Case No: 1401439/2018

EMPLOYMENT TRIBUNALS

Claimant: Lana Nanson

Respondent: Merck Chemicals Ltd

Heard at: **Southampton** **On:** **27-29 March 2019**

Before: **Employment Judge Housego**
Ms K G Symonds
Mr J Shah

Representation

Claimant: In person
Respondent: Mr S Pender, solicitor, of Made UK

JUDGMENT

The claim is dismissed.

REASONS

1. Dr Nanson is a research chemist employed by the Merck Chemicals Ltd, whose complaint arises from her role and pay on return from maternity leave.

Background

2. Merck Chemicals Ltd ("Merck") is a part of a very large international company. As the name suggests it is an industrial chemical company. Its headquarters is in Darmstadt, Germany. It has a site in Chilworth, near Southampton. Earlier it had sites in Korea and in the US, but has since closed them. All the witnesses from whom we heard have doctorates.

3. Dr Hanson works in the Chilworth establishment. She has worked for Merck since 02 March 2009. She was away from work on maternity leave from 14 October 2016 until 02 January 2018. (She used up one week's remaining holiday before maternity leave started on 21 October 2016, and took the holiday accrued during maternity leave before returning, so extending her absence beyond 12 months.)

4. Dr Hanon's line manager had been Dr Owen Lozman. By the time Dr Hanson went on maternity leave it was Dr Nicolas Bluoin, who remained her manager at the date she returned from maternity leave. He is based in Darmstadt. He reports to Dr Stephan Weider, also based there. The manager of the Chilworth site (now) is Dr Richard Harding. We heard evidence from all three, and from Dr Hanson.

5. All the witnesses were clearly witnesses of truth. Dr Blouin was plainly somewhat uncomfortable about what had been found in a grievance outcome letter to be a want of communication with Dr Hanson while she was on maternity leave. Dr Weider was a model of clarity. Dr Harding took the grievance lodged by Dr Hanson. His evidence dealt with that grievance and the matters referred to in it. It was also intended to explain management restructures, but that part of his evidence tended to confuse rather than enlighten. Dr Hanson had the difficult task of cross examining three witnesses, who were, or had been, her line reports or above, and in explaining a complex situation, in which she succeeded admirably. Mr Pender was of great assistance to the Tribunal throughout, as well as to those he represented.

Facts

6. Dr Hanson managed a team of three chemists. They worked in a laboratory which had workspace for six. Each chemist requires a fume hood, and so the number of workspaces is clearly defined. The laboratory was under the control of a laboratory manager. He was not part of Dr Hanson's team, and nor did she report to him. He reported to the site manager. His role was the effective management of the laboratory. The laboratory was on the first floor. Dr Hanson is a hands on chemist and used it, but had an office on the ground floor. When she became pregnant she had concerns about whether the chemicals used might be hazardous for her pregnancy and so when she became pregnant it was agreed that she would not herself perform work in the laboratory, and she did not go there. She managed the work of her team from her office.

7. Dr Hanson's annual appraisals were consistently good. The appraisals are for the calendar year. They are broken down into the constituent parts of the role. The weighting of each part of the role is given in percentage terms. Each part is marked: AAA is *"Outstanding! Exceeded expectations/requirements by far"*. A is *"Met expectations/requirements to full satisfaction".* (AA is "Exceeded expectations/ requirements"). B is *"Mostly met expectations/ requirements"*. There is then an overall grade, similarly marked, and promotion prospects are assessed, so far as relevant they are, in ascending order *"Growing with the Job" ("GWJ"), "Step 1 potential"* and *"Step 2 potential".*

8. In 2014 Dr Hanson was marked overall as AAA by Dr Lozman, and assessed as Step 1 potential. On 22 May 2015 she was promoted to the role she held before she went on maternity leave. This was a from Global Grade 10 to Global Grade 11. She was team leader of the photovoltaic research team ("OPV"), of 3 chemists.

9. In 2015 it was Dr Weider who reported on Dr Hanson, because Dr Lozman had moved on. He assessed her as A throughout. He observed *"People Management excellent with a great start as a GG11…".* She was marked as *"GWJ".*

10. The 2016 review was conducted by Dr Blouin, and was completed on 11 October 2016, before maternity leave started on 14 October 2016. He became her line manager in summer 2016. That appraisal was marked *"Further amended in Dec 2016 following* [individual's name – hereafter "Chemist A"] *issues in Oct-Dec 2016".* He graded Dr Hanson A in three of the four parts of her job. The fourth was *"Safety, continuous improvement development"*. It was 15% of the role. One part of the descriptor is *"monitoring of chemistry labs' safety"*. At the time this was discussed Dr Blouin had intended to grade this as A. We accept Dr Hanson's evidence on this point, which is also supported by the reference to *"further amendment"* and the comment *"Due to maternity Lana was unable to witness some of the issue(s)…".* Thus the final appraisal document was downgraded for this aspect from an "A" to a "B". The overall grade, was by reason of this, also given as "B" instead of the "A" which had been intended when Dr Hanson left for her maternity leave. The promotion assessment was *"GWJ".*

