EMPLOYMENT TRIBUNALS

Claimant: Dr Ildiko Csengei

Respondent : University of Huddersfield

Heard at: Leeds **On:** 20, 21 and 22 July 2021

Before: Employment Judge D N Jones
Ms J Cairns
Mr L Priestley

REPRESENTATION:

Claimant: Ms S Sleeman, counsel
Respondent : Mr Sillitoe, solicitor

JUDGMENT

In selecting the claimant for redundancy, the respondent did not indirectly discriminate against her on the grounds of sex.

REASONS

Introduction

1. This is a claim of indirect sex discrimination.

2. The issues were identified at a preliminary hearing on 11 February 2021.

Evidence

3. The tribunal heard evidence from the claimant, Professor Thomas Schmidt, formerly the Dean of the School of Music Humanities and Media, Professor Barry Doyle, Head of Department of History, English, Linguistics and Music, Professor Jill Johnes, Dean of Huddersfield Business School and Professor Jane Owen Lynch, Pro-Vice Chancellor.

4. The parties produced a bundle of documents of 643 pages.

Background/Findings of fact

5. The claimant was employed by the respondent as a senior lecturer in English literature within the school of music, humanities and media from 1 September 2013 until the termination of her employment by reason of redundancy on 31 August 2020.

6. The claimant took maternity leave from June 2015 to May 2016. She had an earlier period of maternity leave before joining the respondent, from September 2012 to June 2013.

7. In July 2020, a redundancy exercise was initiated in the school of music, humanities and media, within which the English department fell. There was a need to reduce costs in the English department by the equivalent of 2.0 FTE salaries. A consultation document was issued dated July 2020. It included a voluntary redundancy scheme. In the event redundancies were required it contained the proposed method of selection. The selection criteria comprised research (including publications, grant income, impact and supervision of research students), teaching (including teaching- related leadership), contribution to the subject area/ school/ institution and external engagement.

8. The four selection criteria were weighted: research and teaching each had maximum scores of 15; contribution to the subject area/school/institution had a maximum score of 10; and external engagement had a maximum score of 5. The scoring system was broken into 5 possible categories. In respect of research and teaching they were: 'outstanding with respect to the role' – 15, 'exceeds expectations of role' - 12, 'meets expectations of role' – 9, 'partially meets expectations' – 6 and 'fails to meet expectations of the role' – 3.

9. The timescale for the consultation was from 20 July 2020 to 27 August 2020. Consultation took place with the recognised trade unions, UCU and Unison and the affected employees.

10. In respect of the selection criteria, it was agreed that the weighting for the category of external engagement would be increased from 5 to 7.5. Although the extent of the agreement, particularly with the unions, was tested in cross examination, there was nothing in the evidence to suggest it was not an acceptable consultation. The role of Dr Underwood who had made the representation in respect of increasing the weighting for external engagement, which would assist his own situation, was also queried because it appeared from Professor Doyle's statement that he was regarded as a representative of the affected employees. In the event, nothing turned on this in respect of the legal claim we were considering.

11. On 2 July 2020 Professor Doyle approached the claimant and one other member of the department to ask if they were interested in applying for voluntary redundancy. They were not, although the other colleague later chose to do so. They had been approached by Professor Doyle because he had received a spreadsheet of the department's performance under the Research Excellence Framework (REF) and they had both been the lowest ranked for English literature and creative writing. He had not been able to find the spreadsheet for these

proceedings. The REF is an independent programme of assessment of the quality of research for UK universities and higher education providers. The research submitted by the universities are assessed externally by two assessors and then by internal assessors. It is a sector wide system which is recognised as the main driver for core research funding and institutional standing.

12. On 28 July 2020 the human resources department wrote to the claimant to notify her that she was at risk of redundancy and set out the procedure which was to be followed. The claimant attended an individual consultation meeting with Professor Doyle on 31 July 2020 and on 3 August 2020. On 7 August 2020 a further letter was sent notifying her of the consultation process and that the invitation for voluntary redundancy had not avoided the need for compulsory redundancies, so there was still a requirement to lose one full-time equivalent member of staff.

