Appeal No. UKEAT/0171/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 December 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

THE CITY OF OXFORD BUS SERVICES LIMITED t/a OXFORD BUS COMPANY — APPELLANT

MR L HARVEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES DAWSON (of Counsel) Instructed by: Blaser Mills Law 40 Oxford Road High Wycombe Buckinghamshire HP11 2EE
For the Respondent	MR ANDREW ALLEN (of Counsel) Instructed by: Thompsons Solicitors LLP Condor House 5-10 St Paul's Churchyard London EC4M 8AL

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SUMMARY

RELIGION OR BELIEF DISCRIMINATION

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Discrimination - Religion and Belief – Indirect Discrimination – Justification - Section 19(2) Equality Act 2010

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Bus drivers employed by the Respondent were required to work five out of seven days each week, including Fridays and Saturdays. This created difficulties for the Claimant who, as a Seventh Day Adventist, was required to respect the Sabbath by not working between sunset on a Friday to sunset on a Saturday. Accepting that the Respondent's working arrangements imposed a provision, criterion or practice ("PCP") that placed the Claimant at a disadvantage, the question for

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the ET was whether the PCP was a proportionate means of achieving a legitimate aim. It was accepted that the Respondent had established legitimate aims of ensuring efficiency, fairness to all staff, the maintenance of a harmonious workforce, and recruitment and retention but the ET

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considered it had failed to demonstrate that the PCP was a proportionate of achieving these aims, in particular because the Respondent had failed to adduce sufficient evidence and had not been able to demonstrate that its aims could not be met by accommodating the working arrangements requested by the Claimant. The Respondent appealed.

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Held*: Allowing the appeal.*

When carrying out the requisite assessment under section 19(2) of the **Equality Act 2010**, there was a distinction between justifying the application of the rule to a particular individual and

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justifying the rule in the particular circumstances of the business (**Homer v Chief Constable of West Yorkshire Police** [2012] ICR 704 SC, and **Seldon v Clarkson Wright and Jakes** [2012] IRLR 601, SC applied). In the present case, the ET's focus had been on the application of the PCP to the Claimant; it had failed to carry out the requisite assessment of that PCP in the

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A circumstances of the business (see **Hardys & Hansons plc v Lax** [2005] ICR 1565 CA). The matter would be remitted to the same ET for reconsideration of this question.

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A **HER HONOUR JUDGE EADY QC**

Introduction

B 1. The appeal in this matter concerns the approach to be taken to the question of justification in a claim of indirect discrimination; the protected characteristic in issue is religion and belief. In this Judgment I will refer to the parties as the Claimant and Respondent as below.

C 2. This is the Full Hearing of the Respondent's appeal from a Reserved Judgment of the Reading Employment Tribunal (Employment Judge Gumbiti-Zimuto sitting with members, Ms Breslin and Mr Appleton, on 24 to 26 April 2017, with an additional day in Chambers on 17 D May 2017; "the ET"). By that Judgment, the ET dismissed the Claimant's complaints of direct discrimination, harassment and victimisation because of religion and belief but upheld his complaint of indirect discrimination on that ground. The Respondent appeals against the ET's decision on the indirect discrimination complaint, complaining that the ET (1) incorrectly E applied the test for justification; (2) failed to give adequate weight to the Respondent's judgment; and (3) wrongly recorded the evidence. The Claimant resists the appeal on each ground, essentially relying on the reasoning of the ET.

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The Facts

3. The Claimant is a practicing Seventh Day Adventist. In accordance with his faith he G observes the Sabbath. This means he does not work from sunset on a Friday to sunset on a Saturday.

4. In June 2015, the Claimant applied for a job as a bus driver with the Respondent. The H application form did not ask for information regarding his religion or about any restrictions on

his ability to work. Although the Respondent has a document that explains its rostering system and the fact that this means that drivers will work five days out of seven, including either Saturday or Sunday, the Claimant did not see this at any point during the application and interview process.

5. In his interview the Claimant explained that he was a Seventh Day Adventist, but what this would mean the terms of his ability to work was not something pinned down during the interview. In any event, the Claimant was successful in his application and he started his employment with the Respondent on 7 September 2015.

