EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104827/2017

Hearing held in Glasgow on
17th, 18th and 19th July 2018 (hearing)
and 20th and 30th July 2018 (deliberations)

Employment Judge: **M Whitcombe**
Mrs J Ward
Mr E Borowski

Ms N Shabbir — **Claimant**
Represented by:
Mr R Byrom
(Solicitor)

Glamour Eyes Limited — **First Respondent**
Represented by:
Mr I Maclean
(Consultant)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is as follows.

(1) The respondent discriminated against the claimant by treating her unfavourably because she exercised her right to ordinary and additional maternity leave, contrary to section 18(4) of the Equality Act 2010.

(2) The claim for direct sex discrimination contrary to section 13 of the Equality Act 2010 therefore fails by virtue of section 18(7) of that Act and is dismissed.

(3) The respondent subjected the claimant to a detriment for a prescribed reason related to ordinary or additional maternity leave, in contravention of section 47C(1) of the Employment Rights Act 1996.

(4) The claimant is awarded compensation of £8,000 for injury to feelings plus interest of £800.

(5) The claimant is awarded compensation for financial losses of £31,912.85 plus interest of £1,595.64.

REASONS

Introduction

1. The claimant continues to be employed by the respondent in a managerial position, the precise nature of which is in dispute. The respondent provides beauty products and services in some Superdrug stores.

2. The claimant is currently absent from work on maternity leave connected with the birth of her second child. This case concerns events following the claimant's return from maternity leave connected with the birth of her first child. The claimant lodged a grievance regarding her treatment upon her return to work from that first period of maternity leave on 20th February 2017.

3. We must decide three claims arising from the failure to uphold the claimant's grievance appeal. The claims before us no longer include any earlier aspects of the grievance process, still less the subject matter of the grievance itself.

Claims and issues

4. By a claim form (ET1) presented to the Tribunal on 1st October 2017 the claimant originally brought the following claims.

   a. Automatically unfair dismissal contrary to section 99(3)(b) of the Employment Rights Act 1996 in relation to an alleged dismissal on 20th February 2017.

b. Alternatively, a claim that if the claimant was not dismissed on that date she was subjected to a detriment in the form of demotion on 20th February 2017, contrary to section 47C(2)(b) of the Employment Rights Act 1996.

c. A claim of direct sex discrimination contrary to section 13 of the Equality Act 2010 on the basis that the claimant was dismissed or demoted on 20th February 2017.

d. A claim of pregnancy or maternity leave discrimination contrary to section 18(4) of the Equality Act 2010 on the basis that the claimant was dismissed or demoted on 20th February 2017.

e. A separate claim under section 47C(2)(b) of the Employment Rights Act 1996, the detriment being the failure to uphold the claimant's grievance appeal on 5th May 2017.

f. A claim for direct sex discrimination under section 13 of the Equality Act 2010 based on the failure to uphold the claimant's grievance appeal on 5th May 2017.

g. Alternatively, a claim of pregnancy/maternity discrimination under section 18(4) of the Equality Act 2010 based on the failure to uphold the claimant's grievance appeal on 5th May 2017.

5. In fact, the grievance appeal was determined by the respondent on 8th May 2018.

6. Following a preliminary hearing on 20th February 2018 to consider jurisdictional time points, EJ Gall ruled that only the last three of the claims listed above (e, f and g) had been presented in time and would proceed to a final hearing. EJ Gall ruled that the claims based on events on 20th February 2017 (claims a, b, c and d) had all been brought out of time. They were therefore dismissed on the basis that the tribunal had no jurisdiction to hear

them. For full details see the judgment and detailed written reasons of EJ Gall sent to the parties on 8th March 2018, the clarification provided in the case management discussed heard by EJ Garvie on 5th April 2018 and the reconsideration judgment of EJ Gall sent to the parties on 19th April 2018.

7. The claims before us were therefore focused solely on the decision not to uphold the claimant's grievance appeal on 5th May 2017, although evidence of earlier events might be highly relevant background. That decision was alleged to amount to direct maternity discrimination, or alternatively direct sex discrimination, or alternatively a detriment because of a prescribed reason listed in section 47C(2) of the Employment Rights Act 2010.

8. The respondent accepted that the decision not to uphold any part of the claimant's grievance appeal was a "detriment" for the purposes of section 47C(1) of the Employments Rights Act 1996 and also for the purposes of section 39(2)(d) of the Equality Act 2010. It was similarly accepted that the decision not to uphold any part of the claimant's grievance appeal was "unfavourable treatment" for the purposes of section 18(4) of the Equality Act 2010. Those concessions were made against the background of the tests in ***Shamoon v Chief Constable of the RUC*** [2003] ICR 337, HL and ***MOD v Jeremiah*** [1980] ICR 13, CA.

The nature of the discrimination in the grievance appeal outcome

9. During the hearing it appeared that the claimant's case on direct discrimination was put in the following way: because the subject matter of the claimant's grievance and grievance appeal was an allegation of discrimination, a failure properly to consider and resolve that process must also amount to discrimination. The grievance process failed to put right a prior act of discrimination and therefore amounted to a continuation of that act of discrimination.

10. If that approach were correct in law then it would be surprising that the claimant did not argue at the preliminary hearing before Employment Judge Gall that all aspects of the grievance process including its subject matter were

an act extending over a period for time limit purposes. In any event, it is wrong in law. We drew Mr Byrom's attention to authorities such as ***Home Office v Coyne*** [2000] IRLR 838, CA, ***Conteh v Parking Partners Ltd*** [2011] ICR 341, EAT, ***Brumfitt v Ministry of Defence*** [2005] IRLR 4, EAT and ***Unite the Union v Nailard*** [2017] ICR 121, EAT. In summary, failing properly to deal with or to uphold a complaint is not necessarily an act of direct discrimination because of a protected characteristic and it is necessary to consider the mental processes of the person responsible for the treatment. The claimant would have to show that the respondent, in handling her complaint, had treated her less favourably than it would have treated a man in similar or equivalent circumstances. Equivalent remarks could be made about the claim of unfavourable treatment contrary to section 18 of the Equality Act 2010. We also observed that it would be open to the claimant, and consistent with the case advanced in the claim form, to invite us to draw inferences about the reason for the failure to uphold the grievance appeal from earlier matters.

11. In closing submissions Mr Byrom presented the Claimant's case in the manner outlined below. In order to ensure procedural fairness, and to ensure that the case was properly put to witnesses, we granted an application to recall Ms Stevenson for further cross-examination and, if necessary, further re-examination.

Evidence

12. The parties had agreed a single joint file of documents for use at the hearing. In the normal way, we only took into account documents to which we were referred by either or both parties. Some documents were added to the file during the course of the hearing and we are grateful to the representatives both for their help with the administration and also for the provision of larger files.

13. With the agreement of the representatives we pre-read a number of core documents prior to the commencement of oral evidence in order to familiarise

ourselves with the case and to accelerate the hearing.