13. The claimant submitted her representations in a document called an 'Application Statement for Selection to Stay', pursuant to the procedure, on 7 August 2020. Part of that included a declaration of individual staff circumstances, which comprised a table in various sections to be completed if appropriate. One section was entitled "family related leave". The claimant included the 9.5 months of maternity leave she had taken between September 2012 and June 2013 and said that this had affected research and the production outputs at the beginning of the new REF cycle. She also included the period of 12 months of maternity leave from June 2015 to May 2016. In the section entitled "ill-health or injury" the claimant included information about a misdiagnosis of a serious medical condition in June 2018. It had affected her research productivity for two months during the summer research period and prevented her fully developing the seedcorn project on Afghanistan. There were two further sections connected to family and parenting entitled "constraints relating to family leave that fall outside of standard allowance" and "caring responsibilities". In respect of the latter it was stated to include the 'nature, responsibility, periods of absence from work and periods at work when unable to research productively', with a request for the number of months duration. The claimant did not complete either section.

14. The panel which undertook the scoring exercise on 10 August 2020 comprised of Professor Schmidt, Professor Doyle and Professor Johnes. They allocated their own scores without conferring. There were six candidates in the pool. The claimant received the lowest aggregate score of 87. The other scores were 96, 102.5, 107, 108 and 109.5. In respect of the criterion of research, the claimant received an aggregate score of 24. Professor Schmidt and Professor Johnes had allocated a score of 9 (meets expectations) and Professor Doyle had allocated a score of 6 (partially meets expectations).

15. By letter of 11 August 2020 the claimant was informed of the scores which were provided in anonymised form (save for hers) and invited to provide additional information or comment. She requested further information on how the appraisal had been undertaken and how individual circumstances had been taken into account. Feedback from the panel members was sent on 11 August 2020.

16. The claimant provided additional information for selection to stay on 14 August 2020. The document comprised 8 pages and addressed each of the criteria.

The claimant included several representations under the heading 'discrimination', pointing out that maternity leave was a protected characteristic and suggesting there had been unconscious bias by Professors Doyle and Schmidt, by comparing her with a female colleague comparator and men who would not have been on maternity leave. She said she should be compensated for the impact maternity leave would have had on her research output and that men would be given an advantage. She pointed out that one of the colleagues had taken maternity leave significantly earlier and that both periods of her maternity leave had had a negative impact during the REF period. That is a reference to the six-year period over which research analysis is undertaken under the REF programme, which in this case was 2014 to 2020. In addition, the claimant stated that the taxing, caring responsibilities for babies and very young children following a period of maternity leave should be taken into account.

17. She wrote that a further relevant factor was that when she joined the Department in 2013/14 there were heavier workloads and fewer staff, leaving her with sleep deprivation and inability to progress with her research because she was developing the teaching materials for that year. There was then a redesign of the course which meant the claimant spent her summer redesigning and setting up new modules at short notice. For most, the first year is challenging because of time spent preparing materials which can be reused in future years. The claimant said she had two such years of condensed teaching preparation. She expressed the view that the panel had not adequately reflected this in the scoring and it did not follow the REF guidelines.

18. The claimant challenged a remark that she had not supervised any doctoral students to completion, given that that was not part of the criteria and that she had provided supervision to some PHD students.

19. A further factor which she considered to have been inhibiting her research was that a two term sabbatical had been deferred by a year as a consequence of her maternity leave and the interposing of another colleague's request for sabbatical in 2017/2018. Because she would have taken the sabbatical immediately after her maternity leave otherwise, she said this had negatively impacted on the amount of research she could have undertaken. She suggested a fair approach would be to consider her publications from the end of her last period of maternity leave when she had averaged one peer reviewed journal per year. She considered this would lead to a rescoring to exceeding expectations or outstanding.

