Case Number: 3323944/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Sonia Sisk	v	Department for Work and Pensions

Held at: Watford **On:** 15-17 March 2017

Before: Employment Judge Southam
Mr M Kaltz
Ms S Johnstone

Appearances:

Claimant: Mr N Toms, Counsel
Respondent: Mr T Rainsbury, Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The respondent removed the claimant from her post of Surveillance and Tasking Manager in breach of her entitlement under regulation 18(2) Maternity and Parental Leave etc Regulations 1999.

2. The respondent subjected the claimant to a detriment, namely, her removal from the role of Surveillance and Tasking Manager, for a prescribed reason, namely that she took additional maternity leave.

3. The respondent subjected the claimant to direct pregnancy and maternity discrimination by her removal from the role of Surveillance and Tasking Manager and by failing to keep her informed during her pregnancy.

4. The claimant's complaints about harassment fail and are dismissed.

5. The respondent is ordered to pay to the claimant:

    5.1 In respect of injury to feelings, the sum of £13,200.00;

5.2 Interest on the said sum of £13,200.00 thereon as follows: for the period from 9 March 2016 to 7 April 2017 at the rate of 8%: 394 days: £1,139.90; and

5.3 The sum of £1,200.00 in respect of tribunal fees paid by her in connection with the commencement and the hearing of these proceedings.

6. The total sum payable by the respondent to the claimant is £15,539.90.

7. The tribunal recommends that, within 12 months of the date upon which this judgment and the reasons are sent to the parties, the respondent completes training of its 580 managers in the Fraud and Error Service, London and Home Counties, on what are the rights in relation to employment of a woman who takes maternity leave, in particular additional maternity leave, and what managers must do in practice to ensure that staff are kept informed of vacancies and training events during both forms of maternity leave.

RESERVED REASONS

Claim and Response

1. The claimant commenced these proceedings on 24 July, 2016. She did so having entered into early conciliation with ACAS by sending them the requisite information about the intended claim on 26 May, 2016. The ACAS certificate of early conciliation was issued by email on 26 June.

2. In the claim, the claimant indicated that she was bringing complaints about discrimination on the grounds of pregnancy or maternity and on the ground of sex including equal pay. She said that she was making another type of claim which she thought the tribunal could deal with, namely a complaint of discrimination by comparison of her case as a transferee from local government with the cases of existing staff employed by the respondent.

3. The claimant had been employed by the respondent from 1 October, 2014 as a Surveillance and Tasking Manager. She had transferred into employment by the respondent under an agreement between the London Borough of Harrow and the respondent under which she was given the job of a Fraud Team Leader. She was told on arrival that no such job existed. After negotiations, she became a Surveillance and Tasking Manager. In 2015 she began a period of maternity leave. During that leave she was informed that she was to be posted on her return into the role of Compliance Team Leader, a job she had rejected on first transferring to the respondent in 2014. In due course, she was offered another job and, at the time of filing her claim, she was waiting for confirmation of the offer. In the meantime, she made complaints that, during her maternity leave, she was not advised of promotion, recruitment or selection exercises, she was not provided with any Expression of Interest forms for other job

opportunities and that she was not invited to attend conferences. The claimant also complains that she was threatened with disciplinary proceedings if she refused to take the position of Compliance Manager. On the basis of those facts she complained of discrimination and bullying. She prepared the claim form herself, without the assistance of lawyers.

4. The claim was resisted. Unfortunately, the respondent was not provided with a complete copy of the claim form. They did their best to present a response to the claim, but it was clear that they would need to amend it in due course.

Case Management

5. When the claim was issued, it was listed, in accordance with standard practice, for a preliminary hearing for case management purposes. That hearing was listed to take place on 11 October, 2016. The hearing took place before Employment Judge Smail. He listed the claim for a full merits hearing over three days on 15-17 March, 2017. He identified the complaints the claimant was pursuing. He did not in terms dismiss the complaint about discrimination based on a comparison between the claimant's position as a transferee from local government and the position of existing employees of the respondent, but nor did he identify any complaint in that respect over which the tribunal had jurisdiction.

6. The complaints to be pursued were complaints of maternity discrimination, sex discrimination, harassment and detriments under section 47C Employment Rights Act 1996, read together with regulations 18 and 19 Maternity and Parental Leave Regulations 1999. He recorded the issues that the tribunal would have to decide at the full merits hearing. He gave case management directions. These included the right for the respondent to submit an amended response. The claimant for her part was required to deliver further information in terms of a list of promotions and vacancies of which she was not informed during her maternity leave, and for which she would have realistically been interested in applying, as well as a list of conferences she would have wished to attend. Otherwise the directions were routine.

7. Thereafter the respondent filed their amended response. They said that, following the claimant's transfer, she was offered the position of Compliance Team Leader, which she rejected, and was then offered the position of Surveillance Team Leader. Both of these positions were generalist roles at HEO level, that grade being deemed equivalent to the claimant's status upon her transfer. During her maternity leave another HEO grade Team Leader returned from maternity leave and was placed in the claimant's role and the claimant was informed. They say it was considered necessary for this person to be placed in the claimant's role as it was not certain when the claimant would return. The only vacancy available for the claimant was that of Compliance Team Leader, which the claimant again refused. She submitted a grievance. The claimant was willing to consider returning in the role of Fraud Team Leader in Brent if a

compromise could be reached in respect of location. In due course the claimant was transferred into that role.

8. As to the claimant's complaint about breach of maternity leave procedures by the respondent failing to keep her informed of conferences and vacancies, the respondents said that it found that its procedures had not been correctly followed in that a Keeping in Touch programme had not been agreed but that numerous activities did take place both verbally and by correspondence, although it was found that the claimant had not been invited to attend a number of conferences, due to an oversight. On the basis of those contentions, the respondent disputed the claimant's claims. As regards some of them, the respondent contended that the claim was submitted out of time. As regards complaints of maternity discrimination it was denied that the claimant was subjected to any unfavourable treatment. As regards harassment, they denied that the claimant was placed in the compliance role without consultation or that she was threatened with dismissal as alleged. In any event, they denied that those acts, if they were proved, amounted to unwanted conduct or harassing conduct or that it was related to the claimant's gender (since complaints of harassment related to pregnancy or maternity cannot be brought under the Equality Act). As regards the 1999 regulations, the respondent contended that it was not reasonably practicable for the claimant to return to her previous role of Surveillance and Tasking Manager and the role of Compliance Team Leader was both suitable for her and appropriate for her to do in the circumstances.

9. Thereafter the claimant sought disclosure of further documents from the respondent relating to progression exercises, job advertisements, expressions of interest and agendas and minutes of a workforce planning meeting. The respondent opposed the application and Employment Judge Lewis refused to make any order. There was further correspondence from the claimant before she appointed solicitors to represent her, but Employment Judge Lewis was not persuaded to alter his direction. Nothing else arose before the hearing.

