Case No: 1401496/2015
3401933/2015

EMPLOYMENT TRIBUNALS

1st Claimant: Cynthia McFarlane ("C1")

2nd Claimant: Sara Ambacher ("C2")

Respondent: easyJet Airline Company Limited

Heard at: Bristol On: 26th, 27th, 28th and 29th September 2016

Before: Employment Judge Roger Harper
Ms. Y Ramsaran
Mrs. H. Stevens

Representation
Claimants: **Mr. S. Brittenden , Counsel**
Respondent: **Ms. K. Ayre, Solicitor**

JUDGMENT

1. Both claimants succeed in their claim under Section 19 Equality Act 2010 ("EA") - they were both subjected to indirect sex discrimination.

2. Both claimants succeed with their claim under S. 70 of the Employment Rights Act 1996 ("ERA")

Cynthia McFarlane

3. The respondent to pay to the claimant the sum of £8,750 plus interest of £ 1,136.64 for injury to feelings

4. The respondent to pay to the claimant the sum of £1,200 in respect of the tribunal fees

5. No separate award is made for the S. 70 ERA claim as it is just and equitable not to do so having regard to the other sums awarded and/or agreed to be paid by the respondent.

6. The tribunal recommends that the respondent should discount the claimant's absence, from the date the claimant raised her return to work on 10th February 2015 until her ground duties were put in place on 15th October 2015, in any attendance management or redundancy scoring process and that no warnings should be issued against the claimant for this absence which is due to the discriminatory actions of the respondent.

7. The tribunal recommends that any occupational sick pay made to the claimant in the period referred to in paragraph 6 above is not to be counted against the claimant in the future and that when the claimant begins any future absence it is to be paid as though the payments for occupational sick pay were not made.

8. The respondent is to pay to the claimant the sum of £407.52 representing the four days loss of earning for attending this hearing.

9. The claimant is entitled to loss of earning of £ 1246.74 and interest of £79.92.

Sara Anbacher

10. The respondent to pay to the claimant the sum of £12, 500 plus interest of £1,180.94 for injury to feelings.

11. The respondent to pay to the claimant the sum of £1,200 in respect of the tribunal fees.

12. The tribunal recommends that the respondent should discount the claimant's sickness absence between May 2016 and September 2016 in any attendance management or redundancy scoring process and that no warnings should be issued against the claimant for this absence which is due to the discriminatory actions of the respondent.

13. The tribunal recommends that any occupational sick pay made to the claimant in relation to the discriminatory actions of the respondent is not to be counted against the claimant in the future and that when the claimant begins any future absence it is to be paid as though the payments for occupational sick pay were not made between May 2016 and September 2016.

14. The tribunal recommends that the claimant be given back the 15 days of holiday that she took to ensure she received pay up to the tribunal.

15. The claimant is entitled to receive loss of earnings of £6507.22 plus interest of £308.07

16. No separate award is made for the S. 70 ERA claim as it is just and equitable not to do so having regard to the other sums awarded and/or agreed to be paid by the respondent.

17. The respondent is to pay to the claimant the sum of £407.52 representing the four days loss of earning for attending this hearing.

REASONS

1. This is a claim under Section 19 EA alleging indirect sex discrimination. It is also a claim under S.70 ERA . Initially the S. 70 claim was only for C2. It was flagged up in the claimants opening skeleton that in fact both claimants brought such claims. No challenge was made at that stage by the respondent. It was only at the stage of the closing submissions that the respondent raised the point that they did not believe that such claim had also been brought by C1. It was argued that an amendment application should have been made. C1 argued that it was apparent from the pleadings that such a claim was clear and that there was no need to amend. Although there was some reference in the pleadings it was not clear that a S. 70 claim had been brought although the wording in the case management order might suggest to the contrary. An application to amend was required. It was allowed on the basis that the case had been fully fought on both sides up to that point in the belief that both claimants brought a S.70 claim and the respondent could not allege prejudice by allowing such amendment. The prejudice in not allowing C1 to bring a S.70 claim outweighs the prejudice to the respondent.

