Appeal No. UKEAT/0463/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 June 2013
Judgment handed down on 4 March 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR I EZEKIEL

MR D J JENKINS OBE

THE COMMISSIONER OF POLICE OF THE METROPOLIS APPELLANT

MRS KATHARINE KEOHANE RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR DIJEN BASU (of Counsel) Instructed by: Metropolitan Police (Legal Services) New Scotland Yard 8-10 Broadway London SW1H 0BG
For the Respondent	MR MARCUS PILGERSTORFER (of Counsel) Instructed by: Messrs Pattinson & Brewer Solicitors 11 Pilgrim Street London EC4V 6RN

SUMMARY

PREGNANCY AND DISCRIMINATION

An Employment Tribunal found that a Police dog handler, one of whose two narcotics Police dogs was removed from her when she told the force she was pregnant, had suffered a detriment by being exposed to a risk that on her return to work she would suffer financial loss and career disadvantage. It held that the reason for the removal of the dog from her, and subsequently a failure to re-allocate the dog to her before the end of her maternity leave, was because of her pregnancy and maternity, and hence was directly discriminatory. An argument that this took too broad an approach to the question of causation was rejected.

The Tribunal had rejected a claim of indirect sex discrimination arising out of the application to the Claimant of the force's policy to remove a dog from its handler where the handler was likely to be non-operational for a while, as when pregnant. It did so on the basis (i) (possibly) that the Claimant could not succeed both in respect of indirect and direct discrimination in respect of the same circumstances; (ii) that the policy would have an adverse impact only in some, but not all, cases where a PC was non-operational; and (iii) that there was no detriment since there was only a "risk" or "potential" disadvantage. Held: As to (i), the heads of claim were different, and it was thus possible for the same events to give rise both to direct pregnancy discrimination and indirect sex discrimination; as to (ii) that the policy only produced disadvantage in some cases was no reason to exclude it from causing indirect discrimination; and as to (iii) a real risk is capable of being a detriment, as the ET had itself recognised when dealing with the claim for direct discrimination.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. PC Keohane was a dog handler, handling two "narcotics" dogs. Her status as a dual narcotics dog handler was important. It enhanced her career prospects. It gave her an opportunity to earn overtime.

2. The Metropolitan Police operated a policy relating to the "retention, re-allocation or withdrawal of police dogs". It set out the processes to be followed and criteria to be taken into account by managers when considering the retention, re-allocation or withdrawal from service of Metropolitan Police service dogs, where handlers were placed sick, were performing recuperative or restricted duties, were pregnant or on maternity leave, or were suspended from operational duties. In respect of pregnancy or maternity leave, it specified that female officers would in most cases not be permitted to continue as operational dog handlers during their pregnancy. Where the Unit granted authority for such a PC to retain responsibility for care of the allocated police dog the position would be reviewed at regular intervals of 56 days during leave.

3. On 19th October 2010, PC Keohane told the Metropolitan Police that she was pregnant. While such, she could not be deployed on operational duties for safety reasons. On 29th October she attended a meeting to discuss the re-allocation of her police dogs. At that meeting, Chief Inspector Cooper took a decision to re-allocate Nunki Pippin, her passive search dog, leaving her with a pro-active search dog. PC Keohane complained to the Tribunal that the decision to do so was unfavourable treatment because of her pregnancy, contrary to Section 18 (2) of the **Equality Act 2010.** That application was made whilst she was pregnant. In a subsequent application, made toward the end of her maternity leave, she claimed there to have been a further act in breach of Section 18 (2): the rejection of her request to have Nunki Pippin

returned to her before she went back to work (the dog having been removed from the PC to whom it had been re-allocated following the first decision).

4. An Employment Tribunal at Watford (EJ Southam, Mr Lowndes and Mr Burrage) considered both applications, and decided in Reasons of 17th July 2012 that upon the reallocation of Nunki Pippin in November 2010 the Claimant suffered a detriment in that she knew that there was a serious risk that on her return to work she would return to working conditions which were different from those which had pertained before she ceased operational duties on notification to her employers of her pregnancy. The Tribunal accepted that the risk of loss of opportunity for overtime, and damage to career prospects were detriments of which she was entitled to complain, even though they were likely to be only of some 8 months or so duration, a prediction which we were told has been proved true.

5. The Tribunal held that the two decisions (in effect, first to take away Nunki Pippin from the Claimant on 1st November 2010, and second not to re-allocate Nunki Pippin to her on 28th October 2011) were in each case unfavourable treatment because of her pregnancy, but rejected a complaint that the application of the policy of the Metropolitan Police in relation to the retention, re-allocation or withdrawal of police dogs was indirect discrimination. The Metropolitan Police, represented by Mr Dijen Basu, appeal against the first decisions; the Claimant cross-appeals against the finding in respect of indirect discrimination. No further point is taken by either party in respect of the Tribunal's further finding that the police did not victimise the Claimant contrary to Section 27 **Equality Act 2010** in making its second decision, about which we need say no more.

Observations

6. Though much of the decision is written as if the complaint centred upon the separation of dog and handler, between whom there was a bond, rather than the consequences we have set out above, it was accepted by Mr Pilgerstorfer, who appeared for the Claimant, that the Tribunal was entirely right to hold that the loss of and failure to regain the dog as a companion could not be said to be a detriment. The Claimant could have no justifiable sense of grievance about that: and an unjustified sense of grievance would constitute no detriment for which the law would recognise a remedy. Thus he accepted paragraphs 14 and 15 of the Tribunal's decision in which it held there was no detriment in those respects.

7. Second, the matter was argued below, and before us, as one in which the central act consisted of two limbs – first the removal of, and then the later failure to re-allocate, Nunki Pippin. The act was not said in terms to be the failure to ensure that a promise was made that a dog would be allocated to the Claimant upon return to work following maternity leave or, alternatively, that she would not suffer career detriment or financial loss upon return to work, by reason of having no second dog, which seemed to us to be an important aspect of the complaint. Mr Pilgerstorfer argued that the implicit understanding of the parties was that given the policy of the Metropolitan Police, the detriment consequent upon PC Keohane having no second dog when she returned to work was treated as an inherent part of the decision in respect of removal and non-reallocation. With reservations, we were content to resolve the appeal on that basis since it appeared to be the basis upon which parties have conducted themselves and most of the appeal. When we issued an initial draft of this judgment counsel responded that amongst the several grounds of appeal we had missed the fact that Grounds (vii) and (viii) had been permitted through on the sift to determination at a full hearing. We had, for which we take collective responsibility. The logistics of first determining whether the parties wished further oral argument - they did not – and then reconvening as a panel to discuss our conclusions on

these grounds, and any necessary modifications to our first draft, have resulted in a considerable and regrettable delay in the delivery in final form of this judgment.

The Law

8. Section 18 of the **Equality Act 2010** provides materially as follows: -

> **"(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…**
>
> **…….**
> **(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins and ends (a) …at the end of the…maternity leave period or (if earlier) when she returns to work after the pregnancy…"**

9. Section 18, though part of chapter 2 entitled "Prohibited Conduct", does not itself create any right. It just provides a definition. The right relied on here is conferred by Section 39, in Part 5. Under chapter 1 of that Part it is provided that an employer must not discriminate against an employee by subjecting the employee to any detriment (Section 39 (2) (d)).

10. Indirect discrimination is defined within the **Equality Act** by Section 19. Pregnancy and maternity is not one of the protected characteristics in respect of which there may be indirect discrimination. Accordingly, if an allegation arises that there has been indirect discrimination in relation to pregnancy, it cannot be asserted as such. If it is discrimination at all it is sex discrimination, and must fit the criteria for such a claim. As to that, Section 19 provides: -

> **"(1) A person (A) discriminates against another (B) if (A) applies to (B) a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of (B)'s**
> **(2) For the purposes of Sub-Section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of (B)'s if –**
> **(a) (A) applies, or would apply, it to persons with whom (B) does not share the characteristic**
> **(b) It puts or would put persons with whom (B) shares the characteristic at a particular disadvantage when compared with persons with whom (B) does not share it.**

(c) It puts or would put, (B) at that disadvantage and
(d) (A) cannot show it to be a proportionate means of achieving a legitimate aim.

11. Discrimination under Section 18 involves consideration of causation. The unfavourable treatment must be "***because of***" the pregnancy. These words mark a change from the statutory phrase in earlier provisions which conferred a right not to be subjected to any detriment by any act or any deliberate failure to act by an employer ***done for*** a prescribed reason, namely one prescribed by Regulations made by the Secretary of State which related to pregnancy, childbirth or maternity. The Regulations made under Section 47C of the **Employment Rights Act 1996** were the **Maternity and Parental Leave etc. Regulations 1999**. They included as prescribed reasons that the employee was pregnant and, separately, that she took, sought to take, or availed herself of the benefits of ordinary maternity leave or additional maternity leave (Regulation 19 (2) (a) and (d)).

12. In other statutory provisions different wording is used, such as "on the grounds of…" (see the **Sex Discrimination Act 1975**).

13. Where "done for" or "on the grounds of" were used in the forerunner provisions to those of what is now the **Equality Act 2010**, they appear now to be replaced there by "because of". Counsel advanced their submissions upon the basis that these changes of wording involved no change of substance. Nonetheless, the essential principle asserted by Mr Basu on the appeal was that the words "because of" required a narrow focus, such that if the reason for the alleged act of discrimination was only *linked* to pregnancy it would be insufficient to satisfy the Statute. Mr Pilgerstorfer asserted the opposite, although argued that in the present case the distinction made no difference to the result.

The Tribunal Reasoning

14. The Tribunal rejected the argument that there was no direct link between the pregnancy and the removal and non-return of the dog which caused the Claimant to suffer the detriment it identified (paragraphs 20 and 21). At paragraph 23 it set out its central conclusion:

> **"Here we consider that there is sufficient connection between the pregnancy and the removal of Nunki Pippin for it to be said reasonably that the removal of the dog was because of the Claimant's pregnancy. It seems to us also" [we note that word] "…that factors connected with the Claimant's pregnancy were operating on Chief Inspector Cooper's mind in his decision-making process. These include his reference to it being the Claimant's second pregnancy within a period of 17 months and the importance of the return to work date. In our judgment this aspect distinguishes this case from [*Warby v Wunda Group plc* [2012] Eq LR 536] where the Claimant's sex was merely part of the circumstances. The same consideration applies, we think, to Mr Basu's argument at paragraph 45 of his skeleton argument based on *Amnesty International v Ahmed* [2009] ICR 1450, on which Mr Pilgerstorfer also relied. We accept that, if the Claimant's pregnancy was merely part of the circumstances in which the treatment complained of occurred, the Claimant's case would be more difficult. Here, the Claimant's pregnancy had certain consequences which led to the invocation of the policy. Further, we do not think that sex and pregnancy are similar for this purpose. A person's sex is much more likely to be a background factor than pregnancy. Lastly, we considered the distinction made by Mr Basu at paragraph 46 of his skeleton, based on *Khan (Chief Constable of West Yorkshire v Khan* [2001] ICR 1065, HL). We are of the view that the Claimant's pregnancy was more than merely the context for Chief Inspector Cooper's decisions.**
>
> **24. It should be clear from the above we do not think that the Claimant succeeds only by virtue of the technicality of the link between her pregnancy and the Respondent's decisions. We also think that it is important to consider the extent to which the Claimant felt, in the light of the existence of the policy, pressure to return to work after her pregnancies earlier than she might otherwise have done. We noted that the Claimant's 2012 return to work was later than she had originally intended. We infer that an indication of an earlier return might have been given so as to influence the decision against re-allocation. It seems to us to be undesirable that pregnant officers who are dog handlers should be subjected to pressure to cut short their maternity leave. We noted that one of the trainee midwives in *Fletcher [Fletcher v NHS Pensions Agency and Another* [2005] ICR 1458, EAT; [2006] EWCA Civ 517, CA] had felt similar pressure. It seems to us that this consideration demonstrates a real connection between the maternity leave and the decision and that we are not dealing here with merely a succession of events with no tangible link between them.**
>
> **25. In our judgment, for these reasons, it cannot be said that the Claimant's pregnancy was merely the context for the operation of the policy and that in reality it had nothing to do with it. For those reasons, we are not satisfied that the Respondent has proved that his decisions, about the removal of Nunki Pippin in October 2010 and not to re-allocate Nunki Pippin to the Claimant in 2011, were not because of the Claimant's pregnancy and the taking of maternity leave."**

15. The Tribunal then turned to indirect discrimination. The provision, criterion or practice it examined was "the Respondent's policy relating to the removal and re-allocation of dogs which is applied to dog handlers who are non-operational." It said (paragraph 27): -

> **"It is clear that the policy is likely to be applied more frequently to women than to men. That is because all the other circumstances in the policy can refer equally both to men and to women but the pregnancy circumstances can only apply to women. We were not satisfied that women were more likely to feel more pressure than men to return to work sooner than they would otherwise would have intended by the existence of the policy, such that if an early return to work is not possible, there is a risk of a dog handler losing their dog. This, it seems to us, applies just as much to men and women who are sick as it does to women who are pregnant. There is, however, a potential particular disadvantage to women arising from the fact that unlike officers off sick, pregnant officers cannot return to work at least for two weeks after the birth of their child during the period of compulsory maternity leave.**
>
> **28. The group disadvantage which stems from the application of the policy, is not one which inevitably results in re-allocation of the police dog. The most that can be said is that the existence of the policy creates a risk that a police dog may be re-allocated in the circumstances provided for by the policy. It thus cannot be said, for certain, that the policy "puts or would put" women to a particular disadvantage compared with men. There is merely the risk of that occurring. …**
>
> **30. It seems to us that actual applications of the policy in pregnancy cases may well amount to direct pregnancy or maternity discrimination. Whilst, superficially, circumstances meet the requirements of Section 19 for Indirect Discrimination the policy only amounts to potential discrimination, because it does not uniformly result in re-allocation of the dog.**
>
> **31. For these reasons we do not consider that the Claimant has established an indirect discrimination complaint and we did not need to go on to discuss the question of justification."**

16. Finally, though placed early in its Reasons the Tribunal made a recommendation. Section 124 of the Equality Act 2010 provides the power to do so:

> **"(2)The tribunal may……..(c)make an appropriate recommendation.**
>
> **(3)An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate—**
>
> **(a)on the complainant;**
>
> **(b)on any other person."**

The Tribunal determined it would make three such recommendations. That material for present purposes is the second:

> **"Within three months the respondent must amend the terms of the policy relating to the retention, re-allocation or withdrawal of police dogs to ensure that, in future, where a dog is re-allocated away from a handler for reasons related to her pregnancy or maternity leave, that re-allocation is only temporary and the dog or alternatively another dog of the same type is returned to her on the resumption of operational duties following her maternity leave"**

The Appeal

17. Of a regrettably large number of grounds of appeal, only four ultimately were permitted to proceed to this hearing. The ones to which the vast bulk of the submissions were directed were (1) whether the Tribunal erred in considering that the words 'because of' in Section 18 of the **Equality Act 2010**, had a broad, not a narrow meaning, and (2) whether it failed to deal with an argument that the decisions under challenge were made because of the operational requirements that police dogs needed to be deployed, and the retention of a valuable, expensively trained, asset by the handler during the period when she was non-operational first by reasons of health and safety whilst still at work and then whilst on maternity leave, with the result that the dog also would not be operationally deployed either. The other two (originally grounds (vii) and (viii)) related to supposed inconsistency between the decision and (as ground (vii)) the recommendation set out above, and (as viii) the finding of discrimination and the closing words of paragraph 16 of the Judgment. We shall return to these at the conclusion of our judgment on the principal arguments addressed to us on appeal.

18. The first argument assumes that the Tribunal applied a broad approach. There is no sign of this in any self-direction of law, unless it is implicit in the rejection of Mr Basu's case that the conduct was not because of the pregnancy. He had argued that the concept of the phrase "because of" was a narrow one, whereby it must be established that the alleged discriminator was motivated by the fact of pregnancy or maternity, or there was a direct causal connection

between the pregnancy and the decision as opposed to it merely being the context with which the circumstances had arisen.

19. We do not accept that the fact that the Tribunal found causation established means inevitably that it rejected the view of "because of" propounded by Mr Basu to the Tribunal. It did not say that it was rejecting the contention. Rather, in paragraph 23, it addressed the sufficiency of connection in a way which, though it does not propound a test specifically by reference to directness or remoteness, is capable of answering Mr Basu's plea that there be a "direct causal connection between the pregnancy and the decision". Supporting the view that even on Mr Basu's test the Tribunal's decision was within its entitlement is that in paragraph 20 it saw the converse of there being a direct causal connection as being "merely… the context within which the circumstances had arisen". It specifically rejected the pregnancy as having been only the context within which the circumstances had arisen – its reference to the case being distinguishable from **Warby** depended upon the latter case being one in which the sex of the Claimant was 'merely part of the circumstances'. The Tribunal expressly accepted that 'if the Claimant's pregnancy was merely part of the circumstances…' then the Claimant's case would be "more difficult": and it further emphasised in the last sentence of paragraph 23 that its view was that the pregnancy was not merely the occasion for the discrimination. Accordingly, on the Tribunal's understanding of the test proposed by Mr Basu, it found the test satisfied.

20. Therefore, we have no hesitation in rejecting the ground that the Tribunal applied the wrong test: if the Tribunal would have reached the result it did on the application of Mr Basu's approach, it would undoubtedly have reached the same result on the application of Mr Pilgerstorfer's broader approach.

21. We do not therefore have to choose between the approaches on this appeal. However, in case we are wrong on our first conclusion, we shall briefly state our views.

22. Pregnancy, sex, race, disability, age and the other characteristics identified as protected in the **Equality Act** are an inherent part of the identity of a person. They are thus always liable to be present when any decision is made or act is done in respect of that person. Often, and perhaps almost inevitably, those characteristics will shape the context and the circumstances within which that decision or act is taken or done. The purpose of the **Equality Act** put generally is to proscribe criteria or behaviour which are responsive not to the context generally, but specifically to the characteristic concerned. Thus, in **Martin v Lancehawk** [2004] All ER (D) 400 an employee was dismissed because her affair with the manager had broken down. If he had not been male, and she female, the relationship, and consequently its breakdown, would not have occurred. But the fact that they were of different gender did not cause the breakdown; it was merely part of the background circumstances. A difference in sex was not the real, or "activating" cause of the dismissal. It was upon cause in that sense that a Tribunal had to focus - see **Seide v Gillette Industries** [1980] IRLR 427 (per Slynn J for the Appeal Tribunal): context was insufficient. A more recent example is that of **Onu v Akwiwu** [2013] IRLR 523 in which migrant worker status was regarded as a background circumstance rather than an activating cause of the employers' ill-treatment of their domestic worker, who had that status. The distinction between the underlying circumstances, or the context within which a decision or act is taken or done is thus well understood.

23. The House of Lords decision of **Chief Constable of West Yorkshire Police v Khan** [2001] UKHL 48, ICR 1065 concerned a complaint of victimisation, in respect of which the adverse conduct of which a Claimant complained had by statute to be 'by reason that' the

Claimant had brought proceedings or complained of discrimination. In Lord Nicholls' speech is a celebrated passage:

> **"(3) 'by reason that'**
>
> **29. Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1 (1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."**

He identified a search by the courts for the 'operative' or 'effective' cause of an event happening, recognising that a search for the reason operating upon the mind of the actor was "a different exercise". Nonetheless, a person may act for a variety of reasons, all of which determine the outcome constituted by his decision or action. In the present case, Mr Basu has emphasised the need for the police to keep Nunki Pippin operational. Indisputably that was part of the reasoning which the Tribunal recognised: the policy the police adopted was based upon it. However, that does not exclude other factors too from influencing the specific decision in the case of the Claimant. The Tribunal in paragraph 23 expressly had regard to what was in Chief Inspector Cooper's mind, the reason why he acted as he did being clear from the Tribunal's judgment (albeit that the ultimate conclusion in paragraph 25 is expressed in terms of the burden of proof, upon the implicit assumption that it was reversed under Section 136 **Equality Act 2010** and not then satisfied by the police). It is (as Lord Nicholls identified is the nature of such a finding) a finding of fact. It is not perverse.

24. Mr Basu pointed out that in **Webb v Emo Air Cargo (UK) Ltd** (No. 2) [1995] ICR 1021, HL the Employment Tribunal and lower courts had taken the view that an employee dismissed

because she would be absent at the time when she would be needed for work, was not thereby dismissed on grounds of sex where the reason for absence was pregnancy. After a reference to the European Court of Justice ([1994] ICR 770) the matter returned to the House. Lord Keith, with whom the other members of the House agreed, held that in a case where a woman is engaged for an indefinite period the fact that the reason why she would be temporarily unavailable for work at a time when to her knowledge her services would be particularly required was pregnancy was a circumstance relevant to her case, which could not be present in the case of an hypothetical man. He commented:

> **"it does not necessarily follow that pregnancy will be a relevant circumstance in the situation where the woman is denied employment for a fixed period in the future during the whole of which her pregnancy would make her unavailable for work, nor in the situation where after engagement for such a period the discovery of her pregnancy leads to cancellation of the engagement."**

In Mr Basu's argument, these words indicated that the reason for the detriment was to be approached narrowly rather than broadly. The test was not simply that the detriment *could* be related to her pregnancy. A closer focus was needed.

25. In **Danosa v LKB Lizings SIA** [2011] 2 CMLR 2 the European Court of Justice considered the case of a woman dismissed from membership of the board of directors after six months. At paragraph 66 the court observed:

> **"According to the Court the dismissal of a worker on account of pregnancy or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex."**

Mr Basu focussed upon the closeness of connection indicated by the words "on account of".

26. However, immediately following those words are these: "See **Paquay** [2008] 1 CMLR 12 at [29] and the case law cited." In **Paquay v Société d'Architectes Hoet + Minne SPRL** [2008] 1 CMLR 12 / ICR 420 the court said (paragraph 4):-

> "**The dismissal of a female worker during her pregnancy or during her maternity leave for reasons linked to the pregnancy and/or the birth of a child constitutes direct discrimination on the grounds of sex, contrary to articles 2 (1) and 5 (1) of Directive 76/207."**

27. Mr Pilgerstorfer therefore retorts that Mr Basu can draw no comfort from any narrowness indicated by the words 'on account of', since the court was accepting that it meant the same as 'reasons linked to', which describes a broad enquiry.

28. Mr. Basu emphasised that the context of a decision was not the same as the ground or reason for it. He drew a parallel between this case and an hypothetical example considered by Lord Scott in his speech in **Lewisham London Borough Council v Malcolm** [2008] 1 AC 1399. A blind man and his dog wish to enter a restaurant which does not permit the entry of dogs. He is refused entry. Will that refusal be unlawful discrimination? The reason for refusal is plainly connected to the disability, but the disability will have played no part in the mind of the restaurant manager in refusing entry to the dog. The problem is not the blind man, who would have been permitted entry: but the dog (see paragraph 35). In the present case, submitted Mr. Basu, the reasoning had nothing to do with the pregnancy of PC Keohane. It had everything to do with the unavailability of the dog. The decision in the present case was not about the pregnancy of the Claimant, but was all about the deployment of the dog. Take another piece of police equipment, such as a gun: surely a female fire arms officer, relieved of the carrying of fire arms for safety reasons during pregnancy could not complain either of that or the withdrawal of her firearm during her pregnancy, even if in a broad sense the reason for that withdrawal was the pregnancy?

29. Further, he argued that two situations are recognised in Section 18 (2) of the **Equality Act 2010**: unfavourable treatment 'because of the pregnancy' (18 (2) (a)); and 'because of illness suffered by her as a result of it' (18 (2) (b)). If 'because of' is given the width of meaning which 'related to' indicates then to refer to illness in a separate sub-section would be superfluous – the illness would be related to the pregnancy.

30. Next, he submitted that a broad construction of 'because of' would lead to absurd results in the present case – it would be discriminatory for the police to remove dogs from a pregnant handler, even if she were unable to exercise and care properly for police dogs in her custody because of the complications of pregnancy. He relied upon further similar examples in paragraph 19 of his skeleton argument.

31. Mr Pilgerstorfer responded that the words 'because of' mean the same as 'on grounds of'. This is supported by the Explanatory Notes attached to the Statute, to which it is permissible to make reference (**R on the application of Westminster City Council v National Asylum Support Service** [2002] 1 WLR 2956, per Lord Steyn at paragraphs 2-6; **R v Montilla** [2004] 1 WLR 3141, per Lord Hope at paragraph 35). The words had been analysed by Underhill P in **Amnesty International v Ahmed** [2009] ICR 1450 at 1484: they gave rise broadly to two classes - 'criterion cases' and 'reason why' cases. The causal question was sensitive to the context in which it arose. He submitted that the current case was a 'criterion' one; the policy identified pregnancy, and the absence from work inherently associated with it, as the reason for consideration of removal of the dog. But if not, the decision in question in each application was undoubtedly 'related to', which was the test that the law adopted. Where there was a mixture of reasons, the test was that expressed by Elias J in **Law Society v Bahl** [2003] IRLR 640, at paragraph 83:

> **"… the discriminatory reason for the conduct need not be the sole or even the principal reason of the discrimination; it is enough that it is a contributing cause in the sense of a 'significant influence'."**

He pointed out that the reference to 'significant influence' was taken from Lord Nicholls' speech in **Nagarajan v London Regional Transport** [2000] 1 AC 501 in which he observed, at 512-3:

> **"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."**

32. In **O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School** [1996] ICR 33, a teacher at a Catholic school became pregnant as a result of a relationship with a Roman Catholic priest, and was not allowed to return to school after the birth of her child. Although the Tribunal decided that the reason for that treatment was not pregnancy, but rather that her position had become untenable because the father of the baby was a Roman Catholic priest, the Appeal Tribunal disagreed. It was not appropriate to compare the Claimant with an hypothetical man who was a teacher of the same subject who fathered a child by a Roman Catholic Nun, in circumstances which came to the attention of the press. Mummery P held (at 47 B-F):

> **"The critical question is whether, on an objective consideration of all the surrounding circumstances, the dismissal or other treatment complained of by the Applicant is on the ground of pregnancy. It need not be only that ground. It need not even be mainly on that ground. Thus, the fact that the employer's ground for dismissal is that the pregnant woman will become unavailable for work because of her pregnancy does not make it any the less a dismissal on the grounds of pregnancy. She is not available because she is pregnant. Similarly, in the present case, the other factors in the circumstances surrounding the pregnancy relied upon as the "dominant motive" are all causally related to the fact that the Applicant was pregnant – the paternity of the child, the publicity of that fact and consequent untenability of the Applicant's position as a religious education teacher are all pregnancy based or pregnancy related grounds. Her pregnancy precipitated and permeated the decision to dismiss**

her. It is not possible… to say… that the ground for the Applicant's dismissal was anything other than her pregnancy."

33. He drew attention to the fact that the circumstances of the Claimant could not simply be compared to the circumstances of another police officer who was absent for one or the other reasons comprehended by the policy. That would be to fall into the error identified by the Appeal Tribunal in **Fletcher v NHS Pensions Agency** [2005] ICR 1458: Cox J relying upon the decision of the European Court of Justice in **Gillespie v Northern Health and Social Services Board** [1996] ICR 498 noted (at paragraph 76) that those who were absent for reasons unrelated to pregnancy were not suitable comparators for those who were similarly absent, but for reasons which were related to pregnancy or maternity. They were legally in different situations, per **Gillespie**, and were not comparable.

34. Next, Mr Pilgerstorfer argued that the Equal Treatment Directive as re-cast in 2006 (2006/54/EC) provided by Article 2 (2) that:-

"For the purposes of this Directive, discrimination includes…
(a) any less favourable treatment of a woman related to pregnancy or maternity leave…"

It was that definition which was implemented by Section 18 of the **Equality Act 2010**. The words "related to" are broad. The width of the expression was indicated in the speeches in **London Borough of Lewisham v Malcolm** [2008] IRLR 700 HL – at paragraph 10, Lord Bingham held that "related to": "denoted some connection, not necessarily close, between the reason and the disability"; and Lord Neuberger, at paragraph 169, thought the words were such that "a relatively loose or indirect connection between the reason and the disability would suffice". In the slightly different context in which the **European Communities Act 1972** operates, the words "related to" are used in Section 2 (2): and in **R v Secretary of State for Trade and Industry ex parte UNISON** [1996] ICR 1003 were given a wide scope since the Divisional Court considered that to be the natural force of the words.

35. Our conclusion, as set out at paragraph 20, is that nothing here turns upon any postulated difference of approach as between the "broad" and the "narrow". If we were wrong on that, however, the reason why Inspector Cooper acted as he did was found as a matter of fact by the Tribunal, and cannot realistically be attacked (see our paragraph 23, and the Tribunal's paragraph 23).

36. Further, and separately, we do not think it helpful to inquire whether as a proposition of law the words "because of" import a broad as opposed to a narrow construction, so as to argue from that conclusion that what would otherwise be a tenuous link of no real causative significance would suffice to establish causation; nor do we consider that to argue that it should have a narrower focus, to apply which would circumscribe the circumstances in which a Tribunal could legitimately find causation when, unconstrained, it would have found it established, would produce anything other than an artificial result. In short, we do not think that "breadth" or "narrowness" of the test is a necessary step in any reasoning. Those concepts are not required to answer the question whether, in the context established by the evidence before a Tribunal, it is appropriate to hold causation established for the purpose of awarding damages on the footing, or making an appropriate declaration, that a social evil has occurred. Causation is a finding robustly to be made, for that purpose, taking into account the circumstances it is unnecessary to step beyond that. If, however, we are wrong on that, we would unhesitatingly prefer the broader approach. This is the approach taken in the **Equal Treatment Directive 2006/54/EC**; equivalent to the test recited in **Paquay**, to which **Danosa** referred. It gives the words used in European legislation and cases an interpretation which would fit with the statutory interpretation considered in **Malcolm** and **ex Parte UNISON**. It satisfies the purpose of the legislation, which in common with anti-discrimination statutes generally seeks to address the social evil of discrimination, and must be determined purposively

to that end. The fact that the needs of the Metropolitan Police to keep Nunki Pippin operational may have been a major, or indeed *the* major, reason for the decision does not mean to say that the Claimant's pregnancy was not also a cause of it. In any event, here (as we have observed already) the act of removal, and failure to reallocate a dog was not in itself a detriment. They subjected the Claimant to one: namely being put at risk that upon her return to work she would both have no second dog and have lost the opportunity of overtime, and that her career prospects would have been damaged. It is not difficult to see that the cause of that detriment was clearly suffered because of her pregnancy. The focus of the risk is upon the conditions she was to face on return to work following pregnancy and maternity leave, and that they should be no worse than they were as a consequence of her taking such leave, but the risk arose immediately upon the apparently permanent removal of Nunki Pippin (as Mr. Pilgerstorfer submitted it to be). This is a complete answer to Mr Basu's submissions that it was all to do with the unavailability of the dog during pregnancy and maternity leave. It was to do with the risk of what the Claimant would face on her return to work; and it needs to be emphasised that it was subjecting the Claimant to the risk itself, not whether it actually materialised on return to work, which constituted the detriment.

37. The risk might have been obviated if the Respondent had promised that the Claimant would be allocated a passive dog on her return to work, such that she would not suffer loss of income or career, but the fact the detriment might have been avoided did not prevent it being such in the first place.

38. We prefer the submissions of Mr Pilgerstorfer, save in one respect. We do not accept that he was right to characterise this as being a "criterion" rather than "reason why" case. The analysis performed by Underhill J in **Ahmed** to which he referred is of great assistance in most cases. It should not, however, be forgotten that the courts apply the statutory words, and not (as

if they were statute) helpful classifications adopted by courts addressing the application of those statutory words in the particular circumstances before them in individual cases. They should not be adopted unless they are truly apposite. The "criterion" cases are those in which an apparently neutral label (eg "old age pensioner" as in **James v Eastleigh Borough Council**) contains a discriminatory criterion inherently within it. That is not this case. "Being pregnant" is not on the face of it a criterion applicable equally to men as well as women: the criterion cannot be applied as if those to whom it applied were all in the same circumstance. For that reason, it is not applicable here: if, rather, the criterion was that the dog handler (or dog) was non-operational, then removal of the dog by reason of the handler being non-operational would not inherently discriminate, let alone necessarily cause detriment or disadvantage: at most it might discriminate indirectly. This case is one in which the Tribunal focussed on the reason why the Claimant was put at a disadvantage, and was entitled to do so.

39. The second ground of appeal is linked to the first. The Tribunal gave its decision by addressing the issues which it recognised in paragraph 7 of its Decision – they had been set out at a case management decision in respect of which there is no separate appeal. The issues it described were addressed and answered. That is the short answer to Mr Basu's appeal.

40. The longer answer is to the same effect. As we have already set out above, for an act to be one of direct discrimination does not mean that the detriment complained of as a result of the act was caused solely, or even mainly, by an act which was discriminatory. It is enough if the act was a significant and material influence. The Tribunal clearly set out why it found that there had been discrimination by the police force. Those findings are unassailable for the reasons we have given above.

Grounds 7 and 8

41. Ground (vii) is as follows:

> **"The findings of discrimination are inconsistent with the second recommendation**
>
> **(vii) the second recommendation which the tribunal made shows that the tribunal accepted that the Appellant can remove a dog from a handler and can do so "*for reasons related to her pregnancy or maternity leave*" (as long as they return it or allocated another dog of the same type on the resumption of operational duties). But neither of the claims to which this Judgment relates was about the failure to return Nunki Pippin to the Respondent or to allocate another passive scanning narcotics dog to her on the resumption of her duties. Indeed, when this was pointed out in the course of the Appellant's closing submissions, it prompted the Respondent's advisors to present the third claim which is referred to at paragraph 1 of the judgment, which has not been adjudicated upon;"**

42. Ground (viii) reads:

> **"The findings of discrimination are inconsistent with the detriment found**
>
> **(viii) at paragraph 16 of their Judgment, the tribunal say that the "*detriments are temporary in nature and likely to last from 8 February 2012 until, probably, 8 October 2012 one month after the conclusion of the London Paralympic Games*". 8th February 2012 was the due date on which the Respondent had returned to work. This finding, read with the second recommendation, shows that the tribunal's criticism of the Appellant was, in reality, one that did not appear in the list of issues (and is the subject of a separate (disputed) claim), namely, that the Appellant had not provided a passive scanning narcotics dog to the Respondent when she returned to operational duties;"**

43. Both these grounds allege that there is a material inconsistency between different parts of the tribunal decision. On a fair reading of the judgment, taken as a whole, we do not ourselves see that there is such an inconsistency as alleged. As to ground 7, it is right to say that the case was not about the failure to return Nunki Pippin, or to allocate another Police dog, to the Claimant when she resumed her duties. If however the judgment is to be understood as we ourselves understand it – that the Tribunal did not focus on what happened on return, but rather on the subjection of the Claimant to the risk that on return such events might happen – the supposed inconsistency disappears. As we pointed out above, the risk could have been avoided.

The recommendation was such as would ensure that it would be on future occasions: for reasons set out by Mr. Pilgerstorfer at page 331 of the bundle, by reference to his closing submissions to the Tribunal which are there set out, there was good ground to think that the recommendation could practically be implemented.

44. Similarly, we do not see the closing sentence of paragraph 16 as being inconsistent with what went before, where the Tribunal had addressed itself to what it described as the "serious risk" which arose once the decision as to re-allocation of her dog had been made. It was recognised by the parties before it that the loss of and failure to regain the dog as a companion was no detriment. The Tribunal was speaking in paragraph 16 of an immediate detriment, albeit it that the risk would materialise if it did only (as it recognised in hindsight) for a temporary period: and as we read the decision, was not asking whether what actually happened to the Claimant after her return in February 2012 was what she was complaining about. Moreover, it would have made little sense for that to be so, given that the first claim was made in early 2011, and the second in January 2012, both complaining of a detriment which by then had been suffered, and both pre-dating return to work.

The Cross-Appeal

45. Mr Pilgerstorfer complains that in paragraph 26 of its Reasons, the Tribunal appeared to direct itself that the Claimant would succeed at best only once and that, if direct pregnancy/maternity discrimination succeeded it would only consider a claim for indirect sex discrimination in the alternative in the event that the pregnancy result were overturned on appeal. Yet the pregnancy case is based upon pregnancy discrimination; the indirect discrimination case is not. It raises a claim of sex discrimination (see above). The reason why the Tribunal concluded that there was no indirect discrimination was that it could not be said for certain that the policy to re-allocate dogs where their pregnant handlers became non-operational

put or would put women to a particular disadvantage compared with men for, by paragraph 28: "There is merely the risk of that occurring". The concept that "risk" could not be a detriment was repeated in paragraph 30: "…the policy only amounts to *potential* discrimination, because it does not uniformly result in reallocation of the dog" (emphasis added).

46. Mr Pilgerstorfer complained that a risk of disadvantage is capable of being a detriment. Mr Basu argued that the Tribunal had found no particular disadvantage – it was for the Claimant to prove such disadvantage, and the Tribunal thought it unproven. This could not be said to be perverse.

47. In our view, the Tribunal identified a detriment. Being exposed to a risk that one's police dog might be re-allocated is sufficient, providing it is a real risk. It creates a detriment. If the application of a policy has the inevitable result that a woman will suffer that disadvantage, whereas a man will not, it will be directly discriminatory. It will fall within the "criterion" class identified in **Ahmed**. It is only where the consequence of suffering that disadvantage is neither automatic nor inevitable that indirect discrimination can come into play at all. Sometimes – though not always – such disadvantage will materialise. If where it does, however, it arises disproportionately in respect of one gender, then the basis for a finding of indirect discrimination is laid. Looking at the policy, and leaving aside the particular circumstances of any given individual subject to it for the moment, if the policy will have a differential impact, taken over a group as a whole, then it will be indirectly discriminatory unless it can be justified. If one returns to the position of the given individual, whose case has been left aside for the time being, it is necessary in order for her to make a claim that she can show that she was one of those who were actually disadvantaged. Here she was. The Claimant's dog was reallocated, and later was not returned. Accordingly, the policy, creating a risk in general, did materialise with disadvantage in her case in particular. Subject only to the question whether applying the

policy could be justified objectively, despite its discriminatory impact, the basis of a claim for indirect discrimination was made out.

48. In any event, the reasoning by reference to "potential disadvantage arising out of risk" is inconsistent with the Tribunal's own approach when it dealt with the question of whether the Claimant suffered a detriment by reason of direct discrimination: see paragraphs 14-17, in respect of the direct discrimination claim. The opening words of paragraph 16 indicate that it thought being exposed to a "serious risk" of adverse events was sufficient in itself to be a detriment. That conclusion was not challenged before us. If the Tribunal correctly recognised a risk of adverse consequences as sufficient to amount to a detriment for the purposes of a direct discrimination claim, there is no obvious reason why the risk of the same consequences should cease to be so simply because the claim being considered was now one of indirect discrimination. If one were to ask in respect of two persons whether one was disadvantaged by comparison with the other because one suffered a real risk of adverse events materialising, while the other did not, only one answer could be given: that one was indeed disadvantaged by comparison with the other.

49. Accordingly, both the analysis by the Tribunal was flawed and its rejection of "risk" or "potential" as being no current disadvantage was erroneous.

50. Although the Claimant here, as we understand it, seeks no greater compensation in respect of her claim for indirect discrimination than that which she should attain by reason of success in her claim for direct discrimination, the appeal in respect of the finding of indirect discrimination must succeed. We cannot reverse the conclusion, however, since it remains open for the Metropolitan Police Commissioner to show that the policy is entirely justified. The need to keep dogs operational whilst their handlers are absent may well be found sufficient,

though a Tribunal will be bound to consider if it is a proportionate response to invoke the policy without offering a guarantee of some sort that a dog handler deprived of a second dog, as was the Claimant, is not put at disadvantage upon her later return to work.

Conclusion

51. In conclusion, we dismiss the appeal; we allow the cross-appeal; and remit the issue of justification as of potential practical importance if the Metropolitan Police Commissioner wishes to appeal our decision on direct discrimination to a higher court. However, at the request of the parties made when they saw our draft judgment on the first two grounds, we stay remission for 35 days pending a decision as to appeal. If the Commissioner chooses not to appeal, there would seem little practical purpose in remission, at least in the context of the present case taken on its own.