EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Ali**	
Respondent:	**Capita Customer Management Limited**	
Heard at:	**Leeds**	**On: 9, 10, 11, 12 and 13 January 2017**
	Deliberations:	**24 January 2017**
Before:	**Employment Judge Rogerson**	
Members:	**Mr R Webb**	
	Mr J Rhodes	
Representation		
Claimant:	Mrs N Khan (friend)	
Respondent:	Mr P Wilson, Counsel	

RESERVED JUDGMENT

1. The Claimant's complaint of direct sex discrimination succeeds.
2. The Claimant's complaint of victimisation in relation to acts of victimisation by the Respondent on 14 July 2016, 27 July 2016, 28 July 2016 and 21 December 2016, succeeds. The Claimant's complaint in relation to an alleged act of victimisation on 16 August 2016 fails, and is dismissed.
3. A remedy hearing is listed for 1 day on 4 April 2017 to determine remedy in relation to the successful complaints. The Claimant is to provide a schedule of loss to the Respondent and to the Tribunal by no later than 14 days prior to the remedy hearing. The Respondent is to provide a counter-schedule to the Claimant and Tribunal by no later than 7 days prior to the hearing.

REASONS

The issues

1. By a claim form presented on 22 June 2016, the Claimant made complaints of direct and indirect sex discrimination and victimisation.
2. Dealing with the sex discrimination complaints first. The Claimant complains that as a male employee he was entitled to only two weeks paid leave following the birth of his child in April 2016, whereas a female Telefonica transferred employee, would be entitled to 14 weeks pay following the birth of her child. The Claimant accepted there was a material difference in circumstances/justified special treatment of a hypothetical female employee for the first two weeks of that leave because that female, the mother, was required to take 'compulsory maternity leave' which is related to her biological/physiological condition and recovery following childbirth. For that 2

week period the comparator was in a position unique to women who have given birth. However in that 2 week period, he was also paid his full pay for taking parental leave, so was not less favourably treated in relation to his pay/leave. His complaint is that in the following 12 weeks, when he wanted to take leave with pay, in order to care for his baby daughter, (because his wife was suffering with postnatal depression) he was deterred from taking the leave. This was because he was told that as the father he would only receive statutory pay not full pay for that leave. He argued that after the 2 weeks compulsory leave either parent (mother/father) could care for their baby, depending on the choices made by the parents and their particular circumstances. The assumption made that as a man (the father) caring for his baby, he was not entitled to the same pay as a woman (the mother) performing that role, took away the choice he and his wife wanted to make as parents for their baby. It was directly discriminatory on the grounds of sex, and was not a valid assumption to make in 2016.

3. The Respondent advanced 3 arguments against this. The first was that the comparison made by the Claimant was not a valid comparison because the Claimant had not given birth. The law entitles only female employees the right to maternity leave and the ancillary right to maternity pay for this reason because of the special considerations which stem from that biological fact and which can only apply to women who are pregnant or who have recently given birth. The second is that section 13(6) (b) of the Equality Act 2010 applies and the Claimant cannot take any account of the special treatment afforded to a women in connection with pregnancy/childbirth. In relation to pay, 14 weeks enhanced maternity pay was reasonably necessary to ensure that women are not disadvantaged by giving birth and taking maternity leave (**Eversheds Legal Services Ltd-v- De Belin 2011IRLR448)**. It is confined to the minimum period of maternity leave provided for under the **Pregnant Workers Directive 92/85/EEC** and therefore no account should be taken of this benefit. The 3rd argument was that although the Claimant was 'deterred' from applying he did not apply and hence cannot say that he was in fact treated less favourably than his hypothetical comparator because he did not take the leave (**Baldwin –v- Brighton &Hove City Council (2007)IRLR 232.**

Relevant Policies

4. The 'entitlement' to pay for maternity and parental leave was not a contractual term but was contained in separate Telefonica policies that transferred with the transferring employees.

   Female Telefonica transferring employees were entitled to maternity pay in accordance with the Telefonica maternity policy dated December 2011. The policy provides three options for maternity pay of up to 39 weeks. If an employee had 26 weeks service she was entitled to receive the most favourable of 3 options from:

   1. *"14 weeks company maternity pay followed by 25 weeks lower rate statutory maternity pay.*
   2. *6 weeks higher rate statutory maternity pay followed by eight weeks company maternity weeks and then 25 weeks lower rate statutory maternity pay.*
   3. *6 weeks higher rate statutory maternity pay followed by 33 weeks lower rate statutory maternity pay".*

Clearly the most favourable option was 14 weeks basic pay followed by 25 weeks statutory maternity pay for the balance of the leave.

4.1. The Claimant as a father and male employee was entitled to paternity leave and pay under the Telefonica policy. That policy also applied to same sex couples providing you were the partner of the mother and would "*share responsibilities for bringing up your new baby".* Page 47 of the policy deals with paternity leave and provides up to 2 weeks paid Ordinary Paternity Leave (OPL) and up to a further 26 weeks Additional Paternity Leave (APL), which 'may or may not be paid'.

"O*rdinary Paternity Leave (OPL) is paid time out to enable you to spend* ***time with your newly born baby (or newly adopted child)****. Ordinary paternity leave is up to two weeks leave. The earliest you can choose to start your paternity leave is immediately your baby is born or within eight weeks after the birth. The payment provisions for the leave are that you will be paid as usual during your ordinary paternity leave"*.

