Dobson (appellant) v North Cumbria Integrated Care NHS Foundation Trust (respondent)

UKEAT/0220/19/LA

600 *Sex discrimination*
612.1 *Indirect discrimination – requirement/condition with which fewer of particular sex can comply*
612.17 *Flexible working*
615 *Relevant circumstances the same or not materially different*

Equality Act 2010: ss 19, 23(1)
For pools and particular disadvantage see *Harvey* L [310]

The facts:
The claimant was employed by the respondent NHS trust as a community nurse. In 2008, she made a flexible working request after the birth of her first child, who was disabled. It was agreed that she would work only on Wednesdays and Thursdays. She went on to have a total of three children, two of whom were disabled. In 2016, the trust issued a new rostering policy under which all flexible working arrangements across the trust were to be reviewed. Subsequently, it gave the claimant notice that she might be required to work flexibly: on days other than Wednesdays and Thursdays, including Saturdays. She made it clear that she could not accommodate that request and was dismissed. She brought claims against the trust, including for indirect sex discrimination, arguing that the flexible working arrangements put women at a particular disadvantage compared to men on the basis that women were more likely to be child carers. The tribunal found that the provision, criterion or practice ('PCP') was the trust's requirement that 'its community nurses work flexibly, including at weekends' and that this PCP applied to men and women in the claimant's team, which comprised nine women and one man. It rejected the claim on the basis that no evidence had been put before it to show that the PCP had put women at a particular disadvantage compared to men. It stated that, on the contrary, all the claimant's female colleagues had been able to meet the requirement as well as the only man.

The claimant appealed. The first issue was whether the trust had erred in determining the pool for comparison in that it considered group disadvantage by reference only to the small number working in the claimant's team instead of across the trust. The second issue was whether the tribunal erred in finding that the claimant was required to adduce evidence to demonstrate the 'childcare disparity', ie the fact that women bore the greater burden of childcare responsibilities than men and that this could limit their ability to work certain hours. It was submitted that the tribunal ought to have taken judicial notice of the fact that women were more likely to suffer a disadvantage. Another basis on which it was said the tribunal had erred was that it failed to consider that the claimant's disadvantage itself provided some support for group disadvantage.

The EAT (Mr Justice Choudhury – President, Ms V Branney and Miss SM Wilson CBE) by a reserved judgment given on 22 June 2021 allowed the claimant's appeal.

The EAT held:
612.1, 612.17, 615
The indirect sex discrimination claim would be remitted:

(i) The tribunal had failed to identify the correct pool for comparison.

Following *Essop*, the PCP ought, as a matter of logic, to identify the relevant pool, ie all those persons to whom that PCP was applied. The tribunal's description of the PCP as a requirement that *its community nurses* work flexibly, including at weekends appeared, on its face, to suggest that it was one that applied to all of the trust's community nurses, and not just those in her team. Other factors strongly supported that view. For example, the flexible working arrangements had been reviewed across the trust. There was no suggestion that the team was anomalous within the trust. The fact that rotas were set locally did not mean that there was no requirement across the trust to work flexibly, including at weekends. That requirement may have been implemented with slight variations across different teams, but that did not negate the fact that the PCP applied across the trust. In the circumstances, logic dictated that the appropriate pool for comparison was all community nurses at the trust required to work flexibly. Given the terms of the PCP, that was the pool that would satisfy the requirement that it should consist of the group which the PCP affected (or would affect) either positively or negatively, while excluding workers who were not affected by it. A pool that only comprised members of the team would not only have been contrary to the terms of the PCP, it was also potentially unrepresentative in terms of childcare responsibilities. Such a pool would not realistically or effectively have tested the allegation being made. Accordingly, the tribunal erred by limiting the comparison to those in the team. As a matter of logic, that pool was all community nurses.

(ii) The tribunal had erred in not taking judicial notice of the childcare disparity in considering group disadvantage.

Whilst the childcare disparity is not a matter directed by statute to be taken into account, it is one that has been noticed by Courts at all levels for many years. As such, it falls into the category of matters that, according to *Phipson*, a tribunal *must* take into account if relevant. However, taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the childcare disparity and the particular PCP in question. The childcare disparity means that women are more likely to find it difficult to work certain hours (eg nights) or changeable hours (where the changes are dictated by the employer) than men because of childcare responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking judicial notice of the childcare disparity. However, if the PCP as to flexible working requires working any period of 8 hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with childcare responsibilities, then it would be open to the tribunal to conclude that the group disadvantage is not made out.

In the present case, the tribunal erred in not taking account of the childcare disparity and in treating the claimant's case as unsupported by evidence. It was apparent that the 'flexibility' expected was that community nurses would work on other days as and when required by the trust. This was not, therefore, an arrangement whereby the nurses had any flexibility to choose working hours or days within certain parameters. As such, this was one of those cases where the relationship between the childcare disparity and the PCP in question was likely to result in group disadvan-

tage being made out. Indeed, it could have been said that the PCP was one that was inherently more likely to produce a detrimental effect, which disproportionately affected women.

(iii) When considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear in mind that particular disadvantage can be established in one of several ways, including the following: (a) There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected *in limine*; (b) Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared; (c) The disadvantage may be inherent in the PCP in question; and/or (d) The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken. In the present case, the tribunal did not consider any of (b), (c) or (d) and instead dismissed the claim of indirect discrimination because of the lack of direct evidence of group disadvantage. In doing so, it erred in law.

Cases referred to:
Allonby v Accrington and Rossendale College [2001] EWCA Civ 529, [2001] IRLR 364, [2001] ICR 1189, [2001] ELR 679, [2001] 2 CMLR 559
Cadman v Health and Safety Executive (*Equal Opportunities Commission intervening*) (Case C-17/05), EU:C:2006:633, [2006] IRLR 969, [2006] ICR 1623, [2007] All ER (EC) 1, [2006] ECR I-9583, [2007] 1 CMLR 530
Chief Constable of West Midlands Police v Blackburn (2007) UKEAT/0007/07, [2008] ICR 505
Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, [2012] IRLR 601, [2012] ICR 704, [2012] 3 All ER 1287, [2012] EqLR 594
City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492, [2018] 4 All ER 77, [2018] ELR 445
Commerzbank AG v Rajput (2018) UKEAT/0164/18, [2019] IRLR 772, [2019] ICR 1613
Cumming v British Airways plc (2021) UKEAT/0337/19, [2021] IRLR 270
Dugdale v Kraft Foods [1976] IRLR 368, [1977] ICR 48, [1977] 1 All ER 454, [1976] 1 WLR 1288
Dzeidzak v Future Electronics Ltd (2012) UKEAT/0270/11, [2012] EqLR 543
Essop v Home Office (*UK Border Agency*); *Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] IRLR 558, [2017] ICR 640, [2017] 3 All ER 551, [2017] 1 WLR 1343
Games v University of Kent (2014) UKEAT/0524/13, [2015] IRLR 202
Grundy v British Airways plc [2007] EWCA Civ 1020, [2008] IRLR 74
Hammington v Berker Sport Craft Ltd [1980] ICR 248 EAT
HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2017] EWCA Civ 1426, [2018] IRLR 334, [2018] 1 WLR 1471, [2018] 1 All ER 1024, [2018] ELR 25
Kirton v Tetrosyl Ltd [2002] IRLR 840, [2003] ICR 37 EAT
London Underground v Edwards (*No.2*) [1998] IRLR 364, [1999] ICR 494 CA
Ministry of Defence v DeBique (2009) UKEAT/0048/09, UKEAT/0049/09, [2010] IRLR 471
Shackleton Garden Centre Ltd v Lowe (2010) UKEAT/0161/10, [2010] EqLR 138
Whiffen v Milham Ford Girls' School [2001] EWCA Civ 385, [2001] IRLR 468, [2001] ICR 1023, [2001] LGR 309
Wilson v Health and Safety Executive (*Equality and Human Rights Commission intervening*) [2009] EWCA Civ 1074, [2010] IRLR 59, [2010] ICR 302,[2010] 1 CMLR 772

