Appeal No. UKEAT/0020/14/DM
UKEAT/0021/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 July 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

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(1) INDIGO DESIGN BUILD & MANAGEMENT LIMITED APPELLANTS
(2) MR B TANK

MRS M MARTINEZ RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MR CHRISTOPHER OVER (Solicitor) OTB Eveling LLP Senate Court Southernhay Gardens Exeter EX1 1NT
For the Respondent	MR MATTHEW HODSON (of Counsel) Instructed by: Tim Johnson Law Solicitors 200 Aldersgate Street London EC1A 4HD

SUMMARY

SEX DISCRIMINATION

Direct

Pregnancy and discrimination

In respect of pregnancy and maternity discrimination the Employment Tribunal did not apply the correct legal test. **Onu v Akwiku** [2014] ICR 571 and **Johal v Commissioner for Equality and Human Rights** [2010] UKEAT/0541/09 (HHJ Peter Clark) applied. Questions of pregnancy and maternity discrimination and associated time issues remitted to the same Employment Tribunal. In other respects, including issues relating to sex discrimination and compensation, Employment Tribunal's Judgment and Reasons upheld.

Postscript added to draw to the attention of the parties and the Employment Tribunal on remission the recently reported decision in **Commissioner of Police of the Metropolis v Keohane** [2014] Eq LR 386, especially at paragraphs 22-40.

HIS HONOUR JUDGE DAVID RICHARDSON

1. By a Judgment dated 2 May 2013 ("the Liability Judgment") the Employment Tribunal, sitting in Colchester, Employment Judge M Warren presiding, upheld claims by Mrs Marie Martinez that she was (1) discriminated against on the grounds of pregnancy, maternity and her sex; and (2) unfairly dismissed and owed wages. The findings of unlawful discrimination were made against Indigo Design and Build and Management Limited ("Indigo") and Mr Baljit Tank. They appeal those findings. There is no appeal against the findings of unfair dismissal or failure to pay wages.

2. By a subsequent judgment dated 12 August 2013 ("the Remedy Judgment"), the Employment Tribunal awarded Mrs Martinez the total sum of £53,338.45. The bulk of this award was made jointly and severally against Indigo and Mr Tank as compensation for unlawful discrimination. There are grounds of appeal against several aspects of the award.

The Background Facts

3. Mrs Martinez was employed by TQIPS Limited ("TQIPS") with effect from 23 November 2007 as an Engineering Services Coordinator. Mr Tank was its Managing Director. This company carried on business in the construction of garage forecourts. Its headquarters was in Bromsgrove, but it had a subsidiary office in Elsenham, a few miles from where Mrs Martinez lived. This is where she worked. She had taken maternity leave from September 2008 to June 2009. She took it again with effect from 25 October 2010. Her return to work date was confirmed for 25 July 2011.

4. While Mrs Martinez was on maternity leave, TQIPS suffered the loss of a major contract with Shell. The successful bidder was Fujitsu. At the beginning of April 2011, many employees transferred to Fujitsu under TUPE. Mrs Martinez did not transfer - apparently on the basis that only 8 per cent of her work concerned the Shell contract. The Elsenham office was closed. Mrs Martinez was offered the opportunity to work from home but she declined, saying that she did not have sufficient space and did not wish to work from home.

5. In July 2011 TQIPS went into administration. Its business was acquired by Indigo. The employment of various employees, including Mr Tank and Mrs Martinez, transferred under TUPE to Indigo. Mrs Martinez was ready, willing and able to return to work on 25 July, but nothing had been sorted out for her. On 18 July 2011, she raised a grievance which, although the subject of some correspondence and attempts to arrange a meeting, was never dealt with. Indigo did not pay her from the month of August onwards. On 14 December 2011 she resigned, claiming constructive unfair dismissal.