2. The tribunal heard evidence on Oath or Affirmation from the following people :

   Cynthia McFarlane
   Sara Ambacher
   Anne Cosgrove
   Lisa Malone
   Penelope Forder
   Lisa Bailey
   Tina Stephens

   It also read the statement of Clinton Shortman but he did not appear at the hearing so was not cross examined. The tribunal has attached no weight to his evidence.

3. The tribunal considered all the evidence to which its attention was drawn making the point that if its attention has not been drawn to a document it has not considered it.

4. The tribunal has had regard to and applied the burden of proof requirements in relation to the discrimination claim of S. 136 EA. The burden of proving the justification defence is on the respondent

5. The tribunal has had regard to, and applied, the following sections of the EA: 19, 23

6. The tribunal has had regard to, and applied, the following sections of the ERA : 66,67,68,69,70

7. The tribunal has had regard to, and applied, the Suspension from work (on maternity grounds)Order 1994 SI 1994/ 2930; The Management of Health and Safety at Work Regulations 1992 (now SI 1999/3242); Reg 1(2), 16, and 18 of the 1999 Regulations.

8. The tribunal has considered and applied the following case law guidance:

   R v. Chargot Ltd 2009 ICR 263
   Homer v. Chief Constable of West Yorkshire Police 2012 IRLR 601
   London Underground Ltd v. Edwards (No. 2) 1999 ICR 494
   Shackletons Garden Centre Ltd v. Lowe 2010 All ER 98
   CHEZ Razpredelenie Bulgaria AD v. Komisia za zashita ot diskriminatsia 2015 IRLR 746
   Shamoon v. Chief Constable of the RUC 2003 IRLR 285
   Bilka – Kaufhaus GmbH v. Weber von Hartz 1987 ICR 110
   R (Elias) v. Secretary of State for Defence 2006 EWCA Civ 1293
   Seldon v. Clarkson Wright and Jakes 2012 IRLR 590
   Hardys and Hansons Plc v. Lax 2005 ICR 1565
   Hockenjos v. Secretary of State for Social Security 2005 IRLR 471
   Allen v. GMB 2008 ICR 1407
   Gassmayr v. Bundesminister fur Wissehschaft und Forschung
   O'Neill v. Buckinghamshire County Council 2010 IRLR 348
   New Southern Railway Ltd v. Quinn 2006 IRLR 266
   Grundy v. BA 2008 IRLR 74
   Barry v. Midland Bank 1999 ICR 859
   Magoulas v. Queen Mary University of London UKEAT/0244/15
   Ministry of Defence v. DeBique UKEAT/0048/09

9. The tribunal has considered the ACAS Guide on accommodating breastfeeding employees in the workplace.

10. The tribunal has considered the EHRC Code of Practice on Employment chapter 4 (indirect discrimination) and chapter 8 paragraph 8.45 (breastfeeding). The tribunal has considered the HSE Guide entitled " New and expectant mothers who work: a brief guide to your health and safety."

11. The tribunal has considered all the documentary references to the World Health Organisation, NICE, and NHS choices.

12. The tribunal has considered all the written and oral evidence of the witnesses subject to the caveat expressed above re Mr. Shortman's statement; it has also considered the oral and written opening and closing submissions of the claimants and the oral and written closing submissions of the respondent.

13. C1 was born on 25th April 1988. She commenced employment with the respondent on 14th April 2009. Her maternity leave commenced on 1st June 2014. She gave birth to her son on 3rd June 2014. She commenced

breastfeeding as soon as she was able to. She was scheduled to return to work in April 2015. Her claim was filed with the tribunal on 23rd June 2015.

14. C2 was born on 27th August 1978. She commenced employment with the respondent on 19th October 2005. Her maternity leave commenced on 26th July 2014 and she gave birth to her son the same day. She commenced breastfeeding as soon as she was able to. She was scheduled to return to work on 26th July 2015. Her claim was filed with the tribunal on 19th October 2015.

