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EMPLOYMENT TRIBUNALS

Claimant: Mr R Porter

Respondent: Secretary of State for International Trade

Heard at: London Central **On:** 18, 19, 22, 23 January 2018

Before: Employment Judge Goodman

Members: Mr P M Secher
Mr S Higgins

Representation
Claimant: Ms R Tuck, Counsel
Respondent: Mr T Poole, Counsel

JUDGMENT having been sent to the parties on 30 January 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This case is about a placement in Sao Paulo being cut short after the claimant took adoption leave.

2. Formally the claims are of less favourable treatment because of sex, brought under Section 13 of the Equality Act 201, and of detriment for taking adoption leave, under Section 47 (c) of the Employment Rights Act 1996.

3. The treatment and detriment complained of was listed at a preliminary hearing on 19 July 2017:

1. The Respondent's termination of the Claimant's posting to Brazil on or around 9 February 2017.

2. That he was not, in September 2016 or at all during his ordinary adoption leave, consulted or informed that a review was taking place as to the staffing of the Latin American HVC Team.

3. That he was not informed or consulted of a change - significant or at all - of the "approach to how we identify and deliver HVC Campaigns".

4. That he was not informed or consulted about any concerns as to the future pipeline in his region.

5. That his absence on adoption leave, during which period he was not substantively replaced, was not taken into account when assessing the reduced pipeline.

4. The Claimant relied on a hypothetical comparator, that is, a female employee at his level who had taken maternity leave for an equivalent period, but in closing the Claimant has modified the position slightly to a comparison with a woman on adoption leave, adding that it was clear from the Respondent's witness evidence that they would have treated a woman in the same way, but would not have treated a woman in the same way, and would have regarded a woman on adoption leave in the same way as they would a woman on maternity leave.

Evidence

5. To decide the issues, the Tribunal heard evidence from the following:
Richard Porter - the Claimant
Deborah Kobewka - Managing Director Healthcare for the Department of International Trade, based in London. She made the decision that the Claimant was superfluous to the team.

Catherine Coady - Senior HR Business Partner, based in London, consulted on the decision to short tour the Claimant.

Joanna Crellin submitted a witness statement, but was not called to give evidence. She is Consul General in Sao Paulo, and Regional Director for Latin America and the Caribbean in the Department of International Trade. Renata Ramalhosa, who is Head of Trade and Investment for Brazil, reports to her. There was no witness statement from Ms Ramalhosa..

6. There was a bundle of documents approaching 400 pages. A number of significant additions to the bundle were made during the course of the case, notably track changes in the business case made for short touring the Claimant, with emails commenting on the drafting of it, and the plan for Ms Kobewka's visit to Latin America in September 2016.

Findings of Fact

7. The Respondent is the Department for International Trade, which was formed out of UKTI (United Kingdom Trade and Investment) late in 2016. UKTI was a brand of the government Department for Business Industry and Skills (BIS, now BEIS), and for practical purposes its staff when placed overseas were seconded for the Foreign and Commonwealth Office. The purpose of UKTI, and subsequently DIT, was and is to research and exploit overseas business opportunities for British companies.

8. In 2008 the Claimant started employment with PA Consulting Group as a consultant in healthcare practice. In 2010 PA Consulting Group obtained a contract from UKTI to provide trade services. On that contract the Claimant was based in India for 18 months, then South Africa, and in March 2012 he was seconded to Sao Paulo in Brazil. He speaks Portuguese and Spanish. He had a succession of 6 month secondments from PA Consulting to work for UKTI.

9. Towards the end of 2015, as UKTI was terminating its contract with PA Consulting, Joanna Crellin, Regional Director for DIT in Latin America, based in Sao Paulo, emailed her boss on 19 November 2015 about this, saying:

> "Richard (the Claimant) is an incredible asset to the team across the region, I would not under any circumstances want to lose him, his energy, his contacts, his expertise or his experience. What can I do to hold on to him?"

10. The Claimant, in the event, transferred employment to the civil service under TUPE. There is a letter of appointment of 26 January 2016, appointing him to UKTI as Brazil Healthcare Specialist in Sao Paulo. He was to have FCO Grade 6, which is BIS Grade 7. The tour (as it is called) was for 3 years. Paragraph 2 says "however for operational reasons, we may need to ask you to remain in post for a longer or shorter period. We will only ask you to curtail or extend your posting in exceptional circumstances and for as short a time as is operationally necessary". In evidence, Ms Coady said that in practice the use of the word "ask" there is synonymous with "instruct".

11. Part of the letter which deals with the Claimant being a BIS employee on loan to the Foreign and Commonwealth Office. While on loan Foreign and Commonwealth Office terms and conditions and guidance will apply to him except for the grievance and disciplinary procedures, which will be those of BIS.

12. Paragraph 5 says that a loan of his services to the Foreign and Commonwealth Office can be terminated for a number of reasons, which include disciplinary reasons, misconduct and poor performance, or: "for reasons connected to a change in UKTI's business requirements at the post or country to which you are on loan". Cutting short a tour is known in the department as "to short tour".

13. His line manager was Joanna Crellin in San Paulo, and in London Richard Leach.

14. The Foreign and Commonwealth Office adoption leave policy was in the bundle. It provides for civil servants on adoption leave to have paid leave for 26 weeks, thereafter 26 weeks additional adoption leave of which 13 weeks

were paid at statutory rate. There is a provision that notice to the employer must be given within 7 days of the employee being notified by an adoption agency of a match, and that while absent on leave all terms of the contract continue except those relating to remuneration. It stated that the "keeping in touch" days policy is the same as for maternity leave. By contrast, the BIS adoption policy in the bundle provides that there is no common policy on adoption leave, with several legacy arrangements.