Appearances:
For the claimant:
MOHINDERPAL SETHI QC, SOPHIA BERRY and BIANCA BALMELLI, instructed by Slater and Gordon
For the NHS trust:
MARK SUTTON QC and STUART BRITTENDEN, instructed by Ward Hadaway LLP
For Working Families (intervenor):
CLAIRE DARWIN and EMMA FOUBISTER, instructed by Working Families

1 **INTRODUCTION**

CHOUDHURY J: We refer to the parties as the Claimant and Respondent as they were below. The Claimant was employed by the Respondent as a community nurse. She has three children, two of whom are disabled. Due to her childcare responsibilities, the Claimant had, for a number of years, worked only on Wednesdays and Thursdays each week. In 2016, the Respondent required her to work flexibly, including by working one weekend every so often. The Claimant made it clear that she could not accommodate that request and she was dismissed. The issue in this appeal is whether the Carlisle Employment Tribunal ('the Tribunal'), Employment Judge Langridge ('the Judge') presiding, erred in finding that the Respondent had not indirectly discriminated against the Claimant in dismissing her. In particular, the question is whether the Tribunal erred in its approach to the choice of pool for determining group disadvantage and in requiring there to be evidence of such disadvantage.

2 The Claimant is represented by Mr Sethi QC with Ms Berry and Ms Balmelli, and the Respondent is represented by Mr Sutton QC with Mr Brittenden. None of them appeared below. Permission to intervene was given to Working Families, a charity helping parents and carers find a balance between responsibilities at home and in the workplace, in relation to whether the Tribunal ought to have taken judicial notice of the greater childcaring responsibilities of women. Working Families is represented by Ms Darwin and Ms Foubister.

3 **BACKGROUND**

The Claimant was employed by the Respondent as a Band 5 community nurse within the Cockermouth Community Nursing Team ('the Team') from 1 September 2004 until her dismissal on 19 July 2017. At the time of her dismissal, the Team comprised nine women (seven on Band 5 and two on Band 6) and one man, who was also the only Band 7 nurse.

4 The Claimant made a flexible working request in 2008 after the birth of her first child, who is disabled. It was agreed that she would work 15 hours per week over two fixed days, namely on Wednesday and Thursday. The Claimant's mother-in-law arranged her work to be able to provide childcare for the children on those two days. In 2012, the Claimant's third child was born and he was subsequently diagnosed with autism in 2014.

5 In 2013, the Respondent held a working pattern review with the Claimant during which she was asked to work the occasional weekend. However, given the Claimant's domestic circumstances and caring responsibilities, it was agreed at that time that the existing arrangement of working on two separate days per week only should continue.

6 In 2016, the Respondent issued a new rostering policy under which all flexible working arrangements across the Trust were to be reviewed. On 8 September 2016, the Respondent's district nurse team leader, Mr Owens, met with the Claimant and her trade union representative to discuss her working arrangements. The Claimant was asked to work an occasional weekend no more than once a month. On 30 September 2016, the Claimant commenced a period of sickness absence for reasons related to the subject matter of the discussion with Mr Owens. On the same day, the Claimant wrote to Mr Owens to inform him that she would not be considering alternative arrangements as she had none available. That remained the Claimant's position throughout all subsequent discussions. The Respondent gave the Claimant notice that she may be required to work on other days, including Saturdays. The Claimant rejected the proposed changes to her working arrangements, and, on 8 November 2016, she raised a grievance.

7 The grievance was rejected, as was the Claimant's appeal against that grievance outcome. On 6 April 2017, the Respondent invited the Claimant to a final meeting to discuss her working arrangements. At a meeting between the Claimant and the Respondent on 20 April 2017, the Claimant was informed that the Respondent had no other option than to issue a notice of dismissal and to re-engage the Claimant on new terms requiring her to work on additional days subject to the Respondent giving notice of any different days to be worked. The Claimant did not accept the new terms, and, on 26 April 2017, the Respondent gave notice to terminate her employment.

8 The Claimant's appeal against her termination was rejected, and her employment terminated on 19 July 2017.

9 **THE TRIBUNAL'S DECISION**

The Claimant brought claims for unfair dismissal, victimisation, and indirect discrimination. The indirect discrimination claim was based on the protected characteristic of sex.

10 In relation to the claim of unfair dismissal, the Tribunal considered that the gradually increasing demands on the Respondent's service meant that it was no longer possible to ignore the need for all employees to work flexibly. The Tribunal concluded as follows:

> '62. It was not difficult to understand that the Claimant felt unable to agree to alter her working pattern, but one of the safeguards in such a situation is that the employer can be expected to consider all reasonable alternatives before reaching the last resort of dismissal. We find that this employer did do that. It proposed that the Claimant work non-standard days only occasionally (no more than once a month), and that she be given several weeks' notice of any such departure from her usual pattern. It invited her to consider whether she could make other care arrangements for her children, such as occasional respite care. All these suggestions were rejected by the Claimant (for which we make no criticism of her), but in light of the wider needs of the service, it was reasonable for the Respondent to conclude that there was no other resolution to the problem.
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> 63. Even if we had found differently, the Tribunal is satisfied that having paused the Stage Four sickness absence review in late March 2017, pending the outcome of the internal meetings, the Respondent would have moved forward with this in July 2017, and would have completed the Stage Four process by the end of August 2017. At that stage, the Claimant would have been fairly dismissed on the grounds of her long-term ill-health.'