14. The claimant gave oral evidence as did her husband Mr Hayat. Mr Hayat owned a similar business part of which had transferred to the respondent. He was able to give evidence regarding the transferor business and the claimant's position within that business prior to the transfer as well as evidence relevant to remedy.

15. The respondent called Ms Stevenson, its Managing Director.

16. All three witnesses gave their evidence on oath and were cross-examined. We also asked our own questions.

Comments on the evidence

17. At the start of the hearing Mr Byrom drew our attention to the fact that the claimant's English was not perfect, although he also confirmed that she did not wish to give evidence through an interpreter. We made allowances for the additional challenges of giving evidence when English is not a first language. While we did ask the claimant to repeat certain parts of her evidence, that was generally to ensure that the employment judge had taken an accurate note, rather than because of any difficulties we had in understanding her. Generally, the claimant spoke clearly and confidently.

18. At this point we wish to make some general comments on the relative credibility of the witnesses.

19. There were few contemporaneous documents against which the recollections of witnesses could be tested. Nevertheless, we found both the claimant and her husband Mr Hayat to be impressive and credible witnesses whose evidence was given in a measured and consistent manner without hint of exaggeration. Both witnesses were also able to supply a degree of detail when required, which further enhanced their credibility. There was also an impressive degree of corroboration on matters of detail.

20. In contrast, Ms Stevenson's evidence was not always satisfactory.

a. On some points she contradicted herself, for example, on the issue of the number of area managers in the respondent's business immediately after the transfer.

b. Some of her evidence was internally inconsistent, for example, emphasising the need for continuity of line management as a reason for not disturbing the lists of stores allocated to certain area managers while the claimant was on maternity leave, but not allowing for that same consideration in relation to the claimant's own list of stores. Her evidence was also internally inconsistent in that she asserted on the one hand that the transferor's "regional manager" role and the respondent's "area manager" role were effectively the same thing, but on the other hand that the claimant had agreed, following the transfer, to accept an altered role as an area manager. There would not have been any need for the alleged agreement if the roles were in substance the same.

c. She also made serious allegations of fraud for the first time at the hearing, alleging that the claimant's written contract of employment prior to the transfer was a sham, deliberately concocted by the claimant and/or her husband in order to enhance the claimant's position following the transfer. That allegation was made for the first time in her oral evidence, while being pressed on the effect of the terms of that contract. She accepted that she had not previously challenged the authenticity of the document and that she had paid the claimant in accordance with its terms throughout her employment. There was no allegation of fraud in the response form (ET3) or the attached grounds of resistance. No doubt for that reason, it had not been a matter covered during the prior cross-examination of the claimant and Mr Hayat. Not only did we give very little weight to the allegation of fraud in those circumstances, but the nature and timing

of the allegation undermined Ms Stevenson's credibility.

21. For all of those reasons we were left with significant reservations about the credibility of Ms Stevenson's evidence and we preferred the claimant's evidence where there was a conflict. We simply regarded the claimant's evidence as the account which was more likely to be accurate and reliable.

Findings of fact

22. Having heard the evidence and the parties' submissions we made the following findings of fact on the balance of probabilities. We deal with the law regarding the burden of proof elsewhere in these reasons.

23. On 25 January 2012 the claimant commenced employment with Ultimate Brow Bar Ltd trading as "Ultimate Brow and Lash Bar". That was a very similar business to that of the respondent – it provided goods and services through concessions in certain Superdrug stores. The claimant was issued with a statement of terms and conditions of employment dated 1 September 2014 which she signed on the same date. The other signatory was Mr Malik Hayat, her husband and Business Manager of Ultimate Brow Bar Ltd. We find on the balance of probabilities that the statement of terms and conditions shown to us is both genuine and accurate, we reject Ms Stevenson's allegation that it was a sham (see above). In addition to being an employee the claimant was also a director of Ultimate Brow Bar Ltd.

24. According to that document, the claimant's job title was clearly stated to be "Regional Manager". The claimant's duties included acting as Regional Manager for the region of "Scotland and the North of England" and overseeing the activities of "Area Managers" in that region. The claimant managed the staff schedule and rota for stores in Perth, Aberdeen, Edinburgh (two stores), Glasgow (two stores), Coatbridge, Motherwell, Irvine, Kirkcaldy, Morningside, York and Wakefield. The claimant was also required to ensure that those stores were properly stocked and to visit them periodically in accordance with a rota. It is not necessary for present purposes to list or to

summarise every contractual term. It is however relevant to note that the claimant was entitled to a salary of £42,000 per year and a car allowance of £300 per month. There were also other benefits which are not relevant to the claimant's schedule of loss.

25. The claimant's employment transferred to the respondent on 1st June 2015. It is common ground between the parties that TUPE 2006 applied. The claimant's existing contractual terms and conditions were therefore preserved (save for terms relating to pension). As the claimant put it, "whatever I was doing for the old company I did for the new company" although there were some changes in the stores that the claimant covered. She spent more time in Scotland instead of spending time in England.

26. Only part of the business of Ultimate Brow Bar Ltd transferred to the respondent. The remaining parts of that business continued to trade in the same manner in other parts of the UK. Mr Hayat continues to run that business and is based mainly in Manchester for that purpose.

27. Immediately prior to the transfer there were Area Managers working under the claimant. The Area Manager for Newcastle also transferred to the respondent. Two other Area Managers based respectively in Glasgow and Edinburgh chose not to do so and resigned prior to the transfer.

28. At the time of the transfer the claimant had been responsible for about 20 to 22 stores since 2012. All of those stores were either in Glasgow and the surrounding area or Edinburgh. All of the stores were performing very well. The claimant got on very well with all of the employees she worked with and they formed an important part of her social life.

29. Shortly before the transfer, on 25 May 2015, an informal meeting took place between the claimant and Ms Stevenson in a café. We accept the claimant's account of that meeting. Ms Stevenson's main concern was that the claimant would not wish to join the respondent's business. The claimant reassured Ms Stevenson that she did. There was no discussion about contractual terms at

all, still less any agreement on the claimant's part to a variation of those terms. There was neither discussion nor agreement regarding a change to the claimant's job title or to her status within the hierarchy.

30. For the avoidance of doubt, we also find that there was no discussion, still less agreement, to a change in job title, status, duties or hierarchy during the period following the transfer. We have already given our reasons for preferring the evidence of the claimant to that of Ms Stevenson where there is a conflict, and the respondent provided no documentary evidence of any such meeting, discussion or agreement.

31. Following the transfer, the Newcastle Area Manager no longer reported to the claimant since Newcastle was no longer a store for which the claimant was responsible. Ms Stevenson indicated that she intended to hire additional Area Managers but that did not happen for some time. In between the transfer and the commencement of maternity leave the claimant was effectively running 20 to 22 stores without support from an Area Manager.

32. On or about 8 December 2015 the claimant was asked no longer to do the Edinburgh rota and Ms Stevenson effectively took over management of the Edinburgh store from that date onwards.

