Appeal No. UKEAT/0161/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 & 21 December 2017
Judgment handed down on 11 April 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

CAPITA CUSTOMER MANAGEMENT LIMITED — APPELLANT

(1) MR M ALI
(2) WORKING FAMILIES (INTERVENOR) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ANDREW BURNS (One of Her Majesty's Counsel) and MS LUCINDA HARRIS (of Counsel) Instructed by: Irwin Mitchell LLP Solicitors 2 Wellington Place Leeds LS1 4BZ
For the Respondent	MR DESHPAL PANESAR (of Counsel) Direct Public Access
For the Intervenor	Written submissions MR CHRISTOPHER MILSOM (of Counsel)

<u>SUMMARY</u>

SEX DISCRIMINATION - Direct

SEX DISCRIMINATION - Indirect

VICTIMISATION DISCRIMINATION - Detriment

A father who wished to take shared parental leave so that his wife could go back to work claimed direct sex discrimination in not being entitled to pay at the higher maternity pay rate for 12 weeks after the 2 weeks compulsory maternity leave but only that paid for shared parental leave.

The Employment Tribunal erred in failing to consider or have regard to the purpose of maternity leave with pay which is the rationale for domestic law provision for maternity leave and pay and the European legislation which it implements. That purpose is for the health and wellbeing of a woman in pregnancy, confinement and after recent childbirth. The Employment Tribunal erred in holding that the circumstances of the Claimant father were comparable within the meaning of the **Equality Act 2010** section 23(1) to those of a woman who had recently given birth as both had leave to care for their child. Such a finding fails to have regard to the purpose of maternity leave and pay. A mother will care for her baby but that is a consequence not the purpose of maternity leave and pay. Whether and for how much there is an entitlement to pay depends upon and is inseparable from the type of leave taken. Shared parental leave is given on the same terms for men and women. **<u>Hofmann v Barmer Ersatzkasse</u>** [1985] ICR 731 and **<u>Betriu Montull v Instituto NSS</u>** [2013] ICR 1323 considered. Further the ET erred for similar reasons in holding that the payment to a woman who had recently given birth and was on maternity leave at a higher rate than that given to parents of either sex on shared parental leave the purpose of which was different, the care of the child, did not fall within **Equality Act 2010** section13(6)(b). **<u>Eversheds v Legal Services De Belin</u>** [2011] ICR 1137 considered.

Appeal from finding of direct sex discrimination allowed. Finding set aside.

Appeal from three findings of victimisation under **Equality Act 2010** section 27 dismissed. Decision in respect of one finding of victimisation was not **Meek**-compliant. Appeal allowed in respect of this claim of victimisation allowed. Claim of victimisation remitted for hearing before the same Employment Tribunal, if practicable.

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THE HONOURABLE MRS JUSTICE SLADE DBE

1. This appeal is linked to that of **Mr A Hextall v The Chief Constable of Leicestershire Police**. Both appeals raise the issue of whether it is sex discrimination giving rise to a claim, for an employer not to pay a man who takes shared parental leave following the birth of his child, at the same rate as women on maternity leave. Two different Employment Tribunals hearing the claims by the different Claimants reached different conclusions. Mr Ali succeeded in his claim. The claim by Mr Hextall was dismissed.

2. Capita Customer Management Limited ("the Respondent") appeal from the decision of Employment Judge Rogerson and members ("the ET") who by a Judgment sent to the parties on 17 March 2017 ("the Judgment") upheld the claim by Mr Ali ("the Claimant") of direct sex discrimination for not being entitled to pay at the same rate as that paid to a woman on maternity leave for twelve weeks after the expiry of his two weeks entitlement to paternity leave and paternity pay.

3. At first reading the claim appears, as characterised by Employment Judge Camp in **Hextall v The Chief Constable of Leicestershire Police**, "bold and ingenious". The arguments advanced by Mr Panesar, counsel appearing for the Claimant in the Employment Appeal Tribunal ("EAT") seek to defend the conclusion reached by the ET by a careful analysis and application of the statutory provisions underpinning the respective rights of parents to leave and pay following the birth of their child. The position of Mr Burns QC and Ms Harris for the Appellant Respondent characterises the issue on appeal more simply. Counsel for the Respondent set the tone in the introduction to their skeleton argument:

> **"1. This Appeal raises two issues. The first is straightforward: it is not sex discrimination for an employer to make different payments for maternity leave and for shared parental leave. The two types of leave are not comparable. …"**

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The second issue on this appeal is: the challenge to the finding by the ET that the Respondent had victimised the Claimant for having asked for and made a claim in respect of the same rate of pay as a woman on maternity leave.

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4. Mr Milsom has made written submissions on behalf of Working Families, the Intervenor, to be taken into account in this appeal and that in **Hextall**. The submissions provide a useful guide to the provisions relating to maternity and parental protections. The Intervenor does not seek to adopt the position of any party. The Intervenor takes the position that the EAT should not reach a conclusion whose unintended consequences lead to a diminution of the rights of the mother or of parents. The written submissions on behalf of the Intervenor set out their position:

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> **"6. …**
>
> **i. The framing of any direct discrimination complaint must not lead to the undermining of the unique position of the biological mother or give rise to any risk of "levelling down" protection; *Roca Alvarez* [*Roca Alvarez v Sesa Start Espana ETT SA* [2011] CMLR 28];**
>
> **…**
>
> **iii. Shared parental leave enables families choices about who cares [for] the child during the first year of life and had the stated purpose of encouraging fathers to take a more active and engaged role in bringing up their children. We suggest that after a period of 26 weeks (or ordinary maternity leave) the purpose of maternity leave may change from the biological recovery from childbirth and special bonding period between mother and child. At that point it may be possible to draw a valid comparison between a father on shared parental leave and a mother on maternity leave;"**

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5. The appeal with related facts, submissions and law from the finding of direct sex discrimination will be considered before those relevant to the appeal from the findings of victimisation.

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Appeal from Finding of Direct Sex Discrimination

Outline Facts

6. The ET set out the Respondent's maternity, paternity and adoption leave policies which applied to transferring Telefonica employees. Telefonica policies applied to the Claimant. The

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ET held:

> **"4. The 'entitlement' to pay for maternity and parental leave was not a contractual term but was contained in separate Telefonica policies that transferred with the transferring employees.**
>
> **Female Telefonica transferring employees were entitled to maternity pay in accordance with the Telefonica maternity policy dated December 2011. The policy provides three options for maternity pay of up to 39 weeks. If an employee had 26 weeks service she was entitled to receive the most favourable of 3 options from:**

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> > ***"1. 14 weeks company maternity pay followed by 25 weeks lower rate statutory maternity pay.***
> >
> > ***2. 6 weeks higher rate statutory maternity pay followed by eight weeks company maternity weeks and then 25 weeks lower rate statutory maternity pay.***
> >
> > ***3. 6 weeks higher rate statutory maternity pay followed by 33 weeks lower rate statutory maternity pay."***

D

> **Clearly the most favourable option was 14 weeks basic pay followed by 25 weeks statutory maternity pay for the balance of the leave.**
>
> > **4.1. The Claimant as a father and male employee was entitled to paternity leave and pay under the Telefonica policy. That policy also applied to same sex couples providing you were the partner of the mother and would "*share responsibilities for bringing up your new baby*". Page 47 of the policy deals with paternity leave and provides up to 2 weeks paid Ordinary Paternity Leave (OPL) and up to a further 28 weeks Additional Paternity Leave (APL), which 'may or may not be paid'.**

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> > ***"Ordinary Paternity Leave (OPL) is paid time out to enable you to spend time with your newly born baby (or newly adopted child). Ordinary paternity leave is up to two weeks leave. The earliest you can choose to start your paternity leave is immediately your baby is born or within eight weeks after the birth. The payment provisions for the leave are that you will be paid as usual during your ordinary paternity leave".***

F

> > **The Claimant was therefore entitled to, and was paid the benefit of his full pay for two weeks after the birth of his daughter to spend time with his "newly born baby". A parent adopting a child would also get that leave and pay.**
> >
> > **4.2. For parents of either sex adopting a child the statutory provisions applied and provided for Statutory Adoption Leave ('SAL') of up to 52 weeks and an entitlement to 39 weeks of Statutory Adoption Pay (SAP). SAL comprises of 26 weeks Ordinary Adoption Leave (OAL) which can start from the date of the child's placement or from a fixed date up to 14 days before the expected date of placement, followed immediately by 26 weeks of Additional Adoption Leave (AAL).**

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> > **…"**

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7. The ET set out the background facts relating to the sex discrimination claim.

> **"5. The background facts to the sex discrimination complaint were not disputed and are as follows:-**

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5.1. The Claimant is a current employee of the Respondent working now as a Business Customer Adviser (BCA) in the BE Team based in Arlington Leeds.

5.2. In July 2013, his employment had transferred to the Respondent as part of a TUPE transfer from Telefonica and he had accrued 12 years service by the time of these complaints.

5.3. In August 2015, the Claimant was asked to move to the Business Retentions Team (BRT) from the BE team because of his good past performance and experience. This role gave the Claimant greater autonomy, authority and entitled him to participate in a better bonus scheme.

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5.4. The Claimant's daughter was born on 5 February 2016. She was born 2 weeks prematurely but the Claimant was able to take his 2 weeks paternity leave immediately following her birth (from 8-19 February 2016) for which he was paid.

5.5. During that paternity leave, he informed his manager, team leader Lora [Laura] Tummons that his wife had been diagnosed with post natal depression.

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5.6. Fortunately, the Claimant had booked annual leave which was to commence on the due date of his baby and he was able to take a further week's paid leave to care for his wife and daughter.

5.7. On 7 March 2016, he returned to work. He was concerned about the health and well being of his wife and baby and wanted to take time off to care for his daughter. This was in circumstances where his wife was suffering with post natal depression and had been medically advised to return to work to assist her recovery. The Claimant asked Lora [Lorna] Tummons about this and she sought advice from the Senior Management Team.

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…

5.9. On 9 March 2016, a meeting took place between the Claimant, Debbie Oddie and Laura Tummons at which the Claimant was told he was eligible for shared parental leave (SPL) under the Capita policy but would only be entitled to statutory pay.

E

5.10. The Claimant discussed this with his female Telefonica transferred colleagues at work and they confirmed that they were entitled to full pay for 14 weeks maternity leave. He believed he should get the same entitlement in his particular circumstances under the Telefonica policy."

<u>*Statutory Provisions*</u>

F

Equality Act 2010 *("EqA")*

Section 4:

"4. The following characteristics are protected characteristics -

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…; pregnancy and maternity; …; sex; …"

Section 13:

"13. (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

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…

(6) If the protected characteristic is sex -

A

…

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth."

B

Section 23:

"23. (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

Section 39:

C

"39. …

(2) An employer (A) must not discriminate against an employee of A's (B) -

…

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

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…

(d) by subjecting B to any other detriment."

Employment Rights Act 1996 *("ERA")*

E

Maternity Leave

Section 71:

"71. (1) An employee may, provided that she satisfies any conditions which may be prescribed, be absent from work at any time during an ordinary maternity leave period.

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(2) An ordinary maternity leave period is a period calculated in accordance with regulations made by the Secretary of State.

(3) Regulations under subsection (2) -

(a) shall secure that, where an employee has a right to leave under this section, she is entitled to an ordinary maternity leave period of at least 26 weeks;

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…

72. (1) An employer shall not permit an employee who satisfies prescribed conditions to work during a compulsory maternity leave period.

(2) A compulsory maternity leave period is a period calculated in accordance with regulations made by the Secretary of State.

(3) Regulations under subsection (2) shall secure -

H

(a) that no compulsory leave period is less than two weeks, and

(b) that every compulsory maternity leave period falls within an ordinary maternity leave period.

A

…

73. (1) An employee who satisfies prescribed conditions may be absent from work at any time during an additional maternity leave period.