The Hearing

10. At the hearing, the parties appeared and were represented as indicated above. The tribunal heard evidence from both sides. The claimant gave evidence. Mr Rainsbury led evidence from Joe Richards, a Group Manager, Mark Lumsden, a Senior Business Support Manager, and Abdullah Molvi, Essex fraud senior leader. There was an agreed bundle of documents, to which some additions were made during the hearing. In these reasons, references to page numbers are references to the page numbers of the agreed bundle. Once the tribunal had heard the evidence, the parties' representatives made submissions.

Issues

11. The representatives had agreed between them a refinement of the list of issues, which the tribunal found helpful, and which we adopted as our

agenda for the decisions we had to make. The list of issues is reproduced here, with the original numbering retained.

Preliminary Issue

1. The respondent avers that the following three allegations have been brought more than three months after the acts or omissions were committed:

   (a) that the claimant was subjected to direct maternity discrimination by failing to send her an email from Mr Molvi dated 22 January 2016 (see paragraph 10(a) below;

   (b) that the claimant was subjected to direct maternity discrimination by failing to send her an email from Mr Molvi dated 26 February 2016 (see paragraph 10(a) below;

   (c) that the claimant was subjected to harassment on the grounds of sex by being placed in the Compliance Role 'without consultation' by Mr Lumsden on 10 March 2016 (see paragraph 9 below);

   (d) that the claimant was not invited to a London and Home Counties conference on 26 October 2015 (see paragraph 10A(a));

   (e) that the claimant was not invited to a London and Home Counties conference on 17 March 2015 (see paragraph 10A(b)).

2. Were they part of 'conduct extending over a period of time'?

3. If out of time, is it 'just and equitable' to extend time to allow the claimant to plead them under s.123(1)(b) of the Equality Act 2010 ("EqA 2010").

The decision to move

4. It is accepted that a decision was made by the respondent to fill the Surveillance Team Leader role with a permanent replacement and subsequently move the claimant to a different role, and that she was informed of this.

5. Did this breach reg.18(2) of the Maternity and Parental Leave etc Regulations 1999 ("the 1999 Regulations"):

   (a) It is accepted that the claimant did not return to the same 'job' within the meaning of reg.2;

   (b) Was it 'not reasonably practicable' for the respondent to permit the claimant to return to her previous position?

   (c) Did the claimant return to a job which was both 'suitable for her and appropriate for her to do in the circumstances'?

6. If the tribunal finds that there has been a breach of reg.18(2) of the 1999 Regulations, it is accepted that this does not in itself give rise to an actionable cause of action, but a claim needs to be brought under s.47C of the Employment Rights Act 1996 ("ERA 1996") and/or s.18(4) of the EqA 2010.

7. Did this amount to a detriment under s.47C of the ERA 1996;

(a) Did this cause 'detriment' to the claimant?

(b) Was it 'done for a prescribed reason' within the meaning of reg.19(1) of the 1999 Regulations, namely because the claimant 'took…ordinary or additional maternity leave' (reg.19(2)(d))?

8. Did this amount to <u>direct maternity discrimination</u> under s.18(4) EqA 2010:

(a) was the claimant treated unfavourably?

(b) If yes, was this 'because' the claimant was exercising her right to ordinary or additional maternity leave?

9. Was there <u>harassment</u> on the grounds of sex[1] contrary to s.26(1) EqA 2010:

(a) was she placed on the role 'without consultation'?

(b) did this amount to 'unwanted conduct'?

(c) if yes, did the conduct have the purpose or effect of:

(i) violating the claimant's dignity, or;

(ii) creating an intimidating, hostile, degrading, humiliating, or offensive environment for her?

(d) If yes, was the conduct 'related to' the claimant's sex?

<u>Failure to inform</u>

10. The claimant complains that she did not receive the following communications whilst on maternity leave:

(a) An email from Mr Molvi to various recipients, dated 22 January 2016, enclosing details of two HEO vacancies (temporary duties assigned) 'which are only open to LS West London Eos in LSIOs and LSCOs';

(b) An email from Mr Molvi to various recipients, dated 26 February 2016, providing details of a vacancy in the technology team within Universal Credit Digital (Victoria Street, London), available to HEOs on level transfer or Eos on temporary duties assigned;

(c) An email from Ms Ayesha Nunhuck (Management Support) to various recipients including the claimant, dated 15 April 2016, enclosing details of vacancies for Customer Resolution Managers at Acton Jobcentre Plus;

(d) A communication from an unidentified sender to the recipient group 'All LHC WSD Colleagues & OSN Members' dated 5 May 2016, announcing the launch of further progression exercises across the One Service Network in London and the Home Counties, and confirming that vacancies will be published via the Civil Service Jobs website;

(e) An email from Ms Barbara Burke (Management Support) to the recipient ground 'FES LHC-ALL STAFF-DL', dated 20 May 2016, enclosing an

[1] Maternity is not ' a relevant protected characteristic' within the meaning of s.26(5) EqA 2010

'EOI link' which 'will take you to the information that is on the OSN site and provide current job opportunities';

(f) An email sent from Mr Kalvinder Jandoo to various recipients including the claimant, dated 9 August 2016, enclosing details of a six month vacancy in the Logistic Programme Team, for posts based in Newcastle, Cardiff, Warrington, Fylde, Birmingham or London with 'an expectation to be reasonably mobile and flexibility of travel to various other locations on a regular basis'.

10A. The respondent accepts that the claimant did not receive invitations to the following three conferences:

(a) An HEO London and Home Counties conference on 26 October 2015;

(b) An HEO London and Home Counties conference on 17 March 2016;

(c) An HEO London and Home Counties conference on 18 July 2016.

11. Did the respondent fail to inform the claimant of the above communications?

12. Did this amount to <u>direct maternity discrimination</u> under s.18(4) EqA 2010;

(a) Was the claimant treated unfavourably?

(b) If yes, was this because the claimant was exercising her right to ordinary or additional maternity leave?

<u>Threat of dismissal</u>

13. Was the claimant threatened with dismissal on 21 July 2016, if she refused to take up the Compliance Manager or Brent Investigation Team Leader roles?

14. Did this amount to <u>harassment</u> on the grounds of sex contrary to s.26(1) EqA 2010:

(a) Did this amount to 'unwanted conduct'?

(b) If yes, did the conduct have the purpose or effect of:

(i) violating the claimant's dignity, or;

(ii) creating an intimidating, hostile, degrading, humiliating, or offensive environment for her?

(c) If yes, was the conduct 'related to' the claimant's sex?