The Claimant was therefore entitled to, and was paid the benefit of his full pay for two weeks after the birth of his daughter to spend time with his "newly born baby". A parent adopting a child would also get that leave and pay.

4.2. For parents of either sex adopting a child the statutory provisions applied and provided for Statutory Adoption Leave ('SAL') of up to 52 weeks and an entitlement to 39 weeks of Statutory Adoption Pay (SAP). SAL comprises of 26 weeks Ordinary Adoption Leave (OAL) which can start from the date of the child's placement or from a fixed date up to 14 days before the expected date of placement, followed immediately by 26 weeks of Additional Adoption Leave (AAL).

4.3. SAL may be taken by either of the adopting parents where a couple adopts jointly. The parents can **choose** which partner (male or female) will take SAL to care for the child when neither parent has given birth. The parent who will be taking SAL is known as the 'Primary Adopter' and the other parent, the 'Secondary Adopter'. SAP begins when OAL starts and will continue for 39 weeks. Employees who qualify will receive the higher rate SAP which is 90% of average weekly pay for the first 6 weeks of adoption then the lower rate SAP for the remaining 33 weeks. The remaining 13 weeks SAL is unpaid. This entitlement to pay mirrors the statutory maternity pay provisions but unlike maternity there is no 2 week compulsory maternity leave period reserved for the mother. In adoptions the leave can start when child has been placed with the adoptive parents.

5. The background facts to the sex discrimination complaint were not disputed and are as follows:-

5.1. The Claimant is a current employee of the Respondent working now as a Business Customer Adviser (BCA) in the BE Team based in Arlington Leeds.

5.2. In July 2013, his employment had transferred to the Respondent as part of a TUPE transfer from Telefonica and he had accrued 12 years service by the time of these complaints.

5.3. In August 2015, the Claimant was asked to move to the Business Retentions Team (BRT) from the BE team because of his good past

performance and experience. This role gave the Claimant greater autonomy, authority and entitled him to participate in a better bonus scheme.

5.4. The Claimant's daughter was born on 5 February 2016. She was born 2 weeks prematurely but the Claimant was able to take his 2 weeks paternity leave immediately following her birth (from 8-19 February 2016) for which he was paid.

5.5. During that paternity leave, he informed his manager, team leader Lora Tummons that his wife had been diagnosed with post natal depression.

5.6. Fortunately, the Claimant had booked annual leave which was to commence on the due date of his baby and he was able to take a further week's paid leave to care for his wife and daughter.

5.7. On 7 March 2016, he returned to work. He was concerned about the health and well being of his wife and baby and wanted to take time off to care for his daughter. This was in circumstances where his wife was suffering with post natal depression and had been medically advised to return to work to assist her recovery. The Claimant asked Lora Tummons about this and she sought advice from the Senior Management Team.

5.8. In her email seeking guidance, dated 7 March 2016, Laura Tummons recognises the particular circumstances in which the request was made. She states "*I have an adviser who is looking into* ***taking his partners maternity and her going back to work".*** Her line manager, the Operations Manager, Helen Marriot had not come across this situation before and referred Ms Tummons to Debbie Oddie from HR.

5.9. On 9 March 2016, a meeting took place between the Claimant, Debbie Oddie and Laura Tummons at which the Claimant was told he was eligible for shared parental leave (SPL) under the Capita policy but would only be entitled to statutory pay.

5.10. The Claimant discussed this with his female Telefonica transferred colleagues at work and they confirmed that they were entitled to full pay for 14 weeks maternity leave. He believed he should get the same entitlement in his particular circumstances under the Telefonica policy.

5.11. The Claimant raised his concerns with his union (CWU). His union representative, Steve Faber Hamilton then communicated with Debbie Oddie and set out the complaint of sex discrimination the Claimant was making:

"*Madasar informs me that following the birth of his first child by his wife in February 2016, she is suffering from post natal depression. As a result of this and in order to help his wife overcome her illness, she has made the decision that she wishes to return to her work to help return to some normality. This would result in her handing over all her remaining maternity leave and pay entitlement to her husband who is allowed to do so under the new shared parental leave legislation. However in doing so Madasar has been advised by the business (Capita) that he would only benefit in being paid the Statutory Shared Parental Leave amount which would put him at a huge financial detriment. Clearly because of this he is not happy.*

Madasar has stated that he is quite prepared to bring a direct and or indirect sex discrimination tribunal claim against Capita which could result in an award for injury to feelings and financial losses he has suffered as a result of such discriminatory treatment. Given that the government has decided upon levelling the playing field by introducing the Shared Parental Leave Regime ***allowing both mothers and fathers to take leave without any distinction, a father taking shared parental leave who is not able to benefit from the same maternity pay his employer offers to mothers absent during the same period would effectively be the subject of discriminatory behaviour****.*

In order to prevent litigation, Madasar expects to receive confirmation within a reasonable timeframe that ***he will receive the same maternity entitlements that our female employees who have also TUPE'd across from Telefonica to Capita receive."***

5.12. Ms Oddie in her witness statement states that in introducing SPL **at a statutory rate for all staff**, the Respondent **was putting its staff on a level playing field** by **ensuring men and women who took leave were treated equally**.

5.13. However under the Telefonica policy, men and women who took leave to care for their babies were not on a level playing field and were not treated equally in relation to pay. At paragraph 14 she states that "*it was* ***not considered necessary or reasonable for variances to rate of pay to be applied as suggested by the Claimant within the Telefonica contract*** *and, if that had been done, it would have been necessary to apply across all staff on that contract whether they were former Telefonica or not,* ***in order to uphold this aim of treating staff consistently and fairly especially where they are working together".*** This she states is an example of how the Respondent has recognised and has sought to achieve the aim of "treating groups of staff working together, as fairly and consistently as far as practicable".