6. On 28 October 2015, the Claimant was given his first rota of shifts requiring him to work Friday evening and Saturday daytime. When he raised his difficulties with this, it was pointed out there was nothing on his personnel file that showed his shift rota could be changed but arrangements were made so he would not have to work on the Sabbath on that occasion.

7. The more general issue regarding the Claimant's ability to work on Friday evenings and on Saturday daytimes was subsequently investigated by the Respondent, with the suggestion being made that he should make a request under the flexible working policy, albeit he did not have the 26 weeks' service normally required under that policy. The Claimant responded by making a request to work "*Sunday to Thursday any hours. On Fridays, early shift finishing before sunset, on Saturdays late shift starting after sunset, with the guarantee of minimum thirty five (35) hours per week*" (ET Judgment, paragraph 25). Although he also submitted a flexible working request form, the Claimant did not sign this and did not complete some of the boxes. Having already made an exception for the Claimant in allowing him to apply under the policy, the Respondent was not prepared to consider an application which was not properly completed.

8. Thereafter, the Claimant continued to be allocated shifts that required him to work on Friday evenings and Saturdays during the day. He made efforts to swap those shifts with other drivers but was not always able to do so; when he could not, he would call the Respondent's absence line and let them know he was unable to work the shift he had been allocated. Swapping shifts was something the Claimant found difficult and by April 2016, he had missed 22 shifts.

9. In July 2016, the Claimant again submitted a flexible working request and on this occasion, notwithstanding his failure to complete it properly again, it was considered by the Respondent and efforts were made to look across the company to see if it was possible to accommodate his request. In August, an offer was made for him to move to the Respondent's Express Service, which did not require Friday evening or Saturday daytime shifts. The Claimant accepted that but the Respondent subsequently made clear that this was only on a temporary basis. By this time the Claimant had commenced ET proceedings, and the Respondent said that the transfer was until the conclusion of the ET hearing (then due to take place in April 2017).

10. Although the Respondent had wanted to accommodate the Claimant until the determination of his ET complaint, on 12 December 2016 the Claimant was told he was to be moved from the Express Service as the driver who had previously agreed a swap with him no longer wished to continue with the arrangement. As an alternative, the Claimant was told that another driver would swap with him to work Sabbath hours on the Respondent's City Service. The Claimant agreed to that move.

11. What the Respondent did not agree, however, was to accommodate the Claimant's request on a permanent basis. The Respondent's Managing Director, Mr Southall, explained to the ET that the Respondent's policy was that all drivers were required to be available to work shifts on any five days in a seven-day week; individual drivers were allocated a line in a rota and they would then have the flexibility to swap an allocated day within that rota with another driver. The ET recorded Mr Southall's evidence as follows (ET Judgment, paragraph 65):

> **"The key objective of the policy is to ensure the fair and efficient running of bus services taking into account all the different variable[s] that apply. Flexibility is built in for drivers because they have the ability to "swap" their shifts with others, should it be necessary to have time off on particular shifts days [sic] … And it is often the case that members of one religious group may swap with members of other religious groups to cover religious events or festivals. So, for example our Muslim drivers often swap with the Christian drivers and vice versa to cover periods like Christmas and Ramadan … The swap system works well and the claimant is the only driver that I know who struggles to make appropriate swaps."**

12. Of course, as the ET observed, the Claimant was placed in a rather more difficult position than that of other drivers to whom Mr Southall referred. The issue for him was the need to observe the Sabbath each week, not just a particular religious festival or day of observance falling at more limited times of the year. Mr Southall's evidence continued (ET, paragraph 67):

> **"Unfortunately, accommodating the Claimant in this way causes significant problems for our business. It leads to problems with the allocation of duties but the critical issue is the impact on other drivers. Duty allocation is very sensitive and drivers and the union are very keen to ensure that everyone is treated fairly. The rotas are designed to share duties fairly and to give a fair balance of unpopular shifts to every driver. If any driver does not work their fair share it undermines that balance and some drivers have to work more of the unpopular shifts. This causes disharmony within the workforce causing drivers to leave and problems with industrial relations. The union would complain leading to a "failure to agree" notice and the disputes resolution procedure we have with the union being enacted. Ultimately this could lead to industrial action. In a recent ballot scheduling matter was one of the issues that led to industrial action being taken."**

13. The ET noted that the Claimant had been told that the Respondent could accommodate him with relative ease, in terms of the creation of a schedule that would still allow the Respondent to meet required levels of service. If more drivers asked for the same facility,

however, that would - at some unspecified point - be unsustainable (see the ET at paragraph 69).