<u>Remedy</u>

15. If the respondent is found to be liable:

(a) Should the tribunal exercise its discretion to grant a remedy?

(b) If so, what is the appropriate remedy?

Relevant Law

12. Before making our decisions, the tribunal considered the following legal provisions and case law.

12.1 By regulation 18 Maternity and Parental Leave etc Regulations 1999, a woman employee who returns to work after a period of ordinary maternity leave is entitled to return to the job in which she was employed before her absence. By contrast, a woman employee who returns to work after a period of additional maternity leave is entitled to return to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.

12.2 By section 47C Employment Rights Act 1986, an employee has the right not to be subjected to any detriment by any act, or by any deliberate failure to act, by his employer, done for a prescribed reason. A prescribed reason is one which is prescribed by regulations made by the Secretary of State which relates to, among other things, pregnancy, childbirth or maternity. The regulations which have been made under that section are the regulations made in 1999 referred to above. Regulation 19 of those regulations repeats the provisions of section 47C and gives the prescribed reasons. These include that the employee is pregnant, or has given birth to a child, or has taken, sought to take or availed herself of the benefits of ordinary or additional maternity leave.

12.3 Mr Rainsbury referred us to the case of Sefton Borough Council v Wainwright [2015] IRLR 90, a case on regulation 10 of the 1999 Regulations, where the claimant had been made redundant during her maternity leave. In the judgment of the Employment Appeal Tribunal, Judge Eady QC said as follows:

> "Here the unfavourable treatment of the claimant – her own position being made redundant and not being offered a suitable alternative vacancy – certainly coincided with her being on a relevant period of maternity leave. I do not, however, accept Mr Sigee's submission that must inevitably mean that it was *because of* it. That seems to be to be assuming the reason why something happened simply on the basis of the context in which it happened. I note that such an assumption is not made in the other authorities to which I have been referred and it does not seem to me to be the way in which section 18 [of the Equality Act 2010] is worded. I accept Miss Chudleigh's submission that the ET was therefore obliged to ask what was the reason why the claimant was treated the way she was……
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> ….In many cases, the answers may be the same. The particular facts of this case, however, allowed for more than one answer".

12.4 On any complaint made under section 48, in respect of the right specified in section 47C, it is for the employer to show the reason

why any act, or any deliberate failure to act, was done: see section 48(2).

12.5 If an employment tribunal finds such a complaint well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to which the complaint relates. The amount of any compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement to which the complaint relates and any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

12.6 By section 18(4) Equality Act 2010, a person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

12.7 By section 26 of that Act, a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect referred to the tribunal must take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The relevant protected characteristics include sex but do not include pregnancy or maternity.

12.8 By section 39 of the same Act, an employer (A) must not discriminate against an employee of A, (B), in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer, training or receiving any other benefit, facility or service, or by subjecting B to any other detriment. The definition of "discriminate" in section 18 is applied to section 39 because section 18 has effect for the purposes of the whole of part 5 of the Act, which includes section 39.

12.9 For a disadvantage to qualify as a detriment the tribunal must find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he has thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to detriment but it is not necessary to demonstrate some physical or economic consequence: see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.

12.10 Proceedings on a complaint of discrimination brought to an employment tribunal may not be brought after the end of the period of three months starting on the date of the act to which the complaint relates, unless the tribunal thinks it just and equitable to

extend the period. That is provided for by section 123 Equality Act 2010. For the purpose of that section, conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something when they do an act which is inconsistent with doing it or, if there is no inconsistent act, on the expiry of the period when they might reasonably have been expected to do it.

12.11 By section 124, if an employment tribunal finds that there has been a contravention of one of the above provisions, the tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate. They may make an order requiring the respondent to pay compensation to the complainant and they may make an appropriate recommendation, defined as one which provides that, within a specified period, the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate. The tribunal must not order compensation to be paid unless it first considers whether to make a declaration or an appropriate recommendation.

12.12 In Vento v Chief Constable of West Yorkshire (No 2) [2003] IRLR 102, the Court of Appeal held that three bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, can be identified. The top band, £15,000 to £25,000 applies to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in the most exceptional case should an award exceed £25,000. The middle band, £5,000 to £15,000, should be used for serious cases which do not merit an award in the highest band. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

12.13 In Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, it was held that the upper limits of each band should be increased: in the case of the lower band, to £6,000, in the case of the middle band, to £18,000, and in the case of the upper band, to £30,000.

12.14 The consensus of the recent authorities on the question of whether awards for discrimination should be increased by 10% now seems to be in favour of such an increase. We refer in particular to the decisions in Beckford v London Borough of Southwark [2016] IRLR 178 and Sash Window Company v King [2015] IRLR 348.

12.15 By the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, when an employment tribunal makes an award under relevant legislation, which includes the previous provisions relation to discrimination, before the passing of the Equality Act 2010, and which are taken to apply equally to proceedings under that Act, it may include interest on the sums awarded. The tribunal shall consider whether to make such an award without the need for any application to be made by a party. The interest is calculated as simple interest accruing from day to day. The rate of interest has been, since 29 July, 2013, the rate of interest currently prescribed for England and Wales for the purposes of the Judgments Act 1838, which is 8%. In the case of awards for injuries to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation.

Findings of Fact

13. Having heard the evidence, the tribunal reached the following findings of fact:

13.1 In August 2004, the claimant began work for the Council of the London Borough of Harrow as a Team Leader in the Corporate Anti-Fraud Team. She continued in that employment until she was transferred to the respondent in September 2014.

13.2 In 2014, the respondent decided to create a single fraud investigation service. Under its proposal it was envisaged that local authority employed staff doing work similar to that which the claimant did would transfer their employment to the Department for Work and Pensions.

13.3 In February 2014, the Office of the Surveillance Commissioners (OSC) prepared a report which was not shown to the tribunal. This in turn led to the respondent itself preparing its own surveillance strategy review seen in the bundle at pages 43.1 – 43.26. This is a document dated 30 July 2014, issued by Richard West, the director of the respondent's Fraud and Error Service and addressed to Grade 7 leaders in that service. One of the recommendations in the respondent's own review was that each group should appoint a Higher Executive Officer (HEO) as a Surveillance Tasking and Coordination Manager. In addition to that, each group was to appoint a team of surveillance operatives to work to the surveillance tasking and coordination manager, but they were to be rotated back into investigation work every two to three years.

13.4 In September 2014, the respondent issued a posting letter to the claimant, page 171-174, in which she was advised that her employment would transfer to the respondent on 1 October 2014. Her salary and other terms and conditions of her employment would remain the same, but she would now have to report to a new office at Harrow Job Centre in Harrow and to a line manager called Robert

Madigan. It was considered that the claimant's grade with the local authority would transfer most appropriately to the grade of HEO and her job title was to be Local Service Fraud Team Leader. She was provided with a job description appropriate to that role.