5.14. The Claimant and his union were never provided with this explanation at the time. If they had been they might have argued that it was not a case where they were seeking consistency across the whole workforce but were seeking consistency of treatment in the way the Telefonica policy was being applied to the Claimant in his particular circumstances.

5.15. As a result of Ms Oddie's response to the Union, the Claimant raised a grievance by email dated 5th April 2016 alleging sex discrimination. In his grievance he states:

"I find it unfair that the company only pays statutory pay for shared parental leave and ***gives enhanced pay to the female member of staff when she is on maternity leave. I find this to be discrimination against me as I am a male and don't get the same treatment as a female".***

5.16. It was accepted that the grievance is a 'protected act' by virtue of section 27(2) of the Equality Act 2010 for the purposes of the Claimant's victimisation complaint.

5.17. What follows is an unnecessarily long and drawn out grievance process which results in a very short outcome letter which fails to address the complaint made of sex discrimination. By letter dated 23 May 2016, Ms Stubbs (Operation Manager) responds by reciting the grievance, setting

out her investigation and summarising her findings. Her investigation comprised 2 meetings with the Claimant on 15 April 2016 and 10 May 2016, a review of the manager's guide/working/leave/leave-family related/shared parental leave and '*consulting with HR as this is the first known grievance in relation to this subject*'.

5.18. Ms Stubbs finding was that *"Capita do not have a legal obligation to **pay the paternal father at an enhanced rate for parental leave'***. Neither Ms Stubbs nor Ms Oddie (the HR adviser consulted by Ms Stubbs) could explain why the actual complaint made of alleged sex discrimination was not addressed in the outcome letter. We did not see the manager's guide referred to. It was agreed that there had been no consideration of the Telefonica policies the Claimant had referred to, or to the Respondent's Equal Opportunities Policy to explain to the Claimant why his complaint of unequal treatment on the grounds of sex was not upheld.

5.19. At this hearing Ms Oddie produced some statistical information about the numbers of employees who transferred from Telefonica in July 2013. There were 1,119 females and 1,189 males (a very small difference between the sexes of 70). It was clear there was no problem in this case in recruiting and retaining female employees. Of those employees we were told there had been no applications for parental or shared parental leave.

Applicable Law.

Direct Sex Discrimination

5.20. Part 5 (Work) Section 39(2) of the Equality Act 2010 provides that:

(2) An employer (A) must not discriminate against an employee of A's (B)

*(b) in the way A affords access, or by not affording B access, to opportunities for promotion, transfer or training or **for receiving any other benefit**, facility, or service.*

(d) by subjecting B to any other detriment.

Section 13 (Direct Discrimination) provides that:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(6) If the protected characteristic is sex-

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

Section 23 Comparison by reference to circumstances provides that:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

5.21 We were also referred to the guidance given by the Employment Appeal Tribunal in Eversheds Legal Services Ltd –v- De Belin 2011 IRLR448 where the limits of the predecessor provision to section 13(6)(b) of the Equality Act 2010, (section 2(2) of the Sex Discrimination Act 1975) was

considered. In that case Mr De Belin and Ms Reinholz were assessed against various performance criteria in a redundancy process, one of which was 'lock up' which measured the length of time between undertaking a piece of work and receipt of payment from the client. Ms Reinholz was absent on maternity leave at the time of measurement and was awarded the notional maximum score, whereas Mr De Belin received his actual score. This was the **crucial distinction between them** and led to Mr De Belin's selection for redundancy. The EAT upheld the Tribunal's conclusion that the Claimant had been subjected to unlawful direct discrimination notwithstanding that the woman's treatment had been afforded to her in connection with leave consequent on pregnancy and childbirth.

5.22 Paragraph 13 of the judgement of the President, Underhill J as he then was states:

"*We see no conceptual objection to a man bringing a sex discrimination claim by reference to the more favourable treatment of a colleague on account of her being pregnant or on maternity leave. Those are gender specific criteria and discrimination by reference to them is, other things being equal, sex discrimination".*

5.23 Paragraph 29 states: "*the obligation in question* ***cannot extend to favouring pregnant employees or those on maternity leave beyond what is reasonably necessary to compensate them for the disadvantages occasioned by their condition….****To the extent that a benefit extended to a woman who is pregnant or on maternity leave is disproportionate, we see no reason why a colleague who is correspondingly disadvantaged should not be entitled to claim for sex discrimination.*

5.24 In closing submissions, Mr Wilson also relies on paragraph 33 and invites the Tribunal to draw a 'distinct bright line' in this case so that no account at all is taken of the full 14 weeks pay, paid to mothers by the Respondent:

"No doubt an interpretation of s2(2) which protected employers from liability in respect of any advantageous treatment afforded to women who are pregnant or on maternity leave, ***however excessive or unfair to their colleagues such treatment might be, would provide a more distinct 'bright line'.*** *But the price would be too high. The well tried and familiar proportionality principle seems to us to strike the right balance. It is a flexible principle, which in an appropriate case* ***will allow a wide margin of discretion to employers as to the appropriate special treatment to be accorded to pregnant employees and those on maternity leave, particularly where such advantages are not directly at the expense of their colleagues and do not cause them serious prejudice.*** *Captious claims by male colleagues who resent proper protection given to pregnant women and mothers can expect short shrift. But the present case is not of that kind: the disproportionate advantage to Ms Reinholz meant a direct and unfair corresponding disadvantage to the claimant".*