33. The claimant took maternity leave from 19 April 2016 to 20 February 2017, a period of 10 months which included both ordinary and additional maternity leave.

34. Shortly prior to the claimant's formal return to work from maternity leave she attended a "back to work meeting" on 1 February 2017. At that meeting the claimant was asked by Ms Stevenson how she was and whether she was okay to work. The claimant confirmed that she was. There were no other discussions at all about the claimant's role or responsibilities and Ms Stevenson said that she would see the claimant on 20 February 2017.

35. When the claimant returned to work on 20 February 2017 she was given a new and revised list of the stores for which she was responsible. She was also given a new list of responsibilities. The contents of both documents shocked the claimant. She had not seen either of them before. She was described as an "Area Manager" and she was responsible for many fewer stores. She would be responsible for just 10 stores. The claimant's duties would also now include covering for absent "threaders" in stores if alternative cover could not be arranged. There was no similar responsibility in the claimant's statement of terms and conditions dated 1 September 2014 and we accept the evidence of the claimant and Mr Hayat that, prior to the transfer, neither the claimant as a regional manager nor the area managers would be expected to cover for absent staff – rather their role was to arrange cover for absence. The claimant was not herself a beauty therapist.

36. The list of stores included stores much further away from her home in Glasgow than had been the case prior to the commencement of maternity leave. Immediately prior to commencing maternity leave all of the claimant's stores were located in the central belt of Scotland. The problematic new locations mentioned most often in evidence were stores in Carlisle and Dumfries. Carlisle is around 100 miles from Glasgow and Dumfries is around 80 miles from Glasgow. The respondent also introduced a new requirement that managers should spend at least two hours per fortnight in each store that they were obliged to visit. That made it very difficult for the claimant to visit those stores efficiently from her home in Glasgow given her childcare commitments. The problem would be especially acute if there were any sort of emergency or delay, whether at work or at home.

37. During the course of the meeting on 20th February 2017 Ms Stevenson suggested to the claimant that she would be able to take her very young son with her on store visits to Carlisle and/or Dumfries on her way to or from Manchester, where the claimant's husband Mr Hayat was then spending much of his working time and lived during the working week.

38. Ms Stevenson also linked the changes in role and stores to the fact that the claimant had not returned within six months of the commencement of maternity leave. She indicated that the list of stores and the claimant's job would have been unchanged if the claimant had returned to work within six months. Since she had not, the respondent was entitled to make the changes that it had made.

39. Mr Najeeb Ali, the respondent's business development manager, was also in attendance. He told the claimant that if she were to get pregnant again and take maternity leave she might get her former role and stores back (i.e. the role and stores as they were prior to the first period of maternity leave).

40. Overall, the claimant's feeling was that the changes represented a new job title, a downgrading of her role, diminished status and a more difficult and stressful working pattern given the locations she had to cover.

41. We find that she was entitled to regard matters in that way. It was a reasonable assessment of the situation for the following reasons. As the claimant rightly observed during her evidence, Area Managers cannot be equated with Regional Managers. They do different things and the distinct nature of the roles was obvious from the wording of her written statement of terms and conditions dated 1st September 2014. According to those terms, Area Managers worked under Regional Managers. Those terms and conditions were preserved by virtue of regulation 4 of TUPE 2006. The fact that the respondent chose to organise its business such that the one remaining area manager no longer reported to the claimant is not the point. Prior to the transfer, the claimant's role as a Regional Manager was clearly both distinct from, and senior to, that of Area Manager. We were told that the respondent regarded regional managers and area managers as being the same thing. That view was inconsistent with the claimant's terms and conditions. As a matter of contract, the claimant was entitled to a distinct role and a status above that of Area Managers. That was the case regardless of the number of Area Managers actually employed, or whether Ms Stevenson required them to report through the claimant.

42. There is one respect in which we do not accept the claimant's argument that there had been a significant and adverse change in her responsibilities. In her evidence the claimant said that the new statement of responsibilities required her to engage in the training of therapists. We do not interpret it in that manner. To the extent that the claimant was required to train them at all it appears to have been rather more in the nature of coaching in relation to the key service standards required by Superdrug and therefore by the respondent. The training of therapists in specific therapies would continue to be provided by accredited trainers as it had been before, and the claimant was not expected to carry out that sort of training.

43. There had not been any consultation regarding the changes, they were simply presented as the new requirements of the role on 20 February 2017. They were not discussed at all when the claimant met Ms Stevenson on 1 February 2017, nor at any other point during the claimant's maternity leave.

44. The claimant explained her unhappiness and asked a number of questions of Ms Stevenson in an email dated 21 February 2017. Ms Stevenson's reply of 23 February 2017 asserted that the claimant had "left" as an area manager and had come back to the same role with the same core duties. She acknowledged that stores had been "shuffled" for various reasons and stated that one of them was in order to benefit the claimant upon her return. Ms Stevenson denied that there was any new structure or new ranking. We have already set out the respects in which we have found Ms Stevenson's denial to be wrong.

45. Later on 23rd February 2017 the claimant once again emailed Ms Stevenson repeating certain questions that she felt Ms Stevenson had failed to answer. The email also criticises the lack of consultation. The claimant also informed Ms Stevenson that she was extremely distressed, had consulted her doctor and had been advised to take rest. The claimant undertook to send in her sick note soon. The claimant has not attended work since and remained on sick leave until the commencement of her most recent (second) period of maternity leave. The claimant supplied a sick note the following day.

46. The claimant did not receive a reply to her email of 23 February 2017 and therefore lodged a formal grievance by email dated 1 March 2017. In summary, the email recited some of the background and alleged that she had been dismissed from her current role, that there had been a complete failure to consult, that the job had been completely changed, that her responsibility had been reduced and her authority eroded, and that all of those things had been done just after maternity leave and as a result of that leave. By way of resolution the claimant asked to be returned to the role she had enjoyed prior to her maternity leave as a matter of urgency.

47. The respondent acknowledged receipt of the claimant's grievance in a letter dated 8th March 2017 and informed the claimant that it would be heard by a consultant from "HRFace2Face", which is part of Peninsula Business Services. The claimant indicated that she did not feel well enough to attend on the appointed date and so the respondent wrote on 15th March 2017 in an effort to encourage her to attend on a rearranged date. The claimant was also given the option of sending in written submissions, sending a representative to speak on her behalf, sending a representative to read a prepared submission and to speak on her behalf or to participate by telephone.

48. The claimant chose the option of written submissions which she provided by way of an email dated 21st March 2017. The email provided further details of her complaints.

49. The grievance process was conducted by Mr Andrew McCabe of HR Face2Face. A meeting took place on 23rd March 2017 and a report summarising Mr McCabe's reasoning and conclusions was dated 27th March 2017. He did not uphold any aspect of the grievance.

