



EMPLOYMENT TRIBUNALS

Claimant: Ms Samantha Jones

Respondent: Worcestershire County Council

Heard at: Birmingham
(Conducted remotely by CVP) **On:** 21, 22, 23 June 2021

Before: Employment Judge Gilroy QC

Members: Mrs J Keene
Mr P Collier

Representation

Claimant: In person
Respondent: Mr G Probert (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

- 1 The Claimant's claim of unfair dismissal is dismissed.
- 2 The Claimant's claim of indirect sex discrimination is dismissed.
- 3 The Claimant's claim of less favourable treatment, contrary to Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, is dismissed.

REASONS

Introduction and Background

- 1 The Claimant was formerly employed by the Respondent as a School Crossing Patrol Supervisor. Her employment was terminated on the stated grounds of redundancy. She claimed that she had been unfairly dismissed, and that the Respondent had subjected her to indirect sex discrimination, contrary to s.19 of the Equality Act 2010, and less favourable treatment, contrary to Regulation 5 of the Part-time Workers Regulations 2000, "the PTW Regulations". The Respondent admitted that the Claimant was dismissed but denied all of her claims.

Evidence and Material before the Tribunal

- 2 The Tribunal heard oral evidence on behalf of the Respondent from Ms Rachel Datlen, Gypsy Service and Road Safety Education Manger (Unit Manager for Countryside Greenspace, Gypsy Service and Road Safety Education Teams), Ms Gillian Jackson (Senior HR Advisor), and

Jacqui Phillips, (Road Safety Education and Skills Team Leader), who was the Claimant's line manager. The Claimant also gave oral evidence.

- 3 The Tribunal was provided with witness statements on behalf of the Claimant and the witnesses who gave live oral evidence on behalf the Respondent. The Tribunal was also provided with an agreed bundle of documents and an agreed chronology and cast list.
- 4 The hearing was conducted remotely by CVP.

The Issues

- 5 The issues which fell to be determined by the Tribunal were agreed by the parties and set out in writing in an Amended Case Management Summary sent to the parties on 7 July 2020 following a Case Management Preliminary Hearing conducted before Employment Judge Johnson on 30 June 2020, as follows:

UNFAIR DISMISSAL CLAIM

- (i) Was (the) redundancy the real reason for the dismissal of the Claimant meeting the definition of redundancy set out in s.139(1)(b) of the Employment Rights Act 1996 ?
 - a. Had the requirements of the Respondent for employees to carry out work of a particular kind, being school crossing patrol supervision, ceased or diminished ?
 - b. Was the dismissal of the Claimant caused wholly or mainly by the diminishment of the requirement for school crossing patrol supervision ?
 - c. Was the role of School Crossing Patrol Supervisor solely the role undertaken by the Claimant ?
- (ii) Was the decision to dismiss the Claimant within the range of conduct that a reasonable employer could have adopted ("the band of reasonable responses test"), having regard to section 98(4) of the ERA 1996 and the principles of fairness established by case law? In particular, did the Respondent:
 - a. warn and consult the Claimant about the proposed redundancy ?;
 - b. adopt a fair basis on which to select for redundancy, including selecting an appropriate pool of potentially redundant employees and an appropriate selection criteria ?;
 - c. consider suitable alternative employment with the Respondent's organisation ?, and
 - d. follow its own Redundancy and Redeployment Policy ?
- (iii) If the dismissal does not amount to a redundancy, did the circumstances giving rise to the dismissal of the Claimant amount to a substantial reason of a kind to justify the dismissal as fair for some other substantial reason, namely a business reorganisation carried out in the interests of economy and efficiency ?
- (iv) If the Claimant was unfairly dismissed, what compensation is she entitled to ?
- (v) If the dismissal was procedurally unfair, would the Claimant have been dismissed in any event ?
- (vi) If so, should the Claimant's compensation be reduced ?
- (vii) If the Claimant was unfairly dismissed, was there any element of contributory fault, and if so, should her compensation be reduced ?

INDIRECT SEX DISCRIMINATION CLAIM

- (viii) Was there a provision, criterion or practice that the new role of School Crossing Patrol Supervisor/Road Safety Technician be carried out on full-time hours throughout the year ?
- (ix) The Respondent accepts that the new role was a full-time role throughout the year but there is a factual dispute as to whether the Respondent required the new role to be carried out by only one worker working full-time or would have allowed a job share.
- (x) If there was a PCP, did the PCP apply, or would it have applied, to men as well as women ?
- (xi) Would the PCP have put women at a particular disadvantage, namely dismissal, due to women being more likely to have childcare commitments necessitating part-time hours in term time only ?
- (xii) Did the PCP put the Claimant at that particular disadvantage, namely, her dismissal ?
- (xiii) Can the Respondent justify the PCP by showing it to be a proportionate means of achieving a legitimate aim ?
 - a. Can the Respondent establish that it was pursuing a legitimate aim to ensure that the School Crossing Patrol Service was efficiently and safely supervised during school holidays as well as term time and that it was ensuring the role was in accordance with the School Crossing Patrol Guidelines ?
 - b. Can the Respondent establish that the measures taken to achieve that aim were proportionate and appropriate ?
- (xiv) If the Claimant is successful in establishing her claim of indirect sex discrimination, what sum should be awarded to the Claimant by way of remedy ?

LESS FAVOURABLE TREATMENT UNDER THE PART-TIME WORKERS REGULATIONS 2000

- (xv) The Respondent accepts that the Claimant was a part-time worker entitled to protection under the Part-time Workers Regulations 2000. Additionally, the Respondent accepts that Samantha Turner is an appropriate comparator under Regulation 2(4).
- (xvi) The less favourable treatment complained of is that the Claimant was selected for redundancy and dismissed.
- (xvii) Was this treatment less favourable than that of Samantha Turner, the comparable full-time worker ?
- (xviii) Was the dismissal on the grounds that the Claimant required part-time work ?
- (xix) If so, was the dismissal justified on objective grounds ?
- (xx) If the Claimant is successful in establishing her claim of less favourable treatment, what sum should be awarded to the Claimant by way of remedy ?