20. On 17 August 2020 the claimant attended a meeting with Professor Schmidt, accompanied by her union representative, in order to make verbal representations. There is a dispute between the parties as to precisely what was said. There is a note of this meeting which was prepared by the respondent and has annotated comments of the claimant against particular passages. The claimant made similar representations to those in the written document and expressed the view that her personal circumstances had not been taken into account. Professor Schmidt said that the selection matrix had been compiled using the job description criteria. He said that they had taken into account the claimant's personal circumstances. The claimant's annotated note recorded that Professor Schmidt had said the panel could have done a better job at taking her maternity leave into account. Professor Schmidt

said he could not remember if he had said this when put him in evidence. We are satisfied it was likely he did make that remark. A further annotation was that Professor Schmidt had said the panel did not have objective agreed benchmarks as to what constituted the difference between the categories of meets expectations, exceeds expectations and outstanding and it was difficult to distinguish between those categories. We consider it likely this was said given the claimant's annotation shortly after she received the notes. He said that the panel would review the scoring in the light of the additional information provided.

21. On 17 August 2020 the panel met again to reconsider the claimant's scores. Professor Doyle increased his scoring of research from 6 to 9, that is to raise it to meet expectations, following an invitation to review that matter from Professor Schmidt. He pointed out that in previous appraisals or audits of the claimant, there had been no suggestion of underperformance, and this had led to him increasing the score. He said that was not influenced by the claimant's representations in respect to maternity leave and childcare. All members of the panel considered they had already factored that in when they had scored against the matrix and job description initially. This did not retrieve the jeopardy which faced the claimant of being selected for redundancy. This is confirmed in a letter dated 18 August 2020.

22. The claimant submitted a notice of appeal on 23 August 2020. She complained that the decision was discriminatory as well as unfair and unreasonable. She submitted further information for the appeal on 27 August 2020. She drew attention to the two periods of maternity leave which had directly and indirectly impacted on her performance and section 18 (4) of the Equality Act, citing maternity discrimination.

23. The appeal was considered by Professor Owen Lynch and Andrew McDonnell, Director of Financial Services on 27 August 2020. It was rejected. The reasons were provided in a letter dated 28 August 2020. In respect of failing to take maternity leave into account, the appeal panel referred to the feedback from the three panel members; that none of the scores had fallen below the benchmark of 'meet expectations' but even taking account of mitigations the scores would not have achieved 'exceeds expectations'.

24. Confirmation of redundancy was provided by letter 28 August 2020, the last day of service been confirmed as 31 August 2020.

The Law

Discrimination

25. By section 39(2) of the Equality Act 2010 (EqA):
An employer (A) must not discriminate against an employee of A's (B)— …(c) by dismissing B.

26. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

27. Indirect discrimination is defined in section 19:

(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.

28. By section 11 sex is a protected characteristic.

29. By section 23 of the EqA:
On a comparison of cases for the purpose of section 13, 19 there must be no material difference between the circumstances relating to each case.

30. Indirect discrimination has been explained by the Supreme Court in **Essop v Home Office and Naeem v Secretary of State for Justice [2017] IRLR 558, para 58**, in the following way:

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.

31. In **Dobson v North Cumbria Integrated Care NHS Foundation Trust UKEAT/0220/19/LA** the Employment Appeal Tribunal observed that women tend to bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours. This is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. Although societal norms and expectations change over time, that assumption is still very much supported by the evidence of current disparities between men and women in childcare (paragraphs 46a and 47). Whether or not the childcare disparity of group disadvantage is made out, will very much depend on the PCP in question. Women are more likely to find it

difficult to work certain hours, such as nights or changeable hours than men because of childcare responsibilities, see para 50.

31. In **Eversheds Legal Services v De Belin [2011] ICR 1137** the Employment Appeal Tribunal upheld a complaint of direct sex discrimination in circumstances in which a man had been selected for redundancy, the employer had awarded the other candidate in the pool the top mark on one of the selection criteria in the exercise because she had been absent on maternity leave. The President held that whilst the protection of the special position for those who were pregnant or on maternity leave might sometimes require them to be afforded more favourable treatment than their colleagues, that did not extend to favouring beyond what was reasonably necessary and proportionate.

