Appeal No. UKEAT/0267/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 March 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

INTERSERVE FM LIMITED — APPELLANT

MS A TULEIKYTE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JULIAN ALLSOP (of Counsel) Instructed by: BPE Solicitors LLP St James House St James Square Cheltenham GL50 3PR
For the Respondent	MR OLUWATOYIN ONIBOKUN (Solicitor) Victory Solicitors First Floor 37-39 Peckham High Street London SE15 5EB

SUMMARY

SEX DISCRIMINATION - Direct

SEX DISCRIMINATION - Pregnancy and discrimination

In respect of a single finding of unfavourable treatment because of absence on maternity leave under section 18(4) **Equality Act 2010**, the Employment Tribunal did not apply the correct legal test, wrongly treating the case as a "criterion" type case rather than a "reasons why" type case: **Taiwo and Anor v Olaigbe and Ors** [2016] UKSC 31 applied. This approach is appropriate in a direct discrimination claim under section 18 just as under section 13 **Equality Act 2010**. The fact that indirect discrimination cannot be pursued on the basis of pregnancy or maternity leave under section 19 does not alter the position either.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This is an appeal by Interserve FM Ltd (referred to as "the Respondent" for ease of reference) from a decision that the Claimant was subject to unlawful direct discrimination under section 18(4) of the **Equality Act 2010** ("EqA") when she was recorded as a leaver with a termination date of 14 June 2013 (whereas her employment did not come to an end until 13 May 2014) as a result of the employer's blanket application of a policy of treating employees who had been absent without pay for a period of three months as leavers and erasing them from employment records. In a clear and lucid Judgment Employment Judge Tayler held that the application of the blanket policy to the Claimant in this case when she was absent on maternity leave had the automatic consequence of treating her unfavourably because she was on maternity leave and that unlawful discrimination was therefore inherent in the Respondent's blanket policy.

2. Mr Julian Allsop of counsel, who appears for the Respondent, as he did below, challenges the Employment Judge's approach as in error of law. He submits that there was nothing intrinsically discriminatory in the blanket policy applied by the Respondent and that the Tribunal was required therefore to consider the conscious or subconscious thought processes of the putative discriminator before it could make the finding it did. Moreover, he submits that the finding of automatic unlawful discrimination was perverse in the circumstances of this case. The appeal is resisted by Mr Oluwatoyin Onibokun, solicitor, who appears for the Claimant and also appeared below. In short, he submits that the Employment Judge was entitled to treat this as a criterion case. Alternatively, he argues that the decision is justified in any event because the continued application of the policy once the Claimant complained about the error in treating

her as a leaver was in the full knowledge that she was absent on maternity leave. He refers me to a number of Directives and to various judgments of the Court of Justice of the European Union ("CJEU") in advancing these arguments. I am grateful to both advocates for their assistance both in writing and by way of focused oral submissions.

The Facts

3. The facts, so far as relevant to the appeal, can be shortly stated. The Claimant commenced employment with the Respondent's predecessor organisation on 26 June 2010. Her employment transferred to the Respondent subsequently. She commenced a second period of maternity leave on 17 June 2013, and on 26 June 2013 was informed that she was not entitled to statutory maternity pay ("SMP") due to her length of service. That decision was based on an administrative error caused by the transfer date being taken as the commencement date of her employment. Subsequently, the Claimant was told that her earnings were too low to qualify for SMP and that she had no such entitlement in any event, as the Employment Tribunal found.

4. On 2 October 2013 the Claimant was recorded by a manager, Marcelo Garcia, as leaving the Respondent's employment on 14 June 2013. The Employment Judge found that this occurred because:

> **"15. On 2 October 2013 Mr Garcia completed a Leaver Form for the Claimant … in which he recorded the Claimant as leaving the Respondent's employment on 14 June 2013. This resulted from a spreadsheet that was sent to Mr Garcia, who had become the manager of the contract during the course of the Claimant's maternity leave, indicating employees who had not received wages for the last three months. He applied the policy of the Respondent of treating anyone as a leaver who had not received payment for the last three months. That would have the consequence that any woman who was absent on maternity leave for three months, but was not entitled to receive statutory maternity pay because of being [below] the minimum rate of pay to receive statutory maternity pay, would be treated as a leaver. That had the consequence of a P45 being issued for the Claimant on 4 November 2013 …**
>
> **16. On receipt of the P45 the Claimant telephoned Mr Garcia to explain that she was on maternity leave and had not left the employment of the Respondent. Mr Garcia apologised and said that he would try to sort out the problem. He contacted human resources. Rather than correct the Respondent's record Mr Garcia was told that when the Claimant returned to**

work a new joiner form should be completed in which it should be stated that the employment was continuing, at which stage the error would be rectified."