The Law

6 The relevant legislation in relation to the Claimant's claims provides as follows:

Unfair Dismissal - Employment Rights Act 1996

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.....

(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) -

(a) 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

(b) shall be determined in accordance with equity and the substantial merits of the case.

Indirect discrimination - Equality Act 2010

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 -

sex;.....

Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

5. Less favourable treatment of part-time workers

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker -

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if -

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.....

Findings of Fact

7 The Tribunal made the following findings of fact.

The Claimant

7.1 The Claimant was employed by the Respondent as a School Crossing Patrol Supervisor from 13 October 2014 until 4 August 2019, "the effective date of termination".

The Respondent

7.2 The Respondent is the County Council for the non-Metropolitan County of Worcestershire. It is a substantial employer.

The Reason for Dismissal

7.3 The Claimant's employment with the Respondent was terminated as part of a restructure of the Road Safety (Education Skills) Team. The stated reason for the dismissal was redundancy.

Events leading to Dismissal

7.4 Upon the commencement of her employment with the Respondent, the Claimant initially worked 18.5 hours per week during term time only as a School Crossing Patrol Supervisor for North Worcestershire. Her hours were increased from 4 July 2016 to 30 hours per week, but still working term time only from home. The additional hours related to administration duties for the Road Safety Team. Approximately 70% of her time was spent supervising school crossing patrols, and approximately 30% conducting road safety admin.

7.5 The Claimant is a single parent. She has a young son. The reason she worked part-time during term time only was due to her childcare responsibilities and given her limited alternative support options.

7.6 Prior to the restructure which formed the backdrop to the Claimant's dismissal, Ms Samantha Turner was employed by the Respondent as School Crossing Patrol Supervisor for South Worcestershire/Bikeability Technician on a full-time, 37 hour a week, full year contract, working office-based with the Road Safety Team Leader. She had been employed by the Respondent for around 30 years, and spent approximately 18.5 hours a week in her school crossing patrol supervision post, and a further 18.5 hours a week on Bikeability administrative and technical support.

7.7 Bikeability is a UK-wide cycle training programme, which essentially replaced the former cycling proficiency scheme. The Respondent provides training under the Bikeability scheme.

7.8 Over the course of time, the Respondent's need for the role of School Crossing Patrol Supervisor diminished. From a position of 93 patrol sites in 2013, this had reduced to 44 by 2019, with further closures proposed, some being complete closures, others involving closure by reason of infrastructure upgrades meaning that they would also be closed once upgraded due to a duplication of resources. The Claimant's line manager, Jacqui Phillips, Road Safety Education Skills Teams Leader, discussed the topic of school crossing patrol closures with Rachel Datlen, Unit Manager for Countryside Greenspace, Gypsy Service and Road Safety Education Teams, on a number of occasions during the autumn of 2018, following a review of the School Crossing Patrol Service which had been conducted in June 2018. Ms Datlen also

discussed the matter with her Assistant Director, Hannah Needham.

- 7.9 Following discussion between Ms Datlen, Ms Phillips and Gill Jackson, HR Advisor, a business case was drawn up to support a proposal for the deletion of the two School Crossing Patrol Supervisor posts (ie the positions held by the Claimant and Ms Turner respectively) and the creation of a new post of School Crossing Patrol Supervisor/Road Safety Technician. It was proposed that the holder of this post would be responsible for supervising school crossing patrols on a day-to-day basis and providing technical and administrative support to the Road Safety Team. A job description and person specification for the new role was produced and graded.
- 7.10 The proposed restructure was presented to the Union Forum on 28 February 2019. The Forum was content for consultation to go ahead, and consultation on the proposal was duly launched on 4 March 2019.
- 7.11 Local authorities across the UK run their school crossing patrols in accordance with the School Crossing Patrol Service Guidelines, (“the National Guidelines”), which provide that there is a requirement for the service during school holidays, and full-time staff are required to cover all eventualities. Various school crossing patrol supervisory duties are performed during the school holidays, such as absence recording, tending to site issues, infrastructure improvements and consultation, etc. This is by no means an exhaustive list. Within the Respondent, if a School Crossing Patrol Supervisor is not available all year round, there would be no cover for certain of the Team’s Services, and varied cover of Bikeability when Ms Phillips takes leave.
- 7.12 Given the possibility of redundancies, the Respondent’s “Redundancy and Redeployment” policy was engaged, a consultation document was drafted by Ms Phillips and Ms Datlen with the support of Ms Jackson, and affected staff were invited to one-to-one meetings with their line manager.
- 7.13 The consultation document outlined the reasons for the proposed changes, the potentially redundant posts, the pool of selection, the method of selection, ring fencing arrangements, the proposed method of carrying out the dismissals, and the proposed timetable for consultations and implementation.
- 7.14 The Claimant and Ms Turner were ring fenced as potential candidates for the new role, and it was decided that registration on the Respondent’s Redeployment Programme for suitable alternative work could also be ring fenced, subject to actual or potential satisfaction of all the potential criteria contained in the person specification for any same or lower grade vacancy.
- 7.15 Following a request from the Claimant to be supported by a work colleague, her one-to-one meeting took place on 14 March 2019. The meeting was conducted by Ms Phillips. The Claimant was accompanied by a colleague, Terry Cotton. Two job specifications had been produced for the new role, because Ms Phillips had been given advice from the Respondent’s Grading Analyst to provide a career grade for the role so that external applicants with less experience could be recruited if appropriate circumstances arose at any point in the future. The Claimant was told that the elements identified in both person specifications would be explored during the competitive selection process but that this would be clarified with HR. The Claimant queried why the National Guidelines were not being followed in terms of the ratio of Supervisors to patrols. She queried which sites were being closed. She queried the hours of the new role.
- 7.16 On 22 March 2019, the Claimant telephoned Ms Jackson, asking if she could assist in obtaining an interview for her for the post of Well Being Assistant. Ms Jackson said that although the Claimant was not on the Redeployment Programme, she would speak to the Recruiting Manager but was unsure that the vacancy was a vacancy with the Respondent. Upon enquiry, she discovered that it was not, as it was a sub-contracted area of work.
- 7.17 On 25 March 2019, the Claimant e-mailed Ms Jackson asking whether the Respondent would pay professional fees for her to obtain legal advice in relation to her potential redundancy. Ms Jackson informed her that the Respondent would not, and asked her to confirm if she had received a link to the Redundancy and Redeployment Policy, and had been given a copy of the

consultation document. Ms Jackson informed the Claimant that the consultation exercise closed on 2 April 2019, and that she still had the opportunity to submit a written response if she wished to do so.