32. The requirement of the respondent to show that the PCP was a proportionate means of achieving a legitimate aim is sometimes known as justification. In **Bilka-Kaufhaus GmbH v Weber Von Hartz [1984] IRLR 317** the ECJ said that the court or 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*" (paragraph 36). The principle of proportionality requires an assessment of whether the PCP was reasonably necessary. That does not mean that no other measure would have been available, but a balance has 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, see **Hardy & Hansons plc v Lax [2005] IRLR 726**

Discussion, analysis and conclusions

33. Has the respondent applied a PCP to the claimant that it applies or would apply to someone who does not share her protected characteristic, that is a man?

34. What is the PCP? At paragraph 2 of her witness statement, the claimant states that "*the criteria used in general during the redundancy 2020 exercise, and the one relating to research etc in particular, unlawfully discriminated against on the grounds of sex. In particular this is because the criteria adopted placed me at a disadvantage because as a woman I was more likely to have either taken periods of maternity leave, career breaks and/or had caring responsibilities which affected my ability to score against the relevant categories (particularly research output) when compared to male colleagues".*

35. At the preliminary hearing the claimant was required to confirm whether the complaint of indirect discrimination related to anything other than the use and application of research as a criterion for selection for redundancy. Her representative confirmed that was the only criterion, by email of 25 February 2021. At the hearing it was said that the PCP was use and application of research as a criterion for selection for redundancy.

36. The evidence of the three panellists was that they had adjusted the scores to reflect the individual circumstances of the candidates which included maternity leave and childcare responsibilities. The claimant disputes that. She says after she had

raised it in her additional statement to stay, the panellists contrived to have scored her by factoring in these considerations, but that was a sham. She says that the lack of time before the commencement of the new term created a major practical difficulty to reassessing the scores in the light of the point she had raised.

37. If the claimant is correct, then the use and application of the research criterion would have been applied to both men and women in the same way. All would then have been scored regardless of any considerations for maternity leave. But if she is wrong and some factoring in of maternity leave and childcare had occurred, however inadequately, the PCP would not have been applied to women and men. No adjustments would be made for men. A fundamental requirement of section 19(2)(a) of the EqA would be absent. That is what Mr Sillitoe has submitted, on behalf of the respondent.

38. It is the obligation of the Tribunal to identify the PCP. The better approach would be to say the very use of research in the selection matrix as opposed to its application was the PCP. That is not how the case is put, but is implicit from the way in which the case is advanced in the alternative, and in the paragraph of the claimant's witness statement summarised above; that is that if, contrary to the primary case that the panel had made no adjustments for maternity leave and childcare at all, but it had made some, they were not enough. If the PCP is just the use of the research criteria, then the claimant can argue that creates the group and individual disadvantage. It was applied to both men and women and so the requirement in section 19(2)(a) is met. Section 19(1) would normally require the formulation of a PCP without consideration of its application, because the very language of the subsection requires the PCP to be 'applied' to the claimant. It would be tautologous to say that the use and application of the PCP was then applied.

39. The respondent might say that the claimant had nailed her colours to the mast and, in saying use and application rather than 'use or use and application', she cannot advance her case on two fronts. However, we consider that it would be fair to analyse both PCPs, although this is not how the issue was addressed in submissions. But in reality, by saying use and application, the claimant could be understood to mean its use because it then has to be 'applied' to meet the requirement of section 19(1). We do not consider any real injustice arises to the respondent by considering the case in this way.

40. We are satisfied that the use of research as a criterion establishes group disadvantage. We do not consider any complications arise for the pool for comparison, as the very pool who were considered for redundancy establishes the differential. Nor do we consider that one of the other candidates in the pool had a period of maternity leave slightly earlier makes any difference to the assessment, one way or the other. Women alone give birth and take maternity leave. That takes them out of the workplace for up to a year. Any measurement of performance over a period which includes that absent year inevitably creates a handicap for women in comparison to men who do not give birth and take maternity leave. That would apply to the research criterion, which included an assessment of publications and their output. The missing year of maternity leave would ordinarily lead to fewer publications. Although output was only a part of the criterion of research, it was

sufficient. In addition other aspects which were less obvious were adversely affected by maternity leave, for example a shortened period for the supervision of PhD students, if the measure was by reference to their completion, because the opportunity to supervise for the length of the study would be foreshortened by the maternity leave.