5. The Tribunal found that there were in total seven individuals who were treated as leavers including the Claimant, but there is no finding, and my attention was not drawn to any evidence, relating to the circumstances of the other individuals. What is clear from the Tribunal's findings of fact is that there was no finding that these were also women on maternity leave who did not qualify for SMP and therefore had no earnings.

6. There was a dispute about what happened at a subsequent meeting between the Claimant and Mr Garcia to discuss her return to work. In advance of that meeting, when the error was drawn to Mr Garcia's attention he apologised for it, but as a result of HR advice he did not correct it, instead waiting until that return-to-work meeting in order to do so in accordance with the advice he received. So far as the return-to-work meeting is concerned, the Employment Judge accepted the evidence given by Mr Garcia that he was unable to offer the different hours that the Claimant wished to work and she decided not to return to work as a consequence. Since the Claimant did not return to work, the new joiner form that it was anticipated would be completed by Mr Garcia correcting the leaving date was not completed, and the earlier error so far as leaving dates are concerned, was not rectified. That was later to have dire consequences for the Claimant.

The Tribunal's Judgment

7. The Tribunal's Judgment in light of those findings can be summarised as follows. The Judge gave himself a careful direction in relation to the applicable law and the guidance from the authorities at paragraphs 32 to 46. That included a discussion about different types of discrimination, and in particular cases where a criterion is applied that is inherently

discriminatory against a certain group rendering it unnecessary to consider the thought processes of the putative discriminator in order to decide whether unlawful direct discrimination has occurred. The Judge referred to **Amnesty International v Ahmed** [2009] IRLR 884 EAT and **James v Eastleigh Borough Council** [1990] IRLR 288 HL. The Judge also made reference to the decision of HHJ David Richardson in **Indigo Design Build & Management Ltd v Martinez** UKEAT/0020/14, which was described by him as an example of a maternity discrimination case where the "reason why" question was required to be asked.

8. At paragraph 47 the Employment Judge reached the following conclusion:

> **"47. The first act in respect of which the Claimant complains is Mr Garcia on 2 October 2013 issuing a leaver form and giving her leaving date to 14 June 2013. He did this because he was applying a blanket policy of treating as a leaver any employee who had been without pay for a period of three months. This had the consequence that any woman absent on maternity leave who had not got sufficient earnings to qualify for Statutory Maternity Pay would be cleansed, in the Respondent's term, from their records. Mr Garcia took no steps to look into the individual circumstances of those to whom he had applied this criterion. All of them like the Claimant had ceased being paid prior to Mr Garcia coming to the contract so he was unaware of their individual circumstances. We considered that an automatic consequence of applying this approach was to treat the Claimant unfavourably because she was absent on maternity leave. That was inherent in the approach of removing all those who had been absent for three months. The cleansing process then led to the issue of the P45. The Claimant contacted Mr Garcia, he apologised but took no effective steps to remedy the situation."**

9. Although Mr Onibokun sought to argue that the Employment Judge found both the initial act on 2 October and Mr Garcia's ongoing failure to remedy his error in deleting the Claimant's name from the records to be unlawful discrimination pursuant to section 18, I do not agree. The last sentence of paragraph 47, which refers to the contact that the Claimant made with Mr Garcia, the fact he apologised and that he thereafter took no effective steps to remedy the situation, is a factual finding, but there is no finding or conclusion associated with it that this was itself an unlawful act of discrimination by omission. That only a single act of discrimination, on 2 October, was found by the Employment Judge is further supported by: the Judgment recorded at the beginning of the document before the Reasons are set out, refers to a single act of unlawful discrimination occurring when the Claimant was recorded as a leaver

with a termination date of 14 June 2013; paragraph 53 of the Reasons which refers to the "*real item of discrimination*" as being the issue of the leaver form on 2 October; and further by paragraphs 55 and 56, which deal with time limits and the question of whether it was just and equitable to extend time to allow the Claimant to pursue this claim, where the discussion is plainly by reference to an extension of time from 2 October. This is consistent only with that being the sole act of unlawful discrimination in question. There is no cross-appeal by the Claimant against the Tribunal's findings and conclusions.