50. Ms Stevenson told us that she was responsible for supplying information to Mr McCabe in relation to the respondent's position on the points made in the claimant's grievance. She also saw the report in draft before it was finalised. She told us that she only made typographical changes but accepted that she could have made changes of substance had she wished to. Ms Stevenson

accepted and agreed with the contents of the report. She adopted both the reasoning and the conclusions. Ms Stevenson sent the report to the claimant under cover of a letter dated 28th of March 2017 saying, "please find attached their report, which represents my decision. In conclusion, there are no sufficient grounds to substantiate your grievance."

51. The claimant was given a right of appeal which she exercised in a letter or email dated 4th April 2017. The appeal letter was drafted with the assistance of Mr Hayat. The claimant reiterated the basis of her grievance and complained that the grievance report was "riddled with partisan bias with no regard to anything raised in my grievance". The claimant also took issue with what she regarded as Mr McCabe's over-zealous approach, the tone of some of his comments and his failure properly to engage with the complaint that she was making. The claimant alleged that, "the report is full of bias and points to one conclusion, that of collusion".

52. The procedure adopted in relation to the grievance appeal was essentially the same as that adopted for the grievance. A hearing was arranged which was to be conducted by a different consultant from HRFace2Face. Once again, the claimant felt unable to attend by reason of continuing stress and illness. She nevertheless sent some additional comments by email, attached a copy of her contract of employment dated 1st September 2014 and expressly referred both to that and also to earlier correspondence. The claimant indicated that she wished the appeal process to continue on the basis of her correspondence. The appeal process was conducted by Ms Naomi Sayers of HRFace2Face. A meeting took place on 19th April 2017 and a report dated 7th May 2017 summarised her reasoning and conclusions.

53. Once again, Ms Stevenson was involved in the process in three different ways. First, she provided information to Ms Sayers summarising the respondent's position on the points made in the grievance and grievance appeal correspondence. Second, she saw the report in draft before it was finalised. She told us that she made changes but that they were limited to typographical errors and other minor matters. Third, Ms Stevenson accepted

that upon receipt of the finalised report she was not bound by it and remained free to accept, reject or modify any of its conclusions. She decided not to do so and accepted it in full. Ms Stevenson sent the report to the claimant under cover of a letter dated 8th May 2017, saying that it represented her decision.

54. We will make some further findings of fact in relation to the grievance appeal report as part of our reasoning (see in particular paragraphs 103 and 104 below).

Submissions

55. Both representatives made oral submissions, neither of them relied on written submissions. What follows is intended to be a summary rather than a transcript.

Claimant's submissions

56. The following submissions were made on behalf of the claimant.

57. Submissions began with the claim under section 48 of the Employment Rights Act 1996. Our attention was drawn to regulation 18(2) of the Maternity and Parental Leave Regulations 1999. The claimant argues that returning as an Area Manager meant returning to a role which was neither suitable nor appropriate. We were referred to ***Kelly v Secretary of State for Justice*** (UKEAT/0227/13/JOJ) at paragraph 8 as an example of similar treatment. The claimant accepted that she must show that she availed herself of the benefits of ordinary maternity leave or additional maternity leave. The employment judge observed that there was no dispute about that. The claimant must show that detriment had been caused for that reason. The employment judge queried whether it was in fact the respondent who must prove the reason for treatment in a claim under section 48 of the Employment Rights Act 1996. Both representatives agreed.

58. The correct approach to the burden of proof and the evidence was summarised in ***Fecitt v NHS Manchester*** [2012] IRLR 64, CA, a whistleblowing case but nevertheless (as both representatives accepted) the

applicable law on this point. Tribunals were required to look with a critical, indeed sceptical, eye to see whether the innocent explanation given by the employer for the adverse treatment was indeed the genuine explanation. The detrimental treatment of an innocent employee necessarily provides a strong *prima facie* case that the action was taken because of a prescribed reason and it cries out for an explanation.

59. With regard to the causal link to the relevant detriment, section 47C(2)(b) ERA 1996 will be infringed if the prescribed reason materially influences (in the sense of being more than a trivial influence) the employer's treatment of the employee. The test is not the same as that in unfair dismissal, which requires a focus on the sole or principal reason for treatment. We were referred to paragraph 12.8 of the IDS Handbook as a reminder that even seemingly well-intentioned actions can amount to a detriment. That was relevant to the respondent's argument that the alteration in stores had been done for the claimant's benefit.

60. Turning to the discrimination claims, reference was made to the involvement of Ms Stevenson at various stages of the grievance process. Its outcome was in line with her original thinking. The tribunal was asked to infer that there was a predetermined mindset on the matter and that all decisions, including the grievance appeal outcome, were motivated by the fact that the claimant had taken maternity leave.

61. The claimant relied upon the same matters as ***Madarassy*** factors, in other words, the features of the case in addition to the possession of a protected characteristic and unfavourable or detrimental treatment, which were sufficient to place the burden of proof on the respondent in the discrimination claims. If the claimant had not taken additional maternity leave then the handling of the dispute would have been different. The fact that Ms Stevenson's mind was made up, and that she provided inaccurate information to the consultant, were sufficient facts from which it could be inferred that the reason for adverse treatment was the claimant's maternity leave. The respondent's explanation was insufficient to discharge the burden of proof

upon it.

62. So far as direct sex discrimination was concerned, the comparator would be a person who had not taken maternity leave but who had a grievance about terms and conditions. The respondent's conduct demonstrated a mindset tainted by discrimination on the basis of the claimant's sex. That mindset was equally apparent in the grievance appeal outcome.

Respondent's submissions

63. The respondent's submissions did not rehearse the law and appeared to accept that it had been accurately summarised by the claimant.

64. We were reminded that we were concerned with the grievance appeal and not with the grievance, the information supplied during that process, or the action taken upon return from maternity leave.

65. It had not been suggested in cross-examination that there was any misleading information in the grievance appeal report and there had been very little challenge to that report. There was no evidence from the claimant to support the argument that the reason why the grievance appeal had not been upheld was that the claimant had taken additional maternity leave. While the respondent accepted that direct evidence of discrimination would be rare and that it was permissible to rely upon inferences, the respondent respectfully suggested that the limited evidence given was insufficient to justify the drawing of adverse inferences.

66. In any event the respondent's clear evidence was that while the claimant had been absent on maternity leave the business had changed. It had grown and new area managers had been appointed. That necessitated a reorganisation. The detrimental treatment happened because of business need and not because of the fact that the claimant had taken additional maternity leave. The respondent was a small employer without a dedicated human resources department. For that reason it contracted with a third party provider to handle the grievance and the grievance appeal.

67. There was nothing wrong with a rigid mindset on the part of Ms Stevenson. She had taken important decisions in the best interests of her business and unless there were compelling reasons she should not be expected to change her mind. However, had either consultant recommended that she had got it wrong then she would have accepted that recommendation.

68. There was no basis for an adverse inference simply because third party consultants had been engaged.

69. The fact that a third party had made recommendations regarding the grievance appeal outcome had to factor into whether the final decision was an act of discrimination. It was important to note that a fresh pair of eyes had made the recommendation.