41. A more difficult issue relates to child-care. Whilst we accept the proposition from **Dobson** that women are more likely to take the responsibility for the care of children in their early years than men, it does not follow that group disadvantage inevitably follows. As the Appeal Tribunal pointed out that would depend on the interrelationship with the PCP. The claimant's contract required her to teach for up to 18 hours, but she stated that it was 10 hours. We recognise that preparation of lessons will mean that a greater number of hours will be needed than the delivery of the lessons, but there was no evidence as to precisely how much on average this took up. Although we were not taken to it, we were informed that there is a collective agreement required that senior lecturers to work for 37.5 hours. As to research, the claimant's contract stated she would "*normally be expected to engage in research and scholarly activity. The nature and extent of this will vary with the nature of the subject(s) you teach and the full range and balance of your duties and other commitments*" and "*research and scholarly activity will be principally self-managed*."

42. The claimant says, at paragraph 17 of her statement, that it is a fact of academic life that the work allocated is impossible to complete within normal working hours. "*It is necessary to use personal time to stay on top*". She has referred to a study undertaken by her Union as to workload allocation at the University in 2021. Although the study had a particular focus on work during the pandemic, it also commented upon pre-pandemic workloads. It was prepared from feed-back from academics. Analysis of the data indicated that there was an average of 11 hours worked beyond the contractual hours, although this was across the University as a whole and not specific to any department.

43. The claimant did not say how many hours in addition to the 37.5 she had worked in the last 3 years, the period over which she says her work should have been assessed and then extrapolated. That might have indicated the time needed to achieve an appropriate standard and reflect the time she says she did not have in the first years. To invite judicial notice that there is a greater hardship to women academics with child-care responsibilities to undertake research without further evidence is challenging. The problem in undertaking flexible working which arises from child-care responsibilities is that the carer, more usually the mother, has to be with, and attend to, the child in its early years. Providing a substitute, (be it nursery, school, grandparents or nannies) to free up time to work is limited by their availability. It is commonly in the day, on Monday to Friday and the requirement of the employer for the employee to attend a place of work outside these regular periods is not achievable. That is not the issue here. The research can be done at the time and place of the academic's choosing. It was not suggested it could not be done at the family home.

44. Of course, the commitment to provide care for young children brings with it other challenges which might limit the time for working extra hours, such as frequent

distractions of tending to demanding infants such that a sustained period for concentration cannot be found or the sheer tiredness that arises from that childcare and lack of sleep. None of this is easy to quantify and the difficulty we faced was we were invited to draw that conclusion without material to put it in context. How much of the contractual 37.5 hours was used for research? How much additional time was typically worked to generate a publication? The claimant did not complete that part of the proforma of the selection to stay statement which allowed for care responsibilities and included a request for the time this had taken away. The principle was picked up by the claimant later in the additional information she submitted to the panel, but it did not include the above breakdown of time which should be factored into the assessment, perhaps because she expected the panel would know that, as academics.

45. The claimant had made an arrangement to be away from home for three days to work compressed hours. Her children remained at the family home when she was away. This is a perfectly acceptable lifestyle choice, but it demonstrates the difficulty of the Tribunal drawing assumptions about what can and cannot be achieved by senior lecturers in respect of balancing family commitments and meeting expectations for research productivity in the absence of a more specific breakdown of how and when different aspects of the work, including research, were done.

46. In this case neither party broke down the case into disadvantage by maternity leave and additional quantified disadvantage by way of child-care duties, but the two were rolled together. The three assessors say they had given credit for these matters. We have therefore analysed the case on the basis that there is a disadvantage to women compared to men in the use of research as a selection criterion because of maternity leave and the care of young infants, collectively.

47. It is necessary to address the claimant's case that no consideration was given to her maternity leave and child-care responsibilities by the panel and that they have presented such a vague and unparticularised explanation of how they did that, that it is not credible.