15. There has been one Case Management hearing on 23rd March 2016 before EJ Reed. Since that hearing the issues have been refined and only the PCP in paragraph 4.1 of that Order is now pursued with regard to the indirect discrimination claim. The PCP's relied on are, " *Crew members fly to the flying patterns they are rostered; there is no restriction on the length of the day that a crew or staff member can complete; crew members may be required to work more than 8 hours continuously."* These are set out in paragraph 13 of claimant's opening skeleton and there was no challenge that these were inaccurately recorded.

Cynthia McFarlane

16. On 10th February 2015 she applied for flexible working to move from a full time roster to a 75% split month. Significantly she was accompanied by Photeini Kesisoglou (referred to in the rest of the case as "Phenny") to a meeting with Penny Forder on 24th February 2015. She handed in a letter addressed to Tina Stephens at this meeting and she highlighted that she did not know the timescale for breastfeeding and she made it clear that she had not previously expressed milk before and knew that she was unable to do so at work. In cross examination it was put to her that she could express milk in the toilet on the plane. The tribunal was surprised that this was put to her. The general risk assessment which was produced later in the hearing makes it clear that this was not a suitable option.

17. Her flexible working request was granted but her request to reduce her working day whilst breast feeding was refused.

18. She appealed and produced a Fitness to Work Certificate which states, "*New baby, would like to continue to breastfeed. You may be fit for work taking account of the following advice – No longer than 8 hour shift*s." If the advice was not followed she may not be fit for work. The later Fit Note dated 12th May 2015 stated, " *You may be fit for work taking into account the following advice: This lady needs to continue to express her breast milk; is apparently not being allowed to do this at work or have sufficient adaptations to allow her to do it. Not being able to feed her baby or express the milk will increase her risk of developing mastitis."*

19. The appeal was heard by Jason Davies. It was unsuccessful. On 29th April 2015 she was appointed to the role of Cabin Manager on a part time basis. With most easyJet flights there needs to be a Cabin Manager and three cabin crew : 4 crew members. On a busy day there are around 1500 easyJet flights. In addition to rostering a substantial number of crew there

also has to be provision for standby cabin crew and, of course, the pilots. The respondent has a sophisticated rostering team employing some 20 people. Different destination countries have different legal requirements eg Italy. The fact that Italy has a different domestic law requirement is of little consequence to the application of UK and EC law by this tribunal to these facts.

20. C1 attended the return to work course between 24th April 2015 to 5th May 2015 and she did her first flight on 10th and 11th May 2015. She did two coaching flights and on 16th May 2015 she flew as Cabin Manager to Faro – a seven hour duty. On the days she was unable to fly she was placed on unpaid leave. She was unhappy with this. In June and July 2015 she had a period of sick leave but returned to work in July.

21. On 22nd May 2015 she raised another grievance. Throughout all this she never said that she would not work beyond eight hours. At all times she made it completely clear that what she wanted was a "contract" identical to the one offered to Phenny on 2nd August 2012. This had a clear expectation that "*if you were to encounter a delay during your duty you would be expected to continue the duty.*" Although the claimant later made reference to "offloading" herself from a flight the general very clear thrust of what she was saying to her employer was that she would continue doing the duty if necessary.

22. The grievance was heard by Tina Stephens. Although the respondent asked Occupational Health to get in touch with C1 the tribunal has not seen any referral form to OH. OH tried twice on the phone to speak to C1 but she was unable, for good reasons, to take the call and there was no further follow up. The tribunal do not believe that any criticism can be attached to C1 for any failure to obtain an OH report.

23. A letter of 29th September 2015 gave a number of options to return to work. On 6th October 2015 she received the details of her unsuccessful grievance appeal. Having been offered a ground operations role she accepted, undertook that work, and returned to normal duties on 15th April 2016.