- 7.18 The Claimant also raised a query about applying for a Business Support Officer role. On discussion with Ms Jackson, the Claimant essentially indicated that she had almost talked herself out of applying for that role. Ms Jackson contacted the Recruiting Manager and confirmed to the Claimant on 26 March 2019 that there were two vacancies, one of which had an end date of 31 July 2021, and on 28 March 2019, the Claimant confirmed that she had applied for the post. Ms Jackson advised the Claimant to call the Recruiting Manager rather than wait for a response to her e-mail.
- 7.19 At 5.50 pm on 1 April 2019, the day before the consultation exercise closed, the Claimant submitted two alternative proposals to the Respondent for consideration in the context of the proposed restructure. Her first proposal was to maintain having two School Crossing Patrol Supervisors, one working 21 hours per week similar to the Claimant's role, and one working 30 hours per week, similar to Samantha Turner's role. Her second proposal was for the new role to be offered to both existing Supervisors on a job share basis.
- 7.20 The Claimant's proposals were discussed by Ms Datlen and Ms Phillips on 3 April 2019. They were of the view that the Claimant's proposals did not meet the Respondent's business need. The hours of the Claimant's new proposed posts were greater than were necessary to carry out the relevant work. They would have involved an absence of admin and technical support over the school holidays, most importantly the summer holidays, when there is a significant need for such support. The Claimant's proposals included duties and responsibilities for Road Safety Education that were already covered by a Team Leader, such as promotion, marketing and advertising. There was no business need, nor was there finance available, to increase the admin and technical support role for the Road Safety Education function of the Team. The consultation was not, in any event, concerned with the restructuring of the Road Safety Education Service. It was concerned with the supervisory resources of the School Crossing Patrol Service.
- 7.21 The Claimant was invited to, and attended, a one-to-one Outcome Meeting on 4 April 2019. She was provided with an Outcome Document which confirmed that on the basis of the representations made during the consultation period, the decision to delete the existing School Crossing Patrol Supervisor posts and create the new 35 hour a week full year post of School Crossing Patrol/Safety Technician had been confirmed. The Outcome Document confirmed how the process for appointment would be implemented. It was stated that the method of selection for the new post would consist of a short exercise and interview based on the job description and person specification for the new post, which would form the basis of the selection criteria. It was also stated that following the competitive selection process, the unsuccessful candidate would be identified as being at risk of redundancy and would be invited to a Dismissal Decision Hearing.
- 7.22 Upon receipt of the Outcome Document, the Claimant observed that it made no reference to part-time hours despite her need for part-time term time only hours being well known. She raised this with Ms Phillips, who subsequently sent her a further Outcome Document which, in relation to the proposed new role, now said: *"Should an employee make a request to be appointed on a part-time basis the business would need to consider whether or not the request would meet the need of the business and could be accommodated"*.
- 7.23 The Claimant considered that the Respondent had not given full consideration to her alternative proposals. Accordingly, Ms Jackson informed her that a further one-to-one meeting should take place ahead of the selection process. Ms Phillips suggested that the second one-to-one meeting take place on 8 April 2019. This was put back to accommodate the attendance of the Claimant's representative/companion.
- 7.24 On the morning of 9 April 2019, Samantha Turner was interviewed for the proposed new role.
- 7.25 The Claimant's second one-to-one Outcome Meeting took place on the afternoon of 9 April

2019. It was the Claimant's evidence to the Tribunal that Ms Phillips made it clear at that meeting that her preference was for one full-time role and not part-time roles. The Claimant considered that this contradicted the statement made in Ms Jackson's subsequent letter of 24 April 2019 to the Claimant, which stated that "*the new role could be undertaken by one or multiple occupants working part-time hours on a full year basis*". Ms Phillips maintained that what she said at the meeting on 9 April 2019 was that her preference was for one full-time role whereby one or more people shared all of the duties, rather than the duties being split across separate roles as they had been previously, and that she explained what she meant by that.
- 7.26 During the meeting of 9 April 2019, Ms Phillips attempted to explain to the Claimant why her alternative proposals did not meet the Respondent's business need. She highlighted the aspects of the Claimant's alternative proposals that related to the Road Safety Education Service, where the roles and responsibilities were already covered by the Team Leader. There was a discussion about working hours. Throughout the meeting, Ms Phillips' theme was that the driving consideration was to reduce supervision in line with the reduction in School Crossing Patrol Supervisor roles, and that the Respondent could not restructure without reviewing Bikeability and road safety support at the same time as roles were combined.
- 7.27 It was the Claimant's evidence that Ms Phillips said that if it was a job share the Claimant wanted, she should have approached the other affected member of staff to see if she would want to do this, and the matter could then have been put forward to Ms Phillips for her to consider. It was Ms Phillips' evidence that her understanding of the process was that the successful applicant would be able to request a job share, that she did suggest that if the Claimant so desired, she *could* approach the other affected staff member to discuss an alternative proposal that might be agreeable to both of them as affected parties, and that a joint proposal could have been put forward. This had occurred in other areas of the Respondent in previous restructures. In her one-to-one meeting with Ms Turner on 13 March 2019, following the commencement of the consultation process, Ms Turner had informed Ms Phillips that she did not want a job share.
- 7.28 On 10 April 2019, Ms Phillips invited the Claimant to an Outcome Meeting, which was to take place the following day.
- 7.29 A series of questions was drawn up for the interview process. HR advised that the questions should concentrate on the more technical and specialist aspects of the role. There were some scenarios that the candidates were presented with to test them on their technical responses. This took the form of real-life examples of school crossing patrol sites but which neither candidate had been involved with previously.
- 7.30 On the morning of 11 April 2019, the Claimant left Ms Jackson a voicemail message, stating that she wanted to know if the meeting she had been invited to that afternoon was a formal meeting. She said that if it was formal, she did not feel that this was following the procedure of being given 5 days' notice, and she wanted to have someone with her, which she could not organise at such short notice. For the sake of completeness, whilst 5 working days' notice is required by the Respondent's Formal Meeting Guide, an Outcome of Selection Meeting would not have been a formal meeting. It is simply a meeting to feed back the outcome of selection interviews.
- 7.31 Ms Jackson called the Claimant back. The Claimant referred to the meeting she had had on 9 April 2019 with Ms Phillips, stating that part-time hours had not been considered and the fact that she had offered to take a reduction in hours as the hours for the new post did not fit in with her family commitments, and the only reason she was doing the job was because it was term time only. Ms Jackson undertook to provide further answers to the Claimant's queries and indicated that she would respond as soon as possible, but highlighted that people were now breaking up for Easter. It was agreed to again re-schedule the Claimant's competitive selection interview. The Claimant confirmed that she wished to have confirmation as to whether the post could be worked on a job share basis. Whilst she stated that her ideal would be part-time and term time only, she also stated that she could do part-time on a full year basis.
- 7.32 According to the Claimant, by the morning of 11 April 2019, she had come to the conclusion