(2) An additional maternity leave period is a period calculated in accordance with regulations made by the Secretary of State.

(3) Regulations under subsection (2) -

B

(a) may allow an employee to bring forward the date on which an additional maternity leave period ends, subject to prescribed restrictions and subject to satisfying prescribed conditions;

…

(3A) Provision under subsection (3)(a) is to secure that an employee may bring forward the date on which an additional maternity leave period ends only if the employee or another person has taken, or is taking, prescribed steps as regards leave under section 75E or statutory shared parental pay in respect of the child.”

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Adoption Leave

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Section 75A:

“75A. (1) An employee who satisfies prescribed conditions may be absent from work at any time during an ordinary adoption leave period.

(2) An ordinary adoption leave period is a period calculated in accordance with regulations made by the Secretary of State.”

E

Section 75B:

“75B. (1) An employee who satisfies prescribed conditions may be absent from work at any time during an additional adoption leave period.

(2) An additional adoption leave period is a period calculated in accordance with regulations made by the Secretary of State.”

F

Shared Parental Leave

G

Section 75E:

“75E. (1) The Secretary of State may make regulations entitling an employee who satisfies specified conditions -

…

(b) as to being, or expecting to be, the mother of a child,

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(c) as to caring or intending to care, with another person (“P”), for the child,

(d) as to entitlement to maternity leave,

…

A

(2) Regulations under subsection (1) may provide that the employee's entitlement is subject to the satisfaction by P of specified conditions -

> **…**
>
> **(c) as to caring or intending to care, with the employee, for the child, …**

(4) The Secretary of State may make regulations entitling an employee who satisfies specified conditions -

B

> **…**
>
> **(b) as to relationship with a child or expected child or with the child's mother,**
>
> **(c) as to caring or intending to care, with the child's mother, for the child,**
>
> **…"**

C

Section 75F:

"75F. (1) Regulations under section 75E are to include provision for determining -

> **(a) the amount of leave under section 75E(1) or (4) to which an employee is entitled in respect of a child;**

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> **(b) when leave under section 75E(1) or (4) may be taken.**

(2) Provision under subsection (1)(a) is to secure that the amount of leave to which an employee is entitled in respect of a child does not exceed -

> **(a) in a case where the child's mother became entitled to maternity leave, the relevant amount of time reduced by -**

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>> **(i) where her maternity leave ends without her ordinary or additional maternity leave period having been curtailed by virtue of section 71(3)(ba) or 73(3)(a), the amount of maternity leave taken by the child's mother, …**

(4) Provision under subsection (1)(a) is to secure that the amount of leave that an employee is entitled to take in respect of a child takes into account -

> **(a) in a case where another person is entitled to leave under section 75E in respect of the child, the amount of such leave taken by the other person;**

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> **(b) in a case where another person is entitled to statutory shared parental pay in respect of the child but not leave under section 75E, the number of weeks in respect of which such pay is payable to the other person."**

G

Section 75G:

"75G. (1) The Secretary of State may make regulations entitling an employee who satisfies specified conditions -

> **…**
>
> **(c) as to caring or intending to care, with another person ("P"), for the child,**

H

> **…"**

A

Paternity Leave

Section 80A:

> **"80A. *Entitlement to paternity leave: birth***
>
> **(1) The Secretary of State shall make regulations entitling an employee who satisfies specified conditions -**

B

> **…**
>
> **to be absent from work on leave under this section for the purpose of caring for the child or supporting the mother.**
>
> **(2) The regulations shall include provision for determining -**

C

> **(a) the extent of an employee's entitlement to leave under this section in respect of a child;**
>
> **(b) when leave under this section may be taken.**
>
> **(3) Provision under subsection (2)(a) shall secure that where an employee is entitled to leave under this section in respect of a child he is entitled to at least two weeks' leave."**

D

Social Security Contributions and Benefits Act 1992 *("SSCBA")*

Section 166:

> **"166. (1) There shall be two rates of statutory maternity pay, in this Act referred to as "the higher rate" and "the lower rate".**

E

> **(2) The higher rate is a weekly rate equivalent to nine-tenths of a woman's normal weekly earnings for the period of 8 weeks immediately preceding the 14th week before the expected week of confinement or the weekly rate prescribed under subsection (3) below, whichever is the higher.**
>
> **(3) The lower rate is such weekly rate as may be prescribed.**

F

> **(4) Subject to the following provisions of this section, statutory maternity pay shall be payable at the higher rate to a woman who for a continuous period of at least 2 years ending with the week immediately preceding the 14th week before the expected week of confinement has been an employee in employed earner's employment of any person liable to pay it to her, and shall be so paid by any such person in respect of the first 6 weeks in respect of which it is payable.**
>
> **…**

G

> **(8) If a woman is entitled to statutory maternity pay at the higher rate, she shall be entitled to it at the lower rate in respect of the portion of the maternity pay period after the end of the 6 week period mentioned in subsection (4) above."**

H

A

<u>*Regulations*</u>

Maternity Leave

Maternity and Parental Leave Regulations 1999 *SI 1999 No 3312 ("MAPL")*

B

Regulation 7:

> **"7. (1) Subject to paragraphs (2) and (5), an employee's ordinary maternity leave period continues for the period of eighteen weeks from its commencement, or until the end of the compulsory maternity leave period provided for in regulation 8 if later."**

C

Regulation 8:

> **"8. The prohibition in section 72 of the 1996 Act, against permitting an employee who satisfies prescribed conditions to work during a particular period (referred to as a "compulsory maternity leave period"), applies -**
>
> > **(a) in relation to an employee who is entitled to ordinary maternity leave, and**
> >
> > **(b) in respect of the period of two weeks which commences with the day on which childbirth occurs."**

D

Paternity and Adoption Leave Regulations 2002 *SI 2002 No 2788*

E

Regulation 4:

> **"4. (1) An employee is entitled to be absent from work for the purpose of caring for a child or supporting the child's mother if he -**
>
> > **(a) satisfies the conditions specified in paragraph (2), and**
> >
> > **(b) has complied with the notice requirements in regulation 6 and, where applicable the evidential requirements in that regulation."**

F

Regulation 5:

> **"5. (1) An employee may choose to take either one week's leave or two consecutive weeks' leave in respect of a child under regulation 4.**
>
> **…**
>
> **(3) Subject to paragraph (2) and, where applicable, paragraph (4), an employee may choose to begin his period on leave on -**
>
> > **(a) the date on which the child is born;**
> >
> > **…"**

G

H

A

Regulation 15:

> **"15. (1) An employee is entitled to ordinary adoption leave in respect of a child if he -**
>
> **(a) satisfies the conditions specified in paragraph (2), …**
>
> **(2) The conditions referred to in paragraph (1) are that the employee -**
>
> **(a) is the child's adopter; …"**

B

Regulation 18:

> **"18. (1) Subject to regulations 22 and 24, an employee's ordinary adoption leave period is a period of 26 weeks."**

C

Statutory Maternity Pay (General) Regulations 1986 *SI 1986 No 1960*

Regulation 2:

D

> **"2. …**
>
> **(2) The maternity pay period shall be a period of 39 consecutive weeks."**

Regulation 6:

E

> **"6. The rate of statutory maternity pay prescribed under section 166(1)(b) of the Contributions and Benefits Act is a weekly rate of £140.98 [£138.18]."**

Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 *SI 2002 No*

F

2822

> **"6. (1) Subject to paragraph (2) and regulation 8, a person entitled to statutory paternity pay (birth) may choose the statutory paternity pay period to begin on -**
>
> **(a) the date on which the child is born or, where he is at work on that day, the following day;**
>
> **…**

G

> **12. (1) Subject to paragraph (2) and regulation 14, a person entitled to statutory paternity pay (adoption) may choose the statutory pay period to begin on -**
>
> **(a) the date on which the child is placed with the adopter …"**

H

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Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002 *SI 2002 No 2818*

The Regulation as amended from time to time specifies the statutory paternity and adoption leave.

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Shared Parental Leave and Pay

Children and Families Act 2014

C

The right to parental leave and pay derive purely from domestic law

Shared Parental Leave Regulations 2014 *SI 2014 No 3050 ("SPL Regulations")*

Shared Parental Leave ("SPL")

D

M is the mother P is the partner C is the child

A is the adopter AP is the partner of the adopter

Regulation 4:

E

> **"4. (1) M is entitled to be absent from work to take shared parental leave in accordance with Chapter 2 to care for C if she satisfies the conditions specified in paragraph (2) and P satisfies the conditions specified in paragraph (3).**
>
> **(2) The conditions are that -**
>
> > **(a) M satisfies the continuity of employment test (see regulation 35);**
> >
> > **(b) M has, at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of P);**
> >
> > F
> >
> > **(c) M is entitled to statutory maternity leave in respect of C;**
> >
> > **(d) M has ended any entitlement to statutory maternity leave by curtailing that leave under section 71(3)(ba) or 73(3)(a) of the 1996 Act (and that leave remains curtailed) or, where M has not curtailed in that way, M has returned to work before the end of her statutory maternity leave;**
> >
> > G
> >
> > **(e) M has complied with regulation 8 (notice to employer of entitlement to shared parental leave);**
> >
> > **(f) M has complied with regulation 10(3) to (5) (evidence for employer); and**
> >
> > **(g) M has given a period of leave notice in accordance with regulation 12.**
>
> **(3) The conditions are that -**
>
> > **(a) P satisfies the employment and earnings test (see regulation 36); and**
> >
> > H
> >
> > **(b) P has, at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of M).**

A

(4) Entitlement under paragraph (1) is not affected by the number of children born or expected as a result of the same pregnancy."

Regulation 5:

B

"5. (1) P is entitled to be absent from work to take shared parental leave in accordance with Chapter 2 to care for C if P satisfies the conditions specified in paragraph (2) and M satisfies the conditions specified in paragraph (3).

(2) The conditions are that -

(a) P satisfies the continuity of employment test (see regulation 35);

(b) P has, at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of M);

C

(c) P has complied with regulation 9 (notice to employer of entitlement to shared parental leave);

(d) P has complied with regulation 10(3) to (5) (evidence for employer); and

(e) P has given a period of leave notice in accordance with regulation 12.

(3) The conditions are that -

D

(a) M satisfies the employment and earnings test (see regulation 36);

(b) M has, at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of P);

(c) M is entitled to statutory maternity leave, statutory maternity pay, or maternity allowance in respect of C; and

E

(d) where -

(i) M is entitled to statutory maternity leave, she has ended any entitlement to statutory maternity leave by curtailing that leave under section 71(3)(ba) or section 73(3)(a) of the 1996 Act (and that leave remains curtailed) or, where M has not curtailed in that way, M has returned to work before the end of her statutory maternity leave,

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(ii) M is not entitled to statutory maternity leave but is entitled to statutory maternity pay, she has curtailed the maternity pay period under section 165(3A) of the 1992 Act (and that period remains curtailed), or

(iii) M is not entitled to statutory maternity leave but is entitled to maternity allowance, she has curtailed the maternity allowance period under section 35(3A) of that Act (and that period remains curtailed).

(4) Entitlement under paragraph (1) is not affected by the number of children born or expected as a result of the same pregnancy."

G

Regulation 6:

"6. (1) Where M is entitled to statutory maternity leave, subject to paragraph (10), the total amount of shared parental leave available to M and P in relation to C is 52 weeks less -

H

(a) where there is a leave curtailment date, the number of weeks of statutory maternity leave beginning with the first day of statutory maternity leave taken by M and ending with the leave curtailment date (irrespective of whether or not M returns to work before that date), or

A

(b) where M's statutory maternity leave ends without her curtailing that leave under section 71(3) or section 73(3) of the 1996 Act, the number of weeks of statutory maternity leave taken."