<u>Sara Ambacher</u>

24. The relevant medical evidence in relation to C2 is a letter from her GP dated 10th June 2015 which states, " *This is to inform you that this patient of ours is currently breast feeding her 10 month old boy and plans to continue breast feeding when back at work – this is in accordance with our advice for mothers to continue breast feeding for as long as possible. Please be aware that there is a risk of mastitis if breast feeding women go prolonged periods without expressing or feeding. Also the time between feeds cannot be dictated by anyone other than the mother. Please take this into account when arranging working duties for this patient of ours.*"

25. On 15th June 2016 a further medical note from the GP records, amongst other things, " *I would suggest* [i.e. advise] *limiting her shifts to eight hours*

would allow her to return to work which she is highly motivated to do and also allow her to continue breastfeeding."

26. The curious feature of this case is that the respondent had recommendations about 8 hours working from two completely different GP practices in relation to two different women in similar situations and chose to ignore that advice. C2 said in her oral evidence " *not breastfeeding is a choice but breastfeeding is a globally recognized human right as per easyJet.*" In her oral evidence Penny Forder said "*I didn't seek any medical advice about what would happen if she had to work 12 hour shift before expressing. In hindsight yes, I should have done and I will learn from it.*"

27. On 20th April 2015 C2 wrote to the respondent stating that she intended to return to work full time when her maternity leave finished. She attended a meeting with Tina Stephens with Phenny. Her roster request was refused. C2 was given a number of options but was not prepared to accept them. She raised a grievance and a meeting was subsequently conducted by Phil Jones. The respondent was somewhat slow in dealing with providing the outcome which was not sent out until 29th July 2015. This was 4 days after her maternity leave ended on 25th July 2015. At no time did C2 state that she would not work beyond 8 hours if there was, for example, a delay in the flight.

28. No referral to OH was made regarding the issue of the possibility of mastitis.

29. C2 appealed the grievance to Lisa Bailey and this was heard on 20th August 2015. On 29th September she was sent a letter with a number of options. She accepted the Ground Operations role as long as she would be paid at the same rate as if she was on ground maternity.

30. It is common ground with both claimants that the respondent created both the ground roles for them. The respondent has submitted that this was at some cost to the respondent but documentary support for such assertion has not been highlighted.

31. It is also common ground that neither claimant was willing, or indeed able, to indicate for how long they intended to breast feed. It is a personal decision which only a mother can take having regard to a number of factors including the child's development. It is not a precise science.

32. She received her appeal outcome on 6th October 2015. On 15th October 2015 she started working on the Ground Operations role which was scheduled to end on 14th April 2016

33. On 4th March 2016 C2 raised a grievance which was heard by Mrs. Stephens on 14th March 2016 and the outcome was sent to her on 17th March 2016. She appealed on 22nd March 2016 but in the meantime began to feel unwell with stress. The grievance appeal was held on 25th April 2016 and conducted by Aaron Byrne. There was a small delay in

sending the appeal outcome meeting on 13th May 2016. The claimant was signed off with stress and remains signed off.

34. For the avoidance of doubt the tribunal has considered the claimant's cases separately although there is an enormous amount of common ground in their claims.

<u>Analysis</u>

35. The tribunal accept that if breast feeding mothers are not given the opportunity to express breast milk this can lead to an increased instance of mastitis, milk stasis, and engorgement. Although neither claimant has in fact suffered with mastitis it remained a risk for them whilst they continued to breast feed. Although the risk of mastitis is highest in the 12 weeks after birth it can occur later and the advice from two different GP practices to both claimants cannot be ignored. The 8 hour limit was not an arbitrary one – it was one advised by the GP.

36. The tribunal has to assess whether the PCP placed women at a particular disadvantage compared with men ? did it put the claimants at that disadvantage ? if so, can the respondent demonstrate that the PCP was a proportionate means of achieving a legitimate aim ?

37. An obligation to work long or uncertain hours, or a certain shift pattern unfavourable to childcare has frequently been found to be a PCP placing women at a disadvantage : See the **London Underground** and **Shackleton Garden Centre** cases.