The Relevant Legal Framework

10. The Claimant's claim before the Tribunal was pursued under section 18 **EqA** as unfavourable treatment because of pregnancy and maternity. Section 18 provides:

> **"(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)."**

11. As Mr Onibokun correctly observes, a claim properly falling within section 18(4) **EqA** cannot be pursued as direct sex discrimination under section 13. Furthermore, section 19, which deals with indirect discrimination, cannot be pursued on grounds of pregnancy or maternity, although it can be pursued on grounds of sex of course. Section 18 applies to unfavourable treatment and therefore requires no comparison with the treatment that is meted out to others. Whether treatment is unfavourable is a question of fact left to the good sense of tribunals. In most cases, the answer is likely to be obvious. In other cases, where the answer is more difficult, the decision of Langstaff P in **Trustees of Swansea University Pension & Assurance Scheme and Anor v Williams** UKEAT/0415/14 contains a helpful discussion about what may be unfavourable treatment (see paragraph 29).

12. To be unlawful within section 18(4) the unfavourable treatment must be "because" the Claimant was exercising or seeking to exercise, or has exercised or sought to exercise, the right to compulsory, ordinary or additional maternity leave.

13. Section 136 of the **EqA**, which deals with the burden of proof, applies to section 18 claims and, relevantly, provides:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

14. There appears to have been no dispute, quite rightly, that Mr Garcia's act of deleting the Claimant's name from the employment records and issuing her with a leaver form dated 14 June 2014 was unfavourable treatment. It was potentially - and, as matters transpired, actually - highly detrimental to her. There was also no dispute that it was done because of the application of a blanket policy of treating as a leaver any employee who was without pay for a period of

three months (see paragraph 47 of the Reasons). The critical question for the Employment Tribunal on the facts of the Claimant's case was accordingly whether the admitted treatment of the Claimant in applying the blanket policy to her was "because of" her maternity leave.

15. It is now well established that no change of legal approach was intended in the change from "on the grounds of" to "because of" in the **EqA**, and neither advocate sought to contend otherwise. The fundamental question in a direct discrimination case is: what were the reasons or grounds for the impugned treatment? That question is fact and context sensitive and gives rise in broad terms to two types of cases that have been identified in the authorities. These are on the one hand "criterion cases" and on the other "reasons why" cases. The difference between the two is explained by Lady Hale in **R(E) v Governing Body of JFS and Ors** [2010] 2 AC 728 at paragraph 64:

> **"64. The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of "anterior" enquiry, into what caused the treatment in question, is also plain. It is that which is also explained by Lord Phillips, Lord Kerr and Lord Clarke. There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else - usually, in job applications, that elusive quality known as "merit". But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing. As Lord Nicholls went on to say in *Nagarajan* [*v London Regional Transport* [2000] 1 AC 501], "An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did … Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(a)" (p512)."**

16. In criterion cases, where the criterion is inherently based on or indissociably linked to the protected characteristic, it or its application constitutes the reasons or grounds for the treatment complained of, and there is no need to look further. In **Taiwo and Anor v Olaigbe and Ors** [2016] UKSC 31 at paragraphs 22, 23 and 27 to 30 Lady Hale explained in the context of the facts of that case, that there are many non-British nationals living and working in the UK

who do not share the vulnerability of the appellant domestic workers in that case, and the category of those suffering the disadvantage did not therefore coincide exactly with the category of people with the particular protected characteristic. The absence of an exact correspondence between the advantaged and disadvantaged groups and the protected characteristic in question meant that the case was not one of direct but one of indirect discrimination. It seems to me that reasoning potentially applies here.

17. It was not in dispute before me that this approach is appropriate in a direct discrimination claim under section 18 just as it is under section 13, nor was it suggested that the absence of any ability to pursue an indirect discrimination claim on the basis of pregnancy or maternity leave under section 19 alters the position in any way. I consider that to be correct. There is no reason why the approach in a direct discrimination claim under section 18 should not follow the approach identified and explained in the cases I have just referred to. Indeed, there is authority in the Appeal Tribunal that supports this approach (see in particular **Johal v Commission for Equality & Human Rights** UKEAT/0541/09, a decision of HHJ Peter Clark; and see also the decision in **Martinez**).

