Introduction

To advise Ken, certain legal issues should be clarified including the potential relevance of Jess’s employment status, discrimination of part-time workers and indirect sex discrimination.

This will require identification and discussion of legislation that applies. These include the Sex Discrimination Act 1975, the Employment Rights Act 1996 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the 2000 Regulations). An examination of the relevant case law and above legislation will illustrate the strength of Jess’s potential claims of discrimination and constructive dismissal, and Ken’s legal position.

Discrimination of Part-Time Workers

The Part-time Work Directive 97/81/EC regarding the removal of less favourable treatment with respect to part-time workers was implemented in the UK legislation through the provisions of the 2000 Regulations.

If Jess is to make a claim of less favourable treatment to part-time workers under the 2000 Regulations, she must find a comparable full-time worker (reg 2(4)). Thus, a comparison must be made with someone on a similar type of contract and engaged in similar work for the same employer, with regards to a focus on similarities in the work rather than the differences (Matthews v Kent & Medway Towns Fire Authority).

Ken stated that the job position requires a full-timer and not two part-timers, but it is clearly held to be illegal to discriminate against part-time workers in this context. Thus for Ken to be able to successfully defend any claim that Jess may have under discrimination he would have to establish that his actions were objectively justifiable (reg 5), provided he can show that a full-timer is required as a means of achieving a business aim (Hardys & Hanson plc v Lax).

Sex Discrimination

It has been established that the majority of part-time workers are women (Connolly, 2004:p56) and therefore any less favourable treatment which occurs against part-time workers is inextricably linked with sex discrimination (Selwyn, 2006: p54).

If Ken cannot objectively justify the condition he applied to be a proportionate means of achieving a legitimate aim, Jess could claim sex discrimination under the provisions of the SDA. Section 1 of the SDA distinguishes between direct and indirect discrimination whereby direct discrimination occurs in the event that a woman is treated less favourably than a man on the ground of her sex (s.1(1)(a)); while indirect discrimination occurs when a provision is applied to a woman which puts her at a particular disadvantage when compared to a man (s.1(2)(b)). Therefore, it could be argued that Jess has been subjected to indirect discrimination since she has been put at a disadvantage when compared to her full-time colleagues, who are presumably men (Tyne & Wear Passenger Transport Authority (t/a Nexus) v Best).

To assess whether sex discrimination has taken place, a comparator must be used (Section 5(3) of the SDA). In this case the comparator is a man whose circumstances are the same or not materially different than those of the claimant. If the majority of full-time workers at the organisation are male, Jess could claim indirect sex discrimination as Ken is infringing on Jess’s rights to enjoy the same benefits as her male comparator i.e. access to promotion.

This fact is clearly outlined in Section 6(2)(a) of the SDA which echoes the principles of the Equal Treatment Directive 76/207/EEC whereby it is unlawful for an employer to discriminate against a woman “in the way he affords her access to opportunities for promotion..., or by refusing or deliberately omitting to afford her access to them”.

Ken could use the defence of justification where he would have to show that the provision he
applied to Jess were objectively justifiable irrespective of her sex such as was in the case of Bilka-Kaufhaus v Weber von Hartz. It could be argued that the promotion was a core position and therefore required a full-time employee. Factors including costs and resources available could also be considered. Furthermore, if the person who was eventually chosen for the position is a female full-time worker, then Jess’s potential claims of sex discrimination could be eliminated.

**Constructive Dismissal**

11 Under the provisions of the Employment Rights Act 1996 (ERA), section 94, an employee has a right not to be unfairly dismissed. Jess could claim constructive dismissal under section 95(1)(c) “by reason of the employer's conduct”.

12 However, it must be noted that in order for Jess to be able to claim under the ERA, she has to be an employee and not just a worker. The courts could use the employment tests such as the multiple factors test (Ready Mixed Concrete (South East) v Minister of Pensions & National Insurance) to determine this.

13 In the case study it does imply that she has a contract of employment and therefore more likely to be an employee. If Jess is an employee she has a right to claim unfair dismissal through the ERA. However, if she is a worker she can only claim under the 2000 Regulations and SDA.

**Breach of Implied Terms of Contract**

14 There is a possibility that Jess could claim constructive dismissal due to the employer’s breach of the implied duty of trust and confidence. – but only if she is an employee with the requisite service continuity. In the case of Transco Plc (formerly BG plc) v O’Brien, the tribunal held that there had been a breach of the implied term of trust and confidence as the employer had failed to offer the same terms to an employee as offered to the rest of the workforce. Similarly, it could be argued that by discriminating against Jess by not allowing a part-timer the opportunity for promotion, Ken is in fact in breach of this implied term.

15 In the case that Jess is an employee, the abovementioned claims can automatically give rise to a claim of unfair dismissal under section 104 whereby her employer has infringed her statutory rights. Rights asserted under section 104 and under the 2000 Regulations, need not require a 1 year qualifying period of employment (s.108).

**Remedies**

16 If Jess’s claims are successful, under the 2000 Regulations reg 8(7)(b) and section 65 of the SDA, the tribunal will order the employer to pay compensation to the complainant. The amount decided by the tribunal will depend on the extent of the detriment she has suffered including any pecuniary loss or injury to feelings. Under section 112 of the ERA, Jess may receive compensation if her claim of unfair dismissal is successful and an offer of reinstatement if she wishes. It must be noted that if more than one claim is successful, the courts will decide on an overriding amount of compensation.

**Conclusion**

17 As it has been demonstrated throughout it appears that Jess does have a valid claim against the company which could be successful and therefore the company would have to pay compensation. It would be in the best interest of the company to negotiate a settlement with Jess before any proceedings are begun. Furthermore, the company should also adopt the proposed recommendations suggested in order to avoid such situations in the future.

**Recommendations**
To reduce the likelihood of legal action against the company in the future, they should re-evaluate their anti-discrimination policies. The UK and EU legislation should be made clear to managers and employers through the implementation of anti-discriminatory and equal opportunities practice (CIPD, 2006).

REFERENCES

List of Statutes
Employment Rights Act 1996
Equal Treatment Directive 76/207/EEC
Part-time Work Directive 97/81/EC
Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000
Sex Discrimination Act 1975

List of Cases
Hardys & Hanson plc v Lax [2005] IRLR 726
Matthews v Kent & Medway Towns Fire Authority [2006] 2 All ER 171
Ready Mixed Concrete (South East) v Minister of Pensions & National Insurance [1968] All ER 433
Transco Plc (formerly BG plc) v O’Brien [2002] IRLR 444
Tyne & Wear Passenger Transport Authority (t/a Nexus) v Best [2007] ICR 523

Other References
CIPD (2006)

http://www.cipd.co.uk/EmploymentLaw/FAQ/_Discrimination/_FAQ/QA_11.htm,
Discrimination, Date accessed 19/10/07

BIBLIOGRAPHY
Electronic Sources