38. It is largely a question of fact as to whether the claimants suffered any "disadvantage – see the **Shamoon** case

39. The term "particular disadvantage" does not refer to serious, obvious or particularly significant cases of inequality. The term covers *any* disadvantage – see the case of **CHEZ Razpredelenie Bulgaria AD.**

40. The disadvantage was not securing the restriction on their duties. It is important to note that S.19(2)(c) EA requires that someone "*would*" be put at a disadvantage if the PCP was in fact applied. This does not require evidence of actual disadvantage. The claimants were put in the position of **either** working a normal roster (which effectively is a requirement to cease breast feeding or exposing themselves to the increased likelihood of suffering medical effects), **or** to continue breastfeeding but suffer pecuniary disadvantage.

41. The respondent "does not accept that disadvantage, in the absence of evidence to demonstrate the risk of mastitis and the discomfort." The GP's notes and the WHO and NICE documentation makes the risk of mastitis for breastfeeding mothers very clear. The respondent has not taken such evidence on board, or chosen to ignore it.

42. Under S. 19(2)(d) EA justification involves two distinct questions : whether there was a legitimate aim and considerations of proportionality. In **Bilka –**

Kaufhaus it was held that, " *it is also necessary to ascertain whether the pay practice in question is necessary and in proportion to the objectives pursued by the employer."* The **CHEZ** case states that the "*concept of objective justification must be interpreted strictly."*

The ECJ, therefore, held that the measures taken by the respondent must correspond to a real need on the part of the respondent, must be appropriate with a view to achieving the objectives pursued, and must be necessary.

The tribunal has to carry out a balancing exercise – weighing up the needs of the respondent and the needs of the employees – to evaluate whether the business needs were sufficient to outweigh the impact of the PCP on the protected group generally and on the claimants in particular.

43. The pleaded legitimate aims relied upon by the respondent are:

- ensuring that the respondent can deliver its flying schedule by aircraft departing on time with sufficient crew on board;
- avoiding flight delays and cancellations;
- compliance with the legal and regulatory requirements imposed on the respondent including those limiting flying time;
- the organization of rosters for crew members in line with legal and practical requirements; and
- the avoidance of individual rostering arrangements.

44. In the **Hardys** case Pill LJ said,

" *the principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellant's submission that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the circumstances.*

The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise …in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight."

45. In paragraph 5 of the respondent's submissions they admit that the PCP's are applied generally i.e a blanket approach. Having regard the **Hockenjos** case it is clear that a blanket ban is far more difficult to justify because it does not allow for exceptions. The respondent does not admit that the PCP's were applied to the claimants but by our findings herein the tribunal finds that they were.

46. The respondent asserts that the PCP's it applied were a proportionate means of achieving the legitimate aims for the following reasons,

    - the nature of the respondent's business as an airline operating in a heavily regulated environment with strict rules on flying times and rest breaks;
    - disruption is common and not within the respondent's control;
    - the evidence that the respondent had tried bespoke rosters with limits on duty hours previously, and they caused significant difficulties – including the delay and cancellation of flights, disruption to customers, huge cost and adverse publicity;
    - the evidence of regular disruption to flying schedules causing duties to be extended;
    - the lack of availability of shorter duties for the claimants to fly on (combined with the fact that as Cabin Managers there were fewer duties available to them than to flight assistants);
    - neither claimant specifically offered to work beyond 8 hours in the event of a delay – they say they only wanted what Phenny had but in fact C2 in particular asked for more (Phenny's arrangement being limited to 6 months and C2 asking after her 6 month role in ground operations for an extension) and C1, far from saying she was willing to work beyond 8 hours if there was a disruption said she would "offload" i.e. get off the plane/go off duty – which would have a very adverse impact on the respondent;
    - neither claimant would specify, despite being asked on several occasions, how long they intended to breastfeed for (a perfectly reasonable questioning in the light of the respondent's need to know how many employees it had available to fly and to plan accordingly). The respondent was therefore being asked to agree to arrangements which could potentially last for years;
    - the respondent took a number of steps to support the claimants to continue breastfeeding and alleviate the impact of the PCP's on them – including creating, at its own cost, two roles on the ground.

47. The tribunal has only been provided with two relevant examples of a flight being cancelled – one from Newcastle and one from Liverpool. See Lisa Malone and Anne Cosgrove. In that during the summer there are 1500 flights a day the evidence of disruption was less than convincing.