18. Mr Onibokun submits that although the blanket policy in this case is expressed and may be applied neutrally, if it is applied to a woman absent on maternity leave as a matter of fact that is unfavourable treatment per se. He relies on the broad purposive approach that must be adopted in construing section 18 by virtue of **Directive 2006/54/EC**, and on two judgments of the CJEU: **Thibault v Caisse Nationale d'Assurance Viellesse des Travailleurs Salaries** [1999] ICR 160 and **Napoli v Ministero della Giustizia, Dipartimento dell'Amministrazione Penitenziaria** [2014] ICR 486. As regards the **Directive**, however, section 18 **EqA** effectively replicates section 3A of the **Sex Discrimination Act 1975** ("SDA"), which was inserted into

the **1975 Act** with effect from 1 October 2005 by the **Sex Discrimination Regulations 2005**. Those Regulations (SI 2005/2467) introduced amendments to the **SDA** designed to fulfil the UK's obligations under the **Equal Treatment Amendment Directive 2002/73 EC**. Moreover, **Directive 2006/54 EC** has been incorporated into domestic law by virtue of Parts 2, 5, 9, 10 and 11 **EqA**.

19. Mr Onibokun did not contend that section 18(4) does not properly implement the **Directive** in domestic law. So far as its interpretation is concerned, it seems to me that his reliance on the two CJEU cases does not take his argument very far. In **Thibault** the impugned treatment - national rules depriving a woman of the right to a performance assessment when on maternity leave - were found to be done "*because she was absent from work on account of maternity leave*" and therefore amounted to unlawful direct discrimination. In the **Napoli** case the impugned provision was found automatically to exclude women on maternity leave from a training course, making it impossible for those women to sit an exam at the end of the course. Those holdings do not undermine the approach to section 18(4) as requiring the unfavourable treatment to be "because of" the absence on maternity leave.

20. In domestic law, the point is well established that the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination. In **Ahmed**, an authority cited by the Employment Judge, the EAT (Underhill P) held:

> **"37. … The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment. That point was clearly made in the judgment of this tribunal in *Martin v Lancehawk Ltd* [2004] All ER (D) 400 (Mar). In that case the (male) managing director of the respondent company had dismissed a (female) fellow employee when an affair which they had been having came to an end. She claimed that the dismissal was on the ground of her sex because 'but for' her being a woman the affair would never have occurred. At paragraph 12 Rimer J referred to the tribunal's finding that the dismissal was 'because of the breakdown of the relationship' and continued:**

> **'… [T]he critical issue posed by s.1(1)(a) [is] whether Mr Lovering dismissed Mrs Martin "on the ground of her sex", an issue requiring a consideration of *why* he dismissed her. As we have said, we interpret the tribunal as having found that the dismissal was because of the breakdown of the relationship. That, therefore, was the reason for the dismissal, not because she was a woman. We accept that, but for her sex, there would have been no affair in the first place. It could, however, equally be said that there would have been no such affair "but for" the facts (for example) that she was her parents' daughter, or that she had taken up the employment with Lancehawk. But it did not appear to us to follow that reasons such as those could fairly be regarded as providing the reason for her dismissal.'**
>
> …"

21. The same point has been made in the context of unfavourable treatment because of pregnancy or maternity cases in two cases in the EAT: **Sefton Borough Council v Wainwright** [2015] IRLR 90 and **Hair Division Ltd v Macmillan** [2013] EqLR 18. It follows that it is necessary to show that the reason or grounds for the treatment - whether conscious or subconscious - must be absence on maternity leave and the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish unlawful direct discrimination under section 18.

22. In cases that do not involve the application of any inherently discriminatory criterion and where the discriminatory reason or grounds exist because of a protected characteristic that has operated on the discriminator's mind or thought processes to some extent (whether consciously or subconsciously) the discriminatory reason for the conduct need not be the sole or even the principal reason for the impugned treatment. It is enough that it is a contributing cause in the sense of a significant influence.