13.5 When the claimant arrived at the Harrow Job Centre on 1 October 2014, she was told that the job referred to in her posting letter was not available as it was already filled by an existing employee of the respondent, a Mrs Susan Myles. Mr Madigan invited the claimant to take a completely different job, that of Compliance Team Leader.

13.6 On 1 December 2014, Mr Madigan wrote emails, page 194, to the claimant and to Susan Myles, in which he said that, having considered the availability of Band D posts in the Harrow vicinity, he was writing to inform them both that the options available remained the positions of Harrow Fraud Team Leader and Compliance Team Leader. He invited them both to consider the above and to volunteer for the Compliance post. He said that if neither decided to volunteer for that post he would have to make a decision and post one of them to that position.

13.7 On 8 December 2014, the claimant wrote to Mr Madigan and said that she was not volunteering for the Compliance Team Leader post. This was, she said, because that position was not stated in her posting letter. The tribunal understands that Mrs Myles did not volunteer for the Compliance Team Leader post either. It followed that Mr Madigan had to decide. His decision was that Mrs Myles should remain as Harrow Fraud Team Leader and that the claimant should be posted as the West London Compliance Team Leader based at Harrow, with effect from 15 December: see page 176.

13.8 When the claimant enquired if the posting was compulsory, Mr Madigan replied that it was; see page 195-196. In response, the claimant submitted a grievance. She objected to being placed in that position. She refused to start work in that position.

13.9 On 17 December 2014, Mr Madigan held a meeting with the claimant when he discussed with her the possibility of her doing other jobs. There were Fraud Team Leader roles in Fulham, Southwark, Lambeth and West London. The claimant sought advice from her union about this proposal and would not be able to get back to him by 5 January as Mr Madigan had requested.

13.10 With effect from 1 January 2015, Mark Payne took over line management of the claimant. The claimant told him that she was unable to give him an answer immediately about the proposal Mr Madigan had made. Mr Payne asked the claimant to provide her response by 8 January and told the claimant that unless she told him her decision by the end of that working day he could compulsorily post her into the role of Compliance Manager. When

the claimant explained to him why she was not willing to take that role, he said that he would "go down the disciplinary route".

13.11 On 12 January 2015, Mr Payne offered the claimant the role of Surveillance Team Leader based at Harrow. This was a role envisaged in the respondent's own Fraud and Error Surveillance Strategy Review. It was a permanent position and was offered at Harrow Job Centre. Her terms and conditions of employment would not be affected. It would seem the claimant asked if the role could be based at Uxbridge, but Mr Payne could give no guarantee about that.

13.12 The claimant accepted the role and commenced on 23 February 2015, as Surveillance and Tasking Team Leader.

13.13 In March 2015, the claimant advised her new line manager, Mark Lumsden, that she was pregnant, with her baby expected around 16 September 2015.

13.14 In June 2015, Mr Lumsden agreed to the claimant working in Uxbridge in the later part of her pregnancy. This was done as an adjustment to allow for the claimant's pregnancy.

13.15 The claimant enjoyed her role as Surveillance and Tasking Team Leader. It was a satisfying job, which she regarded as prestigious, and she was very keen to return to it after her pregnancy.

13.16 During the course of the relatively short period that the claimant was in post as Surveillance and Tasking Team Leader between February and August 2015, her line manager Mr Lumsden asked his deputy Graham Smith, another HEO, to assist the claimant. The number of surveillance staff at AO (Administrative Officer, which is a lower grade than HEO) level was increasing, as had been envisaged. Mr Smith also managed a fraud team based at Chatham in Kent, which comprised 14 investigators. Mr Smith had an assistant called Helen Martin, an Executive Officer (EO).

13.17 Andrea Dash was a Fraud Team Leader in London. She was on maternity leave, which she began on 17 November 2014. She was due to return in November 2015, and she was keen to return to her old job. However, before she began her leave, she was told that she would not be able to return to that job. In her absence, someone was placed in her position on a permanent basis. She was told at the end of May or the beginning of June 2015, that she might well be posted to the claimant's role as Surveillance and Tasking Team Leader.

13.18 Mr Smith's perception of the matter appears from an investigation meeting held with him in relation to the claimant's later grievance when he was interviewed on 25 July 2015, page 247. He said that it was always the department's intention to have two team

managers for surveillance at HEO level and he made that comment in relation to the decision to place Andrea Dash into the claimant's position on a permanent basis. By then, he said, there were 20 staff on the team, which was too many for one HEO to manage. He was not involved in the decision to post Ms Dash to that position.

13.19 On 15 August 2015, the claimant went into premature labour and commenced maternity leave. On 17 August, she telephoned Mr Smith, from hospital, in order to hand over her work and the following day she gave birth to a baby boy.

13.20 The respondent has a policy for keeping in touch with employees who are absent for a variety of reasons. The policy appeared in the bundle at pages 291-293. The absences to which it relates include absence on maternity leave. The policy states that the manager and the employer must agree keeping in touch arrangements to include detail about the information that the employee is to receive including such things as promotional exercise details, recruitment exercises and vacancy information and how regularly contact should be made. It is clear from section 4 of the policy, which specifies what the manager should do in the employee's absence, that the manager and the employee are to agree these matters but that the process is led by the manager.

13.21 Although the claimant's commencement of her maternity leave was unexpectedly early, there was no attempt after the birth of her child on the part of the claimant's manager to put any arrangement in place regarding keeping in touch during her maternity leave.

13.22 It is agreed that on 15 October 2015, Mr Lumsden telephoned the claimant and asked her about her son and they discussed work issues. He informed the claimant that Andrea Dash would be doing the claimant's Surveillance and Tasking Team Leader role on her own return from maternity leave in November 2015. We all agree that Mr Lumsden did not use the word "permanent" when referring to Ms Dash's posting in the claimant's job.

13.23 Mr Lumsden had had no training in maternity rights or in pregnancy or maternity discrimination.

13.24 The claimant was not invited to a conference for HEOs within the Fraud and Error Service in the London and Home Counties region, which took place on 26 October 2015. This is an event to which guest speakers are invited, and is a training event.

13.25 Ms Dash began her role as Surveillance and Tasking Team Leader based at Harrow on 17 November 2015.

13.26 The following day Mr Lumsden had arranged to visit the claimant at home, but at the last moment, he could not go. Instead,

Mr Smith and Ms Martin visited the claimant. They took gifts. They informed her about a team training event the following week and the claimant attended the Surveillance Team training exercise on 25-26 November in Chatham.

13.27 On 18 December 2015, the claimant attended a management meeting, which was to be followed by a department Christmas lunch, held in Maidstone. She arrived somewhat late and there was not time for much of a discussion about work, but the claimant attended the Christmas lunch which followed it.