6. It was the case for Mrs Martinez, largely upheld by the Tribunal, that she had been poorly treated by TQIPS from the time she informed it of her second maternity leave. Complaints which were upheld by the tribunal may be summarised as follows:

(1) failing to inform her in the requisite 28-day period of the date her maternity leave should end. She was told on 6 October 2010, 21 days late;

(2) failing to conduct a health and safety risk assessment following notification of pregnancy;

(3) failing to keep her informed about the TUPE transfer of some employees to Fujitsu;

(4) failing to resolve her complaint that there was nowhere physically to return to work;

(5) failing to inform her of the administration of TQIPS or her transfer to Indigo, which she learned about indirectly in August;

(6) failing to address her grievance.

The appeal concerning discrimination

Statutory Provisions

7. The case for Mrs Martinez was, for the most part, put under section 18 of the **Equality Act 2010** as pregnancy and maternity discrimination and it was for the most part found by the Tribunal to be unlawful discrimination on these grounds. Section 18 provides:

> **"18 Pregnancy and maternity discrimination: work cases**
>
> **(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
>
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —**
>
> > **(a) because of the pregnancy, or**
> >
> > **(b) because of illness suffered by her as a result of it.**
>
> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) 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.**
>
> **(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).**
>
> **(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—**
>
> > **(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;**
> >
> > **(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.**
>
> **(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—**
>
> > **(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or (b) it is for a reason mentioned in subsection (3) or (4)."**

8. The failure to address Mrs Martinez's grievance was in part outside the protected period. The case for Mrs Martinez was in this respect put on her behalf and found by the tribunal to be direct sex discrimination. Direct discrimination is defined by section 13(1) as follows:

> **"13 Direct discrimination**
>
> **(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."**

9. Section 136 of the Act deals with the burden of proof:

> **"(2) 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.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

10. Finally, it is relevant to mention that time provisions are contained within section 123 of the **Equality Act**. The normal time limit is three months, starting with the date of the act to which the complaint relates. However, it is provided:

> **"(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

The Tribunal's Reasons

11. The Tribunal set out in its reasons a detailed summary of the law which it sought to apply. It is important to keep in mind one paragraph of this summary:

> **"How does one determine whether any particular less favourable or unfavourable treatment was 'because of' a protected characteristic? We look to the authorities under the previous legislation, which used the expression, 'on the grounds of'. To paraphrase and simply state the authorities, which appeared to conflict but which in fact do not: in** *James v Eastleigh Borough Council* **[1990] ICR 554 the House of Lords suggested we should ask ourselves, 'but for' the protected characteristic, would the Claimant have suffered the same treatment? In** *Nagarajan v London Regional Transport* **[1999] ICR 877 the House of Lords spoke of the protected characteristic having a significant influence on the outcome in order to amount to direct discrimination; this has become known as the 'reason why' test. There appeared to be a dichotomy, although in truth there was not, as explained in the EAT by Mr Justice Underhill in** *Amnesty International v Ahmed* **[2009] ICR 1450 and the Supreme Court in** *R (on the application of E) v Governing Body of JFS and the Appeal Panel of JFS* **[2010] IRLR 136: either approach may be appropriate, depending on the facts of the case. Sometimes it will be obvious on the facts that but for the protected characteristic, the act or criteria complained of**

would not have arisen. In other cases, it may be necessary to examine the motive of the alleged discriminator and so look at 'the reason why'."

12. It is now necessary to quote some key paragraphs of the Tribunal's conclusions. Concerning failure to notify the date that maternity leave should end, the Tribunal said:

> **"84.1.1 Well, that was confirmed to her on 6 October 2010; the request was made on 19 August 2010, she should have been told by 15 September 2010 so the confirmation was 31 days late. It is not a matter of huge significance in itself, though it is perhaps indicative of an attitude towards Mrs Martinez and maternity leave, particularly given that she had provided the Government's Guidance to Employers which is very clear as to the requirements. The fact is that the Respondents' response was a breach of a statutory requirement and so it must be regarded as a detriment; in other words it must be seen as something that is unfavourable, and as that is based on the premise that Mrs Martinez is pregnant, it is clearly because of her pregnancy. This aspect of the claim succeeds."**