14. Although Mr Southall accepted there had been no complaints about the arrangements made for the Claimant pending the resolution of his ET claim, he stated that in his experience where a person gets "*preferential treatment without justification there is disharmony*" (ET Judgment, paragraph 81). Of course, it was the Claimant's case that, in his case, there would be justification, because the treatment he was seeking was on the basis of a protected characteristic.

15. Although Mr Southall accepted there had been no complaints about the arrangements made for the Claimant pending the resolution of his claim, he said (ET paragraph 82):

> **"… there were people awaiting the outcome of this case before they made a grievance. He referred to 30-40 people who would request time off for their religious beliefs. When probed, the evidence referred to a conversation Philip Southall had with a Muslim employee about getting time off for Eid. Philip Southall said he was aware people had asked for time off but accepted that nobody had ever asked him for time off for Friday prayers. He said that reason for this was because there is "*an understanding that you work 5 days in 7 days*". Philip Southall said that although there had been no complaints he was aware that there was resentment. "*Accommodating the claimant would open floodgates and will cause massive problems for the company*"."**

The ET's Decision and Reasoning

16. In his complaint of indirect religious discrimination, the Claimant contended that the Respondent operated a provision, criterion or practice ("PCP") requiring all bus drivers to work a rota that included shifts on any five days from all seven days of the week. The Respondent accepted that was so, save it also observed that drivers were permitted to swap shifts with others. Mr Dawson, in arguments before me today, has also pointed out that the provision was further mitigated by the fact that drivers could make a flexible working request.

17. On the question of disadvantage, the Respondent effectively put the Claimant to proof but contended that, even if he was disadvantaged, the PCP was justified; that is, it was a proportionate means of achieving a legitimate aim. In this regard, the Respondent relied on the following aims: "*efficiency, fairness to all staff / a harmonious workforce, and recruitment and retention*". The ET recorded the Respondents arguments in this regard as follows:

> **"94. … The evidence given by Philip Southall sets out the aims of the respondent in requiring employees to work a flexible work rota and why the use of a flexible rota is the appropriate way of achieving such an aim. The respondent contends that there is evidence of potential industrial unrest. We are invited to take note that other faiths have days on which they do not wish to work (whether in whole or part) and that the respondent's concerns are not fanciful. The respondent has issues with driver retention and recruitment, and drivers do not like working at weekends. The respondent contends that this is a classic case for the application of the principle in *Homer* that "*Justification may be established in an appropriate case by reasoned and rational judgment*".**
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> **95. The respondent allows drivers to swap with one another and in offering to give guaranteed hours for those who do not require a full-time shift pattern. In the case of the claimant, the respondent had also moved him [sic] the fixed line set rota, to make changes easier and then moved to the Express Service and then the City Rota."**

18. Considering first whether the Claimant had been put at a disadvantage by the PCP, the ET accepted he had: he was genuinely unable to work on the Sabbath because of his religious belief.

19. The ET then turned to the question of justification. It noted that the burden of proof in this regard was on the Respondent. It further observed, however, that the Claimant had not disputed the Respondent's "*stated aims of efficiency, fairness to all staff / a harmonious workforce, and recruitment of retention*" (ET Judgment, paragraph 116). Weighing the real needs of the Respondent against the discriminatory effects of the PCP, the ET reasoned as follows:

> (1) The fact that the Respondent had been able to move the Claimant to different rotas showed there were effective steps that could be taken to meet his needs, which had not - when undertaken on a temporary basis - resulted in any inefficiency, unfairness to staff or disharmony.

(2) Accepting the reasons provided for why the Express Service accommodation had come to an end, the ET did not accept the Respondent had explained why the current arrangements could not continue - although the Respondent had said there was a cost and that there had been a detrimental impact on the business, this had not been quantified and the evidence from Mr Southall was only that there had been a minor cost, which would not, in the ET's view, be justification for the PCP.