11 As to the claim of indirect discrimination, the Tribunal held as follows:

> '70. The indirect sex discrimination claim arises from section 19 Equality Act 2010. This differs from the direct discrimination provisions of the Act in one important respect: there is no protection against discrimination by association under section 19. For the indirect discrimination provisions to apply, the protected characteristic relied on (sex) must belong to the Claimant personally, and not somebody else. The Equality Act does not assist a Claimant whose disadvantage arises from the protected characteristic (here, disability) of someone else. Although it was submitted on the Claimant's behalf that her protected characteristic was "being female with caring responsibilities", this stretches the wording of the Act too far. There is no such protected characteristic, as the Claimant's sex and her caring responsibilities cannot be conflated in this way. The Claimant can rely on her gender and then seek to persuade the Tribunal that this creates an indirect disadvantage to her as the primary care-giver, but this approach requires a more careful analysis of the statutory provisions.
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> 71. The analysis of indirect discrimination involves four stages under section 19, which the Tribunal considered. Firstly, did the Respondent subject the Claimant to a provision, criterion or practice (PCP)? The Tribunal agrees that it did, though we did not accept the description of the PCP that was put forward on the Claimant's behalf. This was expressed to be "purporting to unilaterally vary the Claimant's terms and conditions by giving notice that [the Respondent] will seek once a month to make the Claimant work on a weekend at their discretion".
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> 72. The law requires a PCP to be expressed in neutral terms from a starting point that everybody has equality of treatment. The question whether there is any detriment or disadvantage resulting from that is a separate consideration. The Tribunal finds that the PCP here was the Respondent's requirement that its community nurses work flexibly, including at weekends. That PCP applied to men and women in the Claimant's team.
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> 73. The second stage is whether the PCP put women at a particular disadvantage compared to men. No evidence at all was put before the Tribunal to support this. On the contrary, all the Claimant's female colleagues were able to meet the requirement as well as Mr Owens, the only man in the team. The Claimant's colleagues had children though none was disabled. During the internal discussions the Claimant asked in fairly strong terms not to be compared with her colleagues, female or male. This was on the grounds that she was the only person in the group looking after children with disabilities. This illustrates perfectly the difficulty facing the Claimant for her claim to succeed, which is that her children having disabilities is not a protected characteristic which she can rely on for herself in an indirect discrimination claim.
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> 74. The Tribunal had no difficulty in accepting that the Claimant personally experienced a disadvantage, due to her personal circumstances. However, section 19(2)(b) of the Equality Act requires there to be group disadvantage as well as personal disadvantage. In the absence of any evidence demonstrating that women as a group were (or would be) disadvantaged by the requirement to work flexibly, the Tribunal concludes that this claim fails.
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> 75. The Tribunal went on to consider whether, if we were wrong in our primary conclusion, the Respondent could justify the PCP. We concluded that the evidence (as summarised in the Respondent's business case) showed clearly that it was pursuing the legitimate aim of achieving flexible working by

all community nurses in order to provide a safe and efficient service, and that it was proportionate to do so by applying the PCP to all members of the nursing team.' (Emphasis added)

12 Accordingly, the Claimant's claims were all dismissed.

13 **LEGAL FRAMEWORK**

Section 19 of the Equality Act 2010 ('EqA') provides:

'(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;

…'.

14 Section 23(1), EqA provides that:

'[o]n a comparison of cases for the purposes of section … 19 there must be no material difference between the circumstances relating to each case'.

15 **GROUNDS OF APPEAL**

The Claimant's Notice of Appeal contained seven grounds of appeal. Permission was granted by Eady J to proceed with Grounds 2 to 7. These are as follows:

a. Ground 2 – the Tribunal erred in law in determining the pool for comparison in that it considered group disadvantage by reference only to the small number working in the Team instead of across the Trust as a whole.

b. Ground 3 – the Tribunal erred in finding that the Claimant was required to adduce evidence demonstrating that women as a group were (or would be) disadvantaged by the requirement to work flexibly, including at weekends. This was a matter in respect of which the Tribunal ought to have taken judicial notice.

c. Ground 4 – the Tribunal erred in failing to consider whether the provision, criterion or practice ('PCP') applied by the Respondent 'would put' women at a particular disadvantage compared to men. In so doing, the Tribunal failed to consider the hypothetical comparison required by the terms of s 19, EqA.

d. Grounds 5 and 7 – the Tribunal's errors above rendered its analysis of justification unsafe. Furthermore, the Tribunal failed to provide adequate reasons in finding that the Respondent's actions were justified.

e. Ground 6 – the Tribunal erred in concluding that the dismissal was not unfair. If the dismissal was tainted by discrimination as the Claimant contends then it would follow that the dismissal was also substantively unfair.

16 We shall deal with each ground of appeal in that order.

17 **GROUND 2 – THE CHOICE OF POOL FOR GROUP DISADVANTAGE**

Submissions

Mr Sethi submits that the Tribunal erred in only considering group disadvantage in the context of the Team rather than across the Trust more widely. Having found that the PCP in this case was 'the requirement that [the Respondent's] community nurses work flexibly including at weekends', it was incumbent on the Tribunal, submits Mr Sethi, to consider whether the pool should comprise all those employees affected by that PCP. Limiting the pool to the Team alone was not an adequate or effective test of the Claimant's allegation of indirect discrimination, particularly in circumstances where the Claimant had expressly indicated that comparing her position to that of her colleagues in the Team would be unfair and not comparing like with like. Furthermore, there was no burden of proof on the Claimant with regard to identifying the pool as contended for by the Respondent, given that pool selection is a not a matter of fact-finding, but of logic: *Allonby v Accrington and Rossendale College* [2001] EWCA Civ 529, [2001] IRLR 364, [2001] ICR 1189 (CA), at para [18].

18 Mr Sutton submits that the Tribunal identified the pool in accordance with the case put to it by the Claimant, which was focused on the Team. The fact that the Respondent undertook a review of flexible working across the Trust is not synonymous with the application of a PCP requiring such working across the Trust. There was no evidence in this case of any application of the particular PCP in question to any group other than the Team. Moreover, the PCP was more limited in its application in that the requirement to work weekends was only an occasional one and even then it would be on several weeks' advance notice. There was no basis for assuming that a PCP on those terms was being applied across the Trust. In fact, the evidence was to the contrary, as is apparent from the fact that the Respondent's business case in support of the proposed change was tailored specifically to the requirements of the Team.

19 Mr Sutton also submitted that the burden of proof in identifying an appropriate pool did rest with the Claimant. That burden was not discharged, not least because no evidence was adduced in relation to a wider pool. The Claimant's pleaded case was focused on the Team and the Tribunal cannot be criticised for approaching the question of the pool on that basis.

20 **Discussion**

The principles relating to a claim of indirect discrimination were comprehensively considered by the Supreme Court in *Essop v Home Office* (*UK Border Agency*) [2017] UKSC 27, [2017] IRLR 558, [2017] ICR 640 (SC). There the Supreme Court considered two claims of indirect discrimination: the first arising out of the fact that black and minority ethnic civil servants over the age of 35 were less likely to pass the core skills assessment test necessary for promotion than younger non-BAME candidates; and the second being a claim that an Imam employed by the Prison Service was disadvantaged by the pay progression system as it depended in part on length of service, and no Muslim chaplains had been able to join the service before 2002. Baroness Hale reviewed the development of the statutory provisions relating to indirect discrimination and made the following observations:

'[23] It is instructive to go through the various iterations of the indirect discrimination concept because it is inconceivable that the later versions were seeking to cut it down or to restrict it in ways which the earlier ones did not. The whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment. All the iterations share certain salient features relevant to the issues before us.

[24] The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons *why* a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality

Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

[25] A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment—the PCP is applied indiscriminately to all—but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

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

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

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

[29] A final salient feature is that it is always open to the respondent to show that his PCP is justified—in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question—fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in *Essop*, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result.'

21 As to the pool with which the comparison is to be made, Baroness Hale said as follows:

'[40] The second argument relates to the group or "pool" with which the comparison is made. Should it be all chaplains, as the employment tribunal held, or only those who were employed since 2002? In the equal pay case of *Grundy v British Airways plc* [2008] IRLR 74, paragraph 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in *Allonby v Accrington and Rossendale College* [2001] IRLR 364, at paragraph 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that "There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition."

[41] Consistently with these observations, the *Statutory Code of Practice* (2011), prepared by the Equality and Human Rights Commission under s.14 of the Equality Act 2006, at para. 4.18, advises that:

> "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively."