13.28 On 22 January 2016, Mr Abby Molvi emailed to various recipients notice of an expression of interest opportunity for vacancies within the fraud and error service for temporary deployment as an HEO which would be open to executive officers in the west London sections of the department. No arrangement having been put in place for the claimant to receive her normal emails during her absence on maternity leave, the claimant did not receive a copy of this email, which is at page 339.

13.29 Mr Lumsden went to visit the claimant at home on 2 February 2016. They discussed work issues and he confirmed to her that Andrea Dash was now in post as the Surveillance Team Leader. Mr Lumsden did not tell her that this was a permanent role. He also told her that the other surveillance and tasking manager post was being covered on a temporary basis by Graham Smith. He asked what she would like to do when she returned and she said that she would very much like to return to her post of Surveillance and Tasking Team Leader. She was willing to look at other posts but she was emphatic that she did not wish to be considered for a Compliance Team Leader role.

13.30 The following day, there was a management meeting to consider staff moves. Mr Lumsden attended this meeting with the group manager, Joe Richards and others. This meeting was not a workforce planning meeting, although it was described as such in Mr Lumsden's diary. In email correspondence, page 220 in the bundle, where the claimant referred to the meeting as having been a workforce planning meeting, Mr Lumsden did not disagree. We were told that a workforce planning meeting is in fact conducted at a much higher level and is a strategic meeting. Such a meeting must include an assessment of the suitability of staff to operate in particular positions. A quarterly business planning meeting, by contrast, is conducted at Mr Richards' level and the level of the senior executive officers and does not have the same requirements.

13.31 It seems to us that two matters were in the forefront of the thinking of those present at the business planning meeting on 3 February regarding the claimant. The first was that she had a clause in her contract which entitled her to continue working in Harrow. The second was the mind-set that, because maternity law did not require the employer to ensure that a member of staff taking

additional maternity leave returns to their original post, it was not normal practice for staff on additional maternity leave to do so. In fact, the opposite was the case in relation to those taking additional maternity leave: they would normally not return to their old jobs. This would apply to the claimant, as she was expected to take additional maternity leave. The decision of that meeting, so far as the claimant was concerned, was to offer the claimant the post of Compliance Team Manager, something she had rejected before, and which she had told Mr Lumsden she did not wish to do.

13.32 The claimant was informed about this decision by telephone from Mr Lumsden on 5 February. There were other posts available, namely Fraud Manager roles in Acton, Wandsworth and Fulham. These were not in the Harrow area and the claimant rejected them. After she did so, and Mr Lumsden explained that that only left the Compliance role, the claimant said that it was not acceptable to her. The claimant was extremely upset and distressed about this decision; she could not understand it and she felt that she had been treated unfairly. The decision to remove her from that role was, in her eyes, compounded by being told that the only available job was the Compliance role in Harrow, which she had rejected previously.

13.33 At the time the claimant's son, then barely six months old, was about to undergo a third major operation at the John Radcliffe Hospital, which would result in him being in the high dependency unit there for several days after the operation. The claimant was extremely anxious and worried about this.

13.34 The claimant heard nothing further from Mr Lumsden about the decision, so on 25 February 2016, she sent him an email asking for a meeting to discuss her performance review and asking him to tell her if the decision to transfer her to West London was a definite one and from what date. She also asked why the decision was made, see page 220.

13.35 At the end of February 2016, an email was circulated among the Fraud and Error Service referring to a vacancy for an HEO on the technology team in Universal Credit Digital Services Section in Victoria Street in London, page 340-342. The claimant was not informed of this vacancy.

13.36 On 2 March 2016, Mr Lumsden provided the claimant with an explanation for her intended posting into the position of Compliance Team Manager. He said that he had to take account of the claimant's terms and conditions around location and her rights on returning to work following maternity leave. He said taking these into account the post of local service Compliance Team Leader was the only option which fitted the criteria. Technically it would be from 1 April, but in practice it would be when the claimant returned from maternity leave. He attached to his email an extract from a policy document explaining an employee’s rights on returning to work after maternity leave. This referred to those who had taken additional

maternity leave and referred to the position where, if it was not possible for the authority to permit an employee to return to her original post, (our underlining) she would be offered suitable alternative employment on terms and conditions no less favourable than if she had been able to return to her original job. In reply to that, page 221, the claimant asked why it was not possible for her to return to her original role because, as she understood it, the second manager's role was being covered on a temporary basis. In reply Mr Lumsden said that the second Surveillance Team Manager position was filled by Graham Smith and the other position had been filled by an HEO manager, returning from maternity leave, (although he did not say it was Andrea Dash). Email correspondence between them continued and it was intended that they would discuss the matter on 22 March.

13.37 However, on 7 March, Mr Richards sent a letter to all staff, but not including the claimant, informing them of a new structure, with the claimant shown as the Compliance Team Manager. This was in a letter seen in the bundle at page 226-227, dated 7 March 2016. The claimant did not receive this.

13.38 On 9 March 2016, Mr Molvi sent an email, page 370, with a wide circulation, not including the claimant, who remained on maternity leave, of the fact, amongst others, that the claimant would be joining the West London team in August 2016 and would be taking up the role of Compliance Team Manager. He also announced a number of acting-up HEO vacancies in Streatham, Brent/Neasden, including an acting-up opportunity in the role the claimant was to take when she returned, for the period before she returned.

13.39 The claimant was not issued, at this stage, with a posting letter. However, when she visited the office on 10 March she discovered from colleagues that it had been announced that she was to be the Compliance Team Manager. When the claimant learnt this, she was very distressed and felt undervalued as a member of the organisation and that she had been forgotten about because she was on maternity leave. Her perception of the matter was that her employers appeared not to wish to give her her old job back, even though they could do so and she could not understand why. She describes her feelings as demoralised, hurt and extremely upset at this decision.

13.40 On 17 March 2016, the claimant sent an email, page 49, to Mr Lumsden, in which she said she had attempted to call him asking for confirmation of a meeting the following week, and for a reply to a previous email, and she asked whether any other HEO vacancies had come up. The reply she received from Maria Rowe, also page 49, was that Mr Lumsden was out of the office and had been attending the London and Home Counties conference, to which the claimant was not invited.

13.41 The claimant attended a meeting with Mr Lumsden on 22 March 2016 in the Fulham office. Mr Molvi was at that office but not participating in the meeting. Mr Lumsden was unaware of the vacancies referred to in Mr Molvi's email of 9 March. The claimant had heard about the vacancy at Brent/Neasden because someone had told her about it and she raised the matter with Mr Lumsden. He agreed to speak to Mr Molvi about it. The claimant told Mr Lumsden she intended to bring a grievance.