15. The Foreign and Commonwealth Office keeping in touch (KIT) policy for maternity leave, stated to be the same for adoption, is that reasonable contact between FCO and staff on maternity leave is allowed, for example to inform staff about changes happening at work, including job vacancies. It adds: "If both agree, then up to 10 days work KIT days can be allowed without jeopardising the right to leave", and there is no obligation for either side to offer them or take them up.

16. Attached to the letter are some standard terms and conditions, they include a clause about mobility saying that a civil servant is liable to move to any Civil Service post in the UK or abroad as long as the post and move is deemed reasonable.

17. The BIS Grade 7 to which the Claimant was appointed has a salary of £74,750 per annum, plus membership of the Civil Service pension scheme. He was also paid a one-off retention allowance of £5,000. He was based in Sao Paulo, covering five Latin America countries, and had two staff reporting to him.

18. His work was appraised in an annual manual appraisal by Ms Crellin on 28 April 2016. She wrote that he had had another great year, almost single handedly beating his target, which included all Latin American markets, and that he had been extremely positive, fantastic dealing with a large high performing team and that they could learn from that. Despite these enthusiastic remarks, he was marked "me", the middle band of three possible marks, we assume because there was no previous appraisal target set against which to mark him.

19. The Claimant and his partner hoped or planned to adopt a child. This had been shared with Catherine Coady of HR at a one-to-one meeting in November 2015 (prior to transfer in), when he asked if he could see the Civil Service Adoption Policy, and the terms were provided to him on 22 December 2015. Thus it was no secret that he planned to adopt.

20. In terms of the Claimant's work, we know that early in 2016 UKTI then (now DIT), planned to reorganise the way it did its work. We can see that during that year there were plans to make redundant a number of local staff allocated to the team. This part of the reorganisation involved a change from measuring HVOs (High Value Opportunities for sales) to HVC's, (High Value Campaigns). As is common in sales, opportunities would be accumulated in a pipeline, meaning those expected to mature or convert into deals from which money could be earned at a later date. In addition to refocusing from HVO's to HVC's, there was a plan to change how the value was measured, moving from business wins, meaning the value of the contract obtained, to export wins, meaning the proportion of the value of that contract that would accrue to UK companies and so increase UK exports. The change would be marked in construction projects, for example hospitals, as a substantial part of the contract value would accrue to local construction companies, rather than UK businesses.

21. In March 2016 the Claimant prepared a trade campaign template for the forthcoming year. He referred to his detailed pipeline of work, which had been independently verified by two consultancies. The fact of this independent verification of the pipeline has not been challenged by the Respondent.

22. In April 2016 Deborah Kobewka was appointed Managing Director for Healthcare across UKTI. She is based in London, responsible for healthcare campaigns across the globe. Coming from an outside healthcare consultancy, it was her first Civil Service job.

23. On 9 June 2016 the Claimant wrote to her about the status of the team in Brazil and wider Latin America. On staffing, he said that they were about to reorganise by making redundancies of local resource staff, and were to replace a C4 who had just left, that there was a new B3, and they were keeping an A2. They were planning full-time resource in Chile, Columbia, Peru and Mexico, with five focused on healthcare.

24. At that time healthcare was divided between healthcare (strictly, hospitals and hospital services) and life science (pharmaceuticals and medical devices). The aim was to deprioritise life science, and focus more on healthcare. The Claimant said he planned to finalise this plan by the end of July, and have a draft by early July. He referred to an export win target of £200,000,000 in the next financial year, and a need to refresh his pipeline. On a practical level he asked for meetings with her to take place at a more convenient time (to include all the global team meant meetings were timed at 5.30am in Latin America). Ms Kobewka replied thanking him for his welcome note, commenting on his ambitious programme, and saying that they would have a monthly call dedicated to Latin America. The regional strategy should go forward.

25. Early in July 2016, the Claimant was notified of a child being available for adoption in short notice. On 6 July 2017 he notified Joanna Crellin and Renata Ramalhosa that he was proposing to take adoption leave within the next couple of weeks. The child was then around 3½ years old, with some development and behaviour difficulties because of his background. He proposed just to take ordinary adoption leave. For cover while he was away, Carol Campos, the C4, had left to go to Canada; we know that she was replaced in September 2016 by Arly Santos, but that left just Danilo Santos, who specialises in life sciences rather than healthcare, in post.

26. The Claimant started adoption leave on 19 July 2016. He said he did a handover with Danilo Santos by going through the various work plans with him to explain what needed to be done. There is no handover document as such. There is no evidence from Danilo Santos, and no work plans documents are in the hearing bundle.

27. Ms Kobewka said she knew around that time that the Claimant was going on adoption leave, because she said she asked Human Resources to inform her when his planned return was. The Claimant was due to return in mid-March, after taking 6 months ordinary adoption leave and then accrued annual leave.

28. In September 2016, he Claimant came into work to assist in recruiting Arly Dos Santos who replaced Carol Campos.

29. He became aware that Ms Kobewka was planning a short visit to Latin America, and that he was not on her plan of meetings. When he asked if he could meet her, she arranged to take an earlier flight from Rio to Sao Paulo so she could have dinner with him on arrival. On 18 September the plane was late and they had around an hour together. The next day, she had meetings with Danilo Santos and Lauren Traitor of the Healthcare Team about pipeline roadshow and strategy, then with Lauren Traitor about the Prosperity Fund, this being a Foreign Office fund for development in which a secondary aim is business opportunities for UK firms, then with Joanna Crellin. In the afternoon there was a programme of meetings with State and Regional Governments on their healthcare projects. Later she paid short visits to other Latin American countries to assess their opportunities.