13. Concerning failure to conduct a health and safety risk assessment following pregnancy, the tribunal said:

> **"84.2.1 There is an obligation under statute to carry out a specific risk assessment for a pregnant woman, one was not carried [out] and so again, that has to be regarded as unfavourable treatment. Again, it is based on the premise that the Claimant is pregnant and so is clearly because of her pregnancy. This aspect of the claim succeeds."**

14. Concerning failure to consult over the Fujitsu process, the Tribunal said:

> **"Because she was not at work, she was not kept up to date with developments on the Fujitsu transfer and it was left to her on her Keeping In Touch days to establish with Fujitsu direct that she was not going to transfer. She lost opportunities to make plans to seek employment at Fujitsu, to argue that she should be transferred. This may have been something that was inadvertent on the part of the Respondents, but motive is not relevant. The fact is that the lack of information and consultation placed her at a disadvantage, was unfavourable and arose because she was absent through pregnancy. This aspect of the claim succeeds."**

15. Concerning failure to resolve her complaint that she had nowhere to work, the Tribunal said:

> **"Had she not been at home on pregnancy leave, she would have been there in front of Mr Tank and the other Managers, in communication on a daily basis and he would have had to have dealt with her because the office closure was approaching; he did not have to deal with her urgently simply because she was not there at work. That is unfavourable treatment and it is because of her pregnancy; it would not have happened that way had she been at work. This aspect of the claim succeeds."**

16. Concerning failure to inform her of the administration, the Tribunal said:

> **"Mrs Martinez was told of the administration of TQIPS in passing in another context and even then, with no explanation of the effect that would have on her employment status. She was not even told of or learnt of the development over the 10 days between 10 and 25 July 201, the later date being when the Claimant first learnt of the administration. Others would have been assured by the new company that their employment was continuing; she was not even told that. That would not have happened had she not been absent on maternity leave. It must be unfavourable treatment and it must be as a consequence of the maternity leave. Add to that, not including her in the schedule of employees in the transfer document; that was unfavourable treatment, although she would not have been aware of it at the time. It would have meant she was more vulnerable to a dispute as to whether or not she had transferred to the First Respondent, although this was not a huge point given that it was rectified by the First Respondent putting her on its payroll."**

17. Concerning the failure to address the grievance, the Tribunal dealt with the matter differently depending on whether it was determining the question of maternity discrimination, which applied only to a few days in July as the case was argued, or sex discrimination. The reasoning as regards maternity discrimination was as follows:

> **"From 28 July 2011, in the subsequent 5 days nothing occurred, nor did anything occur until the end of the protected period on 25 July 2011. We recognise that grievances are very rarely dealt with within the time frames that such policies anticipate, but one would certainly have expected some form of acknowledgment within those 5 days and one would have thought that if the Claimant had been at work, in front of her Managers, coming into contact with them daily, they would have done so. Mrs Martinez was absent from work at the time through her maternity, and if she had not been absent she would not have ignored. This aspect of her claim succeeds."**

18. The reasoning as regards sex discrimination was as follows:

> **"87. Mrs Martinez complains of the failure to address her grievance. She had to do all the chasing and the Respondents frankly just let it drop. We could conclude that was because she was absent from work, because she had been on maternity leave and the question of her return had not been resolved. We could conclude from that the reason was her maternity leave, which is related to her sex, as only a woman would be absent from work on a prolonged period of maternity leave and that therefore, the failure to deal with the grievance promptly was on the grounds of sex. The appropriate comparator is a hypothetical comparator; a man who had been absent from work for a prolonged period. Inferences can be drawn from the lack of Equal Opportunity and Diversity training. We could conclude on those facts that a man absent from work for such a period would have been treated differently, his grievance would have been dealt with more promptly, as indeed would his return to work. It may be (we could conclude that) the Claimant was treated less favourably because she was a women, returning from maternity leave.**
>
> **88. That in our view is sufficient to shift the burden of proof to the Respondents. We looked to the Respondents for an explanation and to satisfy us that discrimination on the grounds of the Claimant's sex played no part whatsoever in the matters complained of. The explanation is that not dealing with her grievance was an administrative oversight, in the context of the difficult situation faced by the business; the first company going into administration, having lost the contract with Shell, having to re-organise and relocate, closing the office at Elsenham. Those are matters that attract some sympathy and understanding on the part of the Tribunal in so far as they go, but in the context of one's obligations to one's employees, they are weak**