13.42 The claimant did present her grievance on 1 April 2016. The substance of the grievance appeared at pages 50-64 in the bundle. She set out a detailed and lengthy history. The outcome she sought was to return to her posting of Surveillance and Tasking Manager. If that was not possible she wished to be placed as a local Fraud Service Team leader in charge of a Fraud Team and not in a Compliance Team. Failing that, she would be willing to be placed as a local Fraud Service Team Leader at Slough or South Buckinghamshire.

13.43 The claimant lives in Iver Heath, which is near to Slough. The position at Brent/Neasden would represent a longer journey for her than her previous journey to Harrow.

13.44 On 15 April 2016, there was a further email to multiple recipients, including the claimant's work email address, enclosing expressions of interest for HEO positions as Complaints Resolution Managers in Acton. Although the claimant was listed as a recipient of this email she did not receive it because no arrangement had been made for forwarding of any business emails to her at home whilst she was on maternity leave.

13.45 At the end of April 2016, Mr Lumsden transferred to a business support role and his position as SEO was occupied on an acting basis by Graham Smith. In turn his role in Surveillance and Tasking Team management was covered by EO Helen Martin, acting up. Mr Molvi, however, became the claimant's line manager.

13.46 On 5 and 20 May 2016, there were further emails circulated to staff in the Fraud and Error Service. The first on 5 May was concerned with the launch of a progression exercise and said that advertisements would be placed on the Civil Service Jobs website. The second was sent by Barbara Burke on behalf of Mr Lumsden and enclosed a web-link which linked to a site called the One-Service Network site, which contained job opportunities. The claimant was not informed of either of these initiatives.

13.47 On 3 June 2016, Mr Molvi wrote a letter to the claimant introducing himself. The letter, at page 79-80, stated that the claimant had been posted to West London Fraud and Error Services Compliance Team Leader when she returns from maternity leave in August 2016. He enclosed a 12-page document called a People Performance Report but there was also a job description attached

along with some key work objectives. She was provided details of the current West London leadership structure. The claimant responded to Mr Molvi by telephone. Whilst she thanked him for his letter, she told him that she objected to her posting. She followed that telephone call with an email addressed to both Mr Molvi and Mr Richards, page 77, in which she reminded them that she had an outstanding grievance for bullying and discrimination. At the end of her email she asked what the position would be if she declined the role of Compliance Team Manager. In response to that Mr Molvi sought advice from the respondent's Human Resources. The advice he received appears at page 100B in the bundle. The query raised by Mr Molvi is summarised as follows:

> "To discuss if your member of staff does not return to the post they have been offered following maternity leave which has ended after more than 26 weeks. It is not reasonably practicable for them to return to the role prior to maternity leave. They have been offered a role where terms and conditions are no less favourable."

13.48 The response is in these terms:

> "If they choose not to return to the role offered they will need to discuss with you what they want to do, the choices are sick (with supporting medical certificate) and we manage under attendance management procedures, they apply for (and you agree) a career break or unauthorised absence which may lead to disciplinary action and/or dismissal. The role you are offering appears to be a reasonable management request in line with DWP policy and they cannot simply refuse to take it without sanction. If they choose not to come back to work they will be asked to repay the departmental maternity pay, less any statutory maternity pay they have been paid."

13.49 On 16 June 2016, the claimant was interviewed in connection with her grievance. She was accompanied by a trade union representative. Interviews with other members of staff, notes of which appear in the bundle at page 228-249, were conducted over the period 6 July - 26 August. Interviewees included Andrea Dash, Mark Payne, Joe Richards, Mark Lumsden, Graham Smith and Abby Molvi.

13.50 On 18 July 2016, there was a further HEO London and Home Counties conference, to which the claimant was not invited.

13.51 On 26 July 2016, Mr Molvi formally wrote to the claimant to offer her a role at Neasden as a Fraud Team Leader and the claimant accepted that position. There was a meeting to discuss her return and although her official return date from maternity leave was 17 August, her first day back in the office was 30 August.

13.52 On 9 August, Kalvinder Jandoo sent a widely circulated email, page 350-1, inviting expressions of interest in Detached Duty opportunities "to support the Logistics 2017 Programme". The email

circulation included the claimant, but she was still then on maternity leave.

13.53 The claimant's grievance was partially upheld, but not on the basis of maternity discrimination. The investigators concluded, in relation to the decision not to allow the claimant to return to her previous job as Surveillance Team Leader, that it was a reasonable course of action not to allow her so to return, but instead to post her as a Compliance Team Leader. They concluded that workforce planning rules did not apply to the allocation of that position to the claimant. The announcement of the claimant's posting to the position of Compliance Team Leader made without her knowledge was described as a regrettable example of less than clear communications. The investigators accepted that during the claimant's maternity leave procedures had not been followed in that a Keeping-in-touch plan was not agreed and the claimant was not invited to attend HEO conferences in October 2015 or February 2016.

13.54 The claimant appealed against those decisions that were adverse to her, but her appeal was unsuccessful.

13.55 As indicated at the start of these proceedings the claimant approached ACAS for the purposes of early conciliation on 26 May 2016. The ACAS Certificate of Early Conciliation was issued by email on 26 June, and the claimant commenced her proceedings on 24 July.

Conclusions - Liability

14. The tribunal now gives its liability conclusions. We do so having applied to our findings of fact, in relation to the issues we had to decide, the above legal provisions where they are relevant.

Decision to Move the Claimant - 1999 Regulations

15. We begin with the decision to move the claimant, and the questions at paragraph 5 of the list of issues, given the concession which appears in paragraph 4. There is also a concession at subparagraph (a) of paragraph 5. The issue here is whether it was not reasonably practicable for the claimant to return to her position of Surveillance Team Leader.

16. The relevant factors bearing on this decision are as follows, so it seems to us. Andrea Dash had been permanently posted into the claimant's position. She had also been replaced on a permanent basis during her maternity leave yet, Andrea Dash wished to go back to her previous job. No good reason was given to us as to why Andrea Dash was permanently posted into the claimant's position. The critical nature of the post (as well as the surveillance strategy) explain why an HEO was required, but do not explain why there could not be a temporary deployment for the period of the claimant's maternity leave. Mr Lumsden himself gave no reason for that particular choice. The reason Mr Richards gave was that it was not

the normal practice and Andrea Dash was happy to take on the claimant's position. In the experience of the members of the tribunal, most employers would appoint someone on a temporary basis, expressly for the purposes of maternity cover. Mr Smith's role was temporarily filled by Helen Martin, who is an EO. An HEO was required under the surveillance strategy. However, there was no one in the claimant's post between August and November 2015, apart from Graham Smith, who also had a separate fraud team to manage at the same time. A decision had been made that two HEOs were required to manage the surveillance team.