(3) The ET further rejected the Respondent's argument that there were recruitment and retention pressures, finding that the application of the PCP did not impact on recruitment and there was no evidence that it had any impact on retention.

(4) As for the suggestion there was a potential for industrial unrest, that was mere assertion: the Respondent's evidence of "*Chinese whispers*" (ET paragraph 121) was contradicted by the testimony of the trade union representative, Mr Trafford (called by the Claimant), who was unaware of any possible industrial action arising from the application of the PCP or non-application of the PCP in the Claimant's case or any other.

(5) The ET also rejected the Respondent's case on the difficulties of accommodating the Claimant more generally, explaining as follows:

> **"122. Philip Southall set out in his evidence a number of matters which justified the application of the PCP. The number of services being operated by the respondent fluctuates throughout the week and throughout the year. The respondent has in place computer systems and a scheduling team which allowed the respondent to react to these changes as they arose and maintain an efficient service and comply with the obligations set by the Traffic Commissioner. The general effect of the respondent's evidence was an acceptance that notwithstanding the complexity involved in making at least ten changes to the schedules during the year, meeting the claimant's requirements could have been accommodated. We do not consider that, in fact, the complexity involved was any issue at all in the considerations for justification."**

The ET concluded that accommodating the Claimant's needs would not have hampered the Respondent's need to ensure the appropriate level of cover: any problems would

arise not from granting the Claimant's request but from granting many such requests. Indeed, there was no evidence as to the impact of accommodating the Claimant and the ET rejected the suggestion that it would encumber the Respondent's ability to require drivers to otherwise work flexibly to cover for no shows, sickness absence and holidays.

(6) The ET further concluded that the real or operative reason for the Respondent not meeting the Claimant's request was the fear that there were many employees who would not wish to work on their holy day or feast day and: "*if the respondent allows the Claimant to avoid being rostered for his holy day … it has to do the same for all those who are religious*" (ET, paragraph 128). Although the Respondent had relied on this concern, however, the ET concluded that it had failed to produce evidence to show this went beyond assertion. The ET also rejected the contention that accommodating the Claimant would mean refusing another employee a similar request, which would amount to direct discrimination, finding: "*there would be no direct discrimination if in each case these were the considerations which determined whether a request was granted or refused*" (ET Judgment, paragraph 129); that was also true for requests made for non-religious reasons. Each would have to be considered on its merits.

(7) Returning to the question of cost, the ET found this had been neither explained nor quantified.

(8) On the Respondent's argument that this was a classic case for the application of the principle identified by the EAT in **Homer v Chief Constable of West Yorkshire Police** [2009] IRLR 262 (that "*Justification may be established in an appropriate case by reasoned and rational judgment*", see paragraph 48), the ET disagreed, holding that the Respondent had "*failed to adduce evidence where evidence should have been produced and relies on assertion and speculative fears*" (ET paragraph 132).

In general terms, the ET explained:

> **"133. A decision made in the circumstances which prevail on a particular day may be judged differently if made on another day in different circumstances. The respondent has to address issues as they arise. The decision to be made when one person wants a facility is not necessarily the same decision to be made where, for example 10 people ask for the same facility. One may be accommodated without difficulty but ten may have a detrimental effect on the business. The prevailing circumstances might result in a proportionate response being to refuse the claimant's request. However, in this case we have not been satisfied that the prevailing circumstances of this case are such that refusing the claimant's request was proportionate. Claire Child stated, in answer to questions from the claimant, that the respondent has not done the work to ascertain how many people are willing to work Friday and Saturday to cover the Sabbath."**

The Relevant Legal Principles

20. The starting point is section 19 of the **Equality Act 2010**, which provides as follows:

> **"19. *Indirect discrimination***
>
> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -**
>
> > **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> >
> > **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> >
> > **(c) it puts, or would put, B at that disadvantage, and**
> >
> > **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**
>
> **(3) The relevant protected characteristics are -**
>
> > **… religion or belief; …"**

21. In a claim of indirect discrimination, it is therefore open to a Respondent to counter what would otherwise be a finding of discrimination by showing the measure taken was a proportionate means of achieving a legitimate aim. This imports a test of objective justification, the key elements of which derive from the European Union case law, see in particular **Bilka-Kaufhaus GmbH v Weber von Hartz** [1986] IRLR 317, where the CJEU

stated that to justify an objective that has a discriminatory impact, an employer must show the means chosen for achieving the objective correspond to a real need on the part of the undertaking, are appropriate with the view to achieving the objective in question, and are necessary to that end.