Regulation 20:

B

"20. (1) A is entitled to be absent from work to take shared parental leave in accordance with Chapter 2 to care for C if A satisfies the conditions specified in paragraph (2) and AP satisfies the conditions specified in paragraph (3)."

Regulation 22:

C

"22. (1) Where A is entitled to statutory adoption leave, subject to paragraph (9), the total amount of shared parental leave available to A and AP in relation to C is 52 weeks less -

(a) where there is a leave curtailment date, the number of weeks of statutory adoption leave beginning with the first day of statutory adoption leave taken by A and ending with the leave curtailment date (irrespective of whether or not A returns to work before that date), or

D

(b) where A's statutory adoption leave ends without A curtailing that leave under section 75A(2A) or section 75B(3) of the 1996 Act, either -

(i) the number of weeks of statutory adoption leave taken; or

(ii) 2 weeks,

whichever is greater.

E

(2) Where A is not entitled to statutory adoption leave, but is entitled to statutory adoption pay, subject to paragraph (10), the total amount of shared parental leave available to AP in relation to C is 52 weeks less -

(a) where A returns to work without reducing A's statutory adoption pay period under section 171ZN(2A) of the 1992 Act, the number of weeks of statutory adoption pay payable to A in respect of C before A returns to work, or

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(b) in any other case, the number of weeks of statutory adoption pay payable to A in respect of C up to the pay curtailment date."

<u>*Statutory Shared Parental Pay*</u>

Statutory Shared Parental Pay (General) Regulations 2014 *SI 2014 No 3051*

G

Regulation 4:

"4. (1) M is entitled to statutory shared parental pay (birth) if M satisfies the conditions specified in paragraph (2) and if P satisfies the conditions specified in paragraphs (3).

(2) The conditions are that -

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(a) M satisfies the conditions as to continuity of employment and normal weekly earnings specified in regulation 30;

(b) M has at the date of C's birth the main responsibility for the care of C (apart from the responsibility of P);

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(c) M has complied with the requirements specified in regulation 6 (notification and evidential requirements of M);

(d) M became entitled by reference to the birth or expected birth of C to statutory maternity pay in respect of C;

(e) the maternity pay period that applies as a result of M's entitlement to statutory maternity pay is, and continues to be, reduced under section 165(3A) of the 1992 Act;

B

(f) it is M's intention to care for C during each week in respect of which statutory shared parental pay (birth) is paid to her;

(g) M is absent from work during each week in respect of which statutory shared parental pay (birth) is paid to her (except in the cases referred to in regulation 15 (entitlement to shared parental pay: absence from work)); and

(h) where M is an employee (within the meaning of the Employment Rights Act 1996) M's absence from work as an employee during each week that statutory shared parental pay (birth) is paid to her is absence on shared parental leave in respect of C;

C

(3) The conditions referred to in paragraph (1) are that -

(a) P has at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of M); and

(b) P satisfies the conditions relating to employment and earnings in regulation 29 (conditions as to employment and earnings of claimant's partner)."

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Regulation 5:

"5. (1) P is entitled to statutory shared parental pay (birth) if P satisfies the conditions specified in paragraph (2) and M satisfies the conditions specified in paragraph (3).

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(2) The conditions specified in paragraph (1) are that -

(a) P satisfies the conditions as to continuity of employment and normal weekly earnings specified in regulation 30;

(b) P has at the date of C's birth the main responsibility for the care of C (apart from the responsibility of M);

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(c) P has complied with the requirements specified in regulation 7 (notification and evidential requirements of P);

(d) it is P's intention to care for C during each week in respect of which statutory shared parental pay (birth) is paid to P;

(e) P is absent from work during each week in respect of which statutory shared parental pay (birth) is paid to P (except in the cases referred to in regulation 15 (entitlement to statutory shared parental pay: absence from work)); and

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(f) where P is an employee (within the meaning of the Employment Rights Act 1996) P's absence from work as an employee during each week that statutory shared parental pay (birth) is paid to P is absence on shared parental leave in respect of C.

(3) The conditions specified in paragraph (1) are -

(a) M has at the date of C's birth the main responsibility for the care of C (apart from the responsibility of P);

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(b) M meets the conditions as to employment and earnings in regulation 29 (conditions as to employment and earnings of claimant's partner);

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(c) M became entitled by reference to the birth, or expected birth, of C to statutory maternity pay or maternity allowance; and

(d) the maternity pay period or the maternity allowance period which applies to M as a result of her entitlement to statutory maternity pay or maternity allowance is, and continues to be, reduced under sections 35(3A) or 165(3A) of the 1992 Act."

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Regulation 17:

"17. (1) A is entitled to statutory shared parental pay (adoption) if A satisfies the conditions specified in paragraph (2) and AP satisfies the conditions specified in paragraph (3).

(2) The conditions referred to in paragraph (1) are that -

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(a) A satisfies the conditions as to continuity of employment and normal weekly earnings specified in regulation 31 (conditions as to claimant's continuity of employment and normal weekly earnings);

(b) A has at the date of C's placement for adoption the main responsibility for the care of C (apart from the responsibility of AP);

(c) A has complied with the requirements specified in regulation 19 (notification and evidential requirements);

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(d) A became entitled to statutory adoption pay by reference to the placement for adoption of C;

(e) the adoption pay period that applies as a result of A's entitlement to statutory adoption pay is, and continues to be, reduced under section 171ZN(2A) of the 1992 Act;

(f) it is A's intention to care for C during each week in respect of which statutory shared parental pay (adoption) is paid to A;

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(g) A is absent from work during each week in respect of which statutory shared parental pay is paid to A (except in the cases referred to in regulation 27 (entitlement to statutory shared parental pay (adoption): absence from work); and

(h) where A is an employee (within the meaning of the Employment Rights Act 1996) A's absence from work as an employee during each week that statutory shared parental pay is paid to A is absence on shared parental leave in respect of C.

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(3) The conditions referred to in paragraph (1) are that -

(a) AP has at the date of C's placement for adoption the main responsibility for the care of C (apart from the responsibility of A); and

(b) AP satisfies the employment and earnings conditions in regulation 29 (conditions relating to employment and earnings of claimant's partner)."

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Regulation 18:

"18. (1) AP is entitled to statutory shared parental pay (adoption) if AP satisfies the conditions specified in paragraph (2) and A satisfies the conditions specified in paragraph (3).

(2) The conditions specified in paragraph (1) are that -

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(a) AP satisfies the conditions as to continuity of employment and normal weekly earnings specified in regulation 31 (conditions as to continuity of employment and normal weekly earnings);

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(b) AP has at the date of C's placement for adoption the main responsibility for the care of C (apart from the responsibility of A);

(c) AP has complied with the requirements specified in regulation 20 (notification and evidential requirements);

(d) it is AP's intention to care for C during each week in respect of which statutory shared parental pay (adoption) is paid to AP;

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(e) AP is absent from work during each week in respect of which statutory shared parental pay (adoption) is paid to AP (except in the cases referred to in regulation 27 (entitlement to statutory shared parental pay: absence from work)); and

(f) where AP is an employee (within the meaning of the Employment Rights Act 1996) AP's absence from work as an employee during each week that statutory shared parental pay is paid to AP is absence on shared parental leave in respect of C.

(3) The conditions specified in paragraph (1) are that -

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(a) A has at the date of C's placement for adoption the main responsibility for the care of C (apart from any responsibility of AP);

(b) A satisfies the employment and earnings conditions in regulation 29;

(c) A became entitled to statutory adoption pay by reference to the placement for adoption of C; and

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(d) the adoption pay period that applies as a result A's entitlement to statutory adoption pay is, and continues to be, reduced under section 171ZN(2A) of the 1992 Act."

Regulation 40:

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"40. (1) The weekly rate of payment of statutory shared parental pay is the smaller of the following two amounts -

(a) £140.98 [£138.18];

(b) 90% of the normal weekly earnings of the individual claiming statutory shared parental pay determined in accordance with section 171ZZ4(6) of the 1992 Act and regulation 32)."

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Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014

SI 2014 No 3052 ("Pay Curtailment Regulations")

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Regulation 5:

"5. (1) M may bring forward the date on which her ordinary maternity leave period or additional maternity leave period ends by giving her employer a leave curtailment notice …"

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Regulation 6:

"6. (1) A leave curtailment notice must be in writing and must state -

(a) where M curtails her ordinary maternity leave period, the date on which M's ordinary maternity leave period is to end;

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(b) where M curtails her additional maternity leave period, the date on which M's statutory additional maternity leave period is to end.

(2) The date specified in the leave curtailment notice must be -

(a) at least one day after the end of the compulsory maternity leave period;

(b) at least eight weeks after the date on which M gave the leave curtailment notice to her employer; and

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(c) where M curtails her additional maternity leave period, at least one week before the last day of M's additional maternity leave period.

(3) In paragraph (2) "the end of the compulsory maternity leave period" means whichever is the later of -

(a) the last day of the compulsory maternity leave period provided for in regulations under section 72(2) of the 1996 Act; …"

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Regulation 7:

"7. (1) Where M has brought forward the date on which her ordinary maternity leave period or additional maternity leave period ends in accordance with regulation 5, her statutory maternity leave period will end on the leave curtailment date.

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(2) In this regulation "statutory maternity leave period" means the period during which M is on statutory maternity leave."

Regulation 9:

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"9. (1) A may bring forward the date on which A's ordinary adoption leave period or additional adoption leave period ends by giving A's employer a leave curtailment notice and either -

(a) a notice of entitlement; or

(b) a declaration of consent and entitlement."

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Regulation 11:

"11. (1) Where A has brought forward the date on which A's ordinary adoption leave period or additional adoption leave period ends in accordance with regulation 9, A's statutory adoption leave period will end on the leave curtailment date."

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European Directives

8. **ERA** sections 66 to 75 and **SSCBA** and related Regulations are the relevant domestic law implementation of Council Directive 92/85/EEC ("**Pregnant Workers Directive**"). The **Pregnant Workers Directive** was introduced under Article 118a of the Treaty establishing the European Community as a health and safety measure.

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Pregnant Workers Directive

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9. Preamble:

> **"Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement.**
>
> **…**
>
> **Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and/or entitlement to an adequate allowance."**

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Article 1:

> **"Purpose**
>
> **1. The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding."**

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Article 8:

> **"Maternity Leave**
>
> **1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.**
>
> **2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice."**

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Article 11:

> **"Employment Rights**
>
> **In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:**
>
> **…**

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> **2. in the case referred to in Article 8, the following must be ensured:**
>
> > **…**
> >
> > **(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2.**
>
> **3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down in national legislation."**

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*Directive 2006/54/EC ("**Recast Equal Treatment Directive**") replacing Directive 76/207/EC*

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*("**Equal Treatment Directive**")*

Article 28:

> **"1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."**

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The exception was implemented in **EqA** section 13(6)(b).

*Directive 96/34/EC ("**Parental Leave Directive**")*

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Article 1: This Directive puts into effect the revised Framework Agreement on parental leave concluded on 18 June 2009 by the European cross-industry social partner organisations

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ANNEX: Whereas in many Member States encouraging men to assume an equal share of family responsibilities has not led to sufficient results; therefore, more effective measures should be taken to encourage a more equal sharing of family responsibilities between men and women.

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Clause 2: This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners.