48. Ms. Cosgrove said in evidence that an analysis is always done when a flight is cancelled and, from the evidence, there is nothing to confirm what other causes may have existed for such cancellations eg. How many others were on standby ? were the crewing team made aware of the restrictions on their roster? If not, why not? If they had been aware, could they have issued other standby duties to the person on restricted hours and allocated the night stop to someone else on standby ? The respondent has produced no evidence that it put in place systems to avoid this situation from arising except for a complete prohibition on restricted hours rosters. The tribunal can only decide cases based on the evidence presented not on speculation.

49. In paragraph 15 of the Ms. Cosgrove;'s statement she stated,

    "*A high volume of bespoke rostering arrangements would restrict flexibility to manage supply and demand.*"

    In cross examination she made the very damaging admission to the respondent's case that a low volume of bespoke rostering arrangements would perhaps not restrict the flexibility to manage supply and demand. This struck at the very heart of the respondent's case.

    The reality was that there was nothing preventing implementing a bespoke roster.

    The report which Ms. Cosgrove prepared was not shared with the claimants. It is not clear why. In the preparation of the report at pages 83 A – B Ms. Cosgrove in oral evidence said that the was not trying to make a case either way and she did not accept that she should have weighed up the evidence on both sides – "*it was trying to say these are the facts regarding the schedules. It wasn't trying to say we should or should not do it.*"

    A reading of the report however results in the conclusion that it was not a balanced assessment of the situation and seems to have been slanted as to why bespoke rosters were not possible rather than a consideration of whether they were possible. In particular there is little in the report about a number of duties of less than 8 hours which were possible. It is correct for the claimant to assert in paragraph 43 of its skeleton argument that,

    "*All of the arguments in Ms. Cosgrove's evidence are undermined by reference to the example of the cabin crew member suffering from a thrombosis. There is no evidence that eJ encountered insuperable difficulties rostering her (over a significant period exceeding 5 years).*"

50. It was forcefully said in the claimant's closing submission that the "*manner in which the respondent has treated and defended this case is 'extraordinary' and the evidence of the witnesses on the whole 'lamentable' because no sensible employer would receive medical advice and ignore it.*" The tribunal find that it was unfortunate and unnecessary that this was said in that way. The respondent was entitled to defend the case if that is what they wanted to do. Clearly triable issues have been raised. The comments were unnecessarily inflammatory especially as the claimants remain employed by the respondent and will have an ongoing working relationship with many of the people who have given evidence for the company. The respondent's witnesses all presented as being professional and conscientious. They were open and honest. They acknowledged that mistakes had been made. It would have been easy for them to have taken a different approach. Both claimants also presented as very good witnesses. This case turned less on the credibility of the witnesses than on an interpretation of a largely agreed factual matrix.

Postscript: after the tribunal had read this Judgment to the parties Mr. Brittenden offered profuse apologies to the Tribunal and to the Respondent's witnesses for the above.

51. The respondent asserted that they approached each situation on a case by case basis. Although they may have thought this was what they were doing it is clear, for example from the evidence of Penny Forder that the establishment team had told her that due to complexity the business no longer offers restricted hours rosters. Once the decision had been taken – probably in 2013 not to offer restricted hours rosters that was a stance that was set in stone. No documentary evidence of this decision has been produced. Subsequent to that decision only one example was given, dealt with later, of a bespoke roster for a woman who has an increased risk of DVT. It followed therefore that many of the meetings to discuss the way forward on this restricted roster issue were window dressing since, even though other alternatives were suggested to the claimants, there was clearly no way that the company was going to entertain a bespoke roster for them. The implacable opposition to even considering such bespoke rosters appeared in the email from Mr. Throsby at page 167B when he stated, " *let me stress, I do not want the bespoke rosters either…and this must not be seen as the easy option.*" Ironically, of course, this assertion actually acknowledges that such bespoke rosters WERE possible. It appears likely that bespoke rosters had existed before 2013 for some years. The evidence was that it was very unusual for all of the standby resource to be used up on a particular day.