48. Professor Schmidt said:

> 48.1 "*The claimant had appended to her selection to stay document a "declaration of individual staff circumstances" for the 2021 REF (page 127), which made reference to her maternity leave. I had to make this judgment without the benefit of the determinations of the University Individual Circumstances Panel that adjudicates on individual cases for the actual REF since this process had not concluded at the time of the selection exercise. While it is clear that the qualifying period of maternity leave in 2015/16 carried a reduction of 0.5 and while I acknowledged that there were further aspects potentially affecting performance that the claimant had referred to in her individual staff circumstances declaration, I did not judge that the actual publication record of one longer and one shorter journal article was more than meeting expectations, also against the job description*.
>
> 48.2 "*When scoring the Claimant, I took into account that she had been on maternity leave in 2015-2016. Her period of maternity leave in 2012-2013 fell outside of the timespan which was being considered (the current REF period*

from January 2014). However, both periods were fully within my mind. If I hadn't taken into account this period of maternity leave and the other personal circumstances she had referred to in her declaration (namely a period of ill health and a bereavement), the level of the Claimant's outputs would have been less than satisfactory; only by taking them into account could her research performance be considered as "meeting expectations".

48.3 *"The Claimant has raised the issue that there was no set numerical annual target for publications. While in terms of expectations, the absolute number may vary according to individual circumstances (factoring in exceptional circumstances), the expectation of "developing an established record of publication or other recognised forms of output" is explicit in the job description for a Senior Lecturer, and the REF guidelines make it explicit that a research active member of staff is expected to produce an average number of 2.5 substantive outputs per year over the assessment period (page 54V). Even given the mitigations as set out above, I did not judge the publication of one shorter and one longer article in the period since 2014 to "exceed expectations*"".

49. Professor Doyle said:

49.1 "*This was not a scientific assessment. I made my decision broadly on the volume of research produced while the Claimant was at the University. This amounted to 3 articles in 7 years, no successful funding applications and no successful doctoral supervisions*.

49.2 "*I have extensive experience of managing research and researchers in the humanities and on that basis I felt that, even with the disruptions and difficulties, this was not a strong performance. It is evident that on the back of the sabbatical her outputs increased but I would still regard one a year as in line with expectations for a full time Senior Lecturer at the top of the scale*".

49.3 "*The decision I made was an objective one based on measurable criteria, as with all affected individuals. The claimant had little published research for a Senior Lecturer on a full-time contract, with no major research grant success nor numerous small grant successes and only limited evidence of grant work and applications, regardless of the success status of those grants"*.

50. Professor Johnes said:

50.1 "*In the context of research, my evaluation focused upon the quantity of research output for the affected individuals and the number of Google Scholar Citations. Whilst (in my non-specialist opinion) I felt that the Claimant appeared to have a reasonable Research Excellence Framework ("REF") portfolio, I noted from the outset of my scoring that there was not a huge quantity (page 143). For a Senior Lecturer I would*

generally expect around 3 or possibly 4 good quality publications in the REF period (2014-2020), and in the case of the Claimant given her REF circumstances, that would be more like 2 or 3. Although I couldn't assess the quality of the work in the Claimant's CV, there seemed to be an expected quantity. While performance during the REF period was important, I was also interested (where appropriate in terms of the staff under consideration) in performance over a wider period than just the one covered by REF".

> 50.2 "*I took guidance from the Claimant's own "application statement for selection to stay" (pages 114-130) and, from my assessment of a reasonable but not huge research output (combined with a reasonable set of citations), I graded the Claimant a score of 9 (meets expectations) for the research element. I did so to represent that the Claimant was meeting the expectations of Senior Lecturer on the basis of a reasonable output of research (page 143)".*
> 50.3 "*To get a feel for how well she was back on a research track, I looked at the Claimant's performance in recent years. I can completely appreciate that there was a period of maternity leave most recently between 2015 and 2016 - the 2012 to 2013 period of maternity leave was not particularly relevant in assessing her research track going forward - and it is certainly not the case that you can return to work and immediately start publishing again. You would expect it to take some time to re-start research, especially as you have increased family responsibilities following a period of maternity leave. I noted that the Claimant also had some illness and bereavement which could also have impacted and slowed down her research. However, ultimately here, none of this seemed to have had a lasting impact for the Claimant in terms of research record; she had recent publications, had clearly restarted her research and publications, and was actively researching. In my opinion, I could see no concerns that she was not meeting expectations"*.

