had reached the point where in order to meet customer demand it was difficult to be flexible enough to accommodate the requests for a bespoke shift pattern. We find as a matter of fact that the respondent had not reached this point: it was still accommodating the requests for bespoke shift patterns, particularly based upon the evidence given of the two employees who were granted bespoke shift patterns around the time of the claimant’s application for flexible working.

32. We therefore find that the first PCP was applied to the claimant and that the second PCP was not. We find that the respondent was willing to allow the claimant to reduce to 22.5 hours per week but only one third of the hours that the claimant could offer were ones where the respondent needed more staff members.

33. An indirect discrimination claim requires the claimant to show that the PCP puts or would put persons with whom the claimant shares the characteristic - in this

case sex - at a particular disadvantage when compared with persons with whom the claimant does not share it. The claimant has pleaded the pool for comparison as "those employees who are engaged in the respondent's premium lost or stolen department on the shift pattern that was the subject of the claimant's request".

34. We know that there are approximately 450 people in the chosen pool split between Manchester and Southend. There are substantially more in Southend than in Manchester. The people are split between core team and premium team, and although we have no knowledge whatsoever, because it has not been provided to us, as to the gender makeup of the people in the pool we do know that approximately 50% of the people in the pool for comparison worked on a bespoke shift pattern, i.e. already worked flexibly to some extent, at the time the claimant was making her application

35. In the absence of any evidence about the members of the pool in this case, which is based upon a specific pool for comparison rather than a general overall pool of men and women in the country as a whole or of the Bank's employees as a whole, we are unable to find anything to say that the first PCP put persons with whom the claimant shared the characteristic at a particular disadvantage when compared with persons with whom the claimant did not share the characteristic.

36. Had the claimant satisfied us that she had been put at a particular disadvantage by the first PCP we would have found in the particular circumstances described that the respondent had satisfied the statutory defence

37. As to constructive dismissal, there is no complaint that the respondent did not reject the claimant's application for flexible working for a permitted reason. We note that in their discussions with the claimant the respondent tried to accommodate the claimant's availability, which was limited and fixed, and they also looked elsewhere within Manchester for work for her to do in other departments and they left open the possibility of a further discussion.

38. In all of these circumstances where the response was within the law and where we have not found the respondent to be in breach of the Equality Act 2010, we do not find that the respondent acted in breach of the term of trust and confidence and therefore the claimant was not, in our judgment, entitled to resign and claim constructive dismissal.

Employment Judge Sherratt

24 January 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
29 January 2018

FOR THE TRIBUNAL OFFICE