5.25 There is no suggestion made and we did not find that the Claimant was pursuing a 'captious claim'. This was a genuine complaint by a father wanting equal treatment for the purpose of taking time off to care for his

baby. In the Eversheds case the 'margin of discretion' applied to the particular facts of that case. It applied in relation to how far Ms Reinholz should be 'advantaged' in a redundancy scoring exercise, due to the fact that exercise took place whilst Ms Reinholz was on maternity leave. The factual matrix was very different to the Claimant's case where he contends there are no crucial distinctions between him and his hypothetical comparator after the 2 week compulsory leave period.

5.26 The Claimant's contends that in the context of 'pregnancy and childbirth' any special treatment/distinction made by the Respondent between him and his comparator should be limited to that 2 week period after the birth, because this time was a health and safety measure associated specifically to childbirth. In his case for the 12 week period he relies upon for the purposes of the comparison there was no need to apply any 'margin of discretion'.

5.27 The Respondent contends that the special treatment extends for the whole of the 14 week period and Mr Wilson refers us to the Pregnant Worker's Directive 92/86/EEC and specifically Article 8 which deals with maternity leave and provides that:

1. *"Member states shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice;*
2. *The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at leave two weeks allocated before and/or after confinement in accordance with national legislation and/or practice"*.

5.28 In relation to pay, Mr Wilson refers to the preamble to the Directive which provides that:

> *"whereas moreover provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and/or entitlement to an* ***adequate allowance****"*.

This is the reason he says that employers are required to pay statutory maternity pay to support pregnant employees and employees who have recently given birth. He accepts in his submissions that the maternity leave and maternity pay are **also** provided in order to "**facilitate the care of a child in its first year of life**" and that need or consideration is not exclusive to women who have recently given birth. That does not explain why the 'adequate allowance' of full pay paid by the Respondent for a further 12 weeks was refused to the Claimant when he wanted to perform that same role.

5.29 The purpose of the Equal Treatment Directive 2006/54/EC is to ensure "the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. In the preamble at paragraph 23 the directive it is made 'without prejudice' to the Pregnant Workers Directive. It is important to remember that the stated purpose of the Pregnant Workers Directive is "to implement measures to encourage **improvements in the heath and safety at work of pregnant workers and workers who have recently given birth or who are**

breastfeeding". In the definitions section 'worker who has recently given birth' shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice.

5.30 As to the national legislation it is also important to consider this claim in the context of parental roles and choices as they are in 2016. Either parent can perform the role of caring for their baby in its first year depending on the circumstances and choices made by the parents. Inevitably more mothers will take primary responsibility from birth and immediately afterwards but that does not necessarily follow. There may be circumstances where different choices are made to suit the parents and their particular circumstances, like the choice the Claimant wanted to make because of his wife's postnatal depression.

5.31 The government introduced the right for parents whose babies were expected after 5 April 2015 to take shared parental leave (SPL) under the Shared Parental Leave Regulations 2014. Unlike its predecessor 'APL', 'SPL' and pay allows parents to share the leave with only a 2 week period of leave post birth, kept exclusively for the mother's maternity leave, the compulsory maternity leave period. The mother must take the 2 weeks after the birth by virtue of section 72(1) Employment Rights Act 1996 and regulation 8 of the Maternity and Parental Leave Regulations 1999(compulsory maternity leave). This period is to protect the mother's heath and safety arising from the biological condition of pregnancy and mothers cannot waive their compulsory maternity leave period for the purposes of SPL. After this 2 week period there is no restriction and no 'exclusivity' of leave for the mother only. This was a deliberate change in policy by the Government to encourage more flexibility and for fathers to take a greater role and be able to move away from outdated and stereotypical assumptions about which parent should care for the baby in the first year.

5.32 Similar rights apply to employees who adopt (for children who are placed for adoption on or after 5 April 2015) and to parents of a child born through a surrogacy arrangement if they have a parental order (or have applied or intent to apply for such an order) and are eligible for adoption leave. For these parents there is no period of 2 weeks compulsory maternity leave so the leave can start immediately upon adoption/surrogacy. This confirms that the only distinction made is for the 2 weeks leave immediately after the birth in order to assist mothers to recover from the biological/physiological condition of childbirth.

5.33 As to pay, the Department for Business Innovation and Skills published an Employers Technical Guide to Shared Parental Leave and Pay ('BIS guidance'). The guidance at paragraph 77 refers to 'contractual rights to shared parental leave and pay' which states "an employer is free to top up the statutory shared parental pay by paying some or all of the shared parental pay at a higher rate determined by the employment contract, which may or may not be the same as the employer offers mothers on maternity leave". It is therefore a matter for the employer to decide how any differences in pay between men and women are treated and whether those differences should be maintained.

5.34 ACAS published "Shared Parental Leave: a Good Practice Guide for Employers and Employees (ACAS guide). That guide indentifies as a key consideration (page 32) that "*in addition to the SPL regulations, employers*

should ensure that they do not discriminate (inadvertently or otherwise) against employees in any way".

Conclusions on Sex Discrimination Complaint.