51. In their evidence the assessors said that the claimant would have been scored at below expectations, or bordering on that, if they had not factored in the family related issues. Professor Johnes said that a publication of 2 articles was below what she would expect which would have been 4 or 5 good ones, from which 2.5 might be selected for REF submission. All commented upon the lack of any funding introduced by the claimant, which was one of the four defined aspects to research. Professor Doyle had scored the claimant below expectations looking at the criteria by which research was measured. He increased this to meets expectations after the panel considered the additional information, but that was because of the fact the claimant's appraisals had not been unfavourable, not her additional representations about maternity leave and child-care.

52. The remark of Professor Doyle that the allowance to cater for maternity and family reasons in the scoring was not scientific is not an understatement. The closest the assessors came to using any sort of rubric was in respect of research output by the REF criteria, whereby an allowance of 0.5 would be allowed for a maternity break during the relevant period as against an expected 2.5 submissions; that is a 20% deduction for each maternity leave. The claimant says the absence of a clear analysis as to how each of the sub-criteria of research, 'publications, grant income, impact and supervision of research students', had been adjusted leads to the view it was not evaluated at all. She believes the writing was on the wall after Professor Doyle had approached her to consider voluntary redundancy on the basis of a spreadsheet relating to research performance which she had never seen.

53. Although there was no common approach, we were satisfied that each of the assessors did have maternity and childcare in mind when they scored the claimant. The proforma for the 'Application Statement for Selection to Stay' had a table for individual

circumstances which included maternity and family reasons. The process was designed for these matters to be taken into account. We do not consider that the assessors ignored this.

54. It is fair to say the approach was impressionistic and not guided by an objective touchstone save for the output of research, where all had used the REF guidance. The three assessors used their judgment and experience. The remarks of Professor Schmidt that the panel could have done a better job at taking into account maternity leave and that the panel did not have agreed objective benchmarks to distinguish between the different categories (paragraph 20 above) was, in our judgment, a recognition of the absence of greater guidance to ensure the panellists took a uniform approach. We do not consider that it leads to the inference that the panellists did not take into account maternity leave and childcare at all.

55. It follows that if the PCP is the 'use and application' of research in the redundancy exercise, it was not applied to men and women alike. Women who had relevant maternity leave were assessed differently. The requirements of section 19(2) (a) of the EqA are not met.

56. We have addressed the group disadvantage in respect of use of research, in contrast to its use and application, at paragraph 41 above. It is necessary for it also to place the claimant at a disadvantage. That necessitates further consideration of the adjustments. That is, were they sufficient?

57. In respect of research output, the claimant had a period of 7 years of employment, with one year of absence through maternity leave. She designed her working week, in agreement with her managers, to provide the 10 hours of teaching in compressed hours on Tuesday to Thursday. That meant she would stay two nights per week in Huddersfield and travel to Cambridge where she and her family lived. Her husband worked full time.

58. The claimant had produced 2 publications in that period. One was at the publishers, but that was not sufficient, because only completed publications were taken into account. By a measurement against 2.5 publications in a 6 year period, the 20% deduction would mean that 2 publications were sufficient and so a score of 'meet expectations' would reflect the a REF adjustment. Without it the claimant would be below expectations. However, that adjustment would not reflect the childcare responsibilities, deferred sabbatical and additional duties in the first two years. The 2.5 publications in the REF criteria is a little misleading. The evidence was that it was commonplace for an academic to produce 1 publication per year of which 3 to 4 would be good. The 2.5 publications laid out in the REF, would have been selected from that larger portfolio. By this measurement, the claimant was given further credit. It is true the assessors could have taken only the last 3 years and made a pro rata calculation across the 7 years, but that would still have led to a score of met expectations against a standard performance of 1 publication per year.