22. Provided a Claimant has established disadvantage, the burden of establishing the defence of justification, on the balance of probabilities, lies squarely on the employer; the assessment of which is for the ET and is objective in nature, see **Singh v British Rail Engineering Ltd** [1986] ICR 22 EAT. As for how the ET is to approach its task in carrying out the requisite assessment, this has been considered in a number of cases, in particular: **Allonby v Accrington & Rossendale College** [2001] IRLR 364 CA; **Hardys & Hansons plc v Lax** [2005] IRLR 726 CA; **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601 SC; and **Seldon v Clarkson Wright & Jakes (A Partnership)** [2012] IRLR 590 SC. From these authorities, the following principles can be drawn:

(1) Once a finding of a PCP having a disparate and adverse impact on those sharing the relevant protected characteristic has been made, what is required is (at a minimum) a critical evaluation of whether the employer's reasons demonstrated a real need to take the action in question (**Allonby**).

(2) If there was such a need, there must be consideration of the seriousness of a disparate impact of the PCP on those sharing the relevant protected characteristic, including the complainant and an evaluation of whether the former was sufficient to outweigh the latter (**Allonby**, **Homer**).

(3) In thus performing the required balancing exercise, the ET must assess not only the needs of the employer but also the discriminatory effect on those who share the relevant

protected characteristic. Specifically, proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (**Homer**).

(4) The caveat imported by the word "reasonably" allows that an employer is not required to prove there was no other way of achieving its objectives (**Hardys**). On the other hand, the test is something more than the range of reasonable responses (again see **Hardys**).

23. When carrying out the requisite assessment there is, however, a distinction between justifying the application of the rule to a particular individual and justifying the rule in the particular circumstances of the business. In **Seldon**, the Supreme Court observed as follows:

> **"There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purposes of having a rule, and justifying the rule in the particular circumstances of the business" (paragraph 66).**

24. This was a point that the Supreme Court also made in **Homer**:

> **"As the EAT said, an ad hominem exception may be the right answer in personnel management terms but it is not the answer to a discrimination claim. Any exception has to be made for everyone who is adversely affected by the rule" (paragraph 25).**

In **Homer**, the problem with making an exception for the complainant as an answer to a complaint of indirect discrimination had been identified by Elias J (as he then was) in the EAT:

> **"49. Nor do we think that the tribunal was correct to say - if indeed it was intending to say - that the discrimination should have been avoided by making a personal exception of the claimant. If the imposition of the criterion of a law degree resulted in unjustified indirect discrimination, because the discriminatory effect was disproportionate to the aim, then all adversely affected by the rule must be treated equally. That may well have had the consequence that only the claimant might qualify, but it is not the same as creating an 'ad hominem' exception for him."**

25. The case of **Seldon** involved a claim of direct age discrimination, which may also be the subject of objective justification arising from the imposition of a compulsory retirement age. Lady Hale, with whom the other Justices of the Supreme Court agreed, noted:

> **"where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it" (paragraph 65).**

26. As for how an employer might demonstrate that a particular rule is justified to the requisite evidential standard, in **Homer** in the EAT, Elias J had considered that it would be an error to think that:

> **"concrete evidence is always necessary … Justification may be established in an appropriate case by reasoned and rational judgment" (paragraph 48).**

27. In **Hardys**, the Court of Appeal offered the following practical guidance:

> **"32. … 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. …**
>
> **33. 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 from job sharing 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. …"**

28. As for the task of the appellate Court, the Judgment of Pill LJ in **Hardys** continues:

> **"33. … In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind … the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**
>
> **34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."**