excuses, lacking cogency and credibility. The Respondent has not satisfied us that the Claimant's sex played no part in its treatment of her in this respect."

19. It is also relevant to quote one aspect of the Employment Tribunal's judgment where it found it favour of Indigo and Mr Tank:

> **"From the e-mail correspondence, it seems that the Claimant's colleagues were as in the dark as she was, in particular Mr Matthews and Mrs Meissenheimer. Whilst certainly it is unfavourable treatment, it is not, as it seems to us, because she is absent through pregnancy. It is more to do with the Respondent's own communication failings with its staff, on that point therefore, Mrs Martinez does not succeed."**

20. Finally, the Tribunal said the following concerning time issues:

> **"It has been suggested that the claims are out of time. It seems to us perfectly obvious that the matters complained of are part of a continuous course of conduct, involving in particular Mr Tank, and there is no doubt at all that the claims brought on 12 September 2011 were brought out of time."**

Submissions

21. On behalf of Indigo and Mr Tank, Mr Christopher Over puts forward three submissions.

22. Firstly, he submits that the Tribunal's reasoning concerning pregnancy discrimination applied the wrong legal test. The critical question for the Tribunal to determine was the reason why less favourable treatment occurred: see **Nagarajan v London Regional Transport** [1999] ICR 877 at 855-856 per Lord Nicholls. It is not sufficient that the treatment would not have occurred but for a protected characteristic. It is necessary that prohibited grounds should have had a significant influence on the outcome whether consciously or unconsciously. By way of example, he relies on **Martin v Lancehawk Limited** [2004] UKEAT/0525/03. He says that the reasoning of the Tribunal shows that it did not grapple with this central issue.

23. In response to this submission, Mr Hodson submits that the Tribunal did not fall into error in this way. He submits that the conclusions on the first two grounds where the Tribunal

said that since the treatment was "based on the premise that Mrs Martinez is pregnant", it was "because of her pregnancy" were a proper application of **Amnesty International v Ahmed** [2009] ICR 1450. These grounds were, he submitted, directly concerned with legislation to protect women in pregnancy or taking maternity leave.

24. As to the other grounds concerned with maternity discrimination, he submits that, read properly and in context, the Tribunal's other findings were addressing the "reason why" question. He relies, for example, on the fact that some allegations failed. He points to paragraph 84.4.2 of the Tribunal's reasons which I have already quoted.

25. Secondly, Mr Over submits that the tribunal did not apply section 120 of the **Equality Act 2010** correctly or gave insufficient reasons when it found that those instances of pregnancy discrimination which occurred before July 2011 were in time. The earlier instances were over by April 2011 and could not sensibly be seen as linked to the later ones. The Tribunal did not specifically refer to **Hendricks v Commissioner of Police of the Metropolis** [2003] ICR 530 or apply its reasoning.

26. In response to this submission, Mr Hodson submits that, while the Tribunal's reasoning was succinct, it had cited the correct statutory provisions and plainly had the correct test in mind when it referred to a "continuing course of conduct". The tribunal was entitled to take into account that a particular individual, Mr Tank, was involved in the continuing state of affairs (see: **Aziz v FDA** [2010] EWCA Civ 304).

27. Thirdly, Mr Over submits that the Tribunal's reasoning concerning sex discrimination was wrong in law. He suggests that the tribunal left out of account important characteristics of

a hypothetical male comparator, in particular that the hypothetical male comparator would have been working for a company in serious distress, as TQIPS was at the material time and Indigo subsequently. He submitted that there was no basis for supposing that such a hypothetical male comparator would have been treated any differently.