30. Ms Kobewka says that the change from HVO to HVC meant being more selective, and the change in metric particularly affected the value of construction projects, reducing the proportion of the value that would be counted as export wins. After her 3 day visit she had developed concerns about the feasibility of healthcare opportunities within Latin America, commenting on the language difficulties, the lack of clarity as to buyer priorities, the lack of clarity on whether they would be funding these projects and when, and the lead times involved - they might announce extensive plans for hospitals and the like, but little progress seemed to be made thereafter. She also decided that she would cover the Claimant's absence on adoption leave with "a London-based resource" who worked with local colleagues on the pipeline to review that the realism of the opportunities and when they were likely to convert to deals. We comment that this is a

standard sales manager exercise to validate salesman's aspirations as to what is live and when it is likely to convert. Ms Kobewka called it "defluffing the pipeline", to clear out projects that would not be going anywhere.

31. The London resource allocated to do this - as well as carrying on the day to day work of the team in Sao Paulo - was Sophie Roscoe. She went to Sao Paulo in mid-October and left in mid-December, but in the middle she returned to London for 2 weeks to accompany a visit by a Brazilian state government group, so she was in Brazil for 6 or 7 weeks. There was no evidence from Sophie Roscoe as to her activities, and apart from one email, no documents. We do know from Ms Kobewka that she had no background in delivering projects, and that she came from private office work within the Department of Health. What did Sophie Roscoe do? We know from an answer to a request for further information that she had meetings with the prosperity team, with George Middleton in Rio, with the DIT Consuls in Horizonte and Recife regions, she met the Head of Trade, Lauren Frater, and with Joanna Crellin, Consul General, and Renata Ramalhosa her deputy. Dealing with the lack of documents, Ms Kobewka referred to making a lot of phone calls to establish the work within the pipeline. Given her limited language competence, we assume that much of this was done by local staff. Ms Roscoe commented on the fact that there was no handover note from the Claimant; no mention is made of the involvement in Danilo Santos or his work plans in the review of the pipeline. We have no documents about the pipeline although we are told that it was a dynamic document on an excel spreadsheet and that the changes may not have been kept. We know that Deborah Kobewka at some point reviewed the availability of UK suppliers for the business opportunities and concluded that it was difficult to match UK suppliers to some of them because UK businesses were reluctant to go to Latin America because of the perception of corruption and delay. This knowledge was she said based on speaking to consultants and lawyers, we have no documents or no detail of who she spoke to or when. The factual material on which decisions were based may therefore have been sparse, and the conclusions based on generality. Some projects were deleted from the pipeline as they had been stationary for a long time.

32. Deborah Kobewka said that during the last quarter of 2016, Sophie Roscoe had a meeting with the Claimant and others in the team about the pipeline, but he was able to provide "no useful insight". Challenged on where this came from, as the Claimant denies any such meeting, she conceded that it was probably a telephone call from Sophie Roscoe to the Claimant to check a particular fact, which she coupled with there being no emails to confirm or explore a wider review of the pipeline with the Claimant. We conclude there was no such meeting. To the extent that Deborah Kobewka has exaggerated perhaps one phone call, we would not suggest that she was deliberately misleading the Tribunal; it illustrates the unreliability of hearsay evidence.

33. During her time in Sao Paolo a presentation at which was prepared by Sophie Roscoe and another, they planned to validate the pipeline to assess UK suppliers, and projected revised figures of £ 213 million for healthcare in the coming year. This proposal lacked detail, and may have been about proposed work, rather than work that had by that date been achieved. The business plan document that was eventually prepared, and is in the bundle, names Arly Santos, Joanna Crellin and Deborah Kobewka, but not the Claimant as having had a contribution to it. Entitled "export forecast for Latin America healthcare 16/17", developed from a high value opportunity for Brazil only, it announced a split between life science and healthcare, and that in last 4 months they had been engaging with healthcare stakeholders and had identified a number of healthcare opportunities. It referred to a target of £269.8 million and a forecast of £43.5 million for healthcare.

34. At some point Ms Kobewka decided that the Claimant was superfluous to the Latin America Team. In her view the project value of the healthcare work following this assessment of pipeline did not merit a Grade 6 within the team.

35. In the bundle we had a table of eighteen other high value campaigns in Latin America which included healthcare and a number of other economic sectors. It is not clear to us when it was prepared or when Ms Kobewka had it. It shows that the Claimant was the only Grade 6 in the region overseeing

the two campaigns for life science and healthcare. The Claimant himself said he also had oversight of other countries, but not of other campaigns. The document mentions oversight from a Grade 7 in London.

36. On the evidence of Joanna Crellin, there were D6's employed in other high value campaigns in Latin America: someone in Mexico overseeing a £500 million target and in Columbia £300 million, compared with the smaller campaign for healthcare in Brazil. Ms Kobewka was not quite clear what exactly these D6's did. She suggested they had duties other than overseeing the high value campaign, but said that Ms Crellin would be better able to tell us. Ms Kobewka referred to a DIT "playbook" which provides that each HVC campaign would be led by either a C7 at HQ, or a D6 in the market, and thus the Claimant was duplicating work being done in London.

37. It was not clear from the evidence when the decision to delete the Claimant's post was made. The Respondent explains that the business plan omitted this deliberately omitted, because the Claimant should not learn from colleagues.

38. In January 2017, there was a report from McKinsey, the independent consultancy firm, about the Prosperity Fund (secondary aim: developing opportunity for K businesses), which concluded that Brazil healthcare was a substantial opportunity to be prioritised. We do not know if this played any part in Ms Kobewka's decision.

39. We know that the team was planning, towards the end of 2016 or beginning of 2017, to recruit an additional healthcare resource, because such a post was advertised, although with an unspecified grade, from that date. We know that it was still being advertised in September/October 2017 when the Claimant came across it, and that the DIT was unsuccessful in recruiting to this post, which means the team continued short staffed on the healthcare side. We know too that the high value campaign in healthcare is to be discontinued for 2018/2019 as it is thought not to be sufficiently valuable.