- that there seemed little point in attending an interview for the new role because of the hours involved.
- 7.33 Whatever was the Respondent's position beforehand, by letter dated 24 April 2019, Ms Jackson confirmed to the Claimant that the new role could be undertaken by one or multiple applicants working part-time hours on a full year basis. In her letter of 24 April 2019, Ms Jackson also confirmed to the Claimant that her interview for the new post would now take place on 29 April 2019.
- 7.34 At 16:37 hours on Friday 26 April 2019, the Claimant sent a further e-mail to Ms Jackson, asking for answers to some more questions that she had prior to being interviewed, which might involve postponing the interview scheduled for 9.30 am on Monday 29 April 2019.
- 7.35 The Claimant asked for an independent representative from HR to be present at her selection interview.
- 7.36 The Claimant's selection interview duly took place on 29 April 2019. It was conducted by Ms Phillips and Ms Datlen. Alison Weaver, HR Advisor, attended, and was present during the scoring process. The Claimant provided answers that met or potentially met the interview selection criteria, but her overall score was lower than Ms Turner's.
- 7.37 On the evidence produced to the Tribunal, no scores were recorded against two of the Claimant's answers to the verbal questions. The Respondent indicated that the missing scores had been recorded on a piece of paper but that the relevant document had been mislaid. It has to be said that the manuscript record of the Claimant's scores which were available were barely legible.
- 7.38 The Tribunal was provided with Ms Turner's full scores. In her witness statement for the Tribunal proceedings the Claimant contended that her answers to the questions had been "under-marked", and that Ms Turner's answers to the questions had been "over-marked". The Claimant did not ask any of the Respondent's witnesses any questions about either her scores or Ms Turner's, despite having been informed by the Tribunal that she needed to put to the Respondent's witnesses any matter where she disagreed with their evidence on any contentious issue.
- 7.39 Ms Turner's scores were 15 for the oral questions, and 6 for the two written tasks, producing a total of 21 out of 24. The Claimant's score for the oral questions was 10, and her total score was 14 out of 24, indicating that her score for the two written tasks was 4. It was, therefore, possible to work out the Claimant's full scores on the basis of the material provided to the Tribunal.
- 7.40 On 2 May 2019, the Claimant e-mailed Ms Jackson seeking clarification as to which stage had been reached in the process. Ms Jackson responded to the effect that point 11 of the Redundancy and Redeployment policy covered the next stages of the process.
- 7.41 Also on 2 May 2019, the Claimant telephoned Ms Jackson seeking guidance as to what would happen at the next meeting, and to ask questions about "bumped" redundancies and job share. She also mentioned that she had asked Ms Datlen if the Dismissal Meeting could be postponed until the following week because her work colleague who she had intended would accompany her would be on leave. Ms Jackson agreed to remind Ms Datlen that the Claimant needed a response on these issues. Ms Jackson also stated to the Claimant that a number of criteria had to be considered in order to be able to consider "bumping", and that, in terms of job sharing, although one person may consider a part-time post possibly on less hours than they were currently working as a suitable alternative, another (for example, the potential job sharer) might not. The Claimant said that she understood. Ms Jackson gave evidence in relation to a voluntary redundancy process which had taken place in December 2018. Her evidence was that the potentially relevant posts were deleted as part of general cost savings.
- 7.42 The Claimant sent Ms Jackson an e-mail on 3 May 2019, accepting the invite to the Dismissal Decision Meeting, and in a separate e-mail sought confirmation as to when the new role would

be implemented, querying whether it already had been. Ms Jackson replied that although the Consultation Outcome Document specified an implementation date of 29 April 2019, because the competitive selection process had not been concluded, the implementation date for the new role would now be 3 June 2019.