28. In response, Mr Hodson submits that the tribunal applied correct legal principles which it had set out correctly and in some detail in its Written Reasons. He submitted that it is plain that the tribunal had the correct comparator in mind.

Discussion and Conclusions

29. The Tribunal was required by section 13(1) and sections 18(2) and thereafter to consider whether the alleged treatment of Mrs Martinez was "because of" the protected characteristic in question or "because of" pregnancy or maternity leave. The use of the term "because of" is a change from terms used in earlier discrimination legislation, but it is now well-established that no change of legal approach is required: see **Onu v Akwiwu** [2014] ICR 571 at paragraph 40, Underhill LJ. The law requires consideration of the "grounds" for the treatment.

30. **Onu** also contains a concise statement of the law concerning what will constitute the "grounds" for a directly discriminatory act. In that case the worker concerned had no proper immigration status. She was subjected to ill-treatment at work. Underhill J said:

> **"42. What constitutes the 'grounds' for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in *Nagarajan* called his 'mental processes' (p. 884 D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had 'a significant influence'. Nor need it be conscious: a subconscious motivation, if proved, will**

suffice. Both the latter points are established in the speech of Lord Nicholls in _Nagarajan_: see pp. 885-6.

43. The distinction between the two kinds of case is most authoritatively made in the judgment of Lady Hale in _R (E) v Governors of the JFS_ [2010] 2 AC 728, at paras. 61-64 (pp. 759-760), though it is to be found in the earlier case-law: I would venture to refer to my own judgment, sitting in the EAT, in _Amnesty International v Ahmed_ [2009] ICR 1450, at paras. 32-35 (pp. 1469-70).

44. The present case is plainly not of the 'criterion' type. Mr Robottom in his skeleton argument contended otherwise, but the contention is, with all respect to him, unsustainable. The various acts of which Ms Onu complains – underpayment, being required to work excessive hours etc. – are not inherently based on her immigration status. If her immigration status was (part of) the grounds for those acts it is only because, in the mental processes which led to their doing them, Mr and Mrs Akwiwu were significantly influenced by it."

31. It was not in dispute before me that this approach is appropriate in a direct discrimination claim under section 18 just as under section 13. I am sure that this is the case. There is, in fact, authority in the Employment Appeal Tribunal following this general approach: see **Johal v Commissioner for Equality and Human Rights** [2010] UKEAT/0541/09, HHJ Peter Clark. The question is whether the tribunal applied this approach.

32. I have reached the conclusion that the tribunal did not apply this approach in respect of the section 18 findings. My reasons are as follows. There is a very plain difference between the way the Tribunal reasoned in respect of the sex discrimination claim and the way it reasoned in respect of the pregnancy and maternity discrimination claim. The reasoning in respect of the sex discrimination claim involves a two-stage process entirely appropriate where the Tribunal is considering whether to find direct discrimination established in a case where the mental processes of the alleged discriminator are in issue. No such reasoning is found when the Tribunal considered the pregnancy and maternity discrimination claim.

33. This difference is particularly stark when the Tribunal considered the failure of Indigo to address the grievance of Mrs Martinez. The Tribunal found the very short period of delay at the outset to be maternity discrimination, without any reference to the burden of proof and despite

acknowledging that the period was very short and not at all unusual. The Tribunal then adopted the conventional two-stage approach in determining whether the much longer period of delay amounted to sex discrimination.

34. The difference also appears to my mind from the use of the phrase "based on the premise that she is pregnant" in paragraphs 8 .1.1 and 84.2.1. The reasoning seems to be that, since a notification and risk assessment were required under statutory regulations to do with pregnancy or maternity leave, failure to provide them, or even in the case of the notification providing it a few days late, must be direct discrimination. This is not the law. Failure to provide a notification or a risk assessment relating to pregnancy or maternity leave may be, but is not necessarily, "because of" pregnancy or maternity leave. It may, for example, be a simple administrative error. The same process of reasoning is required in such a case as is required in any other discrimination case.

35. I have asked myself whether the Tribunal may have regarded the claims as falling within the first of the two categories which it identified in paragraph 14 of its Reasons. If so, it has misunderstood the approach in **Amnesty International v JFS**. The position is summarised on **Onu** which I have quoted. This is not a “criterion” case where TQIPS or Indigo applied the unfavourable treatment because of some rule or criterion which was inherently based on pregnancy or maternity. It is a case where the mental processes of the persons concerned fell to be considered.

36. To my mind, therefore, the reasoning concerning pregnancy and maternity discrimination cannot stand. The error of legal approach inevitable affects all the findings of pregnancy and maternity discrimination. Other findings appear to me to apply what is in effect a "but for" test

and I notice also that, as regards failure to inform Mrs Martinez of the administration of TQIPS, the Tribunal set out no real reasoning at all on the question whether it was "because of" maternity. It follows that the findings of pregnancy and maternity discrimination must be set aside.

37. With those findings also I will set aside the determination of the Employment Tribunal that those claims were in time. The Tribunal's very brief reasoning in paragraph 85 will inevitably require to be revisited. For whether there was a course of conduct of a discriminatory nature will depend on findings which must be made applying the correct legal test. The reasoning of the Employment Tribunal is very brief. I do not say that I would necessarily have upheld the appeal relating to the time point on that ground alone, but when the question is revisited, some much more detailed reasoning would be valuable. It is, for example, not obvious from anything else in the Tribunal's reasons that Mr Tank was involved in all of the earlier aspects of the treatment involved.

38. As regards the finding of sex discrimination made in paragraphs 87 to 88, I reject the submissions of Mr Over. I do not accept that the Tribunal had in mind a wrong hypothetical comparator. The Tribunal referred itself to the fact that the male comparator was stating a grievance. It referred to the period concerned as "such period", that is to say a similar period to that which Mrs Martinez experienced. To my mind, there was no error of law so far as any hypothetical comparator is concerned. On the contrary, it seems to me that paragraphs 87 and 88 are a proper assessment of the sex discrimination aspect of the case made in accordance with the law. The failure by Indigo to address the position of Mrs Martinez seeking to return from maternity leave, ready, willing and able to work and taking positive steps to attempt to resolve the position through the grievance procedure was indeed remarkable. The Tribunal was entitled

to find that the burden of proof shifted to the Respondent, and it was entitled to find the explanation lacking in cogency and credibility.

The appeal concerning remedy issues

39. Mrs Martinez sought compensation for unlawful discrimination and unfair dismissal. I can deal briefly with two grounds of appeal concerning remedy. The Tribunal placed the award of compensation for injury to feelings at the top of the middle bracket applied in such cases. Mr Over sought to criticise this, but I see no error of law on the part of the Tribunal. The award for injury to feelings will need to be reconsidered if, on remission, the findings of pregnancy and maternity discrimination are changed, but in principle there was no error of law in the award of compensation for injury to feelings.

40. The Tribunal assessed an uplift of 15 per cent in respect of failure to follow the ACAS code of practice. Mr Over's Skeleton Argument and Notice of Appeal sought to argue that this was excessive, given the substantial commercial difficulties of TQIPS and Indigo at the time. I, however, see no error of law in the Tribunal's assessment, and Mr Over, I think, in fact withdrew this ground of appeal.

41. I now turn to Mr Over's principal ground, which requires more explanation.

42. The Tribunal made a modest award for psychiatric illness in the sum of £3,500. Mrs Martinez had in fact become depressed during 2011. There was a medical report concerning her condition from Dr Suleman, a consultant psychiatrist, dated 3 January 2013. Mrs Martinez was vulnerable to depression. Her vulnerability resulted from factors in her life long predating her work history. She suffered an episode of depression beginning in

March 2011, which Dr Suleman found was caused in part by factors in her life which were not related to work, but also partly due to what he described as "work-related problems pertaining to the claim". As his report makes plain, he was aware of the nature of the claim which related to unpaid wages, sex discrimination in pregnancy and maternity discrimination and constructive unfair dismissal.