5.35 Dealing with the first argument made by Mr Wilson on behalf of the Respondent. He contends that Mr Ali cannot compare himself to a female transferred Telefonica employee entitled to the benefit of 14 weeks maternity pay, because unlike that hypothetical comparator, Mr Ali has not given birth. He cannot do so because he is a man. Only women can take maternity leave because only women can give birth.

5.36 Mr Ali is not comparing himself to a woman who has given birth and accepts that for the 2 weeks immediately after the birth he cannot and does not do so, because that time is specifically associated with recovery after childbirth, a condition unique to women. He does not suffer any less favourable treatment in that period because he also gets full pay. In the subsequent 12 week period he is denied the benefit of full pay, which would have been given to a hypothetical female transferred Telefonica employee, caring for her child.

5.37 We agreed with Mr Ali that he could compare his treatment with that hypothetical comparator (female Telefonica transferred employee who had a baby in February 2016, taking leave to care for her child after the 2 week compulsory leave period) even though he had not given birth.

5.38 Mr Ali could claim sex discrimination by reference to the more favourable treatment that would have been given to that female colleague. It was accepted that he was denied that benefit and was deterred from taking the leave and was less favourably treated as a man. The reason why Mr Ali was treated less favourably was his sex.

5.39 The next question was whether any account should be taken of the special treatment of 12 weeks full pay afforded to a woman after the 2 weeks compulsory maternity leave. In adoption situations there is no 2 week period and either parent of either sex can take the role of 'primary adopter' and care for and bond with a child immediately, even though neither parent had given birth to that child. For the Claimant in the 2 week compulsory maternity leave period after the birth of his daughter he was already bonding and caring for his daughter as well as supporting his wife. For the remaining 12 weeks the question was whether the hypothetical female employee was entitled to full pay, as special treatment in connection with pregnancy or childbirth or whether no account of that special treatment should be taken.

5.40 Mr Wilson accepts that the "maternity leave and maternity pay" are also provided in order to facilitate the care of a child and that need or consideration is not exclusive to women who have recently given birth. He submits 14 weeks pay is the right period of time for that special treatment to be kept exclusively for the mother.

5.41 It was not clear why any exclusivity should apply beyond the 2 weeks after the birth. In 2016, men are being encouraged to play a greater role in caring for their babies. Whether that happens in practice is a matter of choice for the parents depending on their personal circumstances but the choice made should be free of generalised assumptions that the mother is

always best placed to undertake that role and should get the full pay because of that assumed exclusivity.

5.42 In these particular circumstances the Claimant as the father was best placed to perform that role given his wife's post natal depression. The Respondent knew those were the circumstances in which he was seeking to take the leave in 2016. He was asking for the leave to perform the same role his female comparator would have performed with full pay. The medical advice was for his wife (the mother) to return to work for her well being and for the Claimant (the father) to perform the role of caring for the child. He could and wanted to take that role on 2 weeks after the birth but was deterred because of the pay. The caring role he wanted to perform was not a role exclusive to the mother. It was not special treatment in connection with pregnancy and child-birth it was about special treatment for caring for a newborn baby. This was not about denying full pay to a women, it was about equality of treatment in relation to pay for the Claimant to access the same benefits for performing the same role.

5.43 The Respondent never reviewed the Telefonica policy when Mr Ali was complaining of unequal treatment to consider whether it was applied to him in a discriminatory way. By considering any complaint on a case by case basis they could have ensured that Mr Ali was treated consistently and fairly and in a non discriminatory manner.

5.44 The 3rd argument Mr Wilson makes is that the Claimant was deterred from applying and did not apply and hence cannot say that he was in fact treated less favourably than his hypothetical comparator would have been treated (**Baldwin –v- Brighton &Hove City Council (2007)IRLR 232.** In Baldwin the alleged less favourable treatment was considered in an agency context and was not supported by the findings of fact. Section 39(2)(b) of the Equality Act identifies the discriminatory treatment the Claimant relies upon which is access to the benefit of full pay under the applicable policies. The fact that he did not apply for the leave but was deterred from so doing will be relevant to remedy but does not prevent liability for that discriminatory treatment.

5.45 The Claimant also makes a complaint of indirect discrimination relying on the Telefonica maternity policy. We agree with Mr Wilson's submission that by definition the PCP relied upon (Telefonica maternity policy) is not gender neutral. It is gender specific which is a complaint of direct discrimination not indirect discrimination.

Victimisation Complaint

6. Turning then to the victimisation complaint the relevant legal provision is section 27 of the Equality Act 2010 which provides that "A person A victimises another person B, if A subjects B to a detriment because B does a protected act. The two accepted protected acts were firstly raising his grievance on 5 April 2016 and secondly bringing these Tribunal proceedings on 22 June 2016.

6.1 The Claimant relies on five alleged detriments. There are 3 alleged acts of victimisation by Laura Tummons that on 14 July 2016 he was given an ultimatum that if he did not return to work on the expiry of his sick note he would not be able to return to his BRT role, that on the 27 July he was removed from that role, and that on the 28 July 2016 he was told this was due to his performance which was a false reason.

He also alleges 1 detriment/act of victimisation by Vicky Stubbs on 16 August 2016 in that he was coerced into signing a document about not discussing his tribunal case.

A further alleged detriment was added at this hearing (based on an application made prior to this hearing) relating to an incident in December 2016, when he alleges Sarah Shillito (his line manager) victimised him by threatening to take disciplinary action against him in relation to his Dependents Leave Absences. He describes this alleged detriment as the Respondent "using sneaky underhand methods to secure his signature on documents to facilitate his exit from the business".