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Domestic Law implementation by the ***Maternity and Parental Leave etc. Regulations 1999*** *as amended ("MAPL Regulations")*

10. Employers must provide maternity, parental, adoption and shared parental leave and pay no less than the statutory requirements and may enlarge on those entitlements. The Telefonica policy on maternity leave and pay provides:

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> **"*Maternity leave***
>
> **You're entitled to up to 52 weeks' maternity leave, regardless of how long you have worked for us.**
>
> - **The first 26 weeks of maternity leave is called Ordinary Maternity Leave (OML).**
> - **The remaining 26 weeks is called Additional Maternity Leave (AML).**
>
> **By law you must take at least two weeks' maternity leave immediately following the birth of your baby. This is known as compulsory maternity leave.**
>
> **When it comes to starting your maternity leave, we're a firm believer that mum knows best. The exact start date is up to you, as long as it's after the beginning of the 11th week before the week in which your baby is due and no later than your expected week of childbirth.**
>
> **That said, for you and your baby's health, your maternity leave will start automatically, if you're off work due to a pregnancy related illness which occurs after the start of the 4th week before your expected week of childbirth.**
>
> **Your maternity leave may be a mixture of paid and unpaid leave, depending on the length of your employment and how much time you wish to take.**
>
> ***Maternity pay***
>
> **Your maternity pay will start from the day you begin your maternity leave, or if your baby is born early, from the day your baby is born, if you're eligible.**
>
> > ***If you have more than 26 weeks' service by the beginning of the 14th week before your Expected Week of Childbirth (EWC) and you plan to come back to work there are three options for maternity pay.***
> >
> > **You'll receive the most favourable of the following options:**
> >
> > - **14 weeks' Company Maternity Pay followed by 25 weeks' Lower Rate Statutory Maternity Pay; or**
> > - **6 weeks' Higher Rate Statutory Maternity Pay, followed by 8 weeks Company Maternity Pay and then 25 weeks' Lower Rate Statutory Maternity Pay; or**
> > - **6 weeks' Higher Rate Statutory Maternity Pay followed by 33 weeks' Lower Rate Statutory Maternity Pay.**

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If you don't complete one full calendar month of employment after you come back from maternity leave (this is excluding holiday or time out) you'll have to pay back any company maternity pay paid to you. You'll not be required to pay back any statutory maternity pay."

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11. The Telefonica policy on shared parental leave and pay provides:

> **"Eligible parents will be able to share a maximum of 50 weeks leave and 39 weeks statutory pay for the purpose of caring for a child within the first year of the child's life or in the year after the child is placed for adoption.**
>
> **SPL cannot be taken until after the birth/placing of the child and only applies to babies born or children placed on or after 5th April 2015."**

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The mother and the other parent must give the necessary statutory notices and declarations including notice to end any maternity leave, statutory maternity leave, or maternity allowance periods.

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The first stage of opting into SPL is to bring maternity or adoption leave to an end by giving a curtailment notice stating when maternity or adoption leave is to end. The notice must provide

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that maternity leave is to come to an end no sooner than the two weeks compulsory maternity leave period and no later than one week before the end of the additional maternity leave period.

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12. Shared parental pay was paid at £139.58 at the relevant time or 90% of average weekly earnings whichever is the lower.

<u>*The Judgment of the ET*</u>

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13. The ET set out the claim by the Claimant:

> **"2. Dealing with the sex discrimination complaints first. The Claimant complains that as a male employee he was entitled to only two weeks paid leave following the birth of his child in April 2016, whereas a female Telefonica transferred employee, would be entitled to 14 weeks pay following the birth of her child. The Claimant accepted there was a material difference in circumstances/justified special treatment of a hypothetical female employee for the first two weeks of that leave because that female, the mother, was required to take 'compulsory maternity leave' which is related to her biological/physiological condition and recovery following childbirth. For that 2 week period the comparator was in a position unique to women who have given birth. However in that 2 week period, he was also paid his full pay for taking parental leave, so was not less favourably treated in relation to his pay/leave. His**

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> **complaint is that in the following 12 weeks, when he wanted to take leave with pay, in order to care for his baby daughter, (because his wife was suffering with postnatal depression) he was deterred from taking the leave. This was because he was told that as the father he would only receive statutory pay not full pay for that leave. He argued that after the 2 weeks compulsory leave either parent (mother/father) could care for their baby, depending on the choices made by the parents and their particular circumstances. The assumption made that as a man (the father) caring for his baby, he was not entitled to the same pay as a woman (the mother) performing that role, took away the choice he and his wife wanted to make as parents for their baby. It was directly discriminatory on the grounds of sex, and was not a valid assumption to make in 2016."**

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14. The ET held at paragraph 5.25:

> **"5.25. … This was a genuine complaint by a father wanting equal treatment for the purpose of taking time off to care for his baby. …"**

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15. The ET succinctly encapsulated the principal argument advanced on behalf of the Respondent at paragraph 5.35:

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> **"5.35. Dealing with the first argument made by Mr Wilson on behalf of the Respondent. He contends that Mr Ali cannot compare himself to a female transferred Telefonica employee entitled to the benefit of 14 weeks maternity pay, because unlike that hypothetical comparator, Mr Ali has not given birth. He cannot do so because he is a man. Only women can take maternity leave because only women can give birth."**

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16. In rejecting the argument advanced by the Respondent the ET held at paragraph 5.36:

> **"5.36. Mr Ali is not comparing himself to a woman who has given birth and accepts for the 2 weeks immediately after birth he cannot and does not do so, because that time is specifically associated with recovery after childbirth, a condition unique to women. He does not suffer any less favourable treatment in that period because he also gets full pay. In the subsequent 12 week period he is denied the benefit of full pay, which would have been given to a hypothetical female transferred Telefonica employee, caring for her child."**

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17. The ET concluded at paragraph 5.37 that the Claimant could compare himself after the two weeks compulsory leave period with a hypothetical female comparator on maternity leave who had given birth as both would be taking leave to look after their baby.

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18. The ET then decided that it followed that the Claimant had suffered direct sex discrimination because he would not receive full pay during the twelve week period for which he wished to take leave to look after the baby as would be the entitlement of a woman.

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19. The ET then considered at paragraph 5.39 whether the exception for special treatment of women because of pregnancy or childbirth applied.

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20. The reasoning of the ET for rejecting the 'special treatment' exception is set out in paragraph 5.41:

> **"5.41. It was not clear why any exclusivity should apply beyond the 2 weeks after the birth. In 2016, men are being encouraged to play a greater role in caring for their babies. Whether that happens in practice is a matter of choice for the parents depending on their personal circumstances but the choice made should be free of generalised assumptions that the mother is always best placed to undertake that role and should get the full pay because of that assumed exclusivity."**

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21. The ET applied the principles they had adopted to the facts. At paragraph 5.42 they held:

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> **"5.42. … The caring role he wanted to perform was not a role exclusive to the mother. It was not special treatment in connection with pregnancy and child-birth it was about special treatment for caring for a newborn baby. This was not about denying full pay to a [woman], it was about equality of treatment in relation to pay for the Claimant to access the same benefits for performing the same role."**

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22. The overarching submission made by Mr Burns QC for the Respondent is simple and straightforward. The leave the Claimant states he was deterred from taking, shared parental leave ("SPL"), is available to men and women on equal terms. There is no discrimination between the sexes either on the ability to take such leave or on the payment made by the Respondent to those who take such leave.

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23. The Telefonica Shared Parental Leave Policy applies to birth parents and to parents of an adopted child. The policy on SPL provides:

> **"… Up to 50 weeks' leave and 39 weeks' pay can be shared between the parents if the mother brings her maternity lave and pay to an end early."**

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24. The Telefonica Policy provides that SPL is available in relation to the birth of a child to the child's mother, father and adopter. In order to be entitled to SPL the mother or one of the adoptive parents must opt to bring their maternity leave or adoption leave to an end. Maternity leave cannot be brought to an end until after the two week compulsory maternity leave period. The policy provides that:

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> **"If you are not the mother and she is still on maternity leave or claiming Statutory Maternity Pay. or Maternity Allowance, you will only be able to take SPL once she has either:**
>
> **• Returned to work**
>
> **• Given her employer a curtailment notice to end her maternity leave**
>
> **…"**

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A similar provision applies to SPL and adoption leave and pay.

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25. Mr Burns QC pointed out that the entitlements to SPL and ShPP are the same for parents of either sex.

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26. Maternity leave can start, at the option of the woman, after beginning the 11th week before the week in which the baby is due and no later than the expected week of childbirth.

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27. Maternity pay starts from the day maternity leave begins or, if the baby is born early, from the day the baby is born.

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28. Mr Burns QC pointed out that the policy provides that if there is a stillbirth with a baby dying before they are born after the 24th week of pregnancy, or if the baby is born alive but dies immediately or soon after, the woman is able to take maternity leave and pay. Counsel submitted that this policy is consistent with, and demonstrates that, the policy of maternity

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leave and pay is primarily for the health and wellbeing of the mother rather than for the care of the baby. There is no eligibility for shared parental leave or pay if there is no baby to care for.

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29. Mr Burns QC stated that the ET failed to refer to the purpose of maternity leave as being for the health and wellbeing of the mother. Maternity leave clearly has that purpose as demonstrated by the European Directive which the domestic law implements and the domestic law provisions themselves. This purpose is reflected in the Telefonica policy.

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30. The **Pregnant Workers Directive** was introduced under Article 118a, the health and safety provision in the Treaty. The preamble to the Directive and Article 1 state as its purpose the implementation of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. Article 8 recognises that more than two weeks leave are needed by a woman who has given birth. Member States are required to take necessary measures to provide for a continuous period of maternity leave of at least fourteen weeks allocated before and/or after confinement.

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31. Whilst under domestic law, **MAPL** Regulation 8, compulsory maternity leave of two weeks commences on the day of childbirth, Mr Burns QC submitted that the fact that in accordance with Regulation 6(1) ordinary maternity leave of twenty six weeks can start up to eleven weeks before the expected date of confinement, demonstrates that maternity leave and pay are primarily for the benefit of the health and wellbeing of the mother as there is no child to care for when it can start.

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32. Mr Burns QC also referred to the statutory provisions governing adoption leave and pay. Under the **Paternity and Adoption Leave Regulations 2002** SI 2002 No 2788, ordinary

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adoption leave commences no earlier than the date on which the child is placed with the claimant for adoption. It was submitted that where the adopter has not given birth, the Regulations show that the benefit of leave and pay are for the purpose of looking after the child. This is to be contrasted with maternity leave and pay.

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33. Mr Burns QC submitted that the authorities clearly establish that the primary purpose of maternity leave and pay is the health and wellbeing of the mother. In **Hofmann v Barmer**

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Ersatzkasse [1985] ICR 731 the Court of Justice of the European Community ("CJEU") considered the proper interpretation and application of the **Equal Treatment Directive** 76/207 which contained predecessor provisions to the **Pregnant Workers Directive**. The CJEU held:

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> **"24. It is apparent from the above analysis that the directive is not designed to settle questions concerned with the organisation of the family, or to alter the division of responsibility between parents.**
>
> **25. It should further be added, with particular reference to paragraph 3, that, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with "pregnancy and maternity", the directive recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.**
>
> **26. In principle, therefore, a measure such as maternity leave granted to a woman on expiry of the statutory protective period falls within the scope of Article 2(3) of Directive 76/207, inasmuch as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. That being so, such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely."**

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Mr Burns QC pointed out that the ET did not refer to **Hofmann**. Further, the ET did not refer to **Gillespie v Northern Health and Social Services Board** [1996] ICR 498 in which the CJEU held at paragraph 20 that the "*purpose of maternity leave … [is] the protection of women before and after giving birth*". The amount payable during maternity leave must not be so low as to undermine that purpose.

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34. Mr Burns QC submitted that the ET failed to take into account the particular purpose of maternity leave and pay, as explained both in European and domestic legislation and in authorities in erroneously deciding in paragraph 5.37, that a claimant who wished to take shared parental leave could compare his treatment with a hypothetical female comparator paid at the maternity pay rate.

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35. Even if the ET did not err in holding that the Claimant seeking shared parental leave could compare himself with a woman on maternity leave, Mr Burns QC submitted that the ET erred in holding at paragraph 5.42 that the claim for the equivalent of maternity pay was not about special treatment in connection with pregnancy and childbirth and therefore did not fall within **ERA** section 13(6)(b).