The Appeal

23. The question raised by this appeal is whether the present case is a "criterion case" as the Employment Judge held, or whether it is a "reason why" case. Mr Allsop submits that it was plainly not a criterion type case. He contends that the policy had two constituent criteria, again,

as the Employment Judge recognised. First, the individual had to be absent and secondly the individual had to be without pay. In both cases the period of absence without pay had to last three months. The consequence of the policy was that a woman absent on maternity leave and who did not have sufficient earnings to qualify for SMP would be automatically affected and her name would be deleted from the employer's records. However, on the other hand, a woman on maternity leave with sufficient earnings to qualify for SMP would not be affected and would not have her name deleted from the records. Further, he submits, it is likely, given the neutral phrasing of the policy, that it applied to others; for example, those on long-term sick leave without earnings to qualify for either statutory or contractual sick pay, seasonal workers, or those taking longer periods of absence without pay.

24. Mr Onibokun in his skeleton argument and in oral argument contends otherwise. With all respect to him, it seems to me that his argument is not sustainable. My reasons are as follows. First, the policy has two constituent criteria, as Mr Allsop submits, but it seems to me that neither can be taken in isolation and they must be considered cumulatively as part of a single policy because neither is sufficient on its own to result in the treatment that was applied to the Claimant. Mere absence does not lead to an employee's name being deleted from the records, and it seems to me in those circumstances that the composite criterion that is constituted of absence with no earnings during that absence must be considered as a single criterion overall. Mr Onibokun did not contend otherwise.

25. Secondly, the policy is, as Mr Allsop submits, neutral on its face. It is not directed at a particular group, although I fully recognise that it might have a particularly disadvantageous effect on women. Given its neutral expression, it seems to me that it was for the Claimant to show that whilst neutrally expressed the policy was in practice aimed at women if that was her

case (or aimed at those on maternity leave, again, if that was her case). There is no evidence that she advanced this argument or evidence to demonstrate that it was so. The highest that Mr Onibokun could put it was that Mr Garcia accepted that the majority of his workforce were women on low pay, some working part-time. The policy would of course encompass some women on maternity leave with insufficient earnings to qualify for SMP. I accept that, but the fact remains that those absent for other reasons without earnings would also be caught by the policy and that not all women on maternity leave would be caught. So far as the latter group is concerned, Mr Onibokun relied on the lower earnings limit for qualifying for SMP of £107.50 per week at the date in question, but, as he accepted, somebody performing around 17 or 20 hours a week on the minimum wage could qualify on this basis. That is still very much part-time working at low rates of pay.

26. Mr Onibokun also relies on the fact that Mr Garcia took no steps to enquire into the individual circumstances of the person being deleted and took no steps to remedy the position once it was brought to his attention in relation to the Claimant. However, as I have already indicated, the Employment Judge made no finding of discrimination in this regard. It is not open to Mr Onibokun to reopen the findings of fact made by the Employment Tribunal. The only act of unfavourable treatment found by the Employment Judge related to the deletion of the Claimant's name from the Respondent's records. No other unfavourable acts were established as having been done because of her maternity absence.

27. In all of those circumstances, I have concluded that the Employment Judge made an error of law in his approach to section 18(4) and was wrong to regard the claim as falling within the criterion category. This is not a case where the Respondent applied the unfavourable treatment because of a blanket policy or criterion that was inherently based on or necessarily

linked to pregnancy or maternity. If that were so, all women who went on maternity leave would have had their names deleted from the Respondent's records, and the policy of deleting names would not also apply to others not absent on maternity leave but absent instead, as I have indicated, for other reasons. If the Claimant's absence on maternity leave formed any part of the reason or grounds for her treatment in having her name deleted from the employer's records, it can only have been because Mr Garcia was, whether consciously or subconsciously, significantly influenced by her maternity leave. This is a case where it was necessary for the Employment Tribunal to consider the mental processes of the putative discriminator.

28. The only other way in which the case could have been advanced is by reference to indirect sex discrimination under section 19. The application of the blanket policy in this case may, depending on the facts, have had a disparate adverse impact on women because they take maternity leave and may not qualify for SMP and therefore may be more likely to be disadvantaged by such a policy than their comparator cohort of male employees.

Conclusion

29. For all of those reasons, the appeal must be allowed and the finding of unlawful discrimination cannot stand.

Disposal

30. I have heard from counsel as to the consequences of my conclusion. The Tribunal's error of law in relation to its approach to section 18(4) has two possible consequences. First, as Mr Allsop submits, the Employment Appeal Tribunal can substitute its own conclusion that, applying the correct test, which is a "reasons why" approach, the only and inevitable outcome is that there was no direct discrimination in this case. Mr Allsop particularly relies on the finding

by the Employment Judge that Mr Garcia, who had become the manager of the contract during the course of the Claimant's maternity leave, neither knew the Claimant nor knew of her circumstances and that she was in fact absent on maternity leave. In those circumstances, he invites me to substitute my own conclusion rather than to remit this matter to the Employment Tribunal.