40. Other evidence in how the decision was made comes from an email Renata Ramalhosa sent to Ms Kobewka on 4 January 2017, referring to the past few weeks and advice on life science and healthcare in Brazil and Latin America, that they concluded that there were gains to be made in life science but more time was needed to build a robust pipeline, that their proposal was to have the same staff covering the two, that there were clear synergies using the same stakeholders, and that most of the healthcare pipeline had been built in the last few weeks. On staff it referred to one C4, one B3, one A2, and that they will need to recruit another B3 and having a 5 year horizon. The Claimant is not mentioned, suggesting to us that the decision had been made before Christmas, but unknown to the Claimant, because in December 2016 he was meeting Arly Dos Santos to plan targets for the next financial year and the bid for resources for that.

41. We know too that he had three attempts to meet Joanna Crellin for lunch which were cancelled by her. His purpose was to discuss his return to work. The business case document, which was prepared for HR purposes to justify the claimant being a short toured before the expiry of this 3 year tour, was prepared – on the evidence of the track changes - on 6/7 February 2017. It was Ms Kobewka's evidence that she prepared this in December 2016. It is of course possible that there was an original draft then, as she says she changed computer around that suggesting that was why there was no earlier draft.

42. The business case document (as discussed and changed on 6/7 February) justified the Claimant's departure to London by stating there were to be split teams between the majority target for life science and a lesser one for healthcare; the healthcare contribution was small as the pipeline is still being developed. They had 69 projects in life science and 88 in healthcare, that the team had had a high impact in the last 4 months, there was increased demand for healthcare in other markets, resource needed to be allocated where it was needed, they did not need to line manage Latin America from Brazil, it could be done from London. The only senior lead in-country was in China, in other countries only a C4 Grade led a campaign. A

number of drafting changes show that there a £500 million target was for "business/export" wins, so lack of clarity there.

43. A comment on the draft queried whether in fact the allocation of projects showed that healthcare was stronger than was being suggested. In the event, in the out-turn for the year healthcare vastly exceeded its £45.5 million target, achieving £71.24 million. Ms Kobewka's evidence in cross examination was that this came from one unexpected order from Chile, for which we have no documents or detail, or that some life science projects had been counted as healthcare. Across the globe the other regions, Central Europe, China, India and Middle East made substantially less than their targets (varying from 75% to 25%), and Latin America was advertised within the department as "the best performing campaign in the world". We do not know why Latin America was so much more successful, we have Ms Kobewka's explanation. We wondered if it was because the Claimant knew his pipeline to be more robust than Ms Roscoe, Danilo and Arly Santos had assessed it.

44. The Claimant was not consulted about this decision. Ms Kobewka said that was because he was away on adoption leave. She was unfamiliar with KIT days from her previous experience in managing maternity leave, and was not aware of the FCO policy. She added, in answer to questions, that the evidence of the past 2 to 3 years was that the Claimant had not been successful in building the healthcare pipeline, and she did not need a discussion with him to tell her that. Her decision was based on not needing a D6 resource in-country, a discussion with the Claimant would not have changed her view about that, what the Claimant would have told her about business opportunity would not have changed her assessment of the resource level required.

45. The Claimant, speaking to Ms Kobewka by telephone on 9 February 2017, was informed of her decision. He would be hearing about arrangements from the FCO staff. Her reasons were set out in an email of 10 February, which referred to the demand for healthcare from Latin America being less accessible than anticipated and buyers' decision-making being slow. On the supply side, UK firms had significant reticence to business in Latin

America. They had concluded that for the high value campaign a C4, 2 B3's and 2 A2's were enough.

46. The Claimant protested that the circumstances for cutting short his 3 year tour were not exceptional, and asked what they were. Ms Kobewka replied on 15 March 2017, that the business reasons were exceptional: with full implementation of UKTI transformation, and DIT being evolved following the Brexit referendum, "our strategy and approach to how we identify and deliver HVC campaigns has changed significantly, we need to be increasing the evidence base on our decision making and certain our opportunity pipeline accurately reflects expected outturns in terms of export wins", that it was less certain that there were business opportunities in healthcare, there were lower export wins materialising in the short term than previously anticipated, and that Team HVC "no longer requires your level of experience". It had been reached by consultation with Human Resources (Catherine Coady). Ms Coady's evidence to the Tribunal lacked supporting documents, even reference to notebooks of meetings or telephone calls, which might have been expected. She seems to have been involved only after Ms Kobewka made her decision.

47. The Claimant protested that being short-toured to the UK was particularly difficult, as he would be required to refund the cost of a vehicle which he had brought and had armour plated at considerable expense. He did not want to return to the UK because of immigration difficulties for his adopted son, and would prefer to go to a country where he could retain diplomatic status and his son could accompany him. We have also learned that his partner was not able to accompany him because he had to sell his Brazil business.

48. The Claimant expressed some of his unhappiness in an email to Renata Ramalhosa on 14 March. He described having had in the interval since 9 February phone call, a tough few weeks, completely unsupported, it had had a "devastating effect on me and my family". He asked why this could not have waited until his return from adoption leave, he felt let down and angry, he was certain a new mother on maternity leave would not have

been treated like this. A reference to mitigating his losses suggested he was contemplating an Employment Tribunal claim.

49. In his statement the Claimant said that rumour that he might be adopting a second child, which he had discussed with Joanna Crellin's husband, who he meet at their children's school, was a factor in the decision made. Ms Kobewka denies that any such rumour reached her ears. In the absence of any other evidence that such rumours had circulated, we do not think that it was something we need to take into account.