6.2 In deciding the complaint of victimisation the EHRC Employment Code at paragraphs 9.8 and 9.9 contain a useful summary of treatment that may amount to a detriment: generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage'. The Claimant must show he was subjected to the detriment because he did a protected act. Victimisation claims are subject to the burden of proof provisions at section 136 of the Equality Act 2010. Specifically Sub-section (2) which provides that "*if there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

6.3 The findings of fact we made were based on the evidence we saw and heard are as follows:

6.4 The Claimant was absent from work for work related stress from 22 April 2016 until 25 July 2016 when his sick note expired. The reason for the absence was 'stress related' problems which he said arise from the grievance he had raised alleging sex discrimination. He specifically discusses the grievance and his treatment at work during his welfare meetings with his line manager, Laura Tummons.

6.5 At the meeting on 8 June 2016, Ms Tummons raised the possibility of the Claimant returning to his BE role from the BRT role upon his return work, if his absence was any longer than his current sick note. He was also informed that Helen Marriott was the new Operations Manager for BRT.

6.6 As a consequence of this the Claimant sent an email dated 10 June to Laura Tummons stating:

"*I have had time to reflect over the welfare meeting that took place on 8 June. The point you made that I may be removed from my current position in BRT is unfair due to the fact it is work that has caused me the stress".*

6.7 Laura Tummons sought advice from Debbie Oddie and was asked a series of questions by Debbie Oddie to explain her rationale for considering moving the Claimant back to BE from BRT. We did not see the email from Debbie Oddie to the Claimant setting out those questions but saw the response from Laura Tummons to Debbie Oddie dated 16 June.

6.8 We found it odd that Debbie Oddie was involved at this stage in examining Ms Tummons decision making process. Ms Oddie said this was because she was aware that Mr Ali had '*concerns about his treatment in the*

workplace' and as a HR operator she wanted to satisfy herself and ensure that he was being "*treated consistently and fairly*".

6.9 In the information supplied, Ms Tummons made it clear to Ms Oddie that the reason was the Claimant's sickness absence and had nothing to do with his performance. That reason was confirmed in the email Ms Tummons sent to the Claimant on 20 June 2016, which states:

"*from the details below and also what we discussed at the meeting on 8 June I understand you enjoy your current seconded role in BRT and you* ***do achieve targets when you are in work****, however* ***due to you not being at work*** *this is having a big impact on the monthly and quarterly targets of the whole team….. We have had the same discussions with all advisers that are on long term sick as we cannot sustain the level of absence and still achieve all targets……****when you are absent from work,*** *your targets do not get removed and remain within the targets that we need to achieve. This means that the rest of the team have added pressure as they are having to achieve their own targets and cover extra sales for the advisers that are absent from the business*".

6.10 The Claimant did not return to work on the expiry of his fit note on 24 June 2016, and submitted a further fit note on 24 June covering him for the period 24 June 2016 to 24 July 2016. The fit note again records the reason as 'stress related problem'.

6.11 On 28 June 2016, the Respondent made a referral to Occupational Health in relation to the Claimant's continued absence from work. That report was received by the Respondent on 13 July 2016. In the report it was anticipated that the Claimant would return to work within two to three weeks of the expiry of his sick note after 25 July 2016 (by mid August 2016). That report was considered at the welfare meeting on 14 July 2016.

6.12 The Claimant's account was that at that meeting on 14 July 2016, Laura Tummons gave him an ultimatum that if he did not return to work on 25 July 2016, when his sick note expired, he would not retain his role in BRT he would be demoted to a Customer Adviser Role in BE or they could release him from his job altogether pending an 'options' meeting. Although the Claimant and Occupational Heath anticipated a few more weeks of absence, he felt pressurised into returning earlier to keep his BRT role which caused further stress and upset

6.13 Laura Tummons does not recall discussing this at the meeting stating that "*if we had it would have been reflected in the notes. I would not have put any pressure on him to return when he was not ready to do so. I did not threaten this as now appears to have been alleged. It was not in my authority to decide whether he moved or not anyway".*

6.14 The meeting notes record a discussion about the Claimant's future which were consistent with the Claimant's account: *"discussed again with Madi that* ***options meeting may be next step****.* ***Should he not return to work after this sick note expires (24/7/16)*** *Madi is fully aware of this process due to length of time being off. Next step option meetings if does not return*". It was agreed by Ms Tummons that the options meeting could have resulted in the Claimant's dismissal or a move to another department including a return to the BE team which was a role with less bonus prospects.

6.15 The Claimant is given the very clear message that if he returns to work it will be to BRT role and he is even told where the team were moving to: *"we are moving seating areas so **should** you come back on 25 July we will be located elsewhere*".

6.16 He recalls that at the end of the meeting Laura Tummons walked him out of the building and told him she had managed to keep his role in BRT as long as he came back on 25 July 2016 and she gave him a hug. Ms Tummons could not recall making the comment.

6.17 We preferred the Claimant's evidence which was clear detailed and consistent with the contemporaneous documents. Ms Tummons was inconsistent unclear and could not recall the conversation. Laura Tummons knew about both protected acts (grievance and the claim).She gave the Claimant an ultimatum that if he did not return to work on the 25 July 2016, he would not return to the BRT role. That was the reason why he returned earlier than he expected. He was subjected to a detriment by Laura Tummons

6.18 It was the Respondent's case that no such ultimatum was given and there was no explanation advanced for that treatment. Applying the burden of proof provisions there were facts from which we could decide that the Claimant has been victimised and in the absence of any explanation for this treatment we find the Claimant was victimised by Laura Tummons on the 14 July 2016.