The Respondent's Case

29. The Respondent contends that the ET's reasoning demonstrates that it failed to correctly apply the test for justification. It had accepted that the Respondent had demonstrated it had legitimate aims but, when assessing whether the PCP was a proportionate means of achieving those aims, the ET had repeatedly focused on whether the Claimant's request not to work from Friday evening to Saturday evening could have been accommodated - something that was never in dispute - rather than the question whether the Respondent's rule in general terms was a proportionate means of achieving its aims. The ET's error was made manifest at paragraph 133 when it stated that "*A decision made in the circumstances which prevail on a particular day may be judged differently if made on another day … The Respondent has to address issues as they arise*". The ET had thereby done away with the ability of the Respondent to have a rule or PCP at all. It had required instead that the Respondent decide each case on its own facts. That was an approach rejected by the Supreme Court in **Seldon** and **Homer**, and demonstrated an error of approach as explained by the EAT in **Rajaratnan v Care UK Clinical Services Ltd** [2015] UKEAT/0435/14. Moreover, by focusing on whether the Claimant could be accommodated, the ET had failed to ask itself the correct question; whether the rule was a proportionate means of achieving the aims of the Respondent, which included fairness and the promotion of a harmonious workforce. It thus failed to carry out the task laid down in **Hardys**.

30. Failing to appreciate the nature of the task it was required to carry out, the ET had, for example, separately considered the possibility of requests for religious reasons and non-religious reasons, finding that the Respondent should consider each request on its merits. That, however, placed the Respondent in an impossible position: how would managers judge competing requests and ensure consistency in approach save by having a general rule?

31. That criticism fed into the second ground of appeal, that the ET had failed to give adequate weight to the Respondent's Judgment. In **Homer** before the EAT, Elias J had allowed the justification might be established by reasoned and rational judgment but here the ET asserted that evidence should have been adduced without explaining why it had rejected the arguments expressed by the Respondent's witnesses. Although the ET had acknowledged that the problem for the Respondent was not in granting the Claimant's request but in granting many such requests (see paragraph 123), it had then failed to analyse whether those problems meant that the rule was a proportionate means of achieving a legitimate aim and gave no weight to the Respondent's evidence in that respect. An employer was, however, entitled to rely on its own knowledge that a significant proportion of its staff, if not most, would want weekends off and would feel aggrieved if they were required to work weekends when others were not. Such matters, which fed into questions of efficiency as well as workplace harmony, could not always be reduced to documentary evidence. Judgment played an important part.

32. Turning then to the third ground of appeal, the Respondent relied on its note of Mr Trafford's evidence in cross-examination as follows, "*I know there's been Chinese whispers that people are looking at this case carefully*" albeit "*Nobody has come to Unite yet*", but then - in responding to a question whether a complaint or action was likely, providing the answer "*yes*". That was significant as it went directly to the question whether the Respondent could show its rule was proportionate to its aim. Its employees were waiting to see what the Claimant could demand before doing so themselves, and that would not only justify Mr Southall's view but was further evidence of the need for the rule to be applicable to all staff.

The Claimant's Case

33. The Claimant points out that it was for the Respondent to show that the PCP was justified. It had failed to produce the evidence that would have enabled the ET to find in its favour and the ET had made no error in law in rejecting its case on justification.

34. Specifically, in relation to ground 1, the ET had looked at the question of justification of the PCP and concluded that the Respondent had not discharged the burden upon it. The passage criticised by the Respondent at paragraph 133 was in relation to what the ET had permissibly identified as the real reason for the Respondent's position (see paragraph 128); that was a speculative fear. Although much of the ET's analysis focused on the question of whether the Claimant could be accommodated, that was because the Respondent had failed to adduce evidence that would have enabled the ET to make any wider comparison, such as an assessment of the potential impact upon the wider group suffering an adverse impact, due to their possession of the relevant protected characteristic, as a result of the application of the PCP. The ET engaged with the evidence of Mr Southall regarding the wider effect of the PCP, but found that this really amounted to nothing more than assertion.

35. Turning then to the particular complaint at ground 2, the ET had not focused on the Respondent's ability to accommodate the Claimant to the exclusion of the overall question as to whether the PCP was justified. It had, on the contrary, addressed the Respondent's many arguments on justification in turn, carefully taking into account the assertions made by the Respondent, but finding that it had failed to provide evidence to back up those assertions where such evidence could have been obtained. Even if it was accepted that the EAT's approach in **Homer** was to be followed (notwithstanding that much of that Judgment had not been upheld on appeal), such that justification might be found to have been established in the appropriate case by reasoned and rational judgment, it was apparent that the ET had found that the

Respondent had failed to demonstrate this in this case. Specifically, it recorded that no analysis had been undertaken as to how many other employees might make similar requests and there was no evidence as to the costs involved. All the Respondent could say was that it had been able to make accommodation for the Claimant and there had been no complaints from other employees regarding this. It was clear from the ET's reasoning, taken as a whole, that a lesser form of the PCP could serve the Respondent's legitimate aim.