17. The evidence of how Ms Dash's position had been dealt with suggests that the respondent had no intention to attempt to comply with regulation 18(2) in her case and that seems also to be true in the case of the claimant. The tribunal does not accept that it was not reasonably practicable for the claimant to be accommodated in her old position as Surveillance Team Leader. Andrea Dash might have been willing to return to her old position, but even if that was not possible or her position was otherwise settled, there is no reason why the temporary secondment of Helen Martin into the position held by Graham Smith could not have been terminated so as to permit the claimant to return. We accept that that would have involved the removal of Mr Smith from that post. We return to this subject later in the discussion of maternity discrimination.

18. The respondent's reliance on the permanent posting of Ms Dash as its "not reasonably practicable" defence is particularly unattractive. What may have amounted to a failure to respect the maternity rights of one employee should not be a matter on which an employer can rely to defeat those of another employee.

19. We do not think that the tribunal is expected to deal with the question raised in paragraph 5(c) in the list of issues. In the end the claimant did return to a job that was acceptable, albeit we think that this represented a compromise on her part. If this question is directed to the failed attempt to place the claimant in the position of Compliance Team Leader, our view is that this was a job which was appropriate for the claimant to do in the circumstances, but it was not suitable for her because she did not wish to do the job.

20. As is noted at paragraph 6 of the list of issues, no cause of action arises from a breach of regulation 18 and the tribunal must therefore go on to consider the subsequent issues. It must follow from that, that no time issue arises either in relation to any finding under regulation 18.

<u>Section 47C Employment Rights Act 1996</u>

21. We therefore turned to section 47C Employment Rights Act 1996. The first question (issue 7(a)) is whether the decision by the respondent to fill the position of Surveillance Team Leader with a permanent replacement and subsequently move the claimant to a different role amounted to a detriment.

22. It was not difficult for us to conclude that this decision amounted to a detriment in the sense described in the Shamoon case. The claimant did not want to do that particular job, as she had made clear to her employers before. The claimant had been removed from a job that she wanted to do while she was on maternity leave. The claimant plainly, and we think reasonably, felt that this decision placed her at a disadvantage in the circumstances in which she thereafter would have to work on her return from maternity leave. This was undoubtedly a detriment.

23. The next matter we have to determine is whether the decision was made for a prescribed reason, namely, because the claimant took ordinary or additional maternity leave (issue 7(b)). It seems to us, first, that the claimant would not have had the position removed from her had she not taken additional maternity leave. Mr Rainsbury argued, relying on Sefton Borough Council v Wainwright, that the claimant's extended maternity leave should be regarded as simply part of the factual circumstances. A "but-for" test is not appropriate in the circumstances, he argued. The tribunal must look for the reason why the claimant was replaced in the position of Surveillance Team Leader. He submitted that it was because of the decision to place Andrea Dash permanently in that role.

24. We agree with the principles expressed there, and accept that, the claimant having been on maternity leave does not inevitably lead to a conclusion that the respondent's decision was made because she took that leave. We disagree with the conclusions Mr Rainsbury invites us to draw. The claimant does not require a comparator for purpose of liability in this respect. She nevertheless has a clear and obvious comparator: Graham Smith. In April 2016, he was transferred to act up in Mr Lumsden's position. In his absence, his position as Surveillance Team Leader was retained for his benefit. The claimant was not afforded that consideration. Instead, the respondent appears to have adopted a policy that, because it is not obliged to offer those on additional maternity leave their original job on their return, they should therefore not even attempt to do so. In fact, the respondent appears to have assumed that the claimant would in fact take additional maternity leave when it was by no means certain that she would do so. The appointment of Andrea Dash to her position appears to have been made on that assumption. There was no reason given to us why Helen Martin could not return to her substantive role, and for the claimant to be given that role, other than that Mr Smith wanted to keep the role. This difference of treatment is only explicable on the basis that the claimant was taking additional maternity leave. A man (Graham Smith) who was absent from his substantive role for a different reason was not treated in that way. These factors show that, in our judgment, the reason why the claimant was subjected to that detriment was because she took additional maternity leave, and the claimant therefore succeeds with this allegation.

Direct Maternity Discrimination

25. We now consider whether this amounted to direct maternity discrimination. The first sub-question in issue 8 asks whether the claimant was treated

unfavourably. For the reasons we have already given, we have no doubt that this was unfavourable treatment of the claimant, to place someone else permanently in her role thus forcing her to accept a different role.

26. The second question is whether this was because she was exercising her right to ordinary or additional maternity leave. Our view is that it was because she exercised her right to additional maternity leave. Our reasoning is similar to the reasoning we gave in relation to the issue at paragraph 7 of the list of issues. The burden plainly passes to the respondent to explain why the claimant was treated as she was. She was subjected to a detriment and she had taken additional maternity leave. The respondent's explanation is in three parts. The claimant did not have the right to go back to her job. There was a permanent replacement. It was a high priority job. However, the respondent provided no explanation as to why the job could not be done by an HEO, but on a temporary basis, and Helen Martin was herself not an HEO but an EO. The tribunal is not persuaded that the claimant having taken additional maternity leave was in no sense part of the reason for this unfavourable treatment.

27. In relation to these matters, there is no suggestion that the claim was submitted out of time. The claimant therefore succeeds with this allegation.

Harassment

28. We now give our decision in relation to the harassment question raised at paragraph 9 of the list of issues, in relation to the decision to move the claimant into a different role. We agree that before 7 March, 2016, there was no consultation with the claimant about the decision. The claimant's circumstances bear a striking distinction from those of Mr Smith who, we are told, had a choice as to whether or not he retained his role whilst on secondment into Mr Lumsden's role. We also agree that making a decision without any consultation with the claimant was unwanted conduct so far as she was concerned.

29. The next question is whether the conduct was done with the purpose or whether it had the effect of violating the claimant's dignity or of creating one or more of the environments specified in section 26 Equality Act 2010. The consequence of the decision having been made without consultation with the claimant was that, when it was announced, and she heard about the announcement from colleagues, the claimant found it humiliating and felt that it was a hostile act and it was one which seriously affected her dignity. She was clearly distressed. Responsibility for this lies with Mr Richards and Mr Molvi. We can, we think, absolve them of any intention to subject the claimant to those kinds of environment. We do not think that that was their intention but we think that it is reasonable to think that a decision made in those circumstances in the previous background would have those effects. The claimant's perception was that this was not a role that she wanted and she was being forced into it. It was also a lesser role, something she saw as a dead-end job. The other circumstances include that the respondent regarded the job as at the same level as the claimant's

post as Surveillance Team Leader. It was an HEO post and one which they regarded as equally important. Our view is that, those matters notwithstanding, the claimant was still entitled reasonably to think that the decision affected her in those ways.