6.19 As a result of that ultimatum the Claimant did return to work on the expiry of his sick note. His first day back to work was 25 July 2016. He was welcomed back by the BRT team and was asked to check his emails. Laura Tummons carried out a return to work meeting with the Claimant on 26 July 2016 and did not inform him that he would not be returning to BRT.

6.21 The Respondent accepts that for the first three days they let him believe he was returning to his BRT role because they were looking for a position for him elsewhere in the business but didn't tell him that was what they were doing. We found it difficult to understand why they did not tell him as soon as he came back if that decision had already been made prior to his return to work. Instead he was deliberately misled by the Respondent. Additionally we had contradictory evidence from Sarah Hall about the reason why it was decided he could not to return to BRT, when that decision was made and by whom. She said that decision was made jointly with Laura Tummons when the other two CSA's on long term sick returned to work on 15 and 16 June 2016. As of the 16 June 2016, the team was full and the Claimant was therefore going to be removed from BRT. She was unequivocal in her evidence. The decision had nothing whatsoever to do with his performance it was all about timing. Whoever had returned to work once the full quota of staff were present was the person that would be removed from the BRT team.

6.22 On 27 July 2016, Laura Tummons informed the Claimant that a decision had been made to move him off the BRT role back to the customer service adviser role in the BE team. At the time, she didn't provide the Claimant with any reason for the decision. The Claimant was understandably extremely upset and was allowed to go home early.

6.23 When he returned to work on 28 July 2016 the Claimant asked Laura Tummons to explain why she had had now gone back on the assurance

made on 14 July that he would keep his BRT role if he returned on the 25 July 2016. In response Laura Tummons provided the Claimant with an email setting out her reasons for returning him to the CSA role in the BE team.

6.24 Ms Tummons was cross-examined about the email by Mrs Khan and asked to explain the reference she makes in her own email about the Claimant returning to work in July 2016. The relevant part of the email is:

> Move back to BE
>
> "*In regards to our meeting today 28 July 2016 about you moving back to BE team you expressed concern that you enjoyed your role in BRT and didn't want to go back to your substantive role in SMB. We have discussed in previous welfare meetings that this could be an option and* ***whilst I'd hoped that if you returned in July I would be able to secure your position on the team this has not been the case***"

6.25 That reference to returning in July 2016 was consistent with a return in July 2016 on the expiry of his fit note in July 2016, otherwise the return date would have been sometime in August 2016. It also contradicted Ms Hall's evidence that the decision was all about 'timing' and was made by mid June when the team was full. Ms Tummons could not see any inconsistency between what she was saying in that email and her evidence to the Tribunal. A further inconsistency that arises from this email is the reason given for moving the Claimant. Ms Tummons reference to the Claimant's performance was inconsistent with Ms Tummons earlier communications with the Claimant and Ms Halls very clear evidence that it had nothing whatsoever to do with performance. However, in the email Ms Tummons states:

> "*I've reviewed your contribution to the team's overall performance over your last full three months in work and whilst you did achieve good performance in some areas, this was not consistent in every sales metric – your digital sales. Performance was not on target consistently and this is an area where we are under significant pressure to achieve. This is demonstrated below. It is* ***therefore*** *with regret that you are one of two advisers who will return to their substantive role from Monday 1 August".*
>
> *(*The other adviser that was returning to his substantive role did have performance issues).

6.26 It was not clear from the statistics Ms Tummons referred to, why the Claimant's performance was of concern in July, when those statistics were available in her in June and July 2016, but had not caused her any concern. In fact she tells the Claimant his performance at work was not an issue, he just needed to get back to work by the 25 July 2016.

6.27 Again reminding ourselves of the burden of proof provisions the Claimant has proved facts from which we could conclude in the absence of an explanation from the Respondent, a prima facie case of victimisation. The reasons for removing the Claimant from his BRT role were different (performance or timing) and the Respondent witness evidence contradictory. The Claimant was deliberately misled into believing he was returning to the BRT role and then provided with a false reason for his removal. Without any adequate explanation from the Respondent for that treatment we find that the Claimant was victimised by Laura Tummons on

the 25, 27 and 28 July 2016 because he had done a protected act. This treatment left the Claimant in a position where he couldn't trust what his managers were saying to him.

6.28 The next act of victimisation the Claimant complains about is in relation to the alleged actions of Vicky Stubbs on 16 August 2016. He complains that he was coerced into signing a document in relation to his ongoing Tribunal to state that he could not discuss it with anyone in the company and this he said placed him in a difficult position due to his colleagues already being fully aware of the issues he had raised because the case was in the public forum. Vicky Stubbs explained that on 16 August it was reported to her by another adviser that the Claimant had been on the shop floor discussing his Employment Tribunal claim. A colleague had reported this because they felt uncomfortable about what he was saying. It was alleged that the Claimant was seeking information and indicating to his colleagues that he was going to receive a settlement from the company. She had a private word in a private room with the Claimant to advise him that this was not appropriate and that any discussions in relation to his case were to be kept confidential. She denies coercing him into signing a document in relation to this. She asked Ms Sarah Shillito to make a note of the meeting, and asked the Claimant to sign a copy of that record so that the contents were agreed. That note is produced at page 230 in the bundle. It is a short note headed "meeting notes" and simply records the discussion. The Claimant is told that the case is confidential and he is asked not to discuss it with anyone "*to protect himself and any decisions*". That note made by Miss Shillito at this meeting was signed by the Claimant, Miss Stubbs and Miss Shillito.