50. The reasons why Latin America healthcare is not to be pursued as a high value campaign in 2018/19 have not been examined.

Relevant Law

51. Section 13 of the Equality Act 2010 provides that there is direct discrimination if, because of protected characteristic, A treats B less favourably than A treats or would treat others. The protected characteristic in this case is the difference in sex.

52. Comparators can be actual ("treats") or hypothetical ("would treat").

53. Because discrimination can be hard to prove, the Equality Act 2010 also provides for a reversed burden of proof, set out in Section 136, and there is considerable case law going back to *Igen v Wong.* The Tribunal must assess all the facts at stage 1 to see whether there is a prima facie case from which we could infer that discrimination had occurred, following which it is for the Respondent to provide his explanation of why that treatment did not in any way involve discrimination. If the reason relates to sex, whatever the motive, as in *James* or *Amnesty International v Ahmed* that is clearly discriminatory. We must examine the thought processes of the Respondent of which the decision makers may be unaware - they need not have a motive to discriminate and indeed may be unconscious of its own discriminatory provision as set out in *Leverage v London Regional Transport [2001] 1AC 501.* We must look for a reason why the Respondent made the decision.

54. The Respondent urges on us that as the burden shifts, it is for the Respondent to give at least an adequate explanation as to why it was nothing to do with sex; it is not for the Tribunal to assess whether it was reasonable, or whether they were right to make the decision for that particular reason, provided it was genuine, and as long as sex was not involved.

55. In relation to the claim for detriment for adoption leave, Section 47C provides: "an employee has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done for a prescribed reason". A prescribed reason, by subsection 2 (ba), is ordinary adoption leave.

56. The Tribunal notes that the wording "done for a prescribed reason" differs from the other Section 47 detriment claims (for example for flexible working, or protected disclosures) which are whether done "on the ground that" a worker has made a protected disclosure or applied for flexible working.

57. The parties did not address causation in relation to detriment claims. We know from such cases *Abernethy v Mott Hay and Anderson* that we have to examine the Respondent's state of mind, reasons being a "set of facts of beliefs known to the Respondent". We know from *Fecitt v NHS Manchester [2012] RLR 64,* which deals with Section 47B ("on the ground that") that as only an employer knows the reasons for his decision, the burden is on the Respondent to demonstrate what those were, and that the protected act did not "materially influence, in sense of being more than an trivial influence" the employer's treatment of the employee.

58. The Respondent drew our attention to the fact that detriment means what view a reasonable employee would take in all the circumstances of the Respondent's action or lack of action. It must be to his or her disadvantage, but that an unjustified sense of grievance could not form a detriment.

Submissions

59. The Respondent submits on discrimination that the Claimant has not established a prima facie case on the facts. If he has, then it asserts that it has substantially satisfied that there is a non-discriminatory explanation, which is a good business reason in relation to a level of resource allocated to the healthcare campaign, which had nothing to do with the Claimant's sex. No discriminatory remarks made, there was no breach of any code of practice. It is submitted that within a reasonable person's perception the Claimant was not submitted to detriment in any of the five ways alleged, that this was all about Ms Kobewka's decision, and that her reasons had nothing to do with adoption leave. Further, it was held that because the decision was made on sound business reasons, his sense of grievance that he was affected by it was unjustified.

60. The Claimant, in respect of discrimination, argues that the Respondent's witnesses in their answers as to how women were treated on maternity leave, and whether they would have been consulted in their absence on maternity leave, means that they have elided their view of a woman taking maternity leave with a woman taking adoption leave, and that in establishing the reason why we should not look at the motive, but look at the impact of the difference in sex on their decision-making. Stress is laid on the absence of documents and the lack of evidence from Sao Paulo staff about the evidence relied on.

Discussion and Conclusion

61. What were the Respondent's reasons, to what extent, if any, did adoption leave or the difference in sex play a part in reaching their decision.

62. We start with the reasons given to the Claimant on 10 February, 24 February, 15 March and 10 April. These were based on forecasting lower expert wins following assessment of the pipeline. They were operational decisions, having nothing to do with his presence or absence in the department.

63. We considered whether this is a decision that Deborah Kobewka could have made entirely without the knowledge of the Claimant's adoption, that

is, on looking at the resource allocated to various teams across the globe, she may concluded that having a D6 in Latin America was out of line with the rest of the world (except China, which is a very big market) and therefore decided that he was surplus even before there was any question of him taking adoption leave. This is a possibility, but her email to him of June 2016 gives no hint that he was superfluous, and there is no other evidence of her thinking before adoption leave.

64. Joanna Crellin agreed with her decision, but the post was firmly in Ms Kobewka's budget, not Joanna Crellin's.

65. Potentially this is a sound business decision made on operational reasons alone. We were less clear whether the evidence on which this decision was said to be based was sound. As far as we know all the assessment took place in the Claimant's absence, at a time when the people making the decision were Sophie Roscoe, who lacked both language competence and experience in delivery, accompanied by local staff, Arly Santos who had arrived a few weeks earlier and was starting from scratch, and Danilo Santos of whose activity we know little, save that his main experience was in life science.

66. It is odd that the Claimant was not asked for any input into the business planning or the pipeline review, because not only was he knowledgeable, unlike the three staff who did the review, but he had demonstrated his willingness to remain involved while on leave by coming in to interview for Arly Santos' post, and by asking to meet Deborah Kobewka, and in December arranging a meeting to discuss the following year's targets. All the signs are that he if he had been asked in accordance with the KIT arrangements he would have got involved.