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36. Counsel for the Respondent referred to the judgment of the CJEU in **Betriu Montull v Instituto NSS** [2013] ICR 132 in which the court considered the connection between the difference of treatment in men and women in connection with pregnancy and childbirth provided for in ETD Article 2(3); this provision is implemented in **EqA** section 13(6)(b) and was considered by the ET. In **Betriu** the CJEU were dealing with a national measure which provided for a difference in treatment between the sexes. The court held:

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> **"61. With regard to the justification for such a difference in treatment, Article 2(3) of Directive 76/207 lays down that that Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity (see *Roca Alvarez v Sesa Start Espana ETT SA* (Case C-104/09) [2011] All ER (EC) 253, para 26).**
>
> **62. In that regard, the court has repeatedly held that, by reserving to the Member States the right to retain or introduce provisions which are intended to protect women in connection with pregnancy and maternity, Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth: see, inter alia, *Hofmann*, para 2, and *Roca Alvarez*, para 27.**
>
> **63. A measure such as that at issue in the main proceedings is, in any event, intended to protect a woman's biological condition during and after pregnancy."**

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Mr Burns QC pointed out that the CJEU referred to **Hofmann** which remains good law. Mr Burns QC referred to paragraphs 3 and 6 of the skeleton argument of Mr Panesar, counsel for the Claimant, and submitted that Mr Panesar erred in contending that the purpose of the leave is not material. Mr Panesar wrote that:

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> **"… the fact that the Claimant was on shared parental leave, and the comparator (if that be the case) on [a] maternity leave is not a material difference. Neither form of leave obliges the Respondent to treat the Claimant less favourably than a woman."**

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It was submitted that this is an argument rightly rejected by EJ Camp in **Hextall** at paragraphs 31 and 32.

37. Mr Burns QC contended that **EqA** section 13(6)(b) applies a connection test. Is the special treatment afforded to a woman in connection with pregnancy or childbirth?

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38. Counsel for the Respondent stated that the issue considered in the judgment of the EAT in **Eversheds Legal Services v De Belin** [2011] ICR 1137 relied upon by Mr Panesar was not that in this case. In **De Belin** Eversheds gave a woman on maternity leave a notional maximum score for performance in selection criteria for a redundancy exercise whereas a male colleague received a score based on his actual performance. Underhill P (as he then was) held of the predecessor to **EqA** section 13(6)(b):

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> **"29. … the obligation in question cannot extend to favouring pregnant employees or those on maternity leave beyond what is reasonably necessary to compensate them for the disadvantages occasioned by their condition. …"**

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It was held that:

> **"29. … The only justification for treating the woman more favourably is the need to see that she is not disadvantaged by her condition, and where the treatment in question goes beyond what is reasonably necessary for that purpose a real injustice may be done to a colleague. …"**

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Mr Burns QC distinguished the issue in **De Belin** from that in this appeal. This appeal is not about a procedure or scoring in a redundancy exercise which applies to both women and maternity leave and men and women not on maternity leave, which was designed, to but was held to exceed what was reasonable to compensate women on maternity leave. It was submitted that by contrast, this appeal is one in which the male Claimant seeks the leave and pay required to be given specifically to pregnant women and birth mothers by the **Pregnant Workers Directive**, in respect of whom legal protection is required to be implemented in domestic law. Accordingly, if the ET did not err in comparing the Claimant with a woman on maternity leave they erred in failing to hold that maternity leave and maternity pay of twelve weeks after the two weeks of compulsory maternity leave fell within **EqA** section 13(6)(b) as it was special treatment afforded to a woman in connection with pregnancy or childbirth.

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39. Mr Panesar submitted that this is not a case about leave but about pay. It was said that there is no provision which requires an employer to pay a man less than a mother if he takes leave to care for his child. It was submitted that this is simply a case of an employer choosing to treat men and women differently and to pay men less.

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40. Counsel submitted that the difference in pay for a woman and a man during their leave of twelve weeks after the two weeks compulsory maternity leave period is not imposed upon the Respondent by any external requirement. It is the choice of the Respondent. It was submitted by Mr Panesar that the fact that the Claimant was or would have been on shared parental leave, and the female comparator on maternity leave, is not a material difference. Counsel submitted that the material elements in deciding whether the Claimant could compare himself with a woman who had given birth and who was a transferred Telefonica employee was that they both were caring for their newborn child in the twelve week period commencing two

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weeks after the birth of the child. Mr Panesar submitted that there was no material difference in the Claimant's leave sought after two weeks compulsory maternity leave from that of the mother. The ET did not err in holding that the comparison could be made. On the particular facts of this case counsel submitted that the ET did not err in holding at paragraph 5.37 that the Claimant could compare himself with a transferred Telefonica employee taking leave to care for her child after the two week compulsory leave period.

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41. Mr Panesar contended that the ET were correct in their analysis of the purpose of the underlying legislation. In paragraph 5.29 of the Judgment the ET referred to the purpose of the **Pregnant Workers Directive** to encourage the health and safety at work of pregnant workers and workers who have recently given birth. The ET emphasised "*at work*". Counsel submitted that the ET were entitled to conclude in paragraph 5.31 that the introduction of SPL with the **2014 Regulations** marked a deliberate change in policy by the Government to encourage more flexibility and for fathers to take a greater role in caring for a baby. There are similar rights for adopters and parents of a child born through surrogacy arrangements. The ET noted:

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> **"… for these parents there is no period of two weeks compulsory maternity leave. Shared parental leave starts immediately upon adoption or assuming parental rights."**

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It was submitted that this change demonstrates that the purpose of all leave after two weeks for the birth mother is for the purpose of caring for the baby.

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42. As such Mr Panesar reasoned that the purpose of leave for parents after the compulsory two week period for the birth mother was care of their child. The issue for the ET was whether the Respondent was discriminating on grounds of sex in giving a lower rate of pay for parental leave than for maternity leave. It was submitted that the ET did not err in holding that there was no reason for the difference in pay for leave after the first two weeks from birth.

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43. Based on their analysis of the purpose of the legislation applying to leave after the first two weeks from birth, Mr Panesar contended that the ET did not err in their conclusions at paragraphs 5.41 and 5.42. Having concluded that the introduction of SPL showed that men were being encouraged to play a greater role in caring for their babies, the ET did not err in holding that the choice of who takes parental leave should be given to the parents. That choice should not be governed by an assumption that this was the mother's role and that therefore she should get full pay but the father is not so entitled.

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44. As for whether the claim to the same pay as a mother on maternity leave was precluded by **EqA** section 13(6)(b), Mr Panesar contended that the ET did not err in paragraph 5.42 in which they held that the difference in pay between that to which the Claimant would have been entitled on SPL, and a woman on maternity leave did not fall within the exception. It was submitted that the ET was correct to hold that the increased pay for the mother was not special treatment in connection with childbirth. It was about special treatment for caring for a newborn baby.

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45. Mr Panesar relied upon **De Belin** to contend that in any event the ET were entitled to conclude that, in the particular circumstances of this case, the health and safety of the mother was a factor in favour of her returning to work. The difference in pay between the increased pay the Claimant would receive in that period of leave if he stepped into her shoes in caring for their child and that a woman would receive in maternity pay did not fall within **EqA** section 13(6)(b). As explained in **De Belin** paragraph 29, the difference went beyond what was reasonably necessary to compensate the woman for the disadvantages occasioned by her condition.

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46. The decision to pay a man on SPL less than a woman on maternity leave was a choice made by the Respondent. Counsel contended that it was not mandated by the legislation. It was said that it was a difference which did not fall within **EqA** section 13(6)(b). Counsel therefore submitted that the ET did not err in holding that the claim for direct sex discrimination succeeded.

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Discussion and Conclusion on Direct Sex Discrimination

47. The facts giving rise to the claim of direct sex discrimination are not in dispute.

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48. Following the birth of his daughter on 5 February 2016, the Respondent complied with their statutory obligations to provide the Claimant with two weeks' paternity leave with pay. The Claimant's wife was provided with maternity leave and pay by her employer.

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49. After a further week's paid holiday leave, the Claimant returned to work on 7 March 2016. His wife was advised to return to work to assist her recovery from post natal depression. The Claimant wished to take leave to care for the baby to enable his wife to work. The Claimant considered that he should have full pay for such leave as female Telefonica transferred employees would for twelve weeks maternity leave after the two weeks' compulsory leave. The Claimant was informed that he would not receive full pay if he took leave but would be paid at the statutory rate as would a woman taking shared parental leave. The Claimant formulated his complaint in a grievance sent by email of 5 April 2016 alleging sex discrimination. He wrote:

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> **"I find it unfair that the company only pays statutory pay for shared parental leave and gives enhanced pay to the female member of staff when she is on maternity leave. I find this to be discrimination against me as I am a male and don't get the same treatment as a female."**

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50. As in the statutory scheme, under the Telefonica policy maternity pay is paid to those on maternity leave and shared parental pay to those on shared parental leave. In accordance with statutory requirements, under the Telefonica scheme maternity leave can start at any time after the beginning of the 11th week before the expected week of confinement and no later than the expected week of childbirth. Therefore maternity leave and pay can start before a child is born. For those expectant mothers who fulfil service requirements and plan to return to work, the maternity pay option which was the basis of the claim by the Claimant was 14 weeks Company Maternity Pay. This was at the rate of full pay in respect of which the Claimant claimed 12 weeks, either because he accepted that the first two weeks compulsory maternity leave and pay after birth were attributable to the health of the mother or because he received two weeks' full pay for his paternity leave.

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51. As in the statutory scheme, under the Telefonica policy shared parental leave can be taken provided that the mother has formally expressed her intention to bring her maternity leave and pay to an end. A notice of curtailment cannot bring maternity leave to an end before the two week compulsory maternity leave period or after at least one week before the end of the additional maternity leave period. Shared parental leave of a maximum of 50 weeks may be taken for the purpose of caring for the child within the first year of the child's life.

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52. Pay for shared parental leave is receivable for a maximum of 39 weeks less any weeks of statutory maternity pay. If the mother curtails her entitlement to maternity leave and pay, before she has used her full entitlement, shared parental leave and pay can be claimed for the remaining weeks.

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53. At the heart of the decision of the ET is their conclusion at paragraph 5.37 that the purpose of maternity leave is care of the child. It appears from paragraph 5.36 that the Claimant recognised that the two weeks' compulsory maternity leave and pay immediately after the birth was specifically associated with recovery of the mother after childbirth, a condition unique to women. On this correct approach, on the Claimant's case a woman on maternity leave in the first two weeks was not a comparator. However the ET held that the Claimant did not receive less favourable treatment during those two weeks - a finding appropriate only between comparators - because he also received full pay.

54. Employers are required to implement maternity and parental benefits no less beneficial than those mandated by the statutory schemes. The purpose of the various statutory schemes and the circumstances in which their benefits are conferred may be enlarged upon but not curtailed in the employers' schemes.

55. The predecessor legislation of the **ERA** and **MAPL** was the domestic law implementation of the **Pregnant Workers Directive**. Article 1 of the Directive establishes that the purpose of the measures required to be implemented are for the protection of pregnant workers who have recently given birth or who are breastfeeding. For these purposes, by Article 8 Member States are required to give such women the right to at least 14 consecutive weeks maternity leave allocated before and/or after confinement including two weeks compulsory leave. By Article 11.2(b) and 3 that entitlement is required to be accompanied by a payment to and/or entitlement to an adequate allowance. An allowance is claimed adequate if it:

> **"… guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down in national legislation."**

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The rate of maternity pay is inextricably linked to the purpose and circumstances of maternity leave. That leave is for the health and wellbeing of women who are pregnant and have given birth. The rate of pay is required to be an "*adequate allowance*".

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56. The purpose of the **Parental Leave Directive** is to encourage men to assume an equal share of family responsibilities (an entitlement of up to 4 months' unpaid parental leave in respect of each child up to their 18th birthday). In addition, current domestic law provisions in the **Children and Families Act 2014** allow a woman to bring her statutory maternity leave and pay to an end by curtailing it and sharing the balance with her spouse or partner as shared parental leave and pay. The pay is at the weekly statutory rate, whether paid to a man or to a woman.

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57. The purpose of the Telefonica policy on shared parental leave and pay is expressed to be:

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> **"… for the purpose of caring for a child within the first year of the child's life."**

A woman has to curtail her maternity leave and pay before her partner (male or female) can claim shared parental leave and pay. The rates of shared parental pay are the same for a man and for a woman.

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58. The Claimant sought to be paid at the rate paid to a woman on maternity leave. He claimed that it was direct sex discrimination for the Respondent not to pay him at that rate if he were to take leave to care for his child in weeks three to fourteen of the baby's life.

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59. A claimant alleging direct sex discrimination asserts that a Respondent discriminates against them in that because of his sex they treat him less favourably than they treat or would

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treat others. In deciding whether there has been less favourable treatment for the purposes of **EqA** section 13, section 23(1) requires that there must be no material difference in the circumstances relating to the Claimant and the comparator.

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60. The domestic and European legislation draws a clear distinction between the rights given to pregnant workers and those who have given birth or are breastfeeding, who by reason of biology are women, and the rights given to the parents of either sex to take leave to care for

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their child. The purposes of the two sets of rights are different, as are the circumstances of those to whom they are given. The different provisions in the Telefonica policies for maternity leave and pay and for shared parental leave and pay reflect those different purposes and

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circumstances.

61. Mr Panesar contended that this is not a case about leave but about pay. I do not accept

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that proposition. Maternity leave and the pay attached to it are inextricably interlinked. The **Pregnant Workers Directive** requires Member States to introduce measures to provide leave for workers in defined circumstances. They are workers who are pregnant, who have recently given birth and who are breastfeeding. As is self evident those workers can only be women.

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This is also reflected in the use of the feminine in the definition of those three categories of worker within the scope of the Directive Article 2.

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62. 14 weeks is the minimum period of leave which Member States are required to ensure for the health and safety of workers in defined circumstances which can only apply to women. Member States are required by the Directive to introduce measures to guarantee such workers,

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who are necessarily women, adequate pay for such leave. The Directive lays down a minimum

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requirement for the level of such pay. The level of pay and the type of leave, maternity leave, are inextricably interlinked.

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63. The primary purpose of the **Pregnant Workers Directive** is the health and wellbeing of the pregnant and birth mother. Clause 2 of the Framework Agreement on Parental Leave (Revised) annexed to the **Parental Leave Directive** 2010/18/EU makes clear that the purpose of parental leave is for parents or adopters to care for their child. Importantly there is no European Law requirement for Member States to introduce legislation requiring employers to provide pay for parental leave. Domestic law had given additional rights to parents in the legislation providing for shared parental leave and pay. Domestic law provides for a statutory minimum payment for shared parental leave. This is reflected in the Telefonica policy.

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64. Mr Panesar sought to rely on the judgment of **De Belin**. It is noted that the EAT decided at paragraph 13 to focus on the exception in **Sex Discrimination Act 1975** ("SDA") section 2(2), now **EqA** section 13(6)(b), and consider whether the favourable treatment of the female comparator was afforded "*in connection with pregnancy or childbirth*". The EAT did not decide whether the Claimant could compare himself with a woman on maternity leave. Counsel for Eversheds accepted that the issues were the same on the facts of that case whether **SDA** section 2(2) or 5(3) (now **EqA** section 23) were considered.

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65. The claim is made under the Telefonica policy not directly seeking to enforce statutory provisions. The Telefonica policy complies with the statutory provisions and reflects their purpose and effect.

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66. The ET held at paragraph 5.37 that the Claimant could compare his treatment (entitlement only to statutory parental leave pay) to a female Telefonica transferred employee who had a baby in February 2016 even though he had not given birth. In my judgment the qualification made by the ET to the description of leave taken by a female Telefonica employee after the first two weeks compulsory leave as leave "*to care for the child*" is the cornerstone of their decision that such a mother was a comparator as the Claimant too wished to take leave to care for his child. A similar approach led the ET to conclude that the exception to direct discrimination in **EqA** section 13(6)(b) did not apply. The ET held at paragraph 5.42 that the "*special treatment*", in this case paying the mother full pay for twelve weeks after compulsory maternity leave:

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> **"5.42. .. was not special treatment in connection with pregnancy and child-birth it was about special treatment for caring for a newborn baby. …"**

The ET regarded the claim as being about equality of treatment in relation to pay for the Claimant to access the same benefits for performing the same role as that performed by a woman on maternity leave.

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67. Mr Justice Underhill (as he then was) observed in **<u>De Belin</u>** at paragraph 13:

> **"13. We should say at the outset that we see no conceptual objection to a man bringing a sex discrimination claim by reference to the more favourable treatment of a colleague on account of her being pregnant …"**

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The facts in that case lent themselves to moving straight to the question of whether the subject matter of the complaint, giving a woman on maternity leave a notional maximum score and a man his actual score in a redundancy exercise, fell within what is now **EqA** section 13(6)(b).

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68. The ET in the case of this Claimant did not move straight to a decision on whether the claim fell within the exception to a discrimination claim in the particular circumstances of **EqA**

section 13(6)(b). They considered whether the Claimant could compare himself with a woman on maternity leave. The comparison required by the **EqA** is that of a claimant and comparator in no materially different circumstances. In this case the Claimant was claiming a rate of pay which was directly attributable to the particular type and purpose of leave taken by his hypothetical comparator.

69. In my judgment the ET erred in paragraphs 5.36 and 5.37 in determining the issue of whether a woman on maternity leave was a proper comparator for the purposes of the claim to be paid at the rate of maternity pay for the Claimant's parental leave. The ET decided the comparator question on the basis that after two weeks' compulsory maternity leave immediately following the birth of her child the subsequent twelve weeks of maternity leave are given to and taken by a woman for the care of her child. As the Claimant sought leave for this purpose the ET concluded that he could compare himself with a woman on maternity leave.

70. The ET did not seek to construct an atypical comparator. They therefore must be understood to have proceeded on the basis that all women who have the benefit of the Telefonica scheme are comparators in respect of whom maternity leave after the first two compulsory weeks and for a further twelve weeks is paid at the higher maternity pay rate. The decision of the ET is based on the proposition that the reason a woman is given maternity leave after the first two weeks following birth and therefore the purpose of the statutory maternity leave and pay is for the care of the child. Such a decision or assumption is contrary to the purpose of the **Pregnant Workers Directive** which requires Member States to introduce legislation to enable women to take maternity leave with adequate remuneration of a minimum of fourteen weeks. Article 1 of the Directive makes clear that its purpose is to implement measures to encourage improvements in the safety and health at work of pregnant workers who

A have recently given birth or who are breastfeeding. Article 8 requires Member States to give employees within Article 2 who are defined in the feminine as pregnant workers, workers who have recently given birth and those who are breastfeeding the option of 14 weeks' maternity B leave. Those taking such leave are to be given an adequate allowance as defined. The maternity leave is for those within Article 2 who are necessarily women. The requirement to give women pay of a specified minimum is inextricably interlinked with such pay. Domestic law maternity leave and the pay attached to it are the required implementation of the provisions C of the Directive. The Telefonica scheme reflects the obligations in the domestic law statutory scheme for maternity leave and pay which in turn implements the requirements in the **Pregnant Workers Directive**. These make it clear that maternity leave and the pay associated with it are D for the health of the mother.

71. Leave following the birth of a child can be given for a variety of other reasons. Two are E parental leave and shared parental leave. The purpose of parental leave is expressed in the Annex to the **Parental Leave Directive** as to entitle men and women workers on the grounds of the birth or adoption of a child to take care of that child until a given age. The Directive does not specify any payment to be attached to such entitlement to leave for this purpose. Domestic F law implements this provision. Further the right to shared parental leave, a purely domestic law right, is derived from the **Shared Parental Leave Regulations** and the right to shared parental pay from the **Shared Parental Pay Regulations**. The **Shared Parental Pay Regulations** G provide for payment for such leave of the smaller of a statutory rate or 90% of normal weekly earnings and the Telefonica scheme incorporates this requirement. The European instruments and domestic law provide for a certain level of pay for maternity leave. Member States are not H required to implement a certain level of pay for parental leave although this is provided by

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domestic law. There is no European law requirement for Member States to provide for shared parental leave with pay.

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72. As is made clear from European and domestic legislation reflected in the Telefonica scheme, the purpose of maternity leave is to safeguard the health and wellbeing of a pregnant woman, one who has recently given birth and/or who is breastfeeding. There is a requirement to provide pay for leave taken for these reasons. Whilst a woman on maternity leave will no

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doubt take care of her baby, that is not the expressed or primary purpose of such leave. By contrast the purpose or reason for shared parental leave is for the care of the beneficiaries' child.

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73. The CJEU in **Hofmann** in paragraph 10 rejected the argument of the plaintiff that the main object of German legislation enabling mothers to take maternity leave after a period of eight weeks from birth was not to give social protection to the mother but rather to protect the

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child. The claim made by the father was for pay in respect of a period of leave after eight weeks from birth. The Court based their decision on the predecessor to the provision in the **Recast Equal Treatment Directive** which is the basis for **EqA** section 13(6)(b). The Court

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stated at paragraph 26 that the purpose of maternity leave after the compulsory protective period in German law is the protection of a woman in connection with the effects of pregnancy and childbirth.

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74. Many examples exist in the employment context of different rates of pay or no pay attached to different types of leave. Whether and if so how much payment is made is inextricably linked to the reason for the leave. Pay for leave taken for a holiday may be

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different from pay during sick leave which may depend on the length of the absence, or study leave or other leave taken for a variety of other reasons which may arise.

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75. Various examples were given by counsel of leave provided by statute and the Telefonica scheme to those which have responsibility for a child but who have not given birth. Adopters and parents by surrogacy are not entitled to maternity leave and pay. Different leave and associated pay is provided. Shared parental leave is available to qualifying parents with

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parental responsibility. Such leave is available on the same terms for the mother and father.

76. In my judgment the ET erred in deciding that the purpose of maternity leave after two

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weeks immediately following the birth of the child was no longer associated with recovery after childbirth but was for the care of her child. Domestic legislation implementing the **Pregnant Workers Directive** requires employers to provide pregnant women and those who have given

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birth with a minimum of fourteen weeks' maternity leave with adequate pay. The reason for such provision is to promote the health and wellbeing of the mother. The level of pay claimed by the Claimant is inextricably linked to the purpose of such leave which does not apply to a man.

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77. The ET considered that an appropriate hypothetical female comparator for the Claimant was a transferred Telefonica employee caring for her child. Leave for a parent of either sex to

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care for their child would be shared parental leave not maternity leave. The correct comparator in this case is a woman on shared parental leave. Parents of either sex are given shared parental leave on the same terms. Once the correct comparator has been identified, the inevitable

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conclusion is that the Claimant was not discriminated against on grounds of sex by being entitled to parental leave at the pay rate appropriate for such leave.

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78. Applying the approach of Mummery LJ in paragraph 36 of **Aylott v Stockton-on-Tees Borough Council** [2010] ICR 1278 the purpose of identifying the correct comparator is to assist in determining the reason for the difference in the treatment of which complaint is made.

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79. Having decided that a woman on maternity leave in the twelve weeks after the first two weeks following the birth of her child was a correct hypothetical comparator for the Claimant, the ET decided that paying a woman her full pay whilst she was on maternity leave was not "*special treatment afforded to a woman in connection with pregnancy or childbirth*" within the meaning of **EqA** section 13(6)(b). Accordingly, the ET held that the Respondent had no defence to the claim for pay for leave to take care for his child at the same rate as an employee on maternity leave in the same period.