70. The claimant was not the only person who had her stores altered. It was effectively a business reorganisation since additional managers had been recruited during the claimant's absence.

71. On the balance of probabilities, the action was not taken as a result of a protected characteristic or because the claimant had exercised the right to take additional maternity leave.

Applicable law

Burden of Proof

72. The burden of proof in proceedings relating to a contravention of the Equality Act 2010 is governed by section 136 of that Act. The correct approach is set out in section 136(2) and (3). References to "the court" are defined so as to include an employment tribunal.

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

contravene the provision.

73. The Court of Appeal has repeatedly stressed that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for the statutory language.

74. We have taken into account the well-known guidance given by the Court of Appeal in ***Igen Ltd v Wong*** [2005] ICR 931 (sometimes referred to as "the revised ***Barton*** guidance"), which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054. ***Ayodele v Citylink Ltd*** [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in ***Igen Ltd v Wong***.

75. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a "*prima facie*" or, in plainer English, a "first appearances" case of discrimination which needs to be answered. If the inference of discrimination *could* be drawn at the first stage of the enquiry then it *must* be drawn at the first stage of the enquiry, because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed *unless* the respondent can discharge the burden of proof at the second stage.

76. However, if the claimant fails to prove a "*prima facie*" or "first appearances" case in the first place then there is nothing for the respondent to address and nothing for the tribunal to assess. See ***Ayodele*** at paragraphs 92-93 and ***Hewage*** at paragraph 25.

77. At the first stage of the test, when determining whether the burden of proof has shifted to the Respondent, the question for the tribunal is not whether, on the basis of the facts found, it *would* determine that there has been discrimination, but rather whether it *could* properly do so.

78. The following principles can be derived from ***Igen Ltd v Wong*** (above), ***Laing v Manchester City Council*** [2006] ICR 1519 EAT, ***Madarassy v Nomura International plc*** [2007] ICR 867, CA and ***Ayodele v Citylink Ltd*** (above), which reviewed and analysed many other authorities.

a. At the first stage a tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a *prima facie* case of discrimination. A respondent may, for example, adduce evidence that the allegedly discriminatory acts did not occur at all, or that they did not amount to less favourable treatment, in which case the tribunal is entitled to have regard to that evidence.

b. There is a vital distinction between "facts" or evidence and the respondent's "explanation". While there is a relationship between facts and explanation, they are not to be confused. It is only the respondent's *explanation* which cannot be considered at the first stage of the analysis. The respondent's *explanation* becomes relevant if and when the burden of proof passes to the respondent.

c. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the *possibility* of discrimination and a mere possibility is not enough. Something more is required. See paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy***.

79. However, it is not always necessary to adopt a rigid two stage approach. It is not necessarily an error of law for a tribunal to move straight to the second stage of its task under section 136 of the Equality Act 2010 (see for example ***Pnaiser v NHS England*** [2016] IRLR 170 EAT at paragraph 38) but it must then proceed on the assumption that the first stage has been satisfied. The

claimant will not be disadvantaged by that approach since it effectively assumes in their favour that the first stage has been satisfied. The risk is to a respondent which then fails to discharge a burden which ought not to have been on it in the first place (see ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraphs 71 to 77, approved by the Court of Appeal in ***Madarassy***). Tribunals must remember that if and when they decide to proceed straight to the second stage.

80. It may also be appropriate to proceed straight to the second stage when the claimant compares their treatment to that of a hypothetical comparator. Sometimes the reason for the treatment, and the question whether there is a *prima facie* or "first appearances" case of discrimination, will inevitably be intertwined with the question whether the claimant was treated less favourably than a comparator, especially a hypothetical comparator. In cases of that sort the decision on the "reason why" issue will also provide the answer on the "less favourable treatment" issue (see Lord Nicholls in ***Shamoon v Chief Constable of the RUC*** [2003] ICR 337 at paragraphs 7 to 12 and Elias LJ in ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraph 74).

81. In a similar vein, the Supreme Court in ***Hewage*** (above) observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination but they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

The approach to evidence

82. While the statutory questionnaire procedure has now been repealed, an inference might still be permissible if a respondent has failed to respond to a question asked outside that (now repealed) procedure. Where the burden is on the respondent, its failure to produce relevant documentation can be a relevant matter to which the tribunal should have regard when weighing the

totality of the evidence (see ***EB v BA*** [2006] IRLR 471, CA at paragraphs 50 to 51 and ***Meister v Speech Design Carrier Systems GmbH*** C-415/10 [2012] ICR 1006, ECJ).

83. More generally, a tribunal should exercise caution when asked to place reliance on recollections, particularly if given some time after the event and in the context of litigation, rather than relevant contemporaneous documents (see ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** [2013] EWHC 3560 Comm, at paragraphs 15 to 22).

84. In particular, when considering direct discrimination claims, tribunals must bear in mind the specific difficulties that arise and be astute to the danger of self-serving explanations from employers or witnesses. Discrimination is rarely overt. That problem was alluded to in the well-known passage in ***King v Great Britain China Centre*** [1992] ICR 516, CA at pages 528f to 529c. When testing a respondent's evidence in such a case, it may well be relevant that an equal opportunities procedure has not been followed or that subjective criteria have been adopted. See ***Anya v University of Oxford*** [2001] ICR 847 CA.

Direct Discrimination

85. Section 13 of the Equality Act 2010 defines direct discrimination as follows: 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.

86. By virtue of section 23(1) of the Equality Act 2010 when carrying out that comparison there must be "no material difference" between the circumstances relating to each case.

87. That section is expressly subject to section 18(7) which excludes from direct sex discrimination treatment which is also pregnancy or pregnancy related illness discrimination within the protected period, or unfavourable treatment because the claimant is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave

contrary to section 18(4) of the Act. Therefore, by definition, such situations cannot also be direct sex discrimination.

88. Section 18(4) provides that a person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

Detriment because of leave for family and domestic reasons

89. Section 48(1) of the Employment Rights Act 1996 enables an employee to present a complaint to an employment tribunal that they have been subjected to a detriment in contravention of (among many others) section 47C(1) of the Employment Rights Act 1996.

90. Section 47C(1) of the Employment Rights Act 1996 confers on an employee the right not to be subjected to a detriment by any act, or any deliberate failure to act, by their employer done for a prescribed reason.

a. The prescribed reasons include reasons prescribed by regulations made by the Secretary of State and which relate to (among many other things) ordinary, compulsory or additional maternity leave (section 47C(2)(b)).

b. Regulation 19(2)(d) of the Maternity and Parental Leave etc Regulations 1999 (as amended) confirms that taking or seeking to take ordinary or additional maternity leave is a prescribed reason for the purposes of section 47C(1). These are the “regulations made by the Secretary of State” for the purposes of that section.