52. Other employees had bespoke rosters created for them:

    a) Phoeteini Kesisoglou (Phenny) in August 2012
    b) Lorraine Bowen
    c) A cabin crew member with an increased risk of DVT had been granted a permanent bespoke roster restricted to 8 hours.
    d) Leigh Mallard. The precise details of her "concession" were unclear but some concession appears to have been made for her. The claimants did not lead detailed evidence on this point and neither were there any relevant documents about it in the bundle.

53. The evidence of the length of time that it would take to create and administer a bespoke roster was not very convincing in the absence of hard fact as opposed to partially informed speculation on this issue. The fact that C1 was on a 75% roster was acknowledged to cause less work to produce a bespoke roster than someone employed on a 100% basis.

54. Italian domestic law provides for specific arrangements for new mothers. Italian domestic law does not apply directly, indirectly or by inference to this case save to say that the respondent has had to make accommodation for that situation too.

55. Having heard all the evidence the tribunal is satisfied that neither claimant said that they would refuse to work in excess of 8 hours. Neither was really asked about that. There appears to have been an assumption that, for example they "*may need to stop working part way through a flight.*"

56. Although no weight has been attached to Mr. Shortman's evidence it was significant that none of the respondent's witnesses could really gainsay that there were a number of flights from Bristol, where the claimants were based, as set out in his statement, which would have been for less than 8 hours flying time.

57. Although C1 acknowledged in her evidence that she was aware of other crew members being unhappy at the impact of her arrangements upon them it is significant that there is no evidence of any grievance being submitted by her affected colleagues. A significant issue is that the alleged burden of bespoke rosters would be spread between 350 cabin crew in Bristol.

58. It is clear from page 143 that the main reason for refusing to accommodate the 8 hours request was on safety grounds. It records,

   " *The primary reason for not being able to accept your request for reduced hours is for safety reasons, as per your outcome letter, and as explained in our meeting. This is for your welfare due to the possibility of unforeseen operational circumstances that may arise on the day of your duty which could cause you to be delayed. If this was to happen then you would be working longer than you had requested. As you stated in our meeting that longer duties than those requested could cause you health related issues, due to unexpected disruption we are unable to guarantee that you will always finish your duty on time. As this has implications to your health, we are unable to agree to such a restriction. We have however provided you with a number of alternatives to consider."*

   In the light of this assertion it was then contradictory for the respondent to consider rostering the claimants to work longer hours. This was put to Tina Stephens and Penny Forder but neither satisfactorily dealt with the point.

Conclusion on the sex discrimination claims

59. For all of the above reasons the PCP's placed the claimants at a particular disadvantage. The approach of the respondent was a disproportionate way of dealing with the stated legitimate aims. The tribunal has undertaken the balancing exercise of weighing up the needs of the employer and the needs of the employees – to evaluate whether the business needs were sufficient to outweigh the impact of the PCP's on the protected group generally and on the claimants in particular.The evidence supports the conclusion that the business needs were not so sufficient.

60. Both claimants sex discrimination claims succeed.

The claims under S. 70 ERA by both claimants.

61. Under the Management of Health and Safety at Work Regulations 1999 there is no time limit on the reference to breastfeeding. There is clearly a mandatory obligation to prepare a risk assessment. Surprisingly the document entitled "*Breastfeeding General Risk Assessment*" at pages 453 – 455 of the bundle were only introduced during the hearing and had not been put in the bundle at an earlier stage. Although it identifies some risks it offered no solutions. This was accepted by Tina Stephens. It is, by definition, a generic assessment. The reference in Regulation 16 (2) to an "*individual employee*" clearly pre-supposes a bespoke risk assessment when the need arises to consider the individual's needs. No bespoke risk assessment was undertaken in this case.

62. Here there was a "*material risk to health and safety, which any reasonable person would appreciate and take steps to guard against.*" It was not a risk which was "*trivial or fanciful.*" Lord Hope in **Chargot.**

63. Lisa Bailey gave evidence that the respondent undertook regular risk assessments and that the respondent had an in house Health and Safety team who could have easily carried out risk assessments for both claimants.