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80. The ET observed that the care of a child is not exclusive to women who have recently given birth. At paragraph 5.41 the ET held:

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> **"5.41. It was not clear why any exclusivity should apply beyond the 2 weeks after the birth. In 2016, men are being encouraged to play a greater role in caring for their babies. Whether that happens in practice is a matter of choice for the parents depending on their personal circumstances but the choice made should be free of generalised assumptions that the mother is always best placed to undertake that role and should get the full pay because of that assumed exclusivity."**

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The **Employment Rights Act 1996** ("ERA") section 75E, enables the making of Regulations entitling an employee who satisfies certain conditions "*to be absent from work on leave under this subsection for the purpose of caring for the child*".

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81. The ET concluded at paragraph 5.42:

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> **"5.42. … The caring role he [the Claimant] wanted to perform was not a role exclusive to the mother. It was not special treatment in connection with pregnancy and child-birth it was about special treatment for caring for a newborn baby. This was not about denying full pay to a [woman], it was about equality of treatment in relation to pay for the Claimant to access the same benefits for performing the same role."**

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The reasoning of the ET is based on their assumption or decision that the purpose of maternity leave and pay after the second week from childbirth is care of the child. They therefore concluded that the mother was being paid more than the father would be entitled to for "*performing the same role*".

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82. In my judgment the ET erred in proceeding on the assumption that maternity leave and pay is given for the twelve weeks which are the subject of the claim for performing the same role of caring for a child. In so deciding the ET erred in failing to have regard to the purpose of and reason for maternity leave and pay. It is for the health and wellbeing of the mother. Maternity pay is given not for performing a role but to enable the mother to take leave for her own health and wellbeing. That maternity leave and pay are provided not or not other than incidentally for childcare is illustrated by the fact that a pregnant woman is entitled to those maternity benefits before the birth of a child.

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83. The period in respect of which the Claimant seeks pay at the rate of maternity pay is no longer than that prescribed by the **Pregnant Workers Directive** to be made available to a woman who has given birth. The CJEU in **Hofmann** considered whether a provision of German national law which gave birth mothers an entitlement to maternity leave and pay for a period after compulsory maternity leave fell within the exception for "provisions concerning the protection of women, particularly as regards pregnancy and maternity". The court held:

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> **"25. … First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.**
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> **26. In principle, therefore, a measure such as maternity leave granted to a woman on expiry of the statutory protective period falls within the scope of Article 2(3) of Council Directive (76/207/EEC), inasmuch as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. That being so, such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely."**

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Hofmann was referred to with approval by the CJEU in **Betriu** at paragraph 62.

84. Underhill P in **De Belin** held in paragraph 32 that the **Sex Discrimination Act 1975** section 2(2), now **EqA** section 13(6)(b):

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> **"32. … should be construed so far as possible so as to conform to the underlying principles of EU law … In our view it follows from those principles that it is necessary to read the words "special treatment afforded to women in connection with pregnancy or childbirth" as referring only to treatment afforded to a woman so far as it constitutes a proportionate means of achieving the legitimate aim of compensating her for the disadvantages occasioned by her pregnancy or her maternity leave. …"**

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Having regard to the fact that the maternity leave and pay in issue in this appeal are exactly aligned with the requirements of the **Pregnant Workers Directive**, the proportionality test does not fall to be considered. It was not the basis of the decision of the ET nor is it raised in the Respondent's answer lodged on behalf of the Claimant.

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85. Even if the ET had not erred in finding that a hypothetical woman on maternity leave was an appropriate comparator, they erred in holding that providing a woman with maternity leave and full pay for fourteen weeks after childbirth was for her to care for her child. In so holding the ET erred in disregarding the statutory purpose of and reason for such leave and pay on which the Telefonica policy was founded. The purpose of and reason for such leave and pay is the health and wellbeing of the expectant and new mother. The ET erred in holding that such leave and related pay for the period at issue were not to be disregarded as they did not fall within **EqA** section 13(6)(b) as special treatment afforded to a woman in connection with pregnancy or childbirth.

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86. The claim at issue in this appeal was for a father to be paid at the rate of pay a mother receives for maternity leave in the first fourteen weeks after birth. It may be that, as suggested in the helpful written submissions by the Intervenor, Working Families:

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> **"…after a period of 26 weeks (or ordinary maternity leave) the purpose of maternity leave may change from the biological recovery from childbirth and special bonding period between mother and child. At that point it may be possible to draw a valid comparison between a father on shared parental leave and a mother on maternity leave."**

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A claim based on such facts may well give rise to the comparison referred to by Working Families. The policy of European and domestic law has been to encourage participation of the father in care for his child. How that is done is for the legislature. The role of the courts is to interpret the legislation and any contractual and policy provisions in place in a claimant's workplace.

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87. Accordingly, the appeal from the finding of direct sex discrimination succeeds and it is set aside.

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<u>Victimisation</u>

88. The ET held that the Claimant's complaint of victimisation in relation to acts by the Respondent on 14 July 2016, 27 July 2016, 28 July 2016 and 25 December 2016 succeeded.

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89. By their grounds of appeal the Respondent contend that the ET misapplied the burden of proof provisions of section 136 of the **EqA** and/or test of causation in victimisation claims. Further they contend that the judgment on victimisation is not compliant with the duty to give sufficient reasons for the decision as explained in **<u>Meek v City of Birmingham District Council</u>** [1987] IRLR 250.

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<u>Outline Facts Relevant to the Grounds of Appeal</u>

90. The victimisation claims based on events on 14, 27 and 28 July 2016 are related.

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91. In August 2015 the Claimant was asked to move to the Business Retentions Team ("BRT") from the BE Team because of his good performance and experience. He worked as a customer adviser in both teams. In the BRT the Claimant was entitled to participate in a better bonus scheme than that in the BE Team.

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92. Following the birth of his child and the wish of his wife to return to work to assist recovery from post natal depression the Claimant, through his union, asked to benefit from "the same maternity pay his employer offers to mothers absent during the same period".

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93. On 9 March 2016 a meeting took place between the Claimant, Debbie Oddie from HR and Laura Tummons, his manager and team leader. The Claimant was told he was eligible for shared parental leave ("SPL") under the Capita policy but would only be entitled to statutory pay.

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94. When pay for parental leave at the same rate as for maternity leave was refused by email of 5 April 2016 the Claimant raised a grievance alleging sex discrimination. He asserted that it was discriminatory to refuse to give him the same enhanced pay for leave he proposed to take to care for his child as a female member of staff would have on maternity leave. The grievance was not upheld. The Claimant presented an ET1 on 22 June 2016 claiming the "*same treatment with regards to enhanced maternity pay whilst taking shared parental leave*".

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95. The Claimant was absent from work with work related stress from 22 April 2016 until 25 July 2016 when his sick note expired. The fit notes recorded the reason he was unfit was a "*stress related problem*". The Claimant was seen by Occupational Health.

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96. A meeting took place on 14 July 2016 between the Claimant and Laura Tummons. The evidence of what took place differed. The ET preferred the evidence of the Claimant. The ET recorded the account given by the Claimant of what took place at the meeting as follows:

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> **"6.12. The Claimant's account was that at that meeting on 14 July 2016, Laura Tummons gave him an ultimatum that if he did not return to work on 25 July 2016, when his sick note expired, he would not retain his role in BRT he would be demoted to a Customer Adviser Role in BE or they could release him from his job altogether pending an 'options' meeting. Although the Claimant and Occupational Health anticipated a few more weeks of absence, he felt pressurised into returning earlier to keep his BRT role which caused further stress and upset."**

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The ET held at paragraph 6.17:

> **"6.17. … Laura Tummons knew about both protected acts (grievance and the claim). She gave the Claimant an ultimatum that if he did not return to work on the 25 July 2016, he would not return to the BRT role. That was the reason why he returned earlier than he expected. He was subjected to a detriment by Laura Tummons."**

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The ET concluded at paragraph 6.18:

> **"6.18. It was the Respondent's case that no such ultimatum was given and there was no explanation advanced for that treatment. Applying the burden of proof provisions there were facts from which we could decide that the Claimant has been victimised and in the absence of any explanation for this treatment we find the Claimant was victimised by Laura Tummons on the 14 July 2016."**

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97. The Claimant returned to work on 25 July 2016. The ET held:

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> **"6.21. The Respondent accepts that for the first three days they let him believe he was returning to his BRT role because they were looking for a position for him elsewhere in the business but didn't tell him that was what they were doing. …**
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> **6.22. On 27 July 2016, Laura Tummons informed the Claimant that a decision had been made to move him off the BRT role back to the customer service adviser role in the BE team. At the time, she didn't provide the Claimant with any reason for the decision. The Claimant was understandably extremely upset and was allowed to go home early.**
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> **6.23. When he returned to work on 28 July 2016 the Claimant asked Laura Tummons to explain why she had now gone back on the assurance made on 14 July that he would keep his BRT role if he returned on the 25 July 2016. In response Laura Tummons provided the Claimant with an email setting out her reasons for returning him to the CSA role in the BE team."**

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98. At paragraphs 6.25 and 6.26 the ET referred to important inconsistencies in the evidence of Ms Tummons, including poor performance as a reason for moving the Claimant from his role in BRT. The ET held:

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> **"6.26. It was not clear from the statistics Ms Tummons referred to, why the Claimant's performance was of concern in July, when those statistics were available in [to] her in June and July 2016, but had not caused her any concern. In fact she tells the Claimant his performance at work was not an issue, he just needed to get back to work by the 25 July 2016."**

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99. The ET concluded that the Respondent had victimised the Claimant on 14, 27 and 28 July 2016 for doing protected acts, bringing a grievance and lodging an ET1 alleging sex discrimination. The ET held at paragraph 6.27:

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> **"6.27. … Without any adequate explanation from the Respondent for that treatment we find that the Claimant was victimised by Laura Tummons on the 25, 27 and 28 July 2016 because he had done a protected act. …"**

100. The final act of alleged victimisation took place on 21 December 2016. It appears that

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the victimisation alleged was that Sarah Shillito, Laura Tummons' successor as the Claimant's manager, conducted a meeting with him on 21 December telling him that it would be informal. It then transpired that the meeting was being treated as a trigger for disciplinary action. Ms Shillito asked the Claimant to sign a note of the meeting. The Claimant refused. He thought

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the Respondent was using "*sneaky ways*" to:

> **"6.32. … try to get him to sign documents to manage him out of the business because he was being threatened with disciplinary meetings in the future."**

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101. The ET recorded that Ms Shillito was a relatively inexperienced manager. The ET held:

> **"6.33. … She accepts that she had misunderstood the dependant's leave policy and treated it as if it was sick leave and was applying triggers for disciplinary action when this was not the correct procedure. She says she was instructed by her manager Helen Marriott to "*take it to the next stage and the next stage was disciplinary action*". We had no explanation from Helen Marriott why she would have told a more junior manager seeking advice to 'take it to the next stage' when that was not the procedure that should be followed. We did not know why it was necessary to have the meeting recorded in the formal way it was, when none of the examples produced for other employees were carried out in that way."**

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102. The ET concluded:

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> **"6.36. If the purpose of the meeting was 'informal' as indicated to the Claimant, why not use the 'meeting notes' or pro-forma as she had done previously. To do it in the way that she did created suspicion. It supported the Claimant's perception of a 'sneaky' non transparent process designed to manage him out of the business. It was accepted that this was not the appropriate or right procedure to use to manage the Claimant's dependents leave absences.**

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> **6.37. The Claimant was subjected to a detriment by Ms Shillito on 21st December 2016. The explanation of inexperience and 'consistency of treatment' with others was not accepted based on the evidence we saw. Ms Shillito knew about the tribunal claim and was being directed by her manager to take it to the next stage, in a way she was not doing for the other employees she managed. In the absence of an adequate explanation from her to explain her detrimental treatment of the Claimant we found the complaint is made out."**

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The Submissions on Victimisation

103. Mr Burns QC placed considerable weight on the well known dictum of Mummery LJ in **Madarassy v Nomura International plc** [2007] ICR 867 at paragraph 56 that:

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> **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."**

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Mr Burns QC submitted that the fact that the Claimant had complained about sex discrimination, that Laura Tummons and Sarah Shillito knew about this and that the Claimant was treated unfavourably or differently from others, was insufficient to draw an inference of victimisation. It was submitted that the ET erred in making a finding of victimisation without considering and deciding whether Ms Tummons and Ms Shillito were motivated in taking detrimental action by their knowledge that the Claimant had carried out protected acts. It was submitted that the ET erred in taking into account lack of explanation for detrimental action as supporting a finding that they were motivated by the Claimant having carried out protected acts.