6.29 The Claimant's account was that he was dragged into a meeting without notice and Ms Stubbs "*began interrogating me, accusing me of discussing the Employment Tribunal case at work with other staff. He explained that half the department already knew his situation as all his old team members in BRT did. He explained that he didn't like that Capita would take it this far and the rest of the department was asking why he was no longer on the BRT team. He explained that he had not gone around just telling people".*

6.30 The Claimant agrees he was discussing his case with his colleagues and we accepted that the meeting note was an accurate note of the discussion that took place. He was not coerced into signing the record. There was nothing wrong in Ms Stubbs, having had a concern reported to her, asking the Claimant to refrain from discussing his Employment Tribunal case at work. The meeting was not set in any kind of disciplinary context. It was an informal discussion where a 'meeting note' was kept of that discussion. We did not accept that the Claimant was subjected to a detriment in relation to that discussion. It was therefore not necessary for us to find whether the reason for that treatment was because of a protected act.

6.31 The final act of victimisation and detriment that the Claimant relies upon involves the manager that took over from Laura Tummons in August 2016 Sarah Shillito (the note-taker in the August meeting). The Claimant's complaint about Miss Shillito is that on 21 December 2016, he was approached by her and told that he needed to attend a meeting with her immediately regarding unpaid dependant's leave. He asked Miss Shillito whether he needed to have a union representative present. She told him

that he didn't need to because this was an informal meeting and there would not be any note taker. During the meeting Miss Shillito pointed out the days that the Claimant had taken time off for dependant's leave and told him that in future any further time off for this purpose would no longer be treated as dependent's leave but would be treated as sick leave and as a result he would be taken to a disciplinary meeting.

6.32 He was extremely surprised by this because he understood that dependant's leave was completely separate to sick leave and that the two were not to be treated in the same way. Having left the meeting he returned to his desk to take some calls and five minutes later whilst he was on a call he was approached by Miss Shillito who placed a piece of paper in front of him and asked him to sign it. He indicated that he was on a call, she left it with him. After he finished the call he read the document, approached Miss Shillito to enquire why he was required to sign the document when she had clearly stated it was an informal meeting and no notes would be taken. She informed him that it was merely for her records. The Claimant was unwilling to sign the document. He showed it to his union representative who then pursued it with HR. He was unhappy at the way the Respondent's were choosing to have these meetings using 'sneaky ways' to try to get him to sign documents to manage him out of the business because he was being threatened with disciplinary meetings in the future.

6.33 Miss Shillito was a relatively inexperienced manager who was on secondment for 12 months in this role. She said she had not been instructed to manage the Claimant differently to the way that she managed other people falling under her line management. She provided a number of documents of other meetings she had to support this. She accepts that she had misunderstood the dependant's leave policy and treated it as if it was sick leave and was applying triggers for disciplinary action when this was not the correct procedure. She says she was instructed by her manager Helen Marriott to "*take it to the next stage and the next stage was disciplinary action"*. We had no explanation from Helen Marriott why she would have told a more junior manager seeking advice to 'take it to the next stage' when that was not the procedure that should be followed. We did not know why it was necessary to have the meeting recorded in the formal way it was, when none of the examples produced for other employees were carried out in that way.

6.34 All the other examples used a pro-forma document which Miss Shillito completed on her computer with the employee present. She would fill in the text, check it with the employee, would record what the employee said, what she said to the employee and the form would be printed off. Although there is a box for the line manager's signature and the employee's signature none of those were completed on any occasion for the Claimant and for others.

6.35 What is unusual is that on 21 December 2016 Miss Shillito decided to hold a different type of meeting with the Claimant and did things differently for the Claimant. She did not use the proforma or the 'meeting note record' she used when she was the note taker in August 2016 with Ms Stubbs. This time she uses a Capita 02 document headed "meeting" which states "*this form should be used to capture all one to one discussions with a member of staff regarding their conduct, attendance, performance or any*

other issues which need documenting. The form must be signed by both a member of staff and their line manager". The explanation Miss Shillito gave for using this form was that Helen Marriott had told her to take it to the next stage and the next stage was a disciplinary Stage 1 meeting.

6.36 If the purpose of the meeting was 'informal' as indicated to the Claimant, why not use the 'meeting notes' or pro-forma as she had done previously. To do it in the way that she did created suspicion. It supported the Claimant's perception of a 'sneaky' non transparent process designed to manage him out of the business. It was accepted that this was not the appropriate or right procedure to use to manage the Claimant's dependents leave absences.

6.37 The Claimant was subjected to a detriment by Ms Shilito on 21st December 2016. The explanation of inexperience and 'consistency of treatment' with others was not accepted based on the evidence we saw. Ms Shillito knew about the tribunal claim and was being directed by her manager to take it to the next stage, in a way she was not doing for the other employees she managed. In the absence of an adequate explanation from her to explain her detrimental treatment of the Claimant we found the complaint is made out.

6.38 In relation to those successful complaints a remedy hearing has been listed for 4 April 2017. If possible the Claimant should seek some assistance from his union in relation to that remedy hearing and in preparing a schedule of loss in relation to the successful complaints.

Employment Judge Rogerson

Date: 16 March 2017