91. Section 48(2) of the Employment Rights Act 1996 provides that on a complaint under section 48(1) it is for the employer to show the ground on which any act, or deliberate failure to act, was done. The burden of proof is therefore on the respondent throughout.

Reasoning and conclusions

Discrimination – burden of proof - the first stage

92. We have been very careful to bear in mind that we are only concerned with allegations of discrimination at the point of rejection of the claimant's grievance appeal. We are not concerned with the determination of the grievance still less with its subject matter – alleged changes to the claimant's job title, status and duties upon her return to work from maternity leave on 20 February 2017. Those allegations have been ruled out of time and we must not fall into the trap of allowing them to be raised in the guise of a complaint about the grievance appeal.

93. However, we consider that it is entirely legitimate, when considering the grievance appeal, also to examine other aspects of the employment relationship and of the recent history of that relationship in order to decide whether the burden of proof passes to the respondent. They are part of the totality of the evidence before us, and it would be wrong to exclude those events from consideration merely because they are not also before us as distinct allegations of discrimination.

94. We bear in mind the involvement of Ms Stevenson at a number of key stages of the process. She told us that as managing director she made all of the important decisions in the business. She was the architect of the reorganisation of roles prior to the claimant's return from maternity leave. She decided whether or not to hire area managers and the stores that would be allocated to them. She supplied information on behalf of the respondent to the consultant who prepared the grievance report and also to the consultant who prepared the grievance appeal report. She saw both reports in draft and had the power to make changes to those reports, which she did. The only changes made were minor typographical or grammatical errors. Having received the finalised reports she was also free to accept, reject or modify their conclusions and reasoning. She adopted them as her own decisions but she was in no way obliged to do so and could have taken a different course

if she had wished. The decision to reject the grievance appeal was very much hers, albeit with significant input from a third party.

95. We have already referred above to important inconsistencies in Ms Stevenson's own evidence and to her allegations of fraud, which we found unconvincing. Not only did that undermine her credibility, it suggested to us that she might be straining to justify her actions.

96. We heard unchallenged evidence that on 20 February 2017 (the day on which the claimant returned from maternity leave) Ms Stevenson had told the claimant that her job and stores would have been the same if she had returned from maternity leave within six months, and that both had been changed because the claimant had been away for longer than that. That may be an attempted reference to the rights upon return of an employee who takes additional maternity leave. Regulation 18 of the Maternity and Parental Leave Regulations 1999 provides that in such a situation the employee "is entitled to return from leave to the job in which she was employed before her absence, or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances." Ms Stevenson did not consider the key concepts of "suitability" or "appropriateness", nor did she justify the changes made by reference to reasonable practicability.

97. The failure to mention those important restrictions on the employer's right to make changes causes us to wonder whether the claimant's maternity leave rights were fully understood and respected. Looking at the situation objectively, we are satisfied that the claimant's role upon return was neither appropriate nor suitable for the reasons set out in our findings of fact.

98. Our finding is that upon the claimant's return to work from maternity leave significant detrimental changes were made to her job title, role, status and duties. There had been a reduction in the number of stores for which she was responsible and a reduction in the number of staff reporting to her. Despite the respondent's stated concern for continuity of line management, the

majority of the stores allocated to the claimant prior to her maternity leave had been reallocated by the time she returned. The claimant was instead allocated many stores with which she had had no previous contact. That begs an explanation. Although of course we accept that the respondent was entitled to organise its business and its management team as it saw fit (subject to the requirements of employment law) we heard no evidence to suggest that any other manager had suffered similarly detrimental treatment, even if they had experienced some changes.

99. There had not been any consultation at all on those changes, despite a meeting in anticipation of the claimant's return on 1st February 2017. Once again, that begs an explanation, because it would have been a simple matter to have consulted with the claimant on those changes while the proposals were still at a formative stage. She was a regional manager and her voice within the organisation was important.

100. While there is no distinct allegation of discrimination regarding the grievance (as opposed to the grievance appeal) it nevertheless provides important context for our decision. We are concerned by the content and tone of some sections of the grievance report. While those are, on the face of it, the remarks of a third party, Ms Stevenson saw the report in draft, was able to make changes, and accepted it in full although not bound to do so. She adopted those remarks. In our judgment paragraph 23 of the grievance report expressed stereotypical views by asserting that "millions of working parents managed to combine parental duties with their job and the law enables those parents who find this balancing act to be difficult by enabling them to work flexibly, to reduce their working hours, to have additional absences from work, etc all of which can be requested by Miss Shabbir… However, Miss Shabbir should not expect any special or favourable treatment to be granted to her simply because she has given birth. The law does not allow this." We find that to be an overly critical tone, and that the claimant was not seeking "special or favourable treatment" by lodging her grievance.

101. We also think there is force in the claimant's objection to the contents of paragraph 24, which speculates that having a newborn child was more likely to cause stress than changes in her role and responsibilities. We find that to be an unhelpful and speculative paragraph based on stereotypical assumptions which had little to do with the subject matter of the grievance. It appears rather gratuitous.

102. We are troubled by the fact that the grievance report completely fails to spot the important fact that the claimant's pre-transfer statement of terms and conditions referred both to regional managers and to area managers, with the obvious consequence that they could not be equated and that regional managers were senior to area managers. Paragraph 13 of the report contains a very selective quotation, completely missing out the important words "and oversee activities of Area Managers in the region". The claimant had made those words the core of her argument. That relevant and troubling omission calls for an explanation.

103. We also have concerns about the contents and approach of the grievance appeal report. Once again, although it is the work of a third-party Ms Stevenson was involved at a number of stages and by adopting it in its final form and expressly stating that it represented her decision she must take responsibility for its contents.

    a. At paragraphs 15 to 18 the grievance appeal report fails to grapple with the claimant's allegation that the grievance decision had been "riddled with partisan bias with no regard to anything raised in the grievance." In the three brief paragraphs which follow the summary of the allegation the thrust is to criticise the claimant for failing to meet with the author of the grievance report or the author of the grievance appeal report. That was, however, the claimant's entitlement. That appears to us to be an attempt to deflect blame onto the claimant. There is no obvious attempt to deal with the allegation of bias at all.

    b. Similar comments can be made in relation to paragraphs 19 to 21. The

claimant makes a similar allegation but the thrust of the response is to blame the claimant herself. The real point was not that Mr McCabe had decided an issue not strictly raised by the grievance, the real point so far as the claimant was concerned was that Mr McCabe had "justified anything and everything done by the company". There is no analysis of or response to that complaint at all.

c. Paragraphs 25 to 28 deal with the important argument that the claimant's terms and conditions (prior to the transfer and preserved following the transfer) showed that as a regional manager she must necessarily be more senior than an area manager and could not herself be an area manager. The response in the grievance appeal report is an uncritical acceptance of Ms Stevenson's position. Despite the specialist employment law expertise professed by HRFace2Face there is no consideration of the relevance of TUPE. There is no quotation, still less any analysis, of the key contractual term. In her appeal letter the claimant had specifically drawn attention to the fact that she had formerly overseen area managers. The response refers to what Ms Stevenson "believes" and that appears to have been enough for the author of the report.