11. The situation with Chemist A was as follows. He was known by all to be an untidy or messy chemist, and prone to do things that caused difficulty. Some at work had known him at university. He was the same there. There were no safety issues that arose, but things like leaving chemicals in the fume hood were an annoyance. Dr Hanson knew this was the case. She hoped he would improve. At no time did the laboratory manager express to her any safety concern. These were *"boo boos"* and poor performance rather than matters of safety, so far as Dr Hanson was concerned. The laboratory manager did speak to another manager about Chemist A and there were some discussions about this between him and Dr Hanson, but nothing of any level of seriousness nor any form of report or escalation. The lab manager is someone who does not like confrontation, and who subsequently has been very apologetic to Dr Hanson (as well as somewhat mortified personally) that he did not take any action at all about Chemist A. Dr Hanson was not in the laboratory so did not witness anything after ceasing to attend the laboratory, in the early part of the year (Dr Hanson became pregnant in January 2016.)

12. After Dr Hanson went on her maternity leave there was a major incident involving Chemist A, who dealt with a chemical inappropriately. This led to the evacuation of the entire building. Chemist A was suspended, and did not return to work, resigning in February 2018. Dr Blouin's revision of his 2016 appraisal for Dr Hanson was because his opinion was *"Critical situation with [Chemist A] in Q3/Q4 highlighted warning signal missed in Q1/Q2 related to his behaviour and attitude to safety"*. In short, Dr Hanson bore no responsibility for what actually happened when she was on maternity leave for the very reason that she was not there, but Dr Blouin's view was that it might not have happened at all if she hadn't, in his opinion *"missed warning signals"*.

13. When Dr Hanson found out about this, she was most unhappy. She acknowledged receipt of the appraisal on 23 February 2017, and there is in the report reference to *"ongoing discussion"* about this. It forms the opening point in her subsequent grievance.

14. The Tribunal agrees with Dr Hanson on this point. Her view is that here were no such safety warning signals. Dr Hanson was being judged with 20/20 hindsight. She was not in the laboratory after early 2016. The laboratory manager made no report to her. The laboratory manager was responsible for staff safety, not Dr Hanson. Any concerns that may have been voiced to her were of untidiness and no more. She had responded to a request from Human Resources asking whether Chemist A should pass his probation by saying not, because of concerns, but the then site manager Dr Lozman (succeeded by Dr Harding) overruled her, saying that this might demotivate him. If it did not concern the laboratory manager or the site manager, why did she bear responsibility when she was not there in the laboratory? She did not. The exact date of the major incident was not clear to us, but after the claimant went on maternity leave it was Dr Blouin who was the line manager of Chemist A and in the (short) period before this incident he took no action either. While plainly safety is of paramount importance, laboratory safety was a small part of the performance management objectives relating to staff supervision, and that facet of her job was only 15% weighting. It was unfair to downgrade her whole grading to B, and for these various reasons she was right to be upset by it. She felt she was being scapegoated, which was an entirely understandable reaction. It was what happened.

15. As a result of this she decided that she no longer wanted to have any line responsibility for others (as opposed to leading the science on a project). She had indicated before she went on maternity leave that she did not enjoy that part of her role, and the appraisal meant that she actively wanted that part of her role to be removed, and said so.

16. At this time, and while Dr Hanson was on maternity leave, (April 2017), Merck revisited its promotion and structure. No longer would there be only management promotions, but there would be parallel tracks for project management (leading a team's scientific output towards a preset objective) and as an expert, on an individual basis. The system of Global Grades ("GG") was replaced, with fewer grades. There was a method of *"mapping across"* from one system to another. Grades 10 and 11 mapped across to the new Level 2, and 12 and above to Level 3.

17. Before Dr Lozman moved away from his role and Dr Blouin took it over, Dr Lozman had looked at the team. He prepared an organogram, setting out what he thought it should look like in six months. That had Dr Hanson moving up to a GG12, with no change in role (53). That review was not implemented after Dr Lozman left his post and was replaced by Dr Harding.

18. While Dr Hanson was off on her maternity leave, Dr Blouin took over lime responsibility for the team. As he is in Darmstadt, for day to day matters Dr Hanson was replaced by Dr Pron, who previously had worked under Dr Hanson as part of her team. Dr Hanson was not told of this at the time. Drs Pron and Hanson are friends, and met up during the maternity leave of Dr Hanson. Dr Pron had herself recently returned from maternity leave: their

discussions were mainly about non work related matters, but Dr Pron did email Dr Hanson from work and about work.