30. The acid test for harassment under the Equality Act, is whether the conduct is related to a protected characteristic, in this case, to the claimant's sex. Maternity is not a relevant protected characteristic in relation to harassment. The tribunal has been clear about its decisions so far and is equally clear in this respect, that the conduct was unrelated to the claimant's sex. The mere fact that the claimant took maternity leave, that the decision was made during her absence on maternity leave and that only women take maternity leave is not enough in our judgment to establish that the conduct was related to her sex. For this purpose, the claimant was simply absent and we think it is feasible that a man absent for a different reason, for instance on a career break or a posting abroad, would have been treated in exactly the same way. (This is a complaint about the manner in which the decision was made and communicated, not the decision itself).

31. It follows that the claimant does not succeed with this allegation. Had we concluded otherwise, we would have concluded that, as this occurred on 10 March, 2016, the claim was submitted in time in respect of this matter.

32. Whilst we are on the subject of harassment, it is convenient to deal with the allegation at paragraphs 13 and 14 in the list of issues, which contain a separate allegation of harassment in the sense of a threat of dismissal if the claimant refused to take the positions of Compliance Manager or Brent Investigator Team Leader.

33. We do not think that this allegation is made out. There was no actual threat of dismissal. The highest that this can be put is that the claimant was told that, if she did not agree to take the position of Compliance Manager, the respondent would take disciplinary proceedings. We do not think that this can properly be regarded as a threat of dismissal. This complaint of harassment also fails, for those reasons.

<u>Failing to Inform – Direct Maternity Discrimination</u>

34. We therefore turned to the allegation of failure to inform the claimant of various matters during her maternity leave. Our findings of fact show that the separate allegations at paragraph 10 on the list of issues are all made out. The respondent admits the matters set out at paragraph 10A. In all these respects, the respondent failed to inform the claimant of the subject matter. The question we have to decide is whether this amounts to unfavourable treatment and then we have to consider the reason for that treatment. It is important for us to bear in mind in our consideration of this matter that the claimant was invited by Mr Smith to a training event in November and she was invited to a management meeting followed by a Christmas lunch in December.

35. It seems to us that it does not matter whether the claimant would have applied for any of the jobs which were the subject of the email communications which were not sent to her. In principle, it is unfavourable treatment of a woman on maternity leave not to keep her informed about vacancies which arise during her absence. There ought to have been an arrangement whereby she received emails of that type during her maternity leave.

36. With regard to the reason, it only assists the respondent for a short period that the claimant's maternity leave began unexpectedly early such that there was no time, before it began, for the parties to set up an arrangement. Thereafter there was no reason for the respondent not to put an arrangement in place. The fact of the matter is that the claimant was not at work and the respondent has accepted that it was at fault in not putting in place an arrangement whereby she could be kept informed. The respondent has provided no explanation at all, other than the premature birth of the claimant's son, as a reason for not putting an arrangement in place. In our view, this is completely unsatisfactory and we are satisfied that the reason the claimant was not kept informed at least includes the fact that she was on maternity leave. There is minimal mitigation here on the respondent's side arising from the invitations to attend the training event and the Christmas management meeting. This is a further act of direct maternity discrimination.

37. In our judgment, this was an act extending over a period. There was a failure to put an arrangement in place after the claimant had her child. It would have been reasonable for the respondent to do that. But in our judgment, time does not run from the date when it would have been reasonable for an arrangement to be put in place, because, in this case, there were repeated continuing failures throughout the claimant's maternity leave, including failures for which the claim was submitted well within time, which are not failures because of the original failure to set up an arrangement. No doubt it would have been extra work for the respondent to inform the claimant about things on a piecemeal basis, but the failure to set up an over-arching arrangement did not prevent the respondent from informing the claimant of specific events or initiatives when they arose. In our view, therefore, the claim was not submitted out of time in relation to this otherwise successful allegation.

Remedy

38. The only loss the claimant sustained because of these matters was injury to her feelings. There was no loss of salary. It was possibly unnecessary, because the claimant could have been told of the changes nearer to her return date, at a time when the vacancy she eventually took was known to be available. She might well still have been upset by the decision.

39. We have described above how the claimant felt about these decisions. There is no doubt her feelings were injured. She was at a vulnerable time, because of her son’s illnesses, but the tribunal may not compensate her for hurt feelings which relate to her son. We think that it is appropriate to make a single award, notwithstanding that the claimant succeeded under

section 47C Employment Rights Act, as well as under section 18(4) Equality Act.

40. This is not an isolated matter. Not only was the claimant removed against her will from a role she enjoyed, but the respondent also failed to keep her informed about various matters during her maternity leave. But the removal of the role was the major issue. The lower Vento band is for "less serious cases, such as where the act of discrimination is an isolated or one-off occurrence". On its own, dismissal might be seen as a one-off incident, but the tribunal regards these matters, taken together, as properly to be placed in the middle Vento band, which is for serious cases, which do not merit an award in the highest band. Following Da'Bell, the middle band runs from £6,000.00 to £18,000.00. Our view is that this case falls in the middle of this band. It is not as serious as a case where an employee is dismissed without any alternative employment. The claimant had another job. It is to say the least surprising that a government department responsible for employment should have demonstrated so little appreciation of the law relating to maternity. We are not to punish the respondent, but the claimant was we think entitled to have an expectation that she would be treated fairly and in accordance with the law. It is hardly surprising that, falling from the standard to be expected of an employer such as the respondent caused the claimant so much distress and anguish.

41. We did not think that the conditions for aggravated damages, described by Mr Toms at paragraph 56 of his submissions were met in this case. The respondent's conduct was not malicious, high-handed, insulting or oppressive. The aggravating features listed at paragraph 57 do not in our view support the proposition at paragraph 56. The respondent's decision was based on a failure to understand the claimant's rights, and, in particular, on the mistaken view that someone who takes additional maternity leave has no rights at all.

42. With those considerations in mind we think that the appropriate award is the sum of £12,000.00, to which we must add 10% in accordance with Beckford and King. Our award is therefore in the sum of £13,200.00, to which interest must be added, calculated as at the date this judgment and the reasons are finalised by me, as to which see above in the Judgment. We decided to take this course after considering whether to make a declaration about what happened, and after we considered making a recommendation.

43. As the respondent readily accepted, once we had informed the parties of our decisions, it is appropriate that the tribunal should make a recommendation in this case. We can recommend that the respondent takes specific steps for obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate. The respondent volunteered, through their counsel, to accept a training recommendation. In the end, we went a little further than they proposed, and our recommendation appears in the judgment at the top of this document.

_____
Employment Judge Southam

Date: _10 April 2017_____

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE