Appeal No. UKEAT/0348/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 January 2014

Before

THE HONOURABLE MRS JUSTICE COX DBE

MR C EDWARDS

MR T STANWORTH

MISS C S LYONS — APPELLANT

DWP JOBCENTRE PLUS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL SILLS (of Counsel) Instructed by: Islington Law Centre 38 Devonia Road Islington London N1 8JH
For the Respondent	MR SAUL MARGO (of Counsel) Instructed by: TSOL Employment Group 1 Kemble Street London WC2B 4TS

SUMMARY

SEX DISCRIMINATION

Direct

Pregnancy and discrimination

The Claimant appealed against the Employment Tribunal's dismissal of her complaints of direct sex discrimination and/or pregnancy and maternity discrimination under ss. 13 and 18 of the **Equality Act 2010.** She was dismissed for periods of absence due to post-natal depression arising after her period of maternity leave ended and therefore outside the protected period. Consideration of the ECJ decisions in **Hertz**, **Larsson** and **Brown v Rentokil** and the EAT (Scotland) decision in **Caledonia Bureau Investment v Caffrey** (decided before **Brown**). The ET's decision to reject her claims was upheld.

A second ground of appeal concerned the ET's finding that there should be a **Polkey** reduction of 50%. The ET's decision was found to disclose no error and was also upheld.

THE HONOURABLE MRS JUSTICE COX DBE

Introduction

1. This is an appeal by the Claimant from the Judgment of the London (Central) Employment Tribunal, dated 3 April 2013, upholding her complaint of unfair dismissal but dismissing her complaints of pregnancy/maternity discrimination and direct sex discrimination. Two points arise for determination on appeal: (1) did the Employment Tribunal err in failing to uphold the discrimination complaints? (2) did the Employment Tribunal err in concluding that there should be a "**Polkey**" reduction of 50% in all the circumstances.

The relevant facts

2. The Claimant commenced employment with the Respondent on 1 November 1999. Some ten years later she was appointed a Band C Lone Parent Adviser, based at Barnsbury Jobcentre Plus. The Tribunal found on the evidence, which included the Claimant's medical records, that she had suffered from depression since approximately 2003 and had had periods of sickness absence due to depression between 2003 and 2006, including one absence of some three months in length. She had also had periods of sickness absence for other, unrelated medical reasons, and she had suffered from obsessive compulsive disorder for some time.

3. The Claimant became pregnant in 2009. On the night of 31 December 2009, when the Claimant was in an advanced state of pregnancy, she was a passenger in a car driven by her partner when they were involved in an accident with a motorcyclist, as a result of which, tragically, the motorcyclist died. The Claimant was deeply shocked and upset by this accident and was off work from 4 to 18 January 2010.

4. She commenced her maternity leave on 1 February 2010. She informed the Respondent that she would take six months' ordinary maternity leave and then six weeks' annual leave at the end of her maternity leave. She was therefore due to return to work on 17 September 2010.

5. The Claimant's baby girl was born on 17 February 2010 by emergency Caesarean section. Following the birth the Claimant suffered feelings of tiredness, anxiety, distress and helplessness, which continued for several months. The Claimant did not seek medical help initially because she assumed these symptoms would pass but, when they did not, she saw her GP on 8 July. She was diagnosed on that day as suffering from moderately severe post-natal depression and was prescribed medication a few days later, after she had decided against counselling at that stage. The Tribunal found that, when she saw the GP on 8 July, she also referred to the car accident and the distress that it had caused her. It appears that she had attended the inquest that same day.

6. The Claimant's maternity leave ended on 1 August 2010, when the agreed six-week period of annual leave began. On 15 September, two days before she was due to return to work, the Claimant went to see her doctor again because she was not feeling better. She reported having intrusive thoughts about the car accident and anxiety about something bad happening to her baby. Her medication was changed, and the doctor provided a medical certificate stating that the Claimant was unfit to work until 14 October.

7. The Claimant did not attend work on 17 September. Ms Nawaz, her line manager, telephoned her at home shortly before the Claimant was going to call in herself. The Claimant informed Ms Nawaz that she had been signed off with post-natal depression until 14 October, and the sickness certificate was delivered to the Respondent on 27 September. In these circumstances the Claimant commenced a period of sick leave and the Respondent's attendance

management policies and procedures came into play. The Claimant did not thereafter return to work before, on 1 March 2011, she was dismissed.

8. In her letter to the Claimant of that date, the decision-maker, Ms Mulligan, informed the Claimant that her absence could no longer be supported, because she had been absent since 17 September and was unlikely to return to satisfactory attendance within a reasonable time. The Claimant's appeal against that decision was dismissed on 12 May 2011.

9. In her claim to the Employment Tribunal the Claimant complained: (1) that she had been unfairly dismissed contrary to s 98 of the **Employment Rights Act 1996;** and (2) that her dismissal amounted to direct sex discrimination or pregnancy/maternity discrimination contrary to s 13 or s 18 of the **Equality Act 2010**. Her discrimination claim was subsequently clarified at the Case Management Discussion as a claim that she was both dismissed and treated less favourably before dismissal because of her illness, which was pregnancy/maternity-related. No male comparator was therefore required. Although her dismissal occurred outside the protected period, the Claimant was relying on European law and on the EAT (Scotland) decision in **Caledonia Bureau Investment and Property v Caffrey** [1998] ICR 603.

The Tribunal's decision

(1) Unfair dismissal

10. It is unnecessary for us to recite the Employment Tribunal's detailed findings and reasons for concluding that the Claimant's dismissal was unfair. It was not in dispute that the reason for her dismissal was capability, namely her long-term absence from work since 17 September 2010 due to post-natal depression. In concluding that the Respondent had acted unreasonably in treating that as a sufficient reason for dismissal, the Tribunal found that the Respondent had not followed its own policies and procedures after discovering, on

17 September, that the Claimant was suffering from post-natal depression. There was no early referral to Occupational Health. Ms Nawaz conducted attendance review meetings without a clear understanding of the Claimant's mental state and gave no advice as to health and support that the Respondent could provide. After there was a referral to Occupational Health no-one at any stage sought a report from the Claimant's GP, who was continuing to see and treat her.

11. In their Judgment, the Tribunal were particularly critical of Ms Nawaz, who was found to have acted contrary to the procedures and without regard to the Claimant's vulnerability; and to have maintained contact with the Claimant in a manner that was "insensitive, unsupportive and oppressive". The Claimant was made to feel "anxious, pressurised and insecure about losing her job". The Tribunal concluded that the Respondent did not act reasonably in dismissing the Claimant. The procedure that culminated in her dismissal had not been followed correctly or fairly and her medical condition was inadequately investigated. The dismissal was therefore unfair. The Tribunal also rejected the suggestion that the Claimant had contributed to her dismissal by delaying in seeking help from her GP until 8 July, and then not agreeing, initially, to undergo counselling. In the circumstances, the Tribunal found that her conduct was not culpable.

12. Considering then whether the Claimant would have been dismissed even if the Respondent had conducted a fair and proper investigation and implemented the procedures correctly, the Tribunal said that they did not find that an easy issue. It involved a degree of speculation and constructing a world that did not exist. Doing their best on the evidence before them, they found as follows:

> **"111. The Claimant's post-natal depression began in February 2010 although it was not diagnosed and treatment did not begin until July 2010. The diagnosis was of moderately severe post-natal depression. In the two months before she was due to start work (and had any contact with Ms Nawaz) she tried two different types of medication (Citalopram and Fluoxetine) but did not find them to be effective. The dosage varied between 20 and 40 mg.**

112. At the beginning of November the Claimant's medication was changed to Amitriptyline (25 mg). In November the Claimant saw her GP on a number of occasions and complained about being stressed by the contact with Ms Nawaz and was diagnosed as suffering from anxiety. On 29 November the Claimant's GP wrote to the Respondent that her anxiety was being exacerbated by repeated requests from her line manager to keep them up to date. She also advised that the Claimant would benefit from some time to deal with her current problems. By the end of December the dosage of the Amitriptyline had been increased to 100 mg. There appears to be a correlation between the deterioration in the Claimant's condition at this time and the level and nature of the contact that Ms Nawaz had with her.

113. After 22 December Ms Nawaz had limited contact with the Claimant. On 14 January 2011 the Claimant told her GP that she felt that the Amitryptiline was helping and on the same day in the meeting with Ms Nawaz expressed for the first time an interest in returning to work and discussed it. Again, there appears to be a correlation between the improvement in the Claimant's condition and the diminution of the contact with Ms Nawaz.

114. The Claimant had a psychological assessment on 17 February and commenced therapy thereafter. Between February and July she had five sessions of therapy. She was last prescribed anti-depressants on 24 May 2011, when she was prescribed a month's supply. The Claimant's evidence was that she felt well enough to return to work in May 2011.

115. Having taken into account the above, we are satisfied that if Occupational Health advice had been sought earlier and if the face to face consultation had taken place earlier and Ms Nawaz had conducted the Keeping in Touch arrangements and the attendance review meetings fairly and properly, there is a likelihood, but not a certainty, that the Claimant would have been able to attempt to return to work earlier. Equally, if the face to face consultation with Occupational Health had been rescheduled and had taken place in early January, we are satisfied that there is a likelihood that the Claimant would not have been dismissed. Having carefully considered all the relevant factors and balanced them we considered that there was a 50% chance that the Claimant would still have been dismissed if the Respondent had acted fairly and reasonably."

(2) Discrimination

13. In addition to the relevant statutory provisions, namely ss 13 and 18 of the Equality Act, and the case of **Caffrey**, relied on by the Claimant, the Tribunal considered three decisions of the European Court of Justice, namely Case C-179/88 **Handels-Og Kontorfunktionaernes Forbund i Danmark v Dansk Arbejdsgiverforening** ("**Hertz**") [1992] ICR 332, Case C-400/95 **Handels-Og Kontorfunktionaerernes Forbund I Danmark v Dansk Handel & Service** ("**Larsson**") [1997] IRLR 643 and Case C-394/96 **Brown v Rentokil Ltd** [1998] ICR 790. The Tribunal's findings, at paragraphs 116 to 119 were as follows:

"Pregnancy/maternity discrimination

116 We concluded that by being subjected to the Respondent's Attendance Management procedures and by being dismissed for post-natal depression the Claimant was treated unfavourably for a pregnancy-related illness. However, such unfavourable treatment only amounts to discrimination under section 18 of the Equality Act 2010 if it occurs between the beginning of the pregnancy and the end of maternity leave. Section 3A of the Sex Discrimination Act 1975, which section 18 replaced, was enacted to give effect to the decisions of the ECJ on this issue. In this case, the unfavourable treatment of the Claimant took place

after the end of her maternity leave and, therefore, it does not amount to discrimination under section 18.

Direct sex discrimination

117. The Claimant relies on the EAT decision in *Caledonia* which her counsel submits that we are bound to follow. The EAT distinguished that case from *Hertz* on the grounds that in *Caledonia* the pregnancy-related illness had arisen during the course of the maternity leave and had continued after the end of maternity leave whereas in *Hertz* it had arisen after the end of maternity leave. *Caledonia* was decided before *Larsson* and *Brown v Rentokil*.

118. In *Larsson* the pregnancy-related illness began before maternity leave started and continued during maternity leave and after the end of it. In that case the ECJ held that the Equal Treatment Directive did not preclude account being taken of the pre-maternity leave sickness absence when calculating the periods providing grounds for the dismissal and that it did not preclude dismissals which were the result of pregnancy-related illness, even where the illness arose during pregnancy and continued during and after maternity leave. Although in *Brown v Rentokil* the ECJ disapproved of the decision in *Larsson* insofar as it related to taking into account the absences due to pregnancy related illness before the start of maternity leave, it agreed that the absence after maternity leave must be taken into account in the same way [as] a man's absence in similar circumstances. It is, therefore, clear that European law does not make a distinction between pregnancy-related illness that arises during maternity leave and continues after the end of maternity leave and that which arises after the end of maternity leave. It is unlikely that the EAT in *Caledonia* would have reached the same conclusion had it been decided after the decisions in *Larsson* and *Brown v Rentokil*.

119. In those circumstances, we do not consider that we are bound to follow *Caledonia* and we rely on the ECJ cases decided subsequently that make it clear that the distinction made in *Caledonia* was not correct. We concluded that there was [no] direct sex discrimination."

The appeal

(1) Discrimination

14. On behalf of the Claimant Mr Sills submits that the Tribunal erred in failing to follow the binding EAT authority of **Caffrey**. Mr Margo, appearing for the Respondent, submits that the Tribunal's analysis and decision were entirely right and that the Tribunal correctly rejected the complaints under both ss 13 and 18.

15. Mr Sills contends that the Claimant's dismissal amounted to direct sex discrimination, contrary to either s 13 of s 18 of the **Equality Act 2010,** in that she was dismissed because of pregnancy or maternity-related illness, which she began to suffer during her maternity leave and from which she continued to suffer after the end of her maternity leave and was still suffering at the time of her dismissal.

16. In oral argument, while not abandoning reliance on s 18 entirely, Mr Sills accepted, realistically, that he was placing greater weight on s 13, relying as he does on the decision of the EAT in **Caffrey**. He submits that in **Caffrey** the EAT were dealing with a case with facts very similar to those of the present case, and they decided on those facts that the dismissal amounted to 'classic sex discrimination', where no comparator is required. Mr Sills submits that this authority is binding and that the finding by this Employment Tribunal, that **Caffrey** is no longer good law following the European Court's decision in **Brown v Rentokil**, was arrived at in error.

17. The issue in the present case, he argues, does not arise on the facts of **Brown**, which was concerned only with dismissal for absences during pregnancy and in which the European Court disapproved their earlier reasoning in **Larsson**. Alternatively, if the case of **Brown** does establish the position under EU law so far as the facts of this case are concerned, Mr Sills submits that EU law sets out only minimum standards. Member states may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the **Equal Treatment Directive 2006/54/EC**. He submits that that is what has happened in the United Kingdom, having regard to the relevant statutory provisions and to the decision in **Caffrey**. Mr Sills therefore submits that the Claimant's dismissal amounted to direct sex discrimination and the appeal on this ground should be allowed.

Discussion

18. Direct sex discrimination at work is now prohibited by s 13 of the **Equality Act 2010**, replacing s 1(1) of the **Sex Discrimination Act 1975**, and provides, so far as relevant, 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.

…

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment

afforded to a woman in connection with pregnancy or childbirth."

19. Before the Equality Act, and until the introduction, as from 1 October 2005, of s 3A of the Sex Discrimination Act, there was no specific provision in national legislation for pregnancy and maternity discrimination. As from 6 April 2008 a further amendment of s 3A expressly removed the requirement for a comparator in cases of pregnancy or maternity discrimination.

20. Pregnancy and maternity discrimination at work is now specifically prohibited by s 18 of the Equality Act, providing as follows:

"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).”

21. It was never suggested by the Claimant that there was any other basis upon which it could be found that she was treated less favourably because of her sex, or because of pregnancy and maternity. Her complaint proceeded solely on the basis that she was treated unfavourably; that no comparator was required; and that her dismissal for absences occurring after the end of her maternity leave, which were the result of post-natal depression arising during maternity leave and then continuing beyond it, was discriminatory, contrary to either s 13 or s 18.

22. In our judgment, the Claimant cannot rely on s. 18, and the Employment Tribunal’s decision on this point was correct. By s. 18(2)(b) a woman is discriminated against on grounds of pregnancy and maternity if, because of an illness suffered as a result of her pregnancy, she is treated unfavourably during the protected period, as defined by s. 18(6). While this Claimant was found to have been treated unfavourably for a pregnancy-related illness, it is not in dispute that the relevant treatment took place only after the end of her period of maternity leave.

23. As the Tribunal found, she notified the Respondent that she would take six months of ordinary maternity leave followed by six weeks’ annual leave. In so doing, she thereby notified her employer of her intention to return to work on 17 September 2010, pursuant to regulation 11 of the **Maternity and Parental Leave Etc Regulations 1999**. She gave no notice of an intention to return at a later date pursuant to regulation 11(2A)(b). Thus, the

unfavourable treatment found to have occurred, including the Claimant's dismissal, occurred outside the protected period. She could not therefore complain of discrimination under s. 18.

24. What, then, of sex discrimination under s. 13? As s. 18(7) makes clear, s. 13 has no application to treatment in the protected period which is prohibited by s. 18. The question is therefore whether the Respondent's treatment of the Claimant amounted to less favourable treatment within the meaning of s13.

25. While Mr Sills places considerable reliance on the decision in **Caffrey**, the chronology of the relevant European and domestic case law is instructive in answering this question. The three European Court of Justice decisions, referred to by the Employment Tribunal, were all concerned with cases of dismissal from employment for pregnancy-related illness and alleged contravention of the **Equal Treatment Directive 76/207/EEC**, subsequently replaced by **Directive 2006/54/EEC**.

26. In the case of **Hertz** the complainant, an employee of a company in Denmark, returned to work after the end of her maternity leave. Thereafter she was absent for 100 days due to illness arising as a result of her pregnancy, but which manifested itself only after the end of her maternity leave. Holding that her dismissal did not constitute discrimination on the ground of sex, contrary to articles 2(1) and 5(1) of **Directive 76/2007** the European Court of Justice said, materially, as follows at paragraphs 15 to 17:

> **"15. The Directive does not envisage the case of an illness attributable to pregnancy or confinement. It does, however, admit of national provisions guaranteeing women specific rights on account of pregnancy and maternity, such as maternity leave. During the maternity leave accorded to her pursuant to national law, a woman is accordingly protected against dismissal due to absence. It is for every Member State to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur.**
>
> **16. In the case of an illness manifesting itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness. Such a**

pathological condition is therefore covered by the general rules applicable in the event of illness.

17. Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex."

27. In the case of **Larsson**, decided some five years later, Ms Larsson's illness began during her pregnancy and continued during and after the expiry of her maternity leave, when she went on sick leave and was subsequently dismissed. The ECJ concluded (see paragraphs 24 and 26) that the Equal Treatment Directive did not preclude dismissal on the ground of periods of absence due to an illness attributable to pregnancy or childbirth, even where that illness first appeared during pregnancy and continued during and after the period of maternity leave.

28. Outside the period of maternity leave laid down by national law, during which a woman is protected against dismissal due to absence, a woman is not protected under the Directive against dismissal on grounds of absence periods due to an illness originating in pregnancy. Absence during the period of statutory maternity leave cannot be taken into account as grounds for a subsequent dismissal, since that would be contrary to the article 2(3) objective of permitting national measures concerning the protection of women as regards pregnancy and maternity. The maternity leave period is the period in which the problems inherent in pregnancy and childbirth occur. However, the ECJ said that the principle of equal treatment in the Directive did not preclude account being taken of a woman's absence from work between the beginning of her pregnancy and the beginning of her maternity leave when calculating the period providing grounds for her dismissal under national law.

29. In the case of **Brown v Rentokil** the Claimant developed pregnancy-related disorders in the early stages of her pregnancy and did not thereafter return to work. She was dismissed six weeks before her child was born pursuant to a clause in the standard form contract, providing

for dismissal after 26 weeks' continuous sickness absence. This was held by the ECJ to be unlawful, notwithstanding the fact that the contractual clause was applicable to both men and women. The Equal Treatment Directive was held to preclude the dismissal of a woman at any time during her pregnancy, for absences due to pregnancy-related illness rendering her incapable of work. Notwithstanding the factual context of that case, the ECJ went on to clarify the law relating to dismissals for absences resulting from pregnancy-related illness. We are in little doubt that this was due to the fact that the Advocate-General drew attention, in his Opinion, to what he regarded as errors in the court's previous reasoning in **Larsson,** in which case he had also been Advocate General. The ECJ took the opportunity to restate the general principles.

30. Referring to the '**Pregnant Workers Directive'** (92/85/E.E.C.) by way of general context, the ECJ said this at paragraph 18:

> **"It was precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that the Community legislature, pursuant to Article 10 of Council Directive 92/85/EEC of 19 October 1992 ….. provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. Article 10 of Directive 92/85 provides that there is to be no exception to, or derogation from, the prohibition of dismissal of pregnant women during that period, save in exceptional cases not connected with their condition: see, in this regard, *Webb*, [1994] ICR 770, 798, paras 21 and 22.**

The Court then went on to spell out the law in clear terms, at paragraphs 23 to 27 as follows:

> **"23. In paragraph 15 of its judgment in *Hertz*, cited above, the Court, on the basis of article 2(3) of Directive 76/207, also pointed out that that Directive admits of national provisions guaranteeing women specific rights on account of pregnancy and maternity. It concluded that, during the maternity leave accorded to her under national law, a woman is protected against dismissal on the grounds of her absence.**
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> **24. Although, under article 2(3) of Directive 76/207, such protection against dismissal must be afforded to women during maternity leave (*Hertz*, paragraph 15), the principle of non-discrimination, for its part, requires similar protection throughout the period of pregnancy. Finally, as is clear from paragraph 22 of this judgment, dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex.**

25. It follows that articles 2(1) and 5(1) of Directive 76/207 preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by an illness resulting from that pregnancy.

26. However, where pathological conditions caused by pregnancy or childbirth arise after the end of maternity leave, they are covered by the general rules applicable in the event of illness (see, to that effect, *Hertz*, paragraphs 16 and 17). In such circumstances, the sole question is whether a female worker's absences, following maternity leave, caused by her incapacity for work brought on by such disorders, are treated in the same way as a male worker's absences, of the same duration, caused by incapacity for work; if they are, there is no discrimination on grounds of sex.

27. It is also clear from all the foregoing considerations that, contrary to the Court's ruling in Case C-400/95 *Larsson v Føtex Supermarked* [1997] ECR I-2757, paragraph 23, where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work."

31. We agree with Mr Margo that the Employment Tribunal's interpretation of this reasoning was correct. When a pregnancy-related illness arises during pregnancy or maternity leave and persists after the maternity leave period, an employer is permitted to take into account periods of absence due to that illness, after the end of maternity leave, in computing any period of absence justifying dismissal, in the same way that a man's absences for illness are taken into account.

32. Before the European Court of Justice's decision in **Brown** was handed down, the case of **Caffrey** was decided by the EAT. This case concerned a woman who suffered from post-natal depression during her maternity leave and was then dismissed for absences due to that condition arising after the end of her maternity leave period. In addition to claiming unfair dismissal, she alleged direct sex discrimination under s. 1(1)(a) of the **Sex Discrimination Act 1975**. Both claims were successful in the Employment Tribunal.

33. On appeal the bulk of the Judgment of the EAT concerned the unfair dismissal claim under s. 99 of the Employment Rights Act. Upholding the Employment Tribunal's decision

that the claimant's dismissal also amounted to unlawful discrimination, the EAT said as follows, in a few short, briefly reasoned passages at the end of their Judgment (606G-607E):

> **"Turning to the question of sex discrimination, which raises a wholly separate issue, Miss McLachlan, under reference particularly to [Hertz], submitted that, for the purposes of sex discrimination, if an illness which may have been consequent upon childbirth arose subsequent to the expiry of the period of maternity leave, then there were no grounds for any suggestion of discrimination on the basis of sex or gender because such was simply an illness, and it was to be presumed that a man who was suffering from obviously not a pregnancy-related illness but any other illness would be treated in precisely the same way by the employer. She recognised, however, that in [Webb] the European Court of Justice had held that dismissal of a woman on grounds of pregnancy constituted direct discrimination on grounds of sex if effected during the period of maternity leave.**
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> **Mr Murphy, for the applicant, seized upon this distinction and sought to argue that in the present case, since the illness, which was post-natal depression and therefore pregnancy-related, arose during the period of maternity leave, that was sufficient to exclude [Hertz] and was in any event consistent with a purposive approach to both the Equal Treatment Directive…and Council Directive 92/85/E.E.C. which deals with prohibition of the dismissal of female workers during the maternity leave period. He informed us that in *Brown v Rentokil Ltd* the House of Lords had apparently made a reference to the European Court of Justice against the background of this distinction, for clarification as to whether it was a valid one, which matter was as yet unresolved.**
>
> **For present purposes, we are prepared to affirm that, in terms of the sex discrimination legislation, when a woman is dismissed by reason of an illness which is related to having given birth, or being pregnant, or both, which illness arises or emerges during the course of the maternity leave period albeit the dismissal takes place after the expiry of that period, it is still a discriminatory dismissal against a female, upon the basis that at the time of dismissal she suffered from an illness from which a man could not suffer, and thus she is being treated differently from her male counterparts. That is a classic definition of discrimination and, accordingly, the finding that the industrial tribunal has made will be upheld, albeit for these rather more elaborate reasons. This approach seems to us to be entirely in accordance with the general aims of protection being given to female employees consistent with their right to bear children."**

34. Whether the reasoning in that final passage was erroneous even before the European Court's decision in **Brown v Rentokil** is in dispute before us. However, whether or not it was in the light of **Hertz**, what is clear is that, following the decision in **Brown,** that reasoning, and the conclusion arrived at by the EAT cannot stand. In our view, if the EAT had had the advantage of the European Court's Judgment in **Brown**, they would have arrived at a different decision. The Employment Tribunal in the present case were right to conclude that they should apply the ECJ's Judgment in **Brown**.

35. Mr Margo drew our attention to the subsequent case of **Healy v William B Morrison and Son Ltd** EAT/172/99 (unreported) in which the EAT (Scotland) applied the reasoning in

Brown, which they regarded as clear, as do we. In a case where the claimant suffered post-natal depression during her maternity leave and was then dismissed for absences occurring after the end of that leave, the EAT said as follows:

> **"If as a result of the childbirth or the earlier pregnancy the woman suffers an illness which extends beyond the period of the maternity leave then the employer is entitled to take into account the absence after maternity leave and compare that period with any period of sickness of a man."**

36. For these reasons the Claimant's appeal in relation to her s 13 claim must fail. We reject Mr Sills' alternative submission, that the United Kingdom has adopted a more favourable approach to the protection of the equal treatment principle than that provided for by European law. As Mr Margo points out, the case of **Caffrey** was decided before the amendment of the Sex Discrimination Act in October 2005, introducing an express prohibition against pregnancy and maternity leave discrimination. The present case falls outside both the previous s.3A of the 1975 Act and s.18 of the 2010 Act. If Parliament had intended to extend the protection relating to pregnancy or maternity, provision would have been made within s.13 or s.18 of the 2010 Act.

37. For the reasons we have already given, this case falls outside both the previously enacted s 3A and s 18 of the **Equality Act 2010**. Further, the provisions contained in s 13 of the 2010 Act provide no support for Mr Sills' submissions on this ground. The Employment Tribunal were right to reject the complaint of sex discrimination on the facts of this case, and the appeal on this point therefore fails.

(2) ***Polkey***

38. We turn, then, to the second ground of appeal and to the **Polkey** reduction. Mr Sills submits that in this case it was not possible sensibly to reconstruct the world as it might have been, and that the Employment Tribunal erred in making a 50% reduction. Essentially, he

submits that the Respondent's myriad failings were serious and substantive as well as procedural; that they involved the taking of positive steps rather than being mere omissions; and that they had a serious and causative effect on the Claimant's health and the length of her sickness absence. Consideration of whether she would have been dismissed in any event was therefore impermissibly speculative, in particular where there was no medical report available addressing the Claimant's condition.

39. Further, he submits that the Employment Tribunal failed to consider whether a **Polkey** reduction was just and equitable, having regard to the Respondent's conduct and to its effect on the Claimant's health. Mr Sills developed these submissions by referring in some detail to the evidence and to the facts found in this case. He relied on the well-known cases of **Boulton & Paul Ltd v Arnold** [1994] IRLR 532 and **King v Eaton Ltd** [1998] IRLR 686.

40. He referred in addition to the decision of the EAT (Scotland) in **Davidson v Industrial & Marine Engineering Services Lts** (unreported) EATS/0071/03, dated 24 March 2004. However, this case, like so many of these cases, seemed to us to turn on its own particular facts, which in that case concerned selection for redundancy. The same is true, in our view, for the case of **Lambe v 186K Ltd** [2005] ICR 307, to which Mr Sills also referred.

41. We have considered Mr Sills' submissions carefully, but we cannot accept them. In our view, this is classic Employment Tribunal territory. As the Court of Appeal emphasised in **Gover v Propertycare Ltd** [2006] ICR 1073, the question of whether to make such a reduction is fundamentally a matter of impression and judgment for the fact-finding Tribunal. An appellate court should therefore tread warily when asked to substitute its own judgment for that of the Employment Tribunal (see para. 22).

42. In **Software 2000 Ltd v Andrews** [2007] ICR 825 Elias J. (then President of the EAT) comprehensively reviewed the authorities in this area. At para 53 he said this:

> **"The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice."**

43. He then summarised the relevant principles to be drawn from the various authorities as follows (para 54):

> **"The following principles emerge from these cases:**
>
> **(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)**
>
> **(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.**
>
> **(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.**
>
> **(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.**
>
> **(6) The s.98A(2) and *Polkey* exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.**
>
> **(7) Having considered the evidence, the Tribunal may determine**
>
> > **(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).**
> >
> > **(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.**

> **(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the *O'Donoghue* case.**
>
> **(d) Employment would have continued indefinitely.**
>
> **However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."**

44. In the present case the Employment Tribunal did not expressly refer to these authorities but they are well-known and it is clear that the Tribunal had the relevant law in mind. At paragraph 110 they referred expressly to the difficult issue before them, recognising that it involved a degree of speculation and of constructing a world that did not exist. Acknowledging that, the Tribunal said that they were doing the best they could on the evidence before them, and they made findings having regard to the very detailed findings of fact they had already made on all the evidence they had heard. These included the Claimant's previous medical history; the fact of the car accident and its effects upon her; and other factors suggesting that the Claimant's medical condition was not entirely straightforward. The Tribunal also referred to the psychological assessment of the Claimant on 17 February 2011, at which it was noted, as set out in the medical reports that:

> **"the post-natal depression seemed related to the strain of the new baby on her relationship with her partner, the accident when she was 8 months' pregnant, low self-confidence in [her]ability as a mother, social isolation, and OCD. She was put on a waiting list as a priority for Cognitive Behavioural Therapy."**

45. The Tribunal referred in addition to the Claimant's own evidence that she felt well enough to return to work in May 2011. They referred to the significant factor, as they saw it, of a correlation between the improvement in the Claimant's condition and the diminution of her contact with Ms Nawaz. They referred expressly to their consideration of all the relevant factors and to weighing them in the balance. In our judgment, that is exactly what they did.

46. While there was evidence to suggest that, but for the Respondent's conduct, this Claimant would have recovered sooner and would not have been dismissed, there was also evidence that there were other, causative factors in play in relation to the Claimant's continuing ill-health. The Employment Tribunal had the Claimant's medical records before them and clearly had regard to them. As a matter of fact, no recovery had taken place at the time of the Claimant's dismissal, or for some 2 - 3 months following that date.

47. In our judgment, the Tribunal did not err in law in concluding that there should be a **Polkey** reduction; and that a reduction of 50% was just and equitable in all the circumstances of this case. The express reference to s 123(6) of the Employment Rights Act, at paragraph 5 of their Judgment, indicates that this experienced Tribunal clearly had regard to what they considered to be just and equitable in arriving at their conclusion. For these reasons, this ground of appeal also fails.

48. We add only this. Today Mr Sills sought to pursue a further ground of appeal on this point, namely that the Tribunal's conclusions as to the **Polkey** reduction were inadequately reasoned. He would need permission to amend his Notice of Appeal to pursue that ground, and an application to amend at this late stage was opposed. In our view, however, there is no arguable merit whatsoever in that ground. The Employment Tribunal's conclusions as to the **Polkey** reduction were clearly open to them, given their detailed factual findings. Those conclusions, although briefly expressed at the end of their Judgment, must be read in light of what has gone before. Reading the Judgment as a whole, we consider that their conclusions were sufficiently reasoned. We therefore refuse permission to amend the Notice of Appeal to add this new ground, which we consider to be without merit.

49. For all those reasons, this appeal must be dismissed.