36. On ground 3, although accepting the Respondent's note of Mr Trafford's evidence, this was an insufficient basis to conclude there would be industrial action. Even allowing that Mr Southall's evidence might have been intended to relate to industrial unrest in more general terms, at most the ET had been left with mere assertions, even if those assertions had been made by Mr Trafford as well as Mr Southall. That was simply insufficient to undermine the ET's overall conclusion on justification.

Discussion and Conclusions

37. I start by considering the last of the three grounds of appeal as it is helpful to be clear as to the evidence before the ET before turning to its findings and conclusions.

38. As set out in my summary of the Respondent's submissions, it is the Respondent's case that Mr Trafford (the union representative called by the Claimant) acknowledged that there had been "*Chinese whispers*" about the Claimant's case, which people were "*looking at ... carefully*". Although he said that no-one had yet approached the union, in responding to a question whether a complaint or action was likely, Mr Trafford had said "*yes*". The Respondent's note of Mr Trafford's evidence in cross-examination has effectively been agreed by the Claimant. Of itself, as Mr Allen (for the Claimant) observes, it is not conclusive but it

does add some weight to the evidence given by Mr Southall, which the ET rejected as being "*merely an assertion*" (ET, paragraph 121). On that specific finding, I agree with the Respondent: the ET erred by failing to have regard to a relevant part of the evidence on that particular point. It might ultimately have decided that it was insufficient to assist the Respondent but, whilst Mr Trafford might have said he was unaware of any possible industrial *action*, when assessing whether there might be industrial *unrest* - a somewhat broader concept - the ET erred by dismissing Mr Southall's evidence to this effect as "*merely an assertion*" without any apparent acknowledgment of Mr Trafford's further evidence.

39. That said, Mr Allen is correct in his submission that, if it can otherwise be said that the ET reached a permissible view on objective justification, allowing the Respondent's case on this third ground would not undermine the ET's overall conclusion. That, therefore, takes me back to the first and second grounds of appeal, which are really the substantive points taken by the Respondent and which both focus on the question of proportionality: the ET having accepted the Claimant's case on disadvantage and the Respondent's case on legitimate aim, the real issue was whether the PCP was a proportionate means of achieving that legitimate aim.

40. Turning then to the first ground and the question whether the ET applied the correct approach when assessing proportionality, I acknowledge the careful way in which this ET went through the different reasons identified by the Respondent and its forensic examination of each, explaining why it had found that the Respondent had not discharged the burden upon it. I do not underestimate the difficulty of the task that faces an ET when assessing proportionality and fully acknowledge the respect that is to be afforded to the ET's findings on the evidence. In this case, the ET was entitled to be critical of gaps in the Respondent's evidence: it is entirely

proper for an ET to exercise an appropriate degree of scrutiny of an employer's case where that is unsupported by anything more than a statement of managerial belief.

41. Where I am troubled by the ET's reasoning in the present case is, however, at a rather more fundamental level, that is: whether it kept its focus on the justification of the rule that was in issue rather than its particular application to the Claimant. I appreciate Mr Allen's point that if the only concrete evidence is that relating to the particular complainant then it is inevitable that the ET will focus on that material - it can, after all, only work with the evidence it is given - but that is not an entirely fair characterisation of the evidence in this case. In any event, that would still not absolve the ET from the requirement that it test the question of proportionality in terms of the rule or measure itself - the PCP - not merely its application in an individual case. That, as the case law makes clear, requires the ET to scrutinise the employer's systems of working; here, the service being provided by the Respondent and the way it structured its working arrangements for bus drivers on a rota system. The ET's focus in this case was, however, on how the PCP had been applied to the Claimant and the question of accommodation for him. The issue that the ET was required to address was whether the PCP could be justified as a rule in itself.