- 7.43 On 9 May 2019, Ms Jackson e-mailed the Claimant to invite her to a one-to-one meeting on 14 May 2019, the date which had originally been arranged for her rescheduled Consideration of Dismissal Decision Meeting, in order to ensure that that the Respondent had fully understood her proposals, and that she had fully understood the responses to those proposals. She was informed that in the circumstances the Respondent was looking, following this meeting, to reschedule her Consideration of Dismissal Decision Meeting for 10.00 am on 15 May 2019.
- 7.44 The Claimant declined any feedback from her selection process but commented that she was not surprised that the other candidate had scored higher due to her greater level of experience.
- 7.45 On the morning of Monday 13 May 2019, the Claimant telephoned Ms Phillips to state that her mother had passed away and that both meetings which had been scheduled with her would have to be postponed. The additional one-to-one meeting was rescheduled for Wednesday 22 May 2019, and the Consideration of Dismissal Meeting was rescheduled for Thursday 23 May 2019. The Claimant was informed that although she had not yet been issued with formal notice of redundancy, the Respondent had used its discretion and placed her on the Redeployment Programme and would be sharing with her any vacancies that became available that were deemed as being a suitable alternative for her.
- 7.46 Given the difficulties the Claimant was facing as a result of the death of her mother, she asked for the one-to-one meeting and the Consideration of Dismissal Meeting both to be postponed further. Her request was accommodated, with the former being arranged for Monday 3 June 2019 and the latter, Tuesday 4 June 2019. The Claimant was subsequently on sick leave from 20 May 2019 until 28 June 2019. This resulted in further unavoidable postponement of the necessary meetings, which were rearranged on two further occasions, with it ultimately being agreed that the one-to-one meeting would take place on Monday 1 July 2019, and the Consideration of Dismissal Meeting on Thursday 4 July 2019. Both meetings duly took place.
- 7.47 The Claimant returned to work on an agreed phased return basis on Monday 1 July 2019. Ms Phillips and Ms Jackson conducted the one-to-one meeting with the Claimant and her representative that afternoon. At that meeting, the Claimant did not raise any queries about the selection process or her scores. Ms Phillips went through the Claimant's alternative proposals point by point. Much the same points were made again by management as to the non-viability of the Claimant's alternative proposals. Essentially, Ms Phillips gave management's response to the Claimant's first alternative proposal, and Ms Jackson responded to the Claimant's second alternative proposal.
- 7.48 The Consideration of Dismissal Meeting took place on 4 July 2019, conducted by Ms Datlen. The Claimant was again accompanied by Terry Cotton. Ms Jackson was also in attendance. The outcome of that meeting was that it was confirmed that the Claimant's post was to be deleted and that she would be dismissed on the grounds of redundancy.
- 7.49 The Claimant appealed against her dismissal. Her appeal was heard on 31 July 2019, chaired by Michael Hudson, the Respondent's Director of Finance. Ms Datlen prepared a management statement of case and attended the appeal. Mr Hudson dismissed the Claimant's appeal, confirming the same verbally at the conclusion of the hearing, and subsequently in writing on 7 August 2019.
- 7.50 During cross-examination, the Claimant agreed with the proposition that her selection for redundancy had nothing to do with her part-time status. She accepted that she had been selected based upon the assessment of her competencies, and those of the other candidate, Ms Turner.

Respondent's submissions

- 8 In his closing submissions, Mr Probert for the Respondent advanced the following propositions on the legal position, supported, in part, by established authorities:
- 8.1 Redundancy is a potentially fair reason for dismissal.
- 8.2 It is generally not open to an employee to claim that their dismissal is unfair because the employer chose to make workers redundant. Tribunals do not sit in judgment on business decisions.
- 8.3 Employers will not normally act reasonably unless they warn and consult employees affected or their representatives, adopt a fair decision as to who should be selected for redundancy, and take such steps as may be reasonable to minimise redundancy by means of redeployment.
- 8.4 The requirements of consultation, fair selection and seeking alternative employment are fundamental in a redundancy case.
- 8.5 The employer will seek to establish criteria for selection which so far as possible do not depend solely upon opinion of the person making the selection but can be objectively checked.
- 8.6 The pool for selection should include all those employees carrying out work of that particular kind, but may be widened to include other employees such as those whose jobs are similar to, or interchangeable with, those employees.
- 8.7 Ultimately, the pool from which the selection will be made is for the employer to determine, and, in the absence of a customary arrangement or procedure, it will be difficult for an employee to challenge where the employer can show that he acted reasonably.
- 8.8 Tribunals cannot substitute their own principles of selection for those of the employer.
- 8.9 Tribunals will not need to carry out a detailed re-examination of the way in which the employer applied the selection criteria.
- 8.10 It is generally sufficient for an employer to show that it set up a good system of selection and that it was fairly administered. Ordinarily, there will be no need for an employer to justify the assessment on which the selection for redundancy was based.
- 8.11 In a redundancy situation, there is no absolute obligation on an employer to “bump” or even consider “bumping”. The issue is what a reasonable employer would do in the circumstances and in particular the Tribunal asks whether the employer did what was within the reasonable band of responses of a reasonable employer.
- 8.12 Where redundancy arises in consequence of a reorganisation and there are new roles to be filled, the employer’s decision is likely to centre upon the assessment of the ability of the individual to perform in the new role.
- 9 Applying the legal principles to the facts, Mr Probert made the following submissions.
- 9.1 There could be no doubt as to the genuineness of the restructure or the business case in support thereof.
- 9.2 The Claimant had accepted that there was a redundancy situation.
- 9.3 The Respondent accepted that the Claimant did not simply perform the School Crossing Patrol Supervisor’s role, as approximately 30% of her time was spent dealing with road safety education administration.
- 9.4 The Claimant had accepted that there had been consultation and warning and she raised no arguments against the pool of selection.
- 9.5 The Claimant had accepted that she was placed on the Redeployment Programme but said

that she did not accept that the Respondent fully considered suitable alternative employment.

9.6 She complained about a number of breaches of policy, namely the request for her to provide written submissions (see paragraph 9.7 below), the Respondent's alleged failure to consider her proposals, and placing her on the Redeployment Programme before her redundancy had been confirmed.

9.7 In her letter of 29 April 2019, when inviting the Claimant to a formal Consideration of Dismissal Meeting on 8 May 2019, Ms Datlen stated as follows:

"You will be given the opportunity to make representations about your provisional selection, make alternative proposals and raise any other work related issues or circumstances that you feel should be taken into account.....If you or your representative wishes you may make written representations, but they should be received no later than 5 pm on Monday 6 May 2019. A form is included with this letter".

The Claimant maintained that this was a breach of procedure in that she was being informed that if she wished to make representations she had to do so in writing. Mr Probert submitted that the Claimant had misread Ms Datlen's letter of 29 April 2019. Ms Datlen was simply informing the Claimant that she would have the opportunity to make representations (ie in whichever format she deemed appropriate), and that *if* she or her representative wished to make written representations, she/they should provide the same by a stipulated deadline in order that they could be considered in advance of the meeting which was then scheduled for 8 May 2019.