59. In respect of the other criteria, there was little evidence to suggest that 'impact' should have been in the higher category. Evidence was provided about how the number of citations in other works was one way of evaluating that. Google

scholar citations was one source. 'Pure' was another. All witnesses, including the claimant, accepted that none was infallible. For example, there may have been multiple citations of a piece of research in which it had been heavily criticised in the academic world. Impact is not intended to reflect the adverse, but rather the good. The claimant has made the point that the assessors were not well-positioned to compare the quality of the work two of whom had different subjects. If that criticism were valid, it would not assist the claimant; it would not disadvantage just the claimant, but all in pool.

60. The claimant had produced no grant income. Standing of itself, that would have had to result in a mark of below expectations, but Professor Johnes recognised that the claimant had mentored other staff for grant applications which she factored in.

61. Supervising PHD students would also have fallen below expectations as none had achieved completion and that was a requirement the assessors applied. This had been taken from the promotion criteria to readers. The claimant can say the lost early years set her back but she was awarded a score of meeting expectations, which indicates this had been factored in. To suggest she should have been given credit for those students she was supervising who had not yet completed their qualification and then to extrapolate that for the earlier 4 years would have been to invite speculation of what might have been from a limited base. We do not find there was a case for exceeding expectations.

62. Having had regard to proper and due adjustments in respect of each of the components of the research criterion, we were not satisfied that, as applied by the assessors, it disadvantaged the claimant.

63. Alternatively, we would have found that the respondent had established that the use of research in the selection criteria was a proportionate means of achieving a legitimate aim.

64. The unchallenged evidence of Professor Doyle was that research and particularly teaching staff's contribution to research and publishable content has become increasingly important as a key function of a lecturer's role in recent years. A key focus of the work is that key people are active researchers whose work is published and adds value to the respective subject area fields.

65. In cross examination the claimant said that the respondent was entitled to retain staff who contribute to research output, that research was a fundamental part of the role and an important goal of the institution. Although she had said in her statement that the basic problem was that research was there at all, in her evidence she said she was not sure if research should have been there and her case was not advanced on the premise that research should have been omitted.

66. Given the significance of research to the respondent and to the role of senior lecturer, we consider that retaining staff who contributed to research was a legitimate aim. Using research as a criterion to select staff for redundancy and weighting it

along with teaching as the highest scoring criteria, worth 31.5 of the overall score, was appropriate to meeting that aim, given its importance.

67. Was it proportionate? The discriminatory effect would be significant. Those with the protected characteristic faced the prospect of losing their job and possibly the end of their career. On the other hand, not having the criteria would have defeated the aim and it was never really suggested. Rather, the claimant's case was that she had not been scored fairly. Our task is to assess not just the impact on the claimant, which is a relevant consideration, but whether the respondent can justify the application of the PCP at all. This is to be contrasted with other types of discrimination, such as direct age discrimination or discrimination arising from disability, in which the employer must justify the unfavourable treatment of the claimant.

68. In making this assessment, we must consider what lesser measures would have been suitable. Was applying the PCP reasonably necessary? In our judgment, critical to that in this case is how the respondent sought to eliminate the disadvantage. For the reasons set out above, we are satisfied the adjustments which were made to the scores were measured and appropriate. To have gone further, as the claimant suggests and to have evaluated her as outstanding or exceeding expectations would have been to go beyond what was reasonably necessary. That would have tipped the respondent into the territory of directly discriminating against those without her characteristic, as in the **Eversheds** case. Levelling the playing field is a far from easy exercise.

69. The claimant explored many aspects of the redundancy procedure which she said were wanting, including the approach of those who conducted the appeal and the lack of transparency about how the criteria were to be applied. The three assessors had not conducted such an exercise before and a number of the criticisms made by counsel of the claimant had merit. But this was not an unfair dismissal claim and we did not consider they assisted us on the issues for determination in this indirect sex discrimination case. Similarly, the reference to the first instance decision of ***Duxbury v University of Huddersfield*** did not assist, as that was a case which turned on its own facts.

Unanimous decision

70. All members of the Tribunal agreed on the above findings and conclusions.

Employment Judge D N Jones
Date: 11 August 2021