67. The Claimant was not being asked and might have had a useful input into business planning, while Sophie Roscoe's "sound evidence-based work" seems sketchy and unreliable, and we have rely on Ms Kobewka's hearsay and not always accurate evidence. We have little evidence of why she concluded that UK suppliers are reluctant to do business with Latin

America, and others (McKinsey) thought it a market worth developing. We were concerned that the evidence base for the decision about the value of the pipeline was made out to be more reliable than it was.

68. There is some evidence of hostility to the Claimant. Firstly, there is the natural background fact that someone who is absent, whether on maternity leave or off sick, while the team is managing apparently well without him or her, may be viewed as contributing little to the team, who can be done without. It is always a background temptation for an employer. More specific to this case, we had some evidence that there was resentment about the Claimant not having done a handover note; we conclude from this that he was viewed as unprofessional to have left at short notice on adoption leave without doing so. The Claimant's evidence that he carried out a handover with Danilo Santos is unchallenged. We are concerned that if there was real concern about handover, it would not have been difficult to ask the Claimant to do it.

69. There was specific hostility demonstrated by it being said that Sophie Roscoe concluded that the Claimant could give no useful insight into the pipeline, on the basis of what turns out to be one phone call. To us this indicates some hostility to the Claimant's usefulness. We have no evidence, however, of the second child rumour. Hostility to the Claimant could come not from being on adoption leave but from having built up an over-optimistic, even false pipeline, which seemed cluttered with so-called substantial leads which had not moved for some time. Ms Kobewka's asperity in referring to usefulness of conversations with the Claimant may refer to that. The Claimant may have recognised a need to do this as he said he would work on it in the June email about refocussing on healthcare.

70. We speculated on pressure to reduce costs, but could not understand why the Brexit effect was said to require more evidence-based focus, perhaps something which may have come from the refocusing earlier in the year. As the effect of Brexit may have been that staff were needed to focus on negotiations with other countries, or that there would be an increased focus

on winning non-EU orders. We are left with Ms Kobewka's assertion that the resource was overweight for the value of the campaign.

71. A fact to which we had to give some weight, and which we found hard to understand, was that the Claimant had gone from hero to zero in a period of months. As of November 2015 (when asked to remain) or April 2016 (at appraisal) his performance was highly rated and his contribution to the team said to be outstanding across the region. Suddenly he was of no value whatsoever.

72. It was hard to understand how the switch from HVO to HVC made a practical difference within this region of such a size. We understand the change in metric from business win to export win would mean that a greater pressure on the infrastructure proposals which were in the healthcare pipeline, but we noted the confusion of export win and business win when expressed in the business case of February 2017, so this cannot have been important.

73. It is not demonstrated that the decision to short-tour the Claimant was wrong, but we are not convinced that Ms Kobewka's evidence was sound and unbiased, as evidenced by the limited input of Sophie Roscoe, the confusion of figures in the business case, and the comment that the healthcare projects, in number at any rate, looked stronger than life science. The Claimant was clearly at a disadvantage (and the team) not having his expertise to review the strength of the pipeline assessment or build it up, and the fact that targets were much exceeded in the following year is possibly due to the fact that the pipeline was not as soft as Ms Roscoe and her companions assessed it to be. We discount the fact that healthcare has now been abandoned as a campaign, because in the absence of the Claimant and without other evidence, it is not possible to say what would or would not have resulted had he not been absent.

74. There was no evidence of particular malice towards the Claimant taking adoption leave, though some hostility because of the handover issue. We note that Ms Kobewka saw no need to include the Claimant in any review or her proposals. The effect was he was written out because absent on adoption leave. If the Claimant not been on leave, he would have been

involved in pipeline planning, Sophie Roscoe would not have been there, he would have had an opportunity to clarify with the key players what their plans were, in discussion with Ms Kobewka and possibly Richard Leach. He would have been able to assess the export wins and be involved in rebuilding the pipeline, work that was done in part by Ms Roscoe and presumably Arly Santos.

75. We concluded having weighed up these facts that on the balance of probabilities the Claimant was short-toured because he took adoption leave. The evidence for the business decision was much less than made out, and while everyone can make mistakes with forecasting, it was badly wrong about pipeline value. No attempt was made to include him in the planning, although he was prepared to make himself available. There is a lack of evidence that someone at his grade in Latin America was clearly superfluous. He was highly desirable before he took leave, and entirely dispensable after he started, and it is not shown that a change in operational focus can account for this.

76. In considering whether this fact was related to his sex, we concluded that there was insufficient evidence that if he had been a woman this would not have been the decision. Had a woman been on adoption leave in the same circumstances as a man, there was nothing to suggest Ms Kobewka would not have treated her in the same way. There was no evidence of hostility to a man taking adoption leave: the Claimant referred in his evidence to the fact that no one had congratulated him when he announced that he had just had a child placed with him in July 2016, but we considered that if a woman had made the same announcement at this time, any lack of enthusiasm would be attributable to the very short notice given of the long and immediately impending leave. With maternity leave (the claimant's own comparison and his original case) an employer usually has more notice, and so less shock at the imminent departure of a key worker. This is a material difference, so a woman taking maternity leave is not a proper comparator. We could not conclude that there was hostility to him as a man rather than as a woman, if it was hostile.

77. The only other matter relied on as evidence of sex discrimination was that in answer to a question Ms Kobewka conceded that she would have consulted a woman on maternity leave before making a decision about their job, but we were not certain, given Ms Kobewka's inexperience of handling maternity leave that in fact she would have acted in any way differently with a woman on maternity leave to a man or woman on adoption leave. She was very clear to distance herself in all respects from the actual personnel (to the extent of not naming them in her witness statement, referring instead to "the resource"). HR was not involved until the decision had already been made.