43. He said that she was likely to recover from her current on-going depression within six months to one year. He said:

> **"In my opinion, her work related problems pertaining to the claim have at least 50 per cent contributed to her current ongoing depression."**

44. The Tribunal in its findings accepted that the episode of depression began in March 2011 when Mrs Martinez learned that the Elsenham office was to close. It accepted Dr Suleman's opinion and awarded compensation for the episode of depression in the sum of £3,500. I should add that it carefully distinguished between the award for injury to feelings where it did not take account of Dr Suleman's report, and the award of compensation for psychiatric injury where it did.

45. Mr Over argues that the tribunal was not entitled to accept Dr Suleman's report as a sufficient basis for an award of compensation for personal injury. Alternatively, he argues that the estimation of 50 per cent was inappropriate. He argues that there were "work-related issues" which were bound to occur in any event, such as the closure of the office. These did not follow from any unlawful discrimination. Further, he says, Dr Suleman's report took into account such matters as constructive unfair dismissal and wage deduction claims for which no award of personal injury could be made.

46. In response to these submissions, Mr Hodson replies that the failure to inform Mrs Martinez properly of the closure of the office and most importantly the long drawn-out process which followed over many months were all the consequence of unlawful discrimination. Dr Suleman, by referring to "work related issues pertaining to the claim" plainly had in mind the complaints which Mrs Martinez was making rather than work generally. He submits that the constructive unfair dismissal claim and the claim for unpaid wages were extremely closely bound to the unlawful discrimination claim, such that an Employment Tribunal acting very much as a jury in respect of an award of general damages, was not obliged in law to separate them out. He further points out that Dr Suleman said the contribution was "at least" 50 per cent whereas the Employment Tribunal rounded the figure down to 50 per cent. Overall, he said, there was no error of law in the tribunal's reasons.

47. On this part of the case, I prefer the submissions of Mr Hodson. It seems to me plain that Dr Suleman had in mind the complaints which Mrs Martinez was making. I do not, in the particular circumstances of this case, think that the Tribunal was required to make some further discount from Dr Suleman's assessment because he took into account constructive unfair dismissal or overdue wages. These were so closely bound up with Mrs Martinez's complaints that it would be unrealistic to do so. The award of £3,500 for the contribution which unlawful discrimination made to her depressive episode is moderate and I do not think it is vitiated by any error of law.

48. The only point that I would make as regards the awards for personal injury and injury to feelings is that they would have to be reconsidered if on remission there are more limited or no findings of discrimination on grounds of pregnancy or maternity.

49. I have dealt with Mr Over's main submissions but I should mention two other matters which are raised in the Notice of Appeal. In its Liability Judgment, the Employment Tribunal had declined to make any allowance under what is generally known as the **Polkey** doctrine. In paragraph 96 it said the following:

> **"Next we deal with some points regarding *Polkey* contribution and the ACAS Code. With regard to *Polkey*, we find it difficult to see how *Polkey* could be said to have any application in this case. The principals [sic] are, that where a Tribunal finds that a dismissal was procedurally unfair, it should ask itself what percentage chance there is that a fair dismissal would have followed if a fair procedure had been followed. This is not a case of procedural unfairness, it is a case of constructive dismissal for the way that the Claimant had been treated. It seems to us that *Polkey* has no application in these circumstances."**

50. This was a ground of appeal against the Liability Judgment. There would have been force in it. Even if a dismissal is constructive a Tribunal may have to consider whether and to what extent an employee would have remained in employment. This assessment, usually described in the context of unfair dismissal as a **Polkey** assessment, does not necessarily depend on the question whether the dismissal is constructive or actual.