In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected char-

acteristic and its impact upon the group without it. This makes sense. It also matches the language of s.19(2)(b) which requires that "it"—i e the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.' (Emphasis added)

22 **612.1, 612.17, 615**
The highlighted passages establish that the starting point for identifying the pool is to identify the PCP. Once that PCP is identified then the identification of the pool itself will not be a question of discretion or of fact-finding but of logic. In reaching their decision as to the appropriate pool in a particular case, there may, depending on the PCP, be a range of logical options open to the Tribunal. As stated by Cox J in *Ministry of Defence v DeBique* (2009) UKEAT/0048/09, UKEAT/0049/09, [2010] IRLR 471 (EAT), para 147:

'In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them.'

23 What then is the PCP in this case? The Tribunal appears to have identified the PCP quite clearly as follows:

'72. … The Tribunal finds that the PCP here was the respondent's requirement that its community nurses work flexibly, including at weekends.'

24 That was a finding of fact with which this appeal tribunal cannot readily interfere. Mr Sutton submits that the PCP was in fact one of narrower application and referred to the following passages in the Judgment:

'28. On 8 September 2016 Mr Owens, the District Nurse Team Leader, met with the claimant and her trade union representative …, to discuss the arrangements. The Claimant was asked to work an occasional weekend, no more than once a month …

39. All of that information was provided in the document dated 15 February, and after this the fourth in this series of meetings with the claimant took place on 23 February. This was the Stage Three sickness review. The claimant was again asked to work flexibly, doing her regular days but – provided that several weeks' advance notice was given – sometimes working a different day including occasional weekends.'

25 The difficulty with Mr Sutton's argument, apart from the obvious one that it departs from the Tribunal's own statement as to the PCP, is that it overlooks the fact that a PCP is, by definition, one that is applied more widely than to the Claimant herself. The PCP here was, as the Tribunal found, the need to work flexibly, including the occasional weekend. That PCP was applied more widely than to the Claimant. (We shall return below to the question of how much more widely). If, during the Respondent's various attempts to obtain the Claimant's agreement to flexible working, the Respondent suggests ways of minimizing the impact of the PCP on the Claimant (by, for example, giving her additional notice of the need to work a weekend), it does not thereby alter the PCP (unless of course that additional notice is also given to others). The passages to which Mr Sutton drew our attention do not indicate that the way in which the flexible working requirement might be applied in her case was to be extended to others. Furthermore, it is not suggested that the Tribunal's finding as to the PCP was perverse. Accordingly, we proceed on the basis that the PCP was as found by the Tribunal at para 72 of its judgment.

26 **612.1, 612.17, 615**
That PCP ought, as a matter of logic, to identify the relevant pool, i.e. all those persons to whom that PCP was applied. The Tribunal's description of the PCP as a 'requirement that its community nurses work flexibly, including at weekends' (our emphasis) would appear, on its face, to suggest that it was one that applied to *all* of the Respondent's community nurses, and not just those in the Team. Mr Sutton submits that that cannot be so. He relies on various matters, including the Tribunal's finding in the final sentence in para 72: 'That PCP applied to men and women in the claimant's team'. We do not agree that that sentence conclusively means that the PCP was only applied to the Team: a more natural reading of the last two sentences of para 72 is that the PCP was applied to all community nurses *and* that it was applied to the men and women in the Team. There are other factors emerging from the Judgment that, in our judgment, strongly support the view that the PCP was one that applied to all community nurses.

27 **612.1, 612.17, 615**
In 2016, the flexible working arrangements were reviewed 'across the Trust': para 27, and 'the increasing demands on the service meant it was no longer possible to ignore the need for all employees to work flexibly': para 55 (our emphasis). Mr Sutton submits that the Trust-wide nature of the review does not mean that flexible working was introduced beyond the Team. However, apart from the fact that there was no such finding by the Tribunal, it strikes us as being inherently unlikely that the introduction of flexible working would be so confined. There is nothing in the judgment to suggest that the Team was in a unique position as far as the changing needs of the nursing service were concerned. Indeed, Mr Sutton acknowledged that there is no suggestion that the Team was anomalous within the Trust.

28 Mr Sutton points to the Respondent's business case as evidence in support of a more limited application of the PCP. However, the business case was produced (as is apparent from para 38 of the Judgment) specifically in response to the Claimant's position, and, whilst it refers to the impact on members of the Team, it also referred to more general matters, as the following passage in para 38 demonstrates:

'Other matters mentioned in the business case included the patient-driven changes that had taken place, such as the earlier discharge of patients from hospital needing community nursing instead, and the deployment of intravenous injections in a way that would not previously have happened. This was all felt to be part of a safe and effective service delivery arrangement, and it came as part of an overarching need for flexibility in a modern and changing Health Service'.

29 **612.1, 612.17, 615**
There was material before us (obtained in response to the Claimant's requests under the Freedom of Information Act 2000 ('FOIA')) that there are around 280 (FTE) Band 5 Nurses at the Respondent of whom around 129 (FTE) work in a community setting. It appeared to us to be highly unlikely that the general comments made in the business case as to the 'overarching need for flexibility in a modern and changing Health Service' did not apply also to those nurses. All of this is entirely consistent, in our view, with the Tribunal's clear finding as to the PCP, which, as we have said, reads as if it were one of general application across the Trust. Mr Sutton points out that the FOIA response indicates that rotas are set on 'a locality

basis', and submits that it was that which led the Trust to refuse to provide details of the rotas of community nursing teams across the Trust, as to do so would have led to the Trust exceeding the costs limit for a FOIA response. However, the fact that rotas are set locally does not mean that there was no requirement across the Trust to work flexibly, including at weekends. That requirement may have been implemented with slight variations across different teams, but that does not negate the fact that the PCP applied across the Trust.

30 **612.1, 612.17, 615**
In these circumstances, logic would dictate that the appropriate pool for comparison is all community nurses at the Trust required to work flexibly. In our judgment, given the terms of the PCP, that is the pool that would satisfy the requirement that it should consist of the group which the PCP affects (or would affect) either positively or negatively, while excluding workers who are not affected by it: see para 4.18 of the EHRC Code of Practice and *Essop* at para [41]. A pool that only comprised members of the Team would not be appropriate because the PCP was not so confined.

31 Mr Sutton does not dispute that the proper approach to identifying the pool is logic-driven. He contends, however, that where the claim has been focused on the Team, the Tribunal cannot be criticised for considering the application of the PCP to that Team. We do not accept that argument for the simple reason that the Claimant did not seek to compare herself with members of the Team; in fact, as the Tribunal noted, the Claimant had, during internal discussions, 'asked in fairly strong terms not to be compared with her colleagues, female or male'. In her amended grounds of complaint, the Claimant expressly alleged that:

> '17. In applying this PCP they have put me, as a woman, at a particular disadvantage when compared to men on the basis that women are more likely to be child carers than men.'

32 **612.1, 612.17, 615**
It is right to point out that the Claimant's reason for seeking to avoid a comparison with her team members was that they were not considered to be in a like position in terms of having caring responsibilities for young children or young children with disabilities. However, irrespective of that reason, the thrust of the Claimant's position was that a comparison with her team members would not be appropriate. That position was consistent with the adoption of a wider pool for comparison, as would appear to be proposed by para 17 of the Claimant's amended grounds. The smaller pool would not only be contrary to the terms of the PCP, it was also, for the reasons given by the Claimant, potentially unrepresentative in terms of childcare responsibilities. Such a pool would not realistically or effectively test the allegation being made: see *Grundy v British Airways plc* [2007] EWCA Civ 1020, [2008] IRLR 74 (CA) at para [27].

33 We can deal briefly with Mr Sutton's argument on burden of proof. The submission is that the evidential burden rested with the Claimant to identify an appropriate pool and that she failed to discharge it. He referred us to the case of *Whiffen v Milham Ford Girls' School* [2001] EWCA Civ 385, [2001] IRLR 468, [2001] ICR 1023 (CA) and *Dzeidzak v Future Electronics Ltd* (2012) UKEAT/0270/11, [2012] EqLR 543 (EAT) (28 February 2012), in which Langstaff P (as he then was) held as follows:

> '42. We have done our best to summarise an argument that is not, as it seems to us, an easy one, and which, we have to say, we see as somewhat unreal. In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification. Dealing with this particular case, it is plain that the Tribunal never got, nor could ever have got, to the stage of reversing the burden of proof. It was not shown on balance that lateness was a factor, i.e. there was on balance no sufficient evidence that the Claimant had suffered the disadvantage that she would have had to be shown to have suffered under the wording of the Sex Discrimination Act 1975 as an actual disadvantage if she was to be found to have been discriminated against on the grounds of sex. Accordingly, we dismiss that appeal.'

34 A claim of indirect discrimination is not exempt from the burden of proof requirements under s 136, EqA, as Langstaff P's judgment clearly demonstrates. The issue here is whether the Claimant is required specifically to adduce evidence in support of her contention that there was group disadvantage. In our judgment, there is no such requirement in every case. In *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15, [2012] IRLR 601, [2012] ICR 704 (SC), Baroness Hale, in considering what was required to establish a claim of indirect discrimination, said as follows:

> '[14] Ironically, it is perhaps easier to make the argument under the current formulation of the concept of indirect discrimination, which is now also to be found in the Equality Act 2010. Previous formulations relied upon disparate impact—so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But, as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in *Equality: the New Legal Framework*, Hart 2011, pp.64–68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.' (Emphasis added)

35 That particular disadvantage can be established in a number of ways, including by adducing statistical evidence: see *Essop* at para [28] and para 4.12 of the EHRC Code of Practice. However, as is made clear in *Essop*, the absence of such evidence does not mean that particular disadvantage cannot be shown. As we discuss in considering ground 3 below, the particular disadvantage may be one in respect of which judicial notice may be taken. In that case, there would not be any requirement for actual evidence of disadvantage, and the Claimant would, if judicial notice is taken of the matter asserted, have established a *prima facie* case of particular disadvantage.

36 **612.1, 612.17, 615**
For these reasons, we conclude that the Tribunal did err by limiting the comparison to those in the Team. Having found that the PCP required all community nurses to work flexibly, including weekends, it was

incumbent on the Tribunal to identify a pool comprising all persons affected by it. As a matter of logic, that pool was all community nurses.

37 **GROUND 3 – REQUIREMENT TO ADDUCE EVIDENCE AND JUDICIAL NOTICE**

Submissions

The Tribunal rejected the Claimant's claim that the PCP put women at a particular disadvantage compared to men on the basis that, 'No evidence at all was put before the Tribunal to support this'; and relied upon the fact that all the women in the Team and the sole man were able to comply with the PCP: Judgment at para 73.

38 Mr Sethi submits that it was an error to require the Claimant to adduce evidence of such disadvantage and that this was a case where the Tribunal ought to have taken judicial notice of the disadvantage to women.

39 We were assisted on this ground by the submissions of Ms Darwin on behalf of Working Families. She submits that the Tribunal ought to have taken judicial notice of the fact that women are more likely to suffer a disadvantage as a result of childcare responsibilities than men. Reliance was placed on the evidence of Ms Van Zyl of Working Families to the effect that difficulties for women still persist with evening and weekend working with unpredictable hours presenting particular difficulties. As a specialist tribunal, the employment tribunal should not 'sit in blinkers' and should take account of such matters which have been recognised in many other cases up to Supreme Court level. To require evidence of such matters would be to make the bringing of such claims more difficult than it already is; something that would be contrary to the direction of travel in discrimination claims generally. Instead, the focus should be on justification for the employer's actions.

40 Mr Sutton submits that the approach suggested by Mr Sethi and Ms Darwin is problematic and potentially unfair in that there ought to be, at the very least, a requirement that a party identifies the matter in respect of which judicial notice is to be taken. That was not done here. Furthermore, care needs to be taken in identifying the matter of which judicial notice is expected to be taken. Whilst it is accepted by the Respondent that the majority of child carers in the UK are women, it says that it cannot be assumed that all flexible working requirements are liable to put women at a particular disadvantage for that reason. Mr Sutton points to the circumstances in the present case where all of the women in the Team, including those who had childcare responsibilities, were able to comply. There are many nuances and specific contextual matters that would need to be taken into account before judicial notice could be taken. Care must be taken to avoid moving from 'indisputable fact to disputable gloss': per Etherton MR and Beatson LJ in *HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426, [2018] IRLR 334, [2018] 1 WLR 1471 (CA) at para [108].

41 **Discussion**

That tribunals can take judicial notice of certain matters is not in dispute. The relevant principles are well-established and are summarised in *Phipson on Evidence* 19th edn ('*Phipson*') at 3–01–3–03 and 3–17:

> '3–01
>
> No evidence is required of matters which are either (a) formally admitted for the purposes of the trial, or (b) judicially noticed. Admissions are dealt with in Ch.4. Furthermore, estoppels, which are dealt with in Ch.5, can have the effect of rendering proof of certain facts as being unnecessary.
>
> 3–02
>
> Courts will take judicial notice of the various matters enumerated below. They fall into two broad categories. First, the concept covers matters being so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary. Some facts are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry. Others may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources. Judicial notice can save time and cost, and promote consistency in decision making. Such matters do not require to be pleaded. Secondly, there are numerous statutory provisions which provide for judicial notice to be given of specific matters.
>
> The basis and rationale for the two categories are not necessarily the same. The first covers matters which are so notorious or undisputable that it would be a waste of resources to require a party to prove them through evidence. The second category may cover matters which are not so obvious and may in fact be controversial, but the law has stipulated that formal proof is not necessary. Within this second category the effect may be to provide substantive rules of law.
>
> 3–03
>
> Judicial notice covers the provisions of the law which are not a matter of evidence at all, and the acceptance of facts without admission or proof. The latter may be prescribed by statute in cases where otherwise the courts would not dispense with proof. The doctrine of judicial notice extends to all departments of law, and is not confined to that of evidence. And it applies not only to judges, but also to juries with respect to matters coming within the sphere of their everyday knowledge and experience. Thus, the latter, as well as the former, may be asked to notice, without proof, the meaning of the imputation "frozen snake" in a libel case. Generally, matters directed by statute to be judicially noticed, or which have been so noticed by the well-established practice or precedents of the courts, *must* be recognised by the judges; but beyond this, they have a wide discretion and *may* notice much which they cannot be required to notice, but also may decline to give judicial notice and require the facts to be proved by evidence. The matters noticeable may include facts which are in issue or relevant to the issue, as well as the contents of documents and their methods of proof; and the notice is in some cases *conclusive*, and in others (e.g. the genuineness of signatures) merely prima facie and rebuttable. Something which is the subject of judicial notice in one case need not be so in a subsequent case if the basis of its reception was its notoriety, and that notoriety has now passed. The threshold for judicial notice is strict.
>
> …
>
> 3.17…
>
> The party seeking judicial notice of a fact has the burden of convincing the judge (a) that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy. …' (Emphasis in original)

42 **612.1, 612.17, 615**

From those extracts from *Phipson*, we derive the following principles relevant to the present case:

a. There are two broad categories of matters of which judicial notice may be taken: (i) facts that 'are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry'; and (ii) other matters that 'may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources'.

b. The Court *must* take judicial notice of matters directed by statute and of matters that have been 'so noticed by the well-established practice or precedents of the courts':

c. However, beyond that, the Court has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence;

d. The party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry.

43 We were also referred to the decision of the EAT (Soole J) in *Commerzbank AG v Rajput* (2018) UKEAT/0164/18, [2019] IRLR 772, [2019] ICR 1613 (EAT), in which the issue was whether the tribunal had been correct to infer that in making its promotion decisions, the employer had made certain stereotypical assumptions about women, which it would not have applied to men. In allowing the employer's appeal, Soole J said as follows:

> '79. The existence of stereotypical assumptions may fall within the first category identified in *Phipson*, ie as a fact "so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry"; or within the second category of matters which may be noticed after enquiry …
>
> 80. Furthermore, as I accept, these requirements for judicial notice are to some extent moderated in the case of specialist tribunals, which of course includes employment tribunals; and more particularly those which hear discrimination claims and have a body of knowledge from their experience from hearing and assessing the evidence in such claims. I accept Ms Monaghan's submission that the best source of law for the present question is to be found in the authorities discussed in *Harvey* under the heading "Use of specialised knowledge by tribunal members" ([888]–[891]) and in particular *Hammington* [[1980] ICR 248], *Dugdale* [[1977] ICR 48] and *Kirton* [[2003] ICR 37].
>
> 81. However, I disagree with her submission that a tribunal's use of its experience of stereotypical assumptions falls into the category of knowledge which may be applied in a general way without prior notice to the parties. On the contrary, this is at best specialist knowledge (or at least belief) which, if it is to be relied on for the purpose of drawing inferences about the conscious or unconscious reasoning of the decision-maker, must be disclosed to the parties and their advisers; and to any witness whose decision-making is in question. Without such notice, the [employer] and its representatives will not be in a position to challenge or test the alleged stereotypical assumption, either as to its general existence or as to its application in the case of the decision-maker. Likewise, a witness must be given the opportunity to answer the suggestion that he or she was influenced by such an assumption.
>
> 82. This is all necessary for two interrelated reasons. First, as a matter of basic fairness. Secondly, in order to ensure that, where a case is advanced and/or is being considered by a tribunal on a basis which includes reference to stereotypical assumptions, this is (i) properly tested at each stage, ie the general and the particular; and that (ii) the relevant witness has a proper opportunity to meet the allegation that he or she has acted on discriminatory grounds. For this reason, the requirement of notice applies equally to a case where it is uncontroversial that a particular assumption is often held.'

44 The effect of this judgment is that, whilst stereotypical assumptions could be matters of which judicial notice may be taken, the interests of fairness demanded that the tribunal give notice to the parties and their advisers before relying upon such assumptions.

45 Mr Sethi contends that judicial notice ought to have been taken of the fact that 'women are more likely to be child carers than men'. We were taken to a number of cases where that fact was judicially noticed:

a. In *London Underground v Edwards* (*No.2*) [1998] IRLR 364, [1999] ICR 494 (CA), the Court of Appeal agreed with a submission that the tribunal was 'entitled to take into account their own knowledge and experience that the burden of childcare falls upon many more women than men and that a far greater proportion of single parents with care of children are women than men.' Potter LJ also stated as follows:

> '24. … An industrial tribunal does not sit in blinkers. Its members are selected in order to have a degree of knowledge and expertise in the industrial field generally. The high preponderance of single mothers having care of a child is a matter of common knowledge. Even if the "statistic," ie, the precise ratio referred to is less well known, it was in any event apparently discussed at the hearing before the industrial tribunal without doubt or reservation on either side. It thus seems clear to me that, when considering as a basis for their decision the reliability of the figures with which they were presented, the industrial tribunal were entitled to take the view that the percentage difference represented a minimum rather than a maximum so far as discriminatory effect was concerned.'

b. In *Essop*, Baroness Hale considered that one of the 'context factors' relevant to a claim of indirect discrimination may be that 'the expectation that women will bear the greater responsibility for caring for the home and family than will men' (at para [26]) and at para [39], stated as follows:

> '[39] … There is nothing peculiar to womanhood in taking the larger share of caring responsibilities in a family. Some do and some do not. But (in the context of equal pay) it has been acknowledged that a length of service criterion can have a disparate impact on women because they tend to have shorter service periods as a result of career breaks or later career starts flowing from their childcare responsibilities: see *Wilson v Health and Safety Executive* (*Equality and Human Rights Commission intervening*) [2010] IRLR 59, following *Cadman v Health and Safety Executive* (Case C-17/05) [2010] IRLR 59 …'

c. Similarly, in *Chief Constable of West Midlands Police v Blackburn* (2007) UKEAT/0007/07, [2008] ICR 505 (EAT), the EAT (Elias P) concluded that disparate impact in relation to a benefit for night working could be established from the fact that the female claimants had childcare responsibilities;

d. In *Shackleton Garden Centre Ltd v Lowe* (2010) UKEAT/0161/10, [2010] EqLR 138 (EAT) (27 July 2010), the EAT (Wilkie J) agreed (at paras [9] and [10]) that the tribunal had been entitled, 'based on what is now well recognised in industrial and employment circles' to conclude that '… the ability of women to work particular hours is substantially restricted because of those child care commitments in contrast to that of men'.

e. Finally, in *Cumming v British Airways plc* (2021) UKEAT/0337/19, [2021] IRLR 270 (EAT) (22 January 2021), the EAT (HHJ Shanks) stated that:

> '12. … in the light of Lady Hale's observations [in *Essop*], I do not think that there was any need for evidence to show that female cabin crew (like any other group of females) bear the bulk of childcare responsibilities'.

46 **612.1, 612.17, 615**

Two points emerge from these authorities:

a. First, the fact that women bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. We refer to this fact as 'the childcare disparity';

b. Whilst the childcare disparity is not a matter directed by statute to be taken into account, it is one that has been noticed by Courts at all levels for many years. As such, it falls into the category of matters that, according to *Phipson*, a tribunal *must* take into account if relevant.

47 **612.1, 612.17, 615**
That is not to say that the matter is set in stone: many societal norms and expectations change over time, and what may have been apt for judicial notice some years ago may not be so now. However, that does not apply to the childcare disparity. Whilst things might have progressed somewhat in that men do now bear a greater proportion of child caring responsibilities than they did decades ago, the position is still far from equal. The assumptions made and relied upon in the authorities above are still very much supported by the evidence presented to us of current disparities between men and women in relation to the burden of childcare.

48 **612.1, 612.17, 615**
Should the Tribunal in the present case have taken judicial notice of the childcare disparity? The first point made by Mr Sutton is that this is not a matter that was raised before the Tribunal, and that to expect the Tribunal to take judicial notice in such circumstances would result in the Tribunal descending into the arena. We are sympathetic to the notion that if a party seeks to rely upon a matter in respect of which judicial notice is to be taken, then it should identify that matter up front. There are several reasons for taking that approach:

a. First, it seems to us to be consistent with the principle, which was not disputed, that the burden in terms of establishing that a matter is capable of being judicially noticed lies with the party seeking to rely upon it.

b. Second, it is preferable that all parties and the Tribunal are aware of precisely what it is that should be judicially noticed. Whilst the childcare disparity is uncontroversial and accepted by the Respondent, other related matters are not. For example, it is not accepted that the childcare disparity necessarily means that *any* requirement to work flexibly will put women at a disadvantage compared to men. Flexible working can mean different things in different contexts. Some types of flexible working, eg the ability to work any seven-hour period between the hours of 8am and 6pm, might even be considered advantageous by some with childcare responsibilities. It seems to us that giving advance notice of the matters sought to be relied upon would reduce the scope for disagreement later. A matter in respect of which judicial notice may be taken, by its very nature, ought to be one that is uncontroversial. The fact that it is not might cast doubt on whether it really is so notorious and well-established that it can be accepted without further inquiry.

c. It is in the interests of fairness that the other party be given an opportunity to respond and comment. The Tribunal would be entitled to take judicial notice of a matter, notwithstanding any objection by the opposing party, if it is satisfied that that is warranted. However, the Tribunal may well be better placed to make that assessment once it has heard any argument to the contrary.

d. However, that does not mean that a party needs to plead the term 'judicial notice' expressly in order for adequate notice to have been given. Depending on the context, the nature of the claim and, if relevant, the specialist nature of the tribunal, it might suffice if the allegation being made contains an assertion that could be established by evidence or by the taking of judicial notice. In a claim of indirect discrimination, an assertion that a particular PCP puts women at a disadvantage because of their childcare responsibilities as compared to men, would be sufficient, in our view, to identify a matter in respect of which judicial notice could be taken. The childcare disparity is very well-established. It is frequently referred to in the authorities (see above) and is also referred to in the EHRC Code of Practice, which the Tribunal is obliged to take into account. As such, there is little need for more to be said by way of pleading. Furthermore, as a specialist employment tribunal, the childcare disparity is a matter that falls within the scope of its specialist expert knowledge and can be taken into account without more. We consider that approach to be consistent with the general direction of travel of making it easier for litigants to establish claims of indirect discrimination, and the fact that claims are often brought by litigants in person, who may be aware of the childcare disparity, but who may have no knowledge of the principles relating to judicial notice.

e. The Claimant and the Intervenor appeared to go further in suggesting that the Tribunal was bound to take judicial notice of the childcare disparity even where there is no notice of the issue. Ms Darwin relied upon the extract from *Phipson* in which it is said that in respect of matters noticed in precedents, the Court *must* take judicial notice and has no discretion not to do so. However, that does not, in our judgment, require a Tribunal to be constantly on the lookout for things that might be amenable to being judicially noticed even if not identified by the parties expressly or implicitly in their case. As Mr Sutton submitted, the Tribunal cannot be treated as a 'repository of knowledge' that will rush to the aid of a party whose case lacks clarity or would otherwise flounder for want of evidence.

49 **612.1, 612.17, 615**
In the present case, the Claimant had expressly pleaded at para 17 of her claim that the PCP put her, 'as a woman, at a particular disadvantage when compared to men on the basis that women are more likely to be child carers than men'. The Respondent pleaded in reply that the PCP did not put the Claimant at a disadvantage but did not specifically address the more general case about women being disadvantaged. In our judgment, that pleaded case provides sufficient notice of the issue in respect of which judicial notice is invited: the Tribunal was expressly being asked to find that women are more likely to be child carers than men and that this put women in general, and the Claimant specifically, at a disadvantage in the context of being required to work flexibly. The Tribunal erred in not taking account of it and in treating the Claimant's case as unsupported by evidence. The childcare disparity is so well known in the context of indirect discrimination claims and so often the subject of judicial notice in other cases that it was incumbent on the Tribunal, in the circumstances, to take notice of it here.

50 **612.1, 612.17, 615**
However, taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the childcare disparity and the particular PCP in question. The childcare disparity means that women are more likely to find it difficult to work certain hours (eg nights) or changeable hours (where the changes are dictated by the employer) than men because of childcare responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking judicial notice of the childcare disparity. However, if the PCP as to flexible working requires working any period of eight hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with childcare responsibilities, then it would be open to the Tribunal to conclude that the group disadvantage is not made out. Judicial notice enables a fact to be

established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an 'indisputable fact' (of which judicial notice may be taken) to a 'disputable gloss' (which may not be apt for judicial notice): see *HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426, [2018] IRLR 334, [2018] 1 WLR 1471 (CA) at para [108]. Taking judicial notice of the childcare disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage.

51 We therefore reject Ms Darwin's contention that taking judicial notice of the childcare disparity should invariably result in the group disadvantage being made out with the question for the Tribunal simply being one of justification. Such a blanket approach could give rise to unfairness and illogical outcomes. Where, for example, an arrangement is, on analysis, generally favourable to those with childcare responsibilities, it would be incongruous to treat that arrangement as nevertheless giving rise to group disadvantage falling to be justified.

52 In the present case, the PCP was to work flexibly, including at weekends. It is apparent from the Tribunal's findings that the 'flexibility' expected here was that community nurses would work on other days as and when required by the Trust: see eg paras 28, 32 and 39 of the Judgment. This was not, therefore, an arrangement whereby the nurses had any flexibility to choose working hours or days within certain parameters. As such, this is one of those cases where the relationship between the childcare disparity and the PCP in question is likely to result in group disadvantage being made out. Indeed, it can be said that the PCP was one that was inherently more likely to produce a detrimental effect, which disproportionately affected women: see *Ministry of Defence v DeBique* (2009) UKEAT/0048/09, UKEAT/0049/09, [2010] IRLR 471 (EAT) at para [146].

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

54 The other basis on which it is said the Tribunal erred is that it failed to consider that the Claimant's disadvantage itself provided some support for group disadvantage. Reliance was placed on the decision of HHJ Richardson in *Games v University of Kent* (2014) UKEAT/0524/13, [2015] IRLR 202 (EAT), in which the issue was whether it was necessary to adduce statistical evidence to establish particular disadvantage. At para 41, HHJ Richardson, having referred to Baroness Hale's judgment in *Homer*, said as follows:

> '41. It follows that it was not necessary for the claimant, in order to establish particular disadvantage to himself and his group, to be able to prove his case by the provision of relevant statistics. These, if they exist, would be important material. But the claimant's own evidence, or evidence of others in the group, or both, might suffice. This is, we think, as it should be: the experience of those who belong to groups sharing protected characteristics is important material for a court or tribunal to consider. They may be able to provide compelling evidence of disadvantage even if there are no statistics at all. A court or tribunal is, of course, not bound to accept such evidence. It should, however, evaluate it in the normal way, reaching conclusions as to its honesty and reliability, and making findings of fact to the extent that it accepts the evidence.'

55 Ms Darwin submits that, similarly, the Tribunal in the present case could have extrapolated from the accepted disadvantage to the Claimant to find that group disadvantage was established. We do not agree that the effect of the decision in *Games* is that a claimant need only adduce evidence of her own disadvantage in order to make out group disadvantage. The latter is not inextricably linked to the former. The Claimant's disadvantage might provide support for the contention that there is group disadvantage, and such evidence (as the EAT stated in *Games*) will be important material for the Tribunal to consider. However, whether or not the Tribunal is able to conclude that there was group disadvantage in such circumstances will depend not only on the quality and reliability of the evidence in question, but also on whether any meaningful conclusions about the group picture may be drawn from it. That may not be the case where, for example, the individual's disadvantage arises in circumstances that are unusual or unique to the Claimant, and which do not exist in or are not comparable to those of the wider group.

56 **612.1, 612.17, 615**

In summary, when considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear in mind that particular disadvantage can be established in one of several ways, including the following:

a. There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected *in limine*;

b. Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;

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

d. The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken.

57 **612.1, 612.17, 615**

In the present case, the Tribunal did not consider any of (b), (c) or (d) and instead dismissed the claim of indirect discrimination because of the lack of direct evidence of group disadvantage. In doing so, it is our judgment that the Tribunal erred in law. Accordingly, Ground 3 of the appeal is upheld.

58 The remaining grounds may be dealt with more briefly.

59 **GROUND 4 – HYPOTHETICAL COMPARISON**

Mr Sethi submits that the Tribunal, having rejected the claim that women were put at a particular disadvantage, failed to consider in the alternative whether the PCP 'would put' women at a particular disadvantage compared to men. It is further submitted that as

the Claimant's case relied upon s 19, EqA without qualification or limitation, it was incumbent on the Tribunal to consider the claim both in terms of actual comparators and hypothetical comparators, even if no express reference was made to the latter in the pleaded case, or in submissions.

60 Mr Sutton contends that there was no such obligation on the Tribunal to consider the hypothetical comparison in every case and it would only really come into play if there is no actual comparator. Here, the issue of particular group disadvantage was tested against an actual group. In the absence of any invitation to test it against a hypothetical group, the Tribunal did not err in law in not doing so. In any case, submits Mr Sutton, the Tribunal clearly had the 'would put' aspect of the claim in mind and dealt with it as follows at para 74 of the Judgment:

> 'In the absence of any evidence demonstrating that women as a group were (*or would be*) disadvantaged by the requirement to work flexibly, the Tribunal concludes that this claim fails.' (Emphasis added)

61 The provisions of s 19(2)(b) and (c), EqA are such that in claims of indirect discrimination, if an actual comparison is not possible or appropriate because of the absence of appropriate real comparators or otherwise, then the Tribunal will, in most cases, be required to consider the hypothetical comparison in the alternative. In the present case, the Tribunal did consider the alternative, as is apparent from para 74 of the Judgment. In our judgment, there was no further or separate error of law on the Tribunal's part here: its error lay in its consideration of the wrong pool, as discussed under Ground 2. Had the correct pool been considered, i e that of all community nurses across the Trust, then the Tribunal's analysis of whether the PCP puts or would put women at a particular disadvantage as compared to men, might well have yielded a different result. As it was, the Tribunal's analysis was confined to the members of the Team.

62 **GROUNDS 5 AND 7 – JUSTIFICATION**

Mr Sethi submits that the Tribunal erred in its conclusion that even if particular disadvantage had been established it would be justified. That is because justification was considered only in respect of the PCP's effect on the Team instead of the wider pool of community nurses across the Trust.

63 Mr Sutton relies upon para [47] of *Essop*, in which Baroness Hale held as follows:

> '[47] Neither the EAT nor any higher court is entitled to disturb the factual findings of an employment tribunal. It must detect an error of law. The tribunal had adopted the "no more than necessary" test of proportionality from the *Homer* case [[2017] IRLR 558, [2017] ICR 640] and can scarcely be criticised by this court for doing so. But we are here concerned with a system which is in transition. The question was not whether the original pay scheme could be justified but whether the steps being taken to move towards the new system were proportionate.
>
> Where part of the aim is to move towards a system which will reduce or even eliminate the disadvantage suffered by a group sharing a protected characteristic, it is necessary to consider whether there were other ways of proceeding which would eliminate or reduce the disadvantage more quickly. Otherwise it cannot be said that the means used are "no more than necessary" to meet the employer's need for an orderly transition. This is a particular and perhaps unusual category of case. The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the employment tribunal it is not for the EAT or this court to do so.'

64 We accept that a finding as to justification is a finding of fact that will not readily be disturbed by this appeal tribunal. However, where the analysis of justification is based on an erroneous pool which potentially undermines the conclusion as to the disadvantage in question, then the conclusion on justification cannot be treated as safe. The conclusion on the proportionality of the Trust's measures, in particular, was focused on the effect that these measures had on the Claimant's own small team. Whilst it is quite possible that the conclusion on justification will remain the same even when scaled up to the entire group to which the PCP was found to apply, this is not something that can necessarily be assumed.

65 In these circumstances, we consider that the Tribunal's conclusion on justification must be revisited in the light of its conclusions in respect of the other issues that are remitted.

66 Under Ground 7, Mr Sethi contends that the conclusion as to justification is inadequately reasoned and points to the brevity of para 75. Mr Sutton emphasises the need to consider the Judgment as a whole and to the fact that there is reference in that para to the Respondent's business case, 'the underlying substance [of which] was not seriously disputed by the claimant, either at the time or during this hearing, …'.

67 We agree with Mr Sutton that one cannot focus on para 75 of the Judgment alone: regard must also be had to the rest of the judgment and in particular to the findings on the Respondent's business case. In our judgment, this 'reasons' challenge has no real merit and we have no hesitation in rejecting it. The conclusion on justification, when the judgment is read as a whole, is adequately reasoned given the basis on which it was reached.

68 **GROUND 6 – UNFAIR DISMISSAL**

Mr Sethi's short point here is that if the Tribunal has erred in its conclusions on indirect discrimination, its conclusion on unfair dismissal cannot stand. Mr Sutton's retort is that a finding of indirect discrimination would not necessarily render the dismissal unfair: see *City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 (CA) at para [54].

69 Whilst Mr Sutton's proposition is correct in general terms, the reason for dismissal here, namely the inability to comply with the need for all community nurses to work flexibly, was inextricably linked to the PCP giving rise to the alleged indirect discrimination. It seems to us that if, as we have found, the Tribunal has erred in relation to the claim of indirect discrimination, then the possibility of a different outcome in that claim might well mean that a different conclusion is reached on unfair dismissal. If it is indirectly discriminatory to impose the requirement to work flexibly, then that might provide some support for the contention that dismissal for failing to comply with that requirement falls outside the band of reasonable responses open to the employer. Whether or not that is the case will be for the Tribunal to determine on remittal.

70 **612.1, 612.17, 615**

CONCLUSION AND DISPOSAL

For these reasons, Grounds 2, 3, 5 and 6 of the appeal are upheld. The matter will be remitted to the same Tribunal to consider the issues of indirect discrimination and unfair dismissal again.