78. Turning to the detriments other than the short tour, we thought that not consulting and informing the Claimant in September 2016 as to the pipeline review was to his detriment: firstly, he was unaware of what was coming, next, he was unable to contribute and therefore to affect the decision that was eventually made, especially given our view that his substantial skills could have made a difference. The lack of being consulted about a change on the approach, were less clearly detrimental, as the Claimant knew in outline in June that there was to be a change in approach, and had outlined the work needed to be done. That he was not informed or consulted about concerns as to the future pipeline - this clearly was his disadvantage, as there was information that he could have conveyed and contacts he could have drawn on to build up the pipeline. His absence on adoption leave, during which period he was not substantially replaced, was again a factor that was not taken into account when assessing pipeline value. It could not be assumed that his performance was without value, or that Sophie Roscoe could replace it.

79. We considered the parallel position where there is statutory consultation for redundancy or transfer of undertakings. No statutory consultation was required to short-tour, as employment did not terminate, but the reason (no ongoing need for staff at that level) was similar. Consultation about ways of avoiding redundancy or restructure, even if there was a clear business need would have been required for good staff relations. We know from the fact that Ms Kobewka was entirely unaware of the impact it had on the Claimant

personally of having to return to the UK at short notice, that such consultation would have been helpful. It may have affected some of the decision planning, and it would certainly have mitigated the impact on the Claimant.

80. For the reasons given we concluded that the substantial detriment of the decision to terminate the Claimant's tour, and the detriment to which this contributed, namely not informing or consulting him at the stage the decision was being researched, are made out as a Section 47C detriment. We concluded that it is not established that this was detriment for the purposes of the Equality Act, for the same reasons as before.

Remedy

81. After delivering these reasons on liability the Tribunal has proceeded to hear evidence and submissions on the question of remedy for detriment for taking adoption leave. Section 49 of the Employment Rights Act 1996 provides that where a complaint is well founded we should make a declaration to that effect, and we may make an award of compensation, which should be an amount that we conside just and equitable in all the circumstances having regard to any loss which is attributable to the act which infringed the complainant's right, and to be taken to include expenses reasonably incurred by the complainant in consequence of the act or failure to act to which the complaint relates.

82. We have assessed the evidence provided by the Claimant against his schedule of loss and information about the travel benefits which apply to FCO staff who have to transfer abroad.

83. The first item claimed is for a visit of several nights to Bangkok that the Claimant made in advance of his posting there in July 2017 in order to find a doctor suitable for his child's psychological needs, and to view schools and possible flats. The Respondent opposes this claim on the basis that there was no need to make it, as Foreign and Commonwealth Office supplied to all staff transferring abroad a detailed documentary report on the country and all the facts that it would be necessary to know.They have a

team in London who make arrangements for families, and they have in-country assistance with schools, flats and the like.

84. The question for the Tribunal was whether the Respondent should have to pay for this visit. We compared the position if the Claimant had not been short-toured and had instead reached the end of his tour and was transferring to another country, perhaps on the basis that there was still an immigration difficulty for his son or a business difficulty for his partner. On this basis it seemed to us that this trip was not reasonably incurred. It is something that the Claimant thought desirable, but was not necessary when judged by the standards of other FCO families.

85. The second item of loss concerns the Claimant's car: the Claimant purchased a car from Germany for the sum of about 21,000 Euros. He imported it to Brazil free of tax using diplomatic status, and if the car is sold under 3 years then the tax becomes payable. The Respondent made clear in correspondence after the Claimant lodged a grievance about his short touring that whatever the outcome of this Tribunal they would become responsible for the additional tax liability, but they would not reimburse the tax until it had been paid. This led to an impasse, because the Claimant says he does not have the funds to pay the very substantial amount of tax involved and so the car has remained stationary in the car park of the Sao Paulo mission (despite requests that he move it) from that day to this.

86. The tax is on a diminishing scale over 3 years, 100% if sold in the first year with a one third reduction thereafter. The Tribunal's view is that following this award the Claimant will have the funds with which to pay the tax and tide him over until he is reimbursed by the Respondent under the terms of their letter; counsel for parties have agreed that the Respondent will give an undertaking in that respect.

87. The Tribunal has set a putative sale date of 6 March 2018 - 6 weeks from today, on the basis that by that date the Claimant, acting on the assurance of the Respondents will have had some money from them and will be able to pay the tax and sell his car.

88. We had to consider the dispute about what the Claimant would be able to sell it for and how easy it would be for him to sell. He takes from an online vehicle guide in Brazil that the current resale value of his 2014 petrol BMW 5.28 IA 2 litre turbo model would be 150,800 Brazilian Reals which we are told on a current exchange rate is 4 to 4½ to the pound, which we calculate at around £35,000. From this we were unable to understand that the Claimant would suffer a loss on the sale. We were told that the difficulty of arranging a private sale at this price is that the Claimant's partner is unable to drive so there are considerable practical difficulties in arranging test drives. The Claimant 'understood' that if he sold it through a dealer there would be the dealer's margin to establish so he might get 25% less than if he had been able to make the private sale. We accept that a private sale is usually more favourable than through a dealer, but had difficulty with the figures in establishing that the Claimant will suffer any loss on this sale. On the evidence available to us in this hearing we do not make an award for any loss of value through having to sell to a dealer rather than a private sale.

89. The other item claimed is for car insurance on the basis that the car has continued to be insured at the cost of £231.34 per month. Since the claim to 24 February is £1,610, we add a further 2 weeks to that so bringing that to £1,725 as an award for the cost of insurance. We considered whether in fact that the Claimant should have mitigated his loss in this respect by selling much earlier, but considered that the deterrent effect of paying 100% tax up front without having the funds available was such that it is reasonable for him to have taken no action until now, but now he will be in funds it is reasonable to expect him to make the sale.