d. Paragraphs 29 to 31 deal with the claimant's complaint about Mr McCabe's comment about "millions of working parents" which she regarded as "mansplaining". The two lines of response seem completely to miss the point. There is no analysis of the words used by Mr McCabe, rather the report finds that "there is no suggestion that there was any *intention*" (emphasis added) to be patronising. Intention was not really the point, even if that conclusion is sustainable. In addition, the conclusion does not appear to have been based on any conversation with Mr McCabe.

e. Paragraphs 32 to 34 deal with the claimant's complaint regarding Mr McCabe's comments about the likely cause of her stress. We feel that

the claimant's criticism was well-founded, but even more importantly the grievance appeal report misses the point. The point was the appropriateness of Mr McCabe's remarks. It is no answer to say that Mr McCabe was expressing a "belief" rather than a "fact" or a properly qualified medical opinion.

f. Paragraphs 35 to 37 concerned the claimant's allegation that the grievance report was "full of bias and points to collusion". We consider that the grievance appeal report fails to deal with that allegation. The reasoning is spread over fewer than 3½ lines of text and fails to consider the possibility that Mr McCabe had failed properly to test and challenge what he was being told by Ms Stevenson, still less to form a view on that possibility. There does not appear to have been any conversation with Mr McCabe at all. These paragraphs read rather more like an attempt to defend a colleague than a neutral evaluation of the possibility of collusion or bias.

g. Paragraphs 38 to 48 cover the subject matter of the original grievance. It is therefore rather longer than the other sections of the grievance appeal report, but in our view it fails to analyse the problem in sufficient detail. For example, there appears to be an unquestioning acceptance of the information supplied by Ms Stevenson in relation to the stores allocated to other managers and the implications for travel. There is no analysis of the practicability of the claimant visiting stores in Dumfries or Carlisle. There is no analysis of the locations of the stores allocated to other managers in order to test the proposition that a fair balance had been struck overall. Ms Stevenson's point about continuity and stability of line management is adopted without considering whether it actually strengthened the claimant's argument that she should retain the stores she had prior to commencing maternity leave. We feel that there was insufficient analysis of the claimant's point. The author does not appear to have considered the possibility that any of the information supplied by Ms Stevenson might have been inaccurate or that further detail might be required in order

to investigate properly.

104. In summary, we find that the grievance appeal report was deficient in a number of respects. At various points it shows a willingness to accept uncritically the information supplied by Ms Stevenson without testing it or seeking relevant further detail. Quite apart from that, in some important respects it fails properly to engage with the points made by the claimant. We find that it was neither robust, nor sufficiently impartial. The author accepted that she was not independent (see paragraph 12).

105. Drawing together all of the findings in the preceding paragraphs of this section of our reasons, we find that the claimant has established on the balance of probabilities facts from which we could conclude, in the absence of any other explanation, that the provisions of the Equality Act 2010 have been contravened in relation to the grievance appeal outcome. We therefore turn to consider the respondent's explanation.

Discrimination – burden of proof – the second stage

106. The Respondent's explanation can be summarised as follows. The business had changed while the claimant was on maternity leave such that it became necessary to hire additional area managers. That in turn necessitated a reorganisation of the stores and the responsibilities of particular managers. This is, of course, an important part of the background rather than a response to an allegation of discrimination in itself. Strictly, we are concerned with the respondent's explanation for the allegedly discriminatory treatment (i.e. the grievance appeal outcome), but we understand why the respondent wishes to put forward an explanation for these matters too.

107. While we accept that the business had grown and that it was legitimate for the respondent to hire additional managers to cope with that growth, we do not regard this as a sufficient explanation of the detrimental treatment suffered by the claimant. For example, there is no obvious reason why the hiring of additional managers should necessarily result in a reduction in the

claimant's status in the hierarchy so as to equate her role with that of an area manager. The claimant had previously worked (as a Regional Manager) in the transferor's business and had worked at a level above area management while several Area Managers had been in post. There was no obvious reason why she could not do the same upon return from maternity leave, especially given that additional Area Managers had been recruited by the Respondent in the meantime. The fact that, in between the transfer and the commencement of maternity leave, the respondent had employed just one Area Manager does not alter the principle.

108. The respondent was inconsistent in its application of a principle that the stores allocated to particular managers should ideally be disturbed as little as possible in order to promote continuity of line management. That would also be an argument in favour of returning the claimant to oversee the stores she had directly managed prior to maternity leave. That argument would be strengthened by the fact that several of the other managers were fairly new, with little or no existing relationship with staff. Little or no thought appears to have been given to the allocation of the most distant stores and the fairest way of ensuring that the burden of travel did not fall disproportionately on the claimant, especially given the new requirement to spend at least two hours in each store per fortnight, and to provide cover for absent therapists on occasion. Little or no thought appears to have been given to the need to avoid the claimant facing a disadvantage because she had been away from work on maternity leave.

109. Upon her return from maternity leave the claimant was presented with a situation upon which she had not been consulted. She had not been involved in any attempt to balance the competing interests of different managers or to ensure that the burdens of the new arrangements fell equally upon them. The claimant's views had neither been sought nor taken into account. Given that she had recently become a mother, the mere fact that the respondent considered a reorganisation of the business to be necessary is an insufficient explanation for those omissions. It would have been equally possible to reorganise the business following proper and sensitive consultation.

110. Contrary to the submissions made by the respondent, we find that there was misleading information in the grievance appeal report. It was misleading because it was incomplete and because the examination of the information supplied was inadequate. There was an uncritical acceptance of what Ms Stevenson said, without any apparent attempt to test its accuracy and to reach an impartial assessment. Fault lay both with Ms Stevenson as the supplier of that information and with the author of the report for failing to conduct a sufficiently robust and impartial investigation.

111. We appreciate the difficulty the respondent faced in attempting to ensure that independent expertise was brought to a process challenging Ms Stevenson's decision. We understand the decision to use external consultants. The decision to involve consultants in the grievance and grievance appeal processes is not something from which we draw adverse inferences. We draw adverse inferences from the deficiencies in the process and from the fact that Ms Stevenson adopted the outcome as her own decision. No doubt a thorough, impartial and robust process conducted quite independently of the original decision maker could have served as a lawful explanation for the outcome of that process. However, we have found that the flawed process adopted in this case was insufficient to discharge the burden of proving that there was no contravention of the Equality Act 2010.

112. For all of those reasons, our conclusion is that the respondent has failed to discharge the burden of proving that there was no contravention of the Equality Act 2010. Having applied section 136 of the Equality Act 2010 we find that the outcome of the grievance appeal process constituted an act of maternity discrimination contrary to section 18(4) of the Equality Act 2010. We therefore make a formal declaration that the respondent discriminated against the claimant on this basis.