42. The Respondent did not dispute that an exception might be made for the Claimant as one individual but argued that it could not change the rule to accommodate others who might similarly be placed at a disadvantage; that was why it had the rule. In support of its case in this regard, the Respondent pointed to instances of other employees, either with religious beliefs that would make it difficult for them to work on particular days or with family/caring responsibilities that would also mean that weekend working would be difficult. To the extent that the Respondent also pointed to a more general reluctance amongst its workforce to work at

weekends, seeing that as an antisocial time for a variety of reasons, the Claimant could counter that more general point by observing that it would be open to the Respondent to rely on a system which respected the protected characteristics identified by law and not wider considerations. As for the ET's reasoning, however, although there is some suggestion that it addressed the question of potential impact across the workforce as a whole, the ET not only misstated part of the evidence (see the ground 3 point) but, more worryingly, focused on this issue in terms of the accommodation afforded for the Claimant. Having recognised that "*Any real problems to the Respondent arise not from granting the request [for the Claimant] but from granting many such requests*" (see paragraph 123), the ET then failed to follow that point through. It may have been sceptical of the Respondent's evidence as to the real extent of this as an issue, but it needed to balance the importance of the Respondent's aims against the discriminatory impact of the PCP the Respondent had chosen to meet those aims; a balancing exercise that needed to be carried out in terms of the rule, not merely its application to the Claimant. Undertaking that exercise correctly may or may not have led the ET to reach the same conclusion.

43. It is this failure that undermines the otherwise careful and forensic approach taken by the ET on this aspect of the case. By focusing on the question of the individual application of the rule, the Respondent fairly complains that the ET thereby removed its ability to have a rule or PCP at all, requiring instead that it decide each case on its own facts. Given this error in approach, I am bound to allow the appeal on ground 1.

44. The merit of the Respondent's complaint on ground 2 seems to me to be rather more mixed. Once, however, I have accepted that the ET's focus was on the wrong question that must also mean that its assessment of the question whether the Respondent was entitled to make

A the judgment it did also falls away. That was an assessment where the ET again focused on the impact of the application of the PCP to the Claimant rather than the question whether it was justified as a rule in more general terms.

B 45. For the reasons I have given, I therefore allow this appeal.

Disposal

C 46. Having allowed the parties to address me further on the question of disposal, it is apparent that it is common ground that - given that the assessment required on the question of objective justification is for the ET - this matter must be remitted. The question is whether it should be to the same or a different ET. The Claimant says it should go back to this same ET. D The Respondent says that it should be to a different ET, not least because of the time that has passed and the potential difficulties in recovering the Employment Judge's notes (there had been a delay in producing the ET's Judgment because of some difficulty with the Employment E Judge's computer and possible loss of his notes or, at least, a copy of his draft Judgment), but also because the ET had expressed firm views on the issues to be determined and had recorded aspects of the evidence incorrectly.

F 47. Applying the criteria set out in **Sinclair Roche & Temperley v Heard & Another** [2004] IRLR 763, I consider the most appropriate course here is, to the extent it is possible, for this matter to be returned to the same ET for reconsideration. Other than the issue regarding Mr G Trafford's evidence - on which the parties have reached agreement - there is no suggestion that the ET's record is incorrect. Indeed, the ET has made a number of factual findings relevant to the question of its assessment which have not been disputed. Whilst time has passed, that H presents no greater difficulty for this ET than any other. There would, on the other hand, be potential difficulties for a new ET coming to this matter afresh given that so many of the

existing findings of fact will remain in place. Whilst that might not be an insurmountable difficulty, it seems to me preferable that this matter returns to the same ET if that is reasonably practicable. I accept that the ET reached conclusions adverse to the Respondent but those conclusions were reached applying a test, which as I have indicated, had the wrong focus and there is no reason to doubt this ET's professionalism returning to this matter and approaching the question of proportionality afresh, this time applying the correct test in accordance with the guidance set out in my Judgment. Insofar as it is reasonably practicable, I direct that this matter return for reconsideration by the same ET on the question of proportionality raised by the claim of indirect discrimination. As for whether the ET will need to hear further evidence or rehear aspects of the evidence, that is a matter of case management for the ET.