90. The next item claimed was car hire in Bangkok since the Claimant started work there. It was disputed by the Respondent that it was reasonable for the Claimant to hire a car rather than to use public transport; the Claimant's evidence is that used public transport for 2 weeks and it is during the rush hour extremely crowded, and that with a small child with some emotional difficulty already he found it too problematic, and took to hiring a car.

Assessing this evidence we thought that it was reasonable for a parent of a young child to hire a car rather than to use public transport in these circumstances and we award the sum claimed, £2,160.

91. Then there is a claim for the cost of the Claimant's partner's medical insurance. He has remained in Brazil rather than transferring to Bangkok with the Claimant and his son at the beginning of July 2017, on the basis that the couple had only recently invested in his hairdressing business and that it was better to build up the business in order to sell it with goodwill, or put a manager in and continue to manage it from a distance. Such evidence as we had is that the Claimant hopes or expects that this will be achieved by the end of this year that is December 2018. On health insurance we understood that while there was no policy taken out while the Claimant was employed in Sao Paulo, the Foreign and Commonwealth Office undertook to reimburse the healthcare costs of staff and their families. On that basis the Claimant has replaced that benefit by paying £112.85 per month from July 2017 for the additional costs of any medical claims made by his partner. We accept his evidence in the absence of documentation. If we assume that this loss extends to December 2018, accepting that the partner may travel to Bangkok sooner than expected or indeed later, 18 months at £112.85 gives a loss of £2,031.30.

92. There is then a claim for the cost of travel from Sao Paulo to Bangkok for the family to reunite on occasions. The claim is for four trips a year. The Foreign and Commonwealth Office pays in any event for two visits per annum for separated families, at an economy seat for family and business class for its own personnel. It maintains that four trips a year is excessive when two is the norm, and also disputes the claim which is for £3,735 per trip, that having been paid for business class for the Claimant's partner in October, and there was a visit in December covered on the Claimant's Airmiles savings.

93. The Tribunal's view was that what is reasonable for the Foreign and Commonwealth Office's staff families is reasonable for the Claimant and his partner, and that this award should cover economy class airfares; if the

Claimant and his partner wish to pay for a premium ticket it is open to them to do so but it was in our view not reasonable between the parties to make that award. We thought that in view of the special circumstances of this family, which had had to separate without the time to prepare changes that would had been expected had they reached the end of the normal tour (whether 3 years as contracted or 4 years as was possible subject to notice), they had not time to make arrangements for travel to the new posoting, and that such an extended period of separation merited four visits a year.

94. On the understanding that two of those had been paid for by the Respondent, then the award is for the trip made in 2017 at economy price and two further trips in 2018 at economy price, we are not able to put a figure on this award because neither side had obtained evidence on the value of an economy flight and our proposal is that the value of this award is stayed for 7 days in order for the parties either to agree on the value of a economy flight or to submit written evidence to the Tribunal whereupon the Tribunal will make a written decision on that point. (The parties have subsequently emailed the Tribunal an agreed figure for this)

95. On travel to Employment Tribunal hearings, there is a claim for £120 attendance at the preliminary hearing, a train journey within the UK that is allowed. There is a flight from Bangkok to London at premium economy, the grade is not disputed by the Respondent, and £2,186 is awarded. There is the cost of hotel accommodation for £1,300 at a hotel at the Elephant and Castle that seems to us not unreasonable given that it is London.

96. The final amount which we have to assess an award is for injury to feelings. The Claimant suffered pain and injury on being told this decision on 9 February without notice, he was in effect being told that his job was at an end, without any criticism of performance but without much discussion either. On his evidence which is not disputed, the suffered sleep loss for at least 2 weeks. He was prescribed anti depressants. He also apparently required medication for high blood pressure. The extent to which all that is

due to the stress is not clear, because there is no medical evidence, but we accept that it was acute and painful initially.

97. The Claimant, as he asserts, is a resilient man and prides himself on being able to handle life's difficulties. It is to his credit that despite the shock and difficulty which would have overturned many people, he was able to spring into action, applying for other postings and making plans, with the result that he obtained a job more or less straightaway in Bangkok and transferred there at the beginning of July.

98. We note too that some of the shock will have come from the considerable practical disappointments and difficulties, such as the potentially huge loss on his car if he had to sell at short notice, the reduced notice period and so on, and we note that although belatedly and after the event, the Respondent was thereafter reasonably sympathetic and helpful, offering to extend his notice from 4 months to 9 months, and telling him in the circumstances they would bear the tax loss on early sale of the vehicle. That must have helped assuage some of the difficulty of the decision. As the Claimant gets settled in Bangkok, some of this will have died down. Particularly following this decision, the injury to feelings can be expected to reduce. There is still the continuing difficultly of family separation. Putting all these factors together, it seemed to us that the right place to make this award was towards the lower end of the middle band of *Vento*: our award is £12,500.

99. So the current value of all these figures is £22,022.30, to is added three economy flights at the agreed value, to reach the total in the judgment of ££13,122.30.

Proposed Reconsideration

100. In preparing these written reasons it has come to my attention that the judgment included an award of interest calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 which should not have been made, because it was only the claim under the Employment Rights Act 1996 that succeeded, and that

Act is not relevant legislation for the Interest on Awards Regulations. The Tribunal has no other statutory power to award interest up to the date of judgment.

101. The Tribunal proposes to reconsider its decision to award interest (£1,107.35, 3 and 4 in the judgment sent to the parties on 2 February 2018) and then order that the award of interest be deleted from the Judgment. Notice is hereby given under rule 73. The parties are asked to write to the Tribunal, by 14 days after these reasons are sent to them, about the proposal to reconsider, and whether there should be a reconsideration hearing or the matter can be dealt with on the papers.

Employment Judge Goodman on 1 March 2018