113. Having regard to section 18(7) of the Equality Act 2010 the same act cannot also be an act of direct sex discrimination. On the facts we have found they are mutually exclusive. The claim for direct sex discrimination therefore fails and is dismissed.

Section 47C(1) of the Employment Rights Act 1996

114. We turn now to the claim that the claimant was subjected to a detriment contrary to section 47C(1) of the Employment Rights Act 1996. It is possible to express our reasoning much more concisely. We have already set out many of the relevant factors in the context of discrimination, and we refer to those paragraphs of our reasons. The tests are, of course, different.

115. It is for the respondent to show the reason for the treatment complained of. It must do so on the balance of probabilities. Having regard to the matters we have set out above in relation to the discrimination claims, our conclusion is that the respondent has failed to satisfy us on the balance of probabilities that there was a lawful reason for the treatment complained of. We have reached that conclusion by assessing all of the evidence in the round, rather than by applying the two-stage approach to the burden of proof applicable in discrimination cases.

116. The treatment complained of, which is accepted to amount to a detriment, is the failure to uphold the claimant's grievance appeal. The respondent has failed to satisfy us on the balance of probabilities that the reason was not the prescribed reason of taking ordinary or additional maternity leave listed in section 47C(2)(b) of the Employment Rights Act 1996. We therefore make a formal declaration that the respondent subjected the claimant to a detriment in breach of section 47C(1) of the Employment Rights Act 1996.

Remedy

117. We have already made the necessary mandatory declarations and they are included in the formal judgment.

118. Neither representative identified a reason why an award of compensation for the unlawful detriment claim might exceed the proper award of compensation for the successful discrimination claim. Compensation for injury to feelings is available for both (now confirmed by ***South Yorkshire Fire and Rescue Service v Mansell*** (UKEAT/0151/17/DM). Interest is available on

discrimination awards only. Neither representative put forward arguments about potential differences in the principles of remoteness of damage or causation of loss. No doubt those principles were thought not to have any bearing on this case.

119. We therefore award compensation for the successful discrimination claim. There is no additional award for the unlawful detriment claim since that would inevitably amount to double recovery.

Injury to feelings

120. We begin with compensation for injury to feelings. We took into account the applicable Presidential Guidance on awards of this type. In our assessment of this case is properly placed at the upper end of the lower band of compensation for the following reasons.

121. While the claimant has not lost her job the effect of the discrimination on her has been significant. The claimant felt humiliated and embarrassed. She felt unable to face the workers who had previously known her as a regional manager. It was not simply a question of embarrassment at work since the claimant's social life depended in part on friendships made at work. The claimant felt unable to reply to text messages received from those friends. She simply sat at home feeling stressed. She contrasted that situation with a social life which formerly involved going out regularly with colleagues. She felt like a different person. The claimant has used up all her savings. We are not at this stage compensating her for that, rather that is some indication of the impact upon her feelings. She had a strong financial incentive to return to work had she been able to do so. The claimant saw her doctor regularly although the final position after some slightly confusing evidence was that the only medication taken was paracetamol. As for the future, we find that this judgment and the associated award of compensation will enable the claimant to move on and will bring an end to the injury to her feelings within a very short further period.

122. Having weighed those factors and considered the Presidential Guidance we award the sum of £8,000 as compensation for injury to feelings. To that we add interest at 8% on the whole of the 15 month period from 8th May 2018 until 8th August 2018 (see regulation 6(1)(a) of the ETs Interest on Awards in Discrimination Cases) Regulations 1996). The award of interest on compensation for injury to feelings is therefore £800.

Financial losses

123. Next we turn to financial losses. It is useful first of all to set out our decision on certain points of principle. We are satisfied on the balance of probabilities that the claimant's absence from work and the associated financial losses were directly caused by the discrimination she experienced. Had there not been unlawful discrimination in the grievance appeal outcome it is likely that the claimant would have returned to work shortly after the outcome of that process. Although we were surprised that there was no medical report before us, the claimant was able to show us "fit notes" which covered most of the period of absence. Surprisingly, the respondent does not appear to have taken any steps to obtain medical evidence itself, despite the lengthy period of absence. While the evidential position was unsatisfactory the claimant was a credible witness whose evidence was supported by fit notes. We accept her case on causation on the balance of probabilities. There was no submission or suggestion in cross-examination that there was any other cause of absence or that the claimant had failed properly to mitigate her losses.

124. Having set out those findings we turn to the Schedule of Loss. The respondent did not take issue with any of the arithmetic and nor do we.

a. The agreed figure for net weekly pay was £612.30.

b. From 8th May 2017 to 7th September 2017 the claimant received statutory sick pay. Her claim is therefore based on 17.3 weeks net pay less sums received by way of statutory sick pay. That totals £9,062.60 as calculated in section 2 of the schedule.

c. From 8th September 2017 to 16th May 2018 the claimant did not receive any statutory sick pay. Her claim is therefore for 30 weeks' net pay totalling £22,042.80 as calculated in section 3 of the schedule.

d. On 17th May 2018 the claimant commenced her second period of maternity leave. However, she claimed losses on the basis that the rate of maternity pay was affected by her prior absence, absence due to discrimination. We accept that submission. We therefore award £2,435.34 as calculated in section 4 of the schedule.

e. The claimant gives credit for £5,210.39 received as a result of her having taken some or all of her accrued entitlement to paid annual leave. That is an option legally open to her and since she has chosen to do so she must give credit for sums received. That sum is therefore deducted from the award.

f. Finally, the claimant was entitled to a monthly car allowance towards insurance, tax and maintenance. That was paid regardless of mileage, for which there was a separate payment. £250 per month is claimed and we award it on that basis. The contractual terms referred to an allowance of £300 per month but we assume in the absence of any other explanation that the claimant is claiming the taxable benefit. The respondent raised no objection of principle. We therefore award £3,582.50 as calculated in section 6 of the schedule.

125. The total compensation for loss of earnings is therefore £31,912.85.

126. To that we add interest at the statutory rate of 8% from the midpoint of the period from 8th May 2017 to 8th August 2018, a period of 7.5 months (see regulation 6(1)(b) of the ETs (Interest on Awards in Discrimination Cases) Regulations 1996). The interest due is therefore £1,595.64. It would certainly be possible to calculate interest in more elaborate ways (for example to allow for the fact that losses accrued at a different rate during periods when

statutory maternity pay ("SMP") was received than in periods when there was no entitlement to SMP), but since neither side made any submissions on interest we have adopted a simplified approach.

127. There was no claim for losses beyond the date of the hearing.

128. We raised with the parties whether an element of "grossing up" would be required in this case. It was not claimed in the Schedule of Loss. Neither representative was in a position to make oral submissions on the matter so we gave them until lunchtime the following day to make written submissions if "grossing up" were sought. No submissions were received, so we do not "gross up" the award to reflect the incidence of tax.

Employment Judge: M Whitcombe
Date of Judgment: 09 August 2018
Entered in register: 10 August 2018
and copied to parties