64. Ansell J in the **O'Neill** case stated that there are three discrete pre-conditions to be satisfied before an obligation to undertake a risk assessment arises ,

    - the employee must inform her employer in writing that she is pregnant (or has recently given birth and/or is breastfeeding;
    - the work undertaken by the employee must be such that it gives rise to a risk to her health or that of her baby;
    - the risk must arise from processes, working conditions or exposure to physical, chemical or biological agents.

65. The ground duties could have been offered at a much earlier stage. They were unfit to work on the maternity ground which includes breastfeeding and have a right to be offered work. In C2's case there was no consideration of extending the ground operations role and she was not referred to OH for breastfeeding reasons.

66. If not provided with work these claimants are deemed to have been suspended under S. 63(3). Neither claimant was fit for normal duties. As referred to earlier in these reasons Tina Stephens accepted the contradiction that working 8 hours was unsafe and therefore being expected to work 12 hours was more unsafe. The claimants were therefore entitled to be suspended on full pay.

Conclusion on S. 70 claims

67. Both claims succeed.

Remedy

68. Having announced the above by reading out all of the above to the parties at the hearing, the issue of remedy was then considered. The parties spent sometime discussing matters between themselves before returning to the hearing. The results of that discussion and also the tribunal's ruling are set out below. The parties agreed to file an agreed set of calculations arising from the tribunal's ruling by 4pm on Monday 3rd October 2016.

69. It is hoped that the fact of this litigation has not caused any irreparable relationship problems or stumbling blocks between the parties and that all concerned can work constructively, quickly, and in an entirely friendly and productive manner to a resolution with which all are content.

Cynthia McFarlane

70. In relation to paragraph 2 of her Schedule of Loss ("CMSOL") the respondent is already addressing this issue so no recommendation is required.

71. In relation to paragraphs 3 and 4 CMSOL the respondent agrees.

72. In relation to paragraphs 5 and 6 CMSOL the respondent agrees that mid band Vento is correct and advanced the proposal of £ 7,500. The claimant sought £10,000. The tribunal, made the point that the award was an art not a science and awarded £ £8,750.

73. In relation to paragraphs 7 and 8 CMSOL the parties reached an agreement.

74. In relation to paragraph 10 CMSOL the figure of 8% interest has been calculated at £1,136.64

75. In relation to paragraph 11 CMSOL the respondent agreed that the issue and hearing fees totalling £1,200 are payable to the claimant.

76. The tribunal ordered that the four day loss of earnings attending the hearing should be awarded – £407.52 That loss clearly flowed from the discrimination.

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77. In relation to paragraphs 2 and 3 of her Schedule of Loss ("SASOL") the tribunal declined to make the recommendations sought. This was not because in principle the tribunal disagreed with the sentiments expressed but the tribunal was concerned that making such recommendations may be unduly prescriptive and inflexible. The parties know the issues and the tribunal rulings as set out in this document and can strive to make plans that are consistent with these rulings.

78. With regard to paragraph 4 SASOL the respondent is already addressing this issue so no recommendation is required.

79. With regard to paragraphs 5 and 6 SASOL the respondents agree.

80. With regard to paragraph 7 of SASOL this is a loss flowing from the discrimination and therefore properly awardable.

81. With regard to paragraphs 8 and 9 of SASOL the respondent agrees that mid band Vento is correct and advanced the proposal of £ 10,000. The claimant sought £15,000. The tribunal, made the point that the award was an art not a science and awarded £ £12,500.

82. With regard to paragraphs 10, 11 and 12 the parties reached agreement.

83. With regard to paragraph 14 SASOL the figure of 8% interest has been calculated at £ 1,180.94

84. With regard to paragraph 15 the respondent agreed that the issue and hearing fees totalling £1,200 are payable.

85. The tribunal ordered that the four day loss of earnings attending the hearing should be awarded of £ 407.52. That loss clearly flowed from the discrimination.

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Employment Judge

4th October 2016

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Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

5 October 2016 by email only

FOR THE TRIBUNAL OFFICE