51. In its Remedies Judgment, however, the Employment Tribunal did not award compensation for loss of earnings for unfair dismissal. Rather it awarded loss of earnings for unlawful discrimination. When it did so, the Employment Tribunal did take into account what would have happened but for the discrimination: see paragraphs 41 and 42 of its Remedy Reasons. It recognised that Mrs Martinez might well have been made redundant and might have been out of work even if there had not been any discrimination. It concluded, however, that she would in any event have been at a disadvantage by reason of the discrimination because the discrimination was a cause of her depression which rendered her unfit to work. It took this into account and awarded loss of earnings until she was sufficiently fit to look for work, then scaling that loss of earnings down by 50 per cent to make allowance for the fact that she would, to some extent, have been depressed in any event.

52. In these circumstances, the **Polkey** ground is of no further significance. The Tribunal did not make an award of compensation for unfair dismissal and, when it did make its award for discrimination, it took into account and estimated what would have happened but for the discrimination. This was the correct approach.

53. Finally I should mention that there was a ground of appeal concerning comments which the tribunal made suggesting that the claimant may have lost an opportunity of transfer to Fujitsu. It is argued by these grounds that Mrs Martinez had no real prospect of any such transfer. However, in the event, as I have said, the Tribunal's award of compensation was not made on the basis that there was or would have been a transfer to Fujitsu.

54. This brings me to the disposal of the appeal. I have found that the Tribunal's approach to the question of pregnancy and maternity discrimination was wrong in law. On behalf of Mrs Martinez, Mr Hodson submits that I am in a position to substitute my own conclusion to the effect that, even applying the correct test, the finding was bound to stand. I do not regard myself as in a position to reach such a conclusion. The Appeal Tribunal deals only with questions of law. It must remit a matter to the Tribunal for reconsideration unless, on a proper approach to the law, the Tribunal's finding is inevitable: see recently, **Jafri v Lincoln College** [2014] IRLR 544. I do not think that can be said in this case.

55. The question then arises whether remission should be to the same or to a differently constituted tribunal. Such a decision is taken by the Employment Appeal Tribunal in the light of guidelines set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I have given anxious consideration to those guidelines. I have reached the conclusion that it is appropriate to remit the matter to the same Tribunal. Although the Tribunal approached the matter incorrectly

in law, I think it did so out of a misunderstanding of the boundary between the two types of "grounds" explained in **Onu**. I have every confidence that when the matter is remitted, it will apply the law correctly.

56. The Tribunal's willingness to do so and to reach careful findings is fortified, in my view, by the fact that in paragraph 84.4.2 it expressed itself as willing to see the possibility that some complaint might be to do with communications failings rather than discrimination. It is plainly sensible and convenient that what is a relatively small part of the case should be remitted to the same Tribunal if at all possible. I have reached the conclusion that it is possible. Remission will be to the same Tribunal.

57. I make it clear that the Tribunal should reconsider the question of pregnancy and maternity discrimination in all its aspects. It should start with the question whether there is unfavourable treatment. It should be prepared to listen again to submissions on that issue. It should then consider entirely afresh the "because of" question, again listening to submissions on that issue.

58. Speaking for myself, I do not see the need for any further evidence to be called to the Tribunal. It should, however, as I have said, listen to further submissions and approach the pregnancy and maternity discrimination issues entirely afresh.

Postscript. I am adding this postscript to the transcript of the judgment, which has been placed before me for correction and approval in August 2014. Very shortly after the argument and judgment in this case the previously unreported decision in **Commissioner of Police of the**

Metropolis v Keohane was reported at [2014] Eq LR 386. In that case the citation of authority, and the discussion of the principles concerning direct discrimination under section 18, was much wider than in this appeal; and the whole of the judgment of Langstaff P, but especially paragraphs 22-40, repays study. I draw this authority to the attention of the parties and the Employment Tribunal on remission. I believe, however, that the judgment which I have given adopts essentially the same approach. The true question for the Employment Tribunal to address is the "reason why" question.