9.8 In terms of alternative employment, it was the Respondent's case that the Claimant was placed on the Redeployment Programme (the Claimant accepted that this occurred no later than May 2019). The Claimant had also accepted that she was assisted by Human Resources throughout. She had applied for one role within the Respondent.

9.9 "Bumping" was considered by the Respondent but did not help the Claimant's situation. Reference was made to Ms Jackson's evidence in relation to the voluntary redundancy process which had taken place in December 2018, when potentially relevant posts were deleted as part of general cost savings. In any event, "bumping" was only one of a number of options open to the Respondent according to its Redundancy and Redeployment Policy. It was the Respondent's position in this context that, putting the Claimant's complaint at its highest, the Respondent did not "fully" consider the matter of alternative employment, but there was no evidence to support this proposition and similarly there was no evidence as to what suitable employment was available that the Respondent failed to explore.

9.10 There had been no breach of the Respondent's Redundancy and Redeployment Policy and the Claimant was fully afforded the opportunity to attend the relevant hearings/meetings to make submissions and be accompanied. The Respondent rejected the suggestion that it had failed to consider the Claimant's proposals. To the contrary, the Respondent had provided a consistent and clear rationale for its rejection of the Claimant's proposals. The Claimant had essentially accepted the Respondent's rationale in her oral evidence.

9.11 Ms Phillips had established from Samantha Turner that she did not want to have a job share.

9.12 Placing the Claimant on the Redundancy and Redeployment Programme before she was formally made redundant was not a breach of policy.

9.13 In relation to consultation, the Claimant's only apparent criticism was that the period could have been extended for consideration of her proposals. She had submitted her proposals the day before consultation ended despite the fact that it had been open for nearly one month. The Respondent was provided with sufficient detail for these proposals to be addressed by the Respondent forthwith, which it did, and the Claimant did not request an extension of the consultation period.

9.14 Any criticism by the Claimant about 35 hours being sufficient for the job, or whether the role

could be done in term time, would involve second guessing business decisions which the Respondent was entitled to make, and those decisions were based on logic and evidence.

- 9.15 The Claimant applied for the new role but was unsuccessful.
- 9.16 In terms of questions and scoring, the Respondent had created a new role. This was not a case of the Claimant applying for her old job. The questions put to the candidates rightly reflected the new role.
- 9.17 Crucially, the Claimant had accepted in cross-examination that the decision on her application for the new job was based on the assessment of competencies, and not on her part-time status.
- 9.18 The Respondent therefore contended that the Claimant's only argument was to say that she was deliberately disadvantaged by Ms Phillips, Ms Datlen and the supporting HR Department in order to manipulate the desired outcome that Ms Turner would win the competitive exercise. The Respondent submitted that there was no evidence to support this serious allegation and that, to the contrary, the Respondent had encouraged the Claimant to continue with her interview even though there were doubts about her suitability of the new role for her given her personal circumstances. The Claimant had been given a written assurance that the new role could be covered by part-time hours. It was submitted that these were not the actions of a manipulative employer seeking to get rid of one employee over another.
- 9.19 In terms of the questions at interview, four of the eight questions were the same or similar to the questions that the Claimant had dealt with in her previous interview in 2014. The two written exercises were real-life scenarios that neither candidate had personal experience of dealing with. Neither Ms Datlen nor Ms Jackson were challenged about their evidence on the formulation of the questions for interview.
- 9.20 Whereas the Claimant cross-examined Ms Phillips about the questions being based on risk assessments, Ms Phillips was consistent in explaining that the questions related to the job specification for the new role.
- 9.21 In terms of the scoring exercise, it was most unfortunate that the Respondent had lost the record of the Claimant's scores for the two written tasks, but this was not enough to establish unfairness, not least because the scores could be deduced from the remaining evidential material.
- 9.22 It was beyond doubt that Ms Turner had outscored the Claimant in the competitive exercise.
- 9.23 Summarising matters in relation to the unfair dismissal claim, Mr Probert submitted that the Respondent's process and the decision to dismiss the Claimant was/were fair and reasonable. The restructure had resulted in the creation of a new role. The Claimant had applied for it. She was not successful in the competitive process. She was unable to substantiate a serious claim that the selection decision was predetermined, and the business case, and the restructure and the witness evidence of Ms Datlen and Ms Jackson and Ms Phillips was unimpeachable.
- 9.24 Dealing with the claims of indirect discrimination and less favourable treatment under the PTW Regulations, the Respondent submitted that the Claimant's concession that the Respondent's decision as to who to offer the new role was based on competency and had nothing to do with her part-time status rendered both of these claims unsustainable. For a claim of indirect discrimination, the PCP must cause the particular disadvantage and the Claimant must actually suffer from that disadvantage. In terms of the PTW Regulations, claim causation must be established.
- 9.25 In short, the Respondent had a full answer to the unfair dismissal claim, and the Claimant's other claims were simply unsustainable.

Claimant's Submissions

- 10 The Claimant submitted as follows:

- 10.1 There was no evidence to show that genuine consideration was given to the proposals she put forward as a way of avoiding redundancy.
- 10.2 The attitude towards the Claimant had been defensive and closed throughout the process. The Respondent failed to answer the Claimant's points in relation to her job share proposal. It failed to consult with her about her proposals and, as far as she was concerned/aware, it had failed to consult with Samantha Turner about the Claimant's job share proposal before ending the consultation process.
- 10.3 The outcome of the restructure was predetermined. The Respondent had made its mind up in advance, and about who it would be retaining, even prior to the redundancy consultation process commencing. The entire process amounted to "back-filling" simply to "fulfil obligations" (essentially going through the motions). To illustrate this, the Claimant pointed to the fact that she had been placed on the Redeployment Programme prior to the completion of the redundancy process, which supported her contention that there was a predetermined outcome.
- 10.4 The Claimant did not accept that the selection criteria were balanced or objective.
- 10.5 The Claimant did not accept that the scoring exercise (for herself or Samantha Turner) had been fair.
- 10.6 The Claimant also pointed to the fact that the Respondent had lost the document upon which certain of her scores had been entered.
- 10.7 The key consideration in selecting Ms Turner for the new role was to avoid paying a substantial redundancy payment which would have been due to her in the light of her lengthy service.
- 10.8 The Claimant made a general submission that the Respondent had incorrectly followed and/or applied its own procedure. The Claimant contended that it was not made clear to her that the Respondent was by the end of the process (ie July 2019) no longer considering her proposals.
- 10.9 Samantha Turner was interviewed on 9 April 2019 which was prior to the meetings held with the Claimant on 9 April and 4 July 2019 for the purpose of further consideration being given to her proposals. The Claimant suggested that this demonstrated that genuine consideration was not given to her proposals.
- 10.10 The Claimant submitted that it was not made clear to her that she was at risk of redundancy when she was unsuccessful at securing the new role on 9 April 2019, given that it was not until 29 April 2019 that Ms Datlen informed her by letter that her existing post was now "at risk".
- 10.11 The Claimant maintained that the selection process interview questions were slanted towards the other candidate in that at least 50% of the questions related to accident collision data and risk assessment, and Samantha Turner, the other candidate, held a ROSPA qualification in Road Safety and Engineering Accident Investigation and Prevention, and had gained road safety-type experience from her previous role with the Respondent within the Accident Studies Team.
- 10.12 It was the Claimant's contention that the questions asked at interview did not match the scope of the person specification for the new post.
- 10.13 Under the Redundancy and Redeployment policy, the Respondent committed to making every effort to either avoid or mitigate redundancies. The Claimant did not accept that the Respondent had met this aspiration.
- 10.14 The Claimant maintained that the Respondent had acted in breach of its own procedure by requiring her, if she wanted to make representations at her Consideration of Dismissal Meeting, to provide those in writing beforehand.
- 10.15 The Claimant made a number of arithmetical challenges in relation to the hours required for the

new post.

- 10.16 The Claimant maintained that she had offered to reduce her hours, and there was no evidence to suggest that the Respondent considered “bumping” as a means of avoiding making her redundant.
- 10.17 The Claimant submitted that the Respondent’s position was that a job share could only come into play after selection rather than as a means of avoiding to having to undertake selection.
- 10.18 Notwithstanding the concession she openly made during the course her cross-examination, the Claimant still pursued her claims of indirect sex discrimination and less favourable treatment under the PTW Regulations.

Discussion

- 11 The Claimant did not seriously challenge that the reason for the termination of her employment was redundancy. The Respondent clearly had a diminishing requirement for School Crossing Patrol Supervisors. In light of that fact, the process adopted by the Respondent in considering its options for a restructure, was reasonable. The Respondent accepted that the Claimant did not simply perform school crossing patrol supervision role. It acknowledged that approximately 30% of her time was spent on road safety education administration.
- 12 There was a good business case for moving forward to having one School Crossing Patrol Supervisor role. It was reasonable that the pool for selection for the new single post should comprise the two existing School Crossing Patrol Supervisors. The Respondent engaged in reasonable consultation. The selection criteria were reasonable, ie they were essentially the elements of the new role.
- 13 The Claimant maintained that if the Respondent gave consideration to allowing the new post to be performed on a part-time basis, it only gave such consideration as an afterthought. The Tribunal did not accept that proposition but, in any event, by no later than 24 April 2019, when Ms Jackson wrote to the Claimant, the Respondent made it clear that the new role could be undertaken by more than one person, each working part-time hours. Whether or not it was Ms Phillip’s preference to have one full-time role and no part-time roles, this was not inconsistent with Ms Jackson stating in her letter of 24 April 2019 that the new role could be taken by one or multiple occupants working part-time hours on a full year’s basis.
- 14 The Tribunal did not accept that the relevant officers of the Respondent were “defensive” or “closed” throughout the process. The Tribunal did not accept that the Respondent failed to consider the Claimant’s proposals for alternatives to redundancy. The Tribunal accepted the Respondent’s case that it gave full consideration to those proposals, and fully explained to the Claimant why it had rejected them.
- 15 The Tribunal accepted the Respondent’s evidence that if the Claimant had been identified as the successful applicant as a result of the competitive selection process which was conducted in respect of the appointment to the new post, the Respondent would have considered her request to fill the post on a job share/part-time full year basis.
- 16 It was unfortunate that the Claimant’s selection interview did not take place until 29 April 2019, in circumstances whereby Ms Turner had been interviewed 20 days earlier, but the timing of the Claimant’s selection interview was dictated by a combination of circumstances, including accommodating the Claimant’s various requests to be accompanied at certain meetings. The Tribunal found that there was nothing sinister in the timing of the respective selection interviews for the two candidates.
- 17 As for the Claimant’s assertion that Ms Phillips told her that if it was a job share the Claimant wanted, she should have approached Ms Turner to see if she would want to do this, the Tribunal preferred Ms Phillips’ evidence that she suggested to the Claimant that, if she so desired, she *could* approach the other affected staff member to discuss an alternative proposal that might be agreeable to both of them as affected parties, and that a joint proposal could then have been

put forward.

- 18 The Tribunal did not accept that the Respondent failed to consult Ms Turner on the matter of job sharing. As to the latter point, the Tribunal accepted Ms Phillips' evidence that she raised that specific issue with Ms Turner at her one-to-one meeting on 13 March 2019, and Ms Turner had informed Ms Phillips that she did not want a job share.
- 19 The Claimant maintained that the questions at the selection interview were heavily slanted in Ms Turner's favour. Despite the fact that this proposition was not put to any of the Respondent's witnesses by the Claimant, the Tribunal was able to form its own view that the questions were reasonable. The questions were based upon the requirements of the new single role.
- 20 The Tribunal was satisfied that on the basis of the evidence available, it was possible to deduce that the Claimant scored significantly lower than Ms Turner. It is highly regrettable that the Respondent mislaid the document upon which the Claimant's full scores had been recorded. It is equally unfortunate that it was extremely difficult to discern from the manuscript record of the Claimant's scores precisely what her scores were. Whilst neither of those two factors rendered the Claimant's dismissal unfair, both matters were entirely avoidable. Reference is made to the Post Script at the end of this judgment.
- 21 The Tribunal did not accept that the Respondent embarked upon a predetermined course of action with the objective of making sure that the Claimant was not selected for the one available role. If there had been such predetermination, it is difficult to understand why the relevant officers of the Respondent should have encouraged the Claimant to continue in her efforts to secure the new post when she indicated on 11 April 2019 that she had come to the conclusion that there seemed little point in attending an interview for the new role because of the hours involved. On a similar note, the Tribunal rejected the Claimant's complaint that by being placed upon the Redeployment Programme before she had been formally notified of her redundancy, this also signified that there had been some form of predetermination. It was both prudent and beneficial to the Claimant that the Respondent should have been proactive in this regard so that, if it transpired that the Claimant was not selected for the new post, she would already have had the benefit of being on the register for some time.
- 22 The Tribunal did not accept that the Respondent failed to consider alternative employment for the Claimant. There was, in any event, no evidence before the Tribunal that there were any suitable alternative positions available.
- 23 The Tribunal did not accept that the Respondent failed to have regard to the possibility of "bumping". "Bumping" was considered and ruled out.
- 24 The Tribunal did not accept that the Claimant was selected for redundancy because of her part-time status. She was selected for redundancy because she was not the successful candidate at the interview selection process, based on questions which did not discriminate against her because of her part-time status. In any event, the Claimant conceded, during cross-examination, that her selection for redundancy had nothing to do with her part-time status. She accepted that she had been selected based upon the assessment of her competencies, and those of the other candidate, Ms Turner.
- 25 The Tribunal did not accept the Claimant's complaint that when being invited to her formal Consideration of Dismissal Meeting on 8 May 2019, Ms Datlen was placing a requirement upon her, if she wished to make representations, to make those representations in writing. The Tribunal accepted the Respondent's interpretation of Ms Datlen's letter of 29 April 2019, namely that the Claimant was informed that *if* she or her representative wished to make written representations, she/they should provide the same by a stipulated deadline in order that they could be considered in advance of the meeting, and this was in no way a bar to the Claimant or her representative making oral representations.
- 26 As to the Claimant's complaint that the Respondent failed to make every effort to either avoid or mitigate her redundancy, the Tribunal concluded that the Respondent's efforts in this regard were reasonable.

- 27 With regard to the Claimant's arithmetical challenges in relation to the hours required for the new post, such matters were within the remit of the Respondent, based on business decisions with which the Tribunal could not interfere.

Tribunal's Conclusions in relation to the Issues

- 28 Reference is made to the Issues set out at paragraph 5 above. The Tribunal's conclusion in relation to each of the Issues, adopting the numbering thereof, is as follows:

Unfair Dismissal

(i) and (ii) The Tribunal was satisfied that the requirements of the Respondent for employees to carry out work of a particular kind, namely school crossing patrol supervision had diminished, and that the Claimant's dismissal was wholly caused by that. The Claimant actually conceded both of those matters. She was right to do so because both matters were firmly established by the evidence. The role of School Crossing Patrol Supervisor took up 70% of the Claimant's time with approximately 30% of her time being taken by road safety education administration. The Respondent gave the Claimant adequate warning of her proposed redundancy and entered into adequate and meaningful consultation with her. The Respondent adopted a fair basis of selection. The pool was appropriate. The criteria were based on the job description for the proposed new role and were therefore appropriate. There was no other suitable alternative employment. The Tribunal concluded that the Respondent did not contravene its Redundancy and Redeployment Policy. The Tribunal concluded that the decision to dismiss the Claimant fell within the range of reasonable responses, having regard to s.98 (4) of the Employment Rights Act 1996.

(iii) In light of the Tribunal's conclusions that the reason for dismissal was the potentially fair reason of redundancy, the question of whether dismissal occurred for "some other substantial reason" did not arise.

In view of the above conclusions, Issues (iv) to (vii) do not arise.

Indirect Sex Discrimination

(viii) to (xii) Whilst there was a PCP that the new role be carried out on full-time hours throughout the year, the Respondent was prepared to consider a job share arrangement, subject to the issue of competencies. The PCP was, therefore, dispensed with. The Claimant did not actually suffer from the disadvantage contended for.

(xiii) and (xiv) In view of the above conclusions, Issues (iv) to (vii) do not arise.

PTW Regulations Claim

(xv) to (xx) The Claimant's concession that selection for the new role was based entirely on the assessment of competencies was fatal to the claim under the PTW Regulations.

Conclusion

- 29 Properly analysed, this was, purely and simply, a claim of unfair dismissal by reason of alleged unfair selection. For all of the reasons given above, that claim, and the further claims of indirect sex discrimination and less favourable treatment under the PTW Regulations, are dismissed.

Post Script

- 30 The Tribunal requests that this paragraph of its judgment is brought to the express attention of the Respondent's Director for Human Resources. The Tribunal strongly urges the Respondent to review its systems to minimise the risk of any repetition of the error of simply losing such important documents as selection interview scores. The Tribunal recommends that the Respondent implements a new system with appropriate checks and balances to ensure that

such a repetition is avoided. This observation applies to record keeping in all situations where candidates are scored for the purposes of such matters as job applications, appraisals, selection for redundancy and the like. That list is not exhaustive. The Tribunal also urges the Respondent to ensure that in terms of the preservation of records of interviews of this nature, the records which are kept are entirely legible. That was not so in relation to the Claimant's interview scores in this case. All employers (certainly substantial employers) should proceed on the assumption that at some point, documents of this nature may be the subject of scrutiny in some form of legal process. A failure to properly record such matters, and to retain the relevant records, can cause suspicion on the part of affected employees, and could easily have adverse implications for employers in the event of future legal challenges.

Employment Judge Gilroy QC

Date: 20/07/2021