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104. Mr Burns QC referred to the judgment of the EAT in **Amnesty International v Ahmed** [2009] ICR 1450 in which it was emphasised that the test for victimisation requires consideration of the employer's motivation, conscious or unconscious. Counsel submitted that the ET failed to consider or make findings supporting a finding that the actions of which complaint was made were motivated by knowledge that the Claimant had carried out protected acts.

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105. Counsel for the Respondent submitted that the ET gave insufficient reasons to enable the parties to know why the findings of victimisation had been made out. The judgment on victimisation was not **Meek**-compliant (**Meek v City of Birmingham District Council** [1987] IRLR 250). The lack of findings on motivation for the acts alleged to be detrimental was an example of such insufficiency.

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106. Mr Panesar submitted that all of the Respondent's grounds of appeal from the findings by the ET of victimisation are examples of the approach deprecated in **ASLEF v Brady** [2006] IRLR 576. It was said that the Respondent seeks to subject the reasons given by the ET to unrealistically detailed scrutiny for "*artificial defects*".

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107. Counsel for the Claimant submitted that findings of fact made by the ET put the allegations of victimisation in context. The Claimant was off sick with stress at work which was the result of being refused full pay for the parental leave he wished to take. He believed that the Respondent had failed to address his complaint of sex discrimination. The Respondent had displayed an attitude of wanting to sweep the complaint under the carpet. The ET held that on 14 July Laura Tummons gave him an ultimatum that if he did not return to work on 25 July 2016, when his sick note expired, he would not return to his role in BRT and would be demoted to a Customer Advisor role in BE or he could be "*released*". This was despite the report from Occupational Health that it was anticipated that the Claimant would return to work within two to three weeks of the expiry of the sick note, on 25 July 2016, in mid August 2016. Further it was submitted that the ET were entitled to take into account that despite the assurance that he would return to BRT when the Claimant returned to work on 25 July 2016, the Respondent did not tell him that they were looking for a job for him elsewhere in the business. The Respondent's evidence on this decision was contradictory.

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108. Mr Panesar submitted that the ET were entitled on the facts found by them that the ultimatum given to the Claimant on 14 July 2016 was a detriment motivated by the protected acts of raising a grievance and lodging an ET1 asserting sex discrimination. Laura Tummons was well aware of these acts by the Claimant. The ET did not accept the evidence given by Laura Tummons of what was said at the meeting on 14 July 2016.

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109. The detriment alleged was that Ms Tummons gave the Claimant an ultimatum on 14 July 2016; return to work on 25 July or you will not get your job back on the BRT. The ET did not accept the evidence of Ms Tummons that no such ultimatum was given. Mr Panesar submitted that the ET were entitled to conclude that the burden of proof shifted to the Respondent to show that the reason for the detriment was not the protected acts. As no explanation had been offered for the detriment the ET were entitled to infer that the reason for it was the protected acts

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110. Mr Panesar contended that the ET did not err in concluding in paragraph 6.27 that the burden of proof moved to the Respondent to show that the protected acts were not the reason for the second and third acts of alleged victimisation, the removal of the Claimant from the BRT Team. Counsel contended that on the findings of fact the ET were entitled to conclude that the explanations for the move given by the Claimant's manager were inconsistent. Her evidence that the Claimant could return to his role in the BRT if he came back to work on 25 July 2016 was contradicted by the evidence of Sarah Hall recorded in paragraph 6.21 of the Judgment of the ET that by then the Team would be full. Further, the ET referred to and relied upon the inconsistency with Ms Tummon's statement at the time as to the reason why the Claimant was moved away from the BRT Team. Ms Tummons and Ms Hall had previously said that the move was nothing to do with the Claimant's performance. However, in an email

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to the Claimant Ms Tummons stated that his performance was "*consistently not on target … It is therefore with regret that*" the Claimant would not be returning to the BRT.

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111. It was submitted that the ET did not err in taking all these matters into account in concluding that the burden of proof had shifted to the Respondent to show that the reason for the detriments was not the protected acts by the Claimant.

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112. The detriment on 21 December 2016 by Miss Shillito was in effect conducting a formal meeting as a precursor to disciplinary proceedings when this was contrary to procedure and to what the Claimant had expected. The ET in paragraph 6.37 observed that Ms Shillito knew

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about the Tribunal claim and was being directed by her manager to take her dealings with the Claimant to the next stage. Counsel contended that the ET were entitled to reject the explanation of inexperience of Ms Shillito and consistency of treatment with others. In the

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absence of a credible explanation Mr Panesar submitted that the ET were entitled to conclude that the detrimental treatment of the Claimant on 21 December 2016 of proceeding to a formal meeting as a precursor to disciplinary proceedings was because of his protected disclosures.

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Discussion and Conclusion on Victimisation

The Relevant Statutory Provision

113. **Equality Act 2010** section 27:

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> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, …"**

Section 136:

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> **"(1) This section applies to any proceedings relating to a contravention of this Act.**
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> **(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."**

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114. It is important to bear in mind the purpose of **EqA** section 136 in moving the burden of proof to the Respondent. The section is a tool enabling a tribunal to decide the reason for the detriment alleged in a victimisation claim. There is no requirement on a tribunal to go through the step of considering the shifting of the burden of proof. Their task is to determine whether **EqA** has been infringed. As explained in **Madarassy** at paragraphs 71, 72 and 79 there may be cases in which an employment tribunal is not obliged to apply the shifting of burden of proof provision if there is nothing in the evidence from which the tribunal could properly infer a *prima facie* case that the reason for the prohibited act in this case the detriment was on the prescribed ground so as to constitute victimisation.

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115. The fact that a complainant has carried out a protected act and has suffered a detriment will not be sufficient applying **EqA** section 136 to shift the burden of proof to a respondent. However, having regard to the purpose of section 136 in assisting the tribunal to decide whether the reason for the detriment was a protected act, the observations in paragraph 56 of **Madarassy** do not apply on the facts of this case. There was evidence connecting the detriment carried out by the Respondent to knowledge or belief or a reasonable inference of knowledge or belief of the alleged perpetrator that the Claimant has carried out the protected acts.

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116. Mummery LJ at paragraph 71 of **Madarassy** held that the burden of proof provision:

> **"71. … does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. …"**

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So too, in my judgment, can the ET take into account their assessment of evidence given by the respondent in deciding whether the claimant has satisfied section 136 so that the burden of proof moves to the respondent to rebut the allegation of victimisation.

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117. Laura Tummons was the manager and supervisor of the Claimant until August 2016 when Sarah Shillito took over from her. Ms Tummons knew of the sex discrimination grievance raised by the Claimant and that he had started proceedings in the Employment Tribunal alleging that not being entitled to full pay for shared parental leave was unlawful discrimination.

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118. The complaints of victimisation asserting detriments on 14, 27 and 28 July are all related. They were all alleged to have been carried out by Ms Tummons.

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119. The detriment alleged to have taken place on 14 July 2016 was Ms Tummons giving the Claimant an ultimatum that if he did not return to work on 25 July 2016 when his sick note expired he would not retain his role in BRT, he would be demoted to a Customer Adviser role in BE or he could be "*released*" from his job pending an "*options meeting*". The ET held in paragraph 6.12:

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> **"6.12. … Although the Claimant and Occupational Health anticipated a few more weeks of absence, he felt pressurised into returning earlier to keep his BRT role which caused further stress and upset."**

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120. Laura Tummons did not accept that she had given the Claimant the ultimatum he alleged. The ET preferred the Claimant's evidence that he was given an ultimatum by Laura Tummons and that she knew about the protected acts.

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121. There was a connection between the perpetrator of the detriment and the protected acts. Ms Tummons gave the ultimatum to the Claimant and she knew about his protected acts. This situation is distinguishable from status and a detrimental act which are unconnected posited by Mummery LJ at paragraph 56 of **Madarassy**.

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122. In my judgment the ET did not err in applying the burden of proof provision of **EqA** in determining the first complaint of victimisation.

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123. Similar considerations apply to the second and third complaints of victimisation. The acts complained of were carried out by Ms Tummons who knew about the protected acts of the Claimant. At paragraph 6.27 the ET held:

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> **"6.27. Again reminding ourselves of the burden of proof provisions the Claimant has proved facts from which we could conclude in the absence of an explanation from the Respondent, a prima facie case of victimisation. The reasons for removing the Claimant from his BRT role were different (performance or timing) and the Respondent witness evidence contradictory. The Claimant was deliberately misled into believing he was returning to the BRT role and then provided with a false reason for his removal. Without any adequate explanation from the Respondent for that treatment we find that the Claimant was victimised by Laura Tummons on the 25, 27 and 28 July 2016 because he had done a protected act. This treatment left the Claimant in a position where he couldn't trust what his managers were saying to him."**

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In my judgment the ET did not err in relying on the factors which they set out in paragraph 6.27 of their Judgment to hold that the burden of proof provisions of **EqA** section 136 were satisfied.

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124. The alleged perpetrator of the detriment on 21 December 2016 of erroneously treating her meeting with the Claimant as a precursor to a disciplinary process was Ms Shillito. The ET recorded at paragraph 6.33 that Ms Shillito was a relatively inexperienced manager. She

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accepted that she had misunderstood the parental leave policy and treated such leave as sick leave in applying triggers for disciplinary action. She said that she had been instructed to take the meeting with the Claimant "*to the next stage and the next stage was disciplinary action*".

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That is why she used a form applicable to one to one discussions with a member of staff regarding their conduct, attendance, performance or any other issue which needs documenting.

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125. The ET observed that by conducting the meeting with the Claimant in the way Ms Shillito did created suspicion in his mind. The ET did not accept the explanation of inexperience and consistency given by Ms Shillito for conducting the meeting with the

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Claimant on 21 December 2016 as a precursor to a disciplinary process. Unlike their findings in relation to the complaints of the behaviour of Ms Tummons on 14, 27 and 28 July 2016, in my judgment the ET failed to give adequate reasons for disbelieving Ms Shillito. They merely referred to "*evidence we saw*" as the basis for not accepting the reasons given by Ms Shillito for the way in which she conducted the meeting with the Claimant on 21 December 2016. In my judgment the decision of the ET to uphold the complaint of victimisation on 21 December 2016 was not **Meek**-compliant. The decision does not give reasons or adequate reasons to enable the Respondent to know why that complaint was upheld.

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Conclusion

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126. The appeal from the findings of victimisation in relation to detriments on 14, 27 and 28 July 2016 are dismissed.

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127. The appeal from the finding of victimisation in relation to the detriment on 21 December 2016 is allowed.

Disposal

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128. The finding of direct sex discrimination is set aside. The claim of direct sex discrimination is dismissed.

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129. The appeal from the findings of victimisation in relation to acts of the Respondent on 14, 27 and 28 July 2016 is dismissed.

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130. The appeal from the finding of victimisation in relation to the act of the Respondent on 21 December 2016 is allowed. This complaint of victimisation is remitted to the same Employment Tribunal, if practicable, for rehearing.

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