31. On the other hand, Mr Onibokun submits that this is a case in which the Claimant sought to argue that the policy was in practice inherently discriminatory. He refers me to paragraphs 13 to 15 of the submissions made below, which deal with the nature of the Respondent and the fact that the vast majority of cleaners are on the minimum wage, working low numbers of hours and the majority of whom are women. He submits that the argument advanced below encompassed an argument that, although neutrally expressed, this policy was necessarily in practice directed at those on maternity leave with no earnings. That argument is identified in the submissions made on the Claimant's behalf below, but no findings were made in respect of it by the Employment Judge. Although I sought to identify during the course of the appeal hearing in my questioning of Mr Allsop whether he could assist with the numbers of people who took absences for other reasons as compared with the numbers who took absences for maternity leave or with the numbers who have no earnings and the reality in practice of how this policy operated, he was not able to do so.

32. It seems to me, in those circumstances, that this is not a case, notwithstanding the burden that is on the Claimant to establish a *prima facie* case, where I can feel sure that the only possible outcome is a finding of no discrimination. It seems to me that this is a case where, applying the approach set out in **Jafri v Lincoln College** [2014] EWCA Civ 449, I must remit the matter to the Employment Tribunal for these issues to be reconsidered. It may be necessary

at a remitted hearing for the Tribunal to hear further evidence in relation to the congruence issue if that is the approach that the Claimant wishes to take. Otherwise, the Tribunal will need to reconsider the question whether the unfavourable treatment on 2 October was because of the Claimant's absence on maternity leave. So far as that is concerned, at the moment I do not see any further need for evidence to be called, but that will be a matter for submissions and for the Tribunal to determine.

33. The only remaining question is whether remission should be to the same or to a differently constituted Tribunal. Both sides agree, quite rightly, that remission should be to the same Tribunal. I have no hesitation in concluding that is the appropriate course to adopt. The Tribunal's Judgment in all other respects is a model judgment. The error was limited to a misunderstanding of the boundary between the two types of cases ("criterion" cases and "reasons why" cases) and I have every confidence if this matter is remitted to the same Employment Judge in light of his careful findings that he will reach a fair decision. Remission will be to the same Tribunal, and is limited to the single act of deleting the Claimant's name from the employment records on 2 October recording her as a leaver with a termination date of 14 June 2013 whereas her employment did not come to an end until 13 May 2014.

Costs

34. There are two further consequential matters I am asked to deal with. First, the successful Appellant in this case has applied for costs limited to the fees incurred in lodging the appeal (£400) and in pursuing the appeal to a Full Hearing (£1,200) under Rule 34A(2)(a) of the **Employment Appeal Tribunal Rules 1993**. The only threshold for such costs is the extent of success of the appeal, but the Appeal Tribunal has a broad discretion in relation to such fees and is in particular entitled to have regard to the potential paying party's ability to pay when

considering the amount of a Costs Order. There is no dispute that the consequences of Mr Garcia's actions were dire for this Claimant. She lost her benefits and ultimately the accommodation in which she was then living with her children, and I am told by Mr Onibokun that she remains in temporary accommodation. Furthermore, she was earning so little that she did not even qualify for statutory maternity pay; the earnings threshold being £107.50 per week. She supports two children. It seems to me, in those circumstances, that she has no ability to pay on what I have heard, and, given the dire consequences upon her of the actions taken by the Respondent, albeit ultimately I have allowed this appeal, it seems to me that it would not be just to award these costs. I therefore refuse the application in light of the Claimant's means and inability to pay.

35. The final matter is that there has been a Remedy Hearing and a Remedy Judgment; the enforcement of which is currently stayed. Since that Judgment is contingent on the finding of unlawful discrimination that has now been set aside, it seems to me that the inevitable consequence of my Judgment is that the Remedy Decision cannot stand and must also be set aside. Mr Onibokun was driven to accept that that must be right. If the matter is pursued on a Remitted Hearing and the Claimant is successful, then there will have to be a further Remedy Hearing following on from any Liability Decision.

36. Finally, that leaves one further matter and that is to thank both advocates for their care and assistance in dealing with this somewhat difficult case.