19. Dr Hanson said, in March 2017, as a direct result of the 2016 appraisal, that she did not want to return to line management. She wished to be in the *"expert"* track. Dr Pron was then appointed to be line manager of the OPV team, including of Dr Hanson. This was announced internally in October 2017, but Dr Hanson was not told. Dr Blouin assumed that Dr Pron would tell her. While that may have been a reasonable assumption, it was incorrect. Dr Hanson had no objection when eventually Dr Pron asked if she had.

20. On 04 March 2017 Dr Hanson responded (87) to an email from Dr Blouin asking for a conversation to explain the rationale for the appraisal decision and to start looking to what she might do in 2018. She said that there was no point in a call about the appraisal as it was plain that nothing she might say would make any difference, and he might as well put his reasons in an email. She had not had more than 90 minutes sleep for two weeks and was mentally and physically exhausted. The last thing she needed was to be discussing what she would be doing in 2018: *"I'm just not in a position to be making decisions about that yet."* Dr Blouin did not contact her again until late November 2017.

21. On 18 September 2017 Dr Hanson put in a flexible working request, to work Monday – Wednesday, full days, at Chilworth, as the same rate of pay, pro rata. She was unspecific as to the role she would have. Merck agreed to this. She had made clear to Dr Brouin that she did not want to manage people (email 126 dated 26 September 2017 Dr Hanson to Dr Pron). Dr Pron asked if they could discuss what she would be doing on return: Dr Hanson replied that January was *"still a long way off"*.

22. On 26 September 2017 Dr Hanson emailed Dr Pron (127), and said *"All I told Nicholas [Blouin] was that I don't want to manage people any more, what I do when I come back is therefore pretty open, it depends what needs doing!"* and *"I'd rather wait … there's no real hurry…"*

23. On the same day in another email to Dr Pron (125) Dr Hanson asked about Dr Pron travelling, and said that *"This is another reason I wanted to step back, I'm just not up for travelling anymore…"*

24. On 28 September 2017 the flexible working request was approved (119), Monday to Wednesday at the same pay, pro rata.

25. On 20 October 2017 Dr Hanson replied to Dr Pron (about another matter) (138) and added *"As to work, I guess it depends a bit what you can do for me, and what is needed, whether I come back as an expert 2 and do the same as all the new guys, or whether you need to use my experience more and have me as an expert 3, I have no idea how the team is laid out now or how it will be in January, but I am interested to see what is possible.".*

26. In October 2017 Dr Pron's appointment as head of chemistry team in CTC (Dr Hanson's role previously) was announced (113), and it was also announced that *"Lana will return from maternity leave in Jan as part of this team"*. Dr Hanson was not told, Dr Blouin assuming that Dr Pron would tell Dr

Hanson.

27. On 28 November 2017 Dr Bluoin proposed a meeting on 06 or 07 December 2017 when he was to be in Chilworth to discuss options, but Dr Hanson said she could not do the dates. She proposed 11 December 2017. Dr Blouin could not manage that, and suggested a Skype call. In the end it was Dr Pron and Dr Hanson who met, and Dr Blouin did not participate by Skype. It was at this meeting that the *"smartie leader"* role was put forward for Dr Hanson.

28. Dr Pron reported to Dr Blouin about this, and on 11 December 2017 Dr Blouin reported by email (136) to Drs Morse and Weider (Dr Weider being his own line report) about the meeting. He said that Dr Hanson was pushing hard to be a Level 3, and would do no more than required of a Level 2 if put in the proposed post. It was not clear if she would go to a lab daily. She was expecting to be given a series of options from which to choose. He opined that Dr Hanson was expecting to return as Level 3 as her husband (Dr Dan Walker) and Dr Tan had been promoted, because of her (Dr Hanson's) length of service. He did not think this right, but it was clear that Dr Hanson was seeing even a senior Level 2 role as demotion. He said *"Lana current forceful approach is antagonising me deeply"*. He also said that the role envisaged for her fell somewhere between Expert Level 2 and Expert Level 3 and was *"neither black nor white but rather grey"*.

29. All staff on GG11 were *"mapped across"* to Level 2, and there were parallel gradings for management, function leading and experts. Dr Hanson became an Expert Level 2, as Dr Blouin and Simon Hill of human resources thought was right.

30. On 02 January 2018 (Dr Hanson's first day back) Simon Hill of Human Resources wrote to agree a 60% fte role paid pro rata. Her role was a leader of one of four teams dealing with photovoltaic chemicals, regarded as a possible mainstream product for Merck. (These were called *'smartie'* teams from a previous Powerpoint showing them as smartie shapes and in different colours, an imagery that stuck to the job title.) Dr Pron was in charge of the materials function for OPV: Dr Hanson's previous role.

31. On 17 January 2018 Dr Hanson wrote about chemicals that might be problematic for women of child bearing age. That was accommodated.

32. Dr Hanson became very unhappy at her position. She had much more experience in Merck than the other smartie leaders. Of 12 people at her grade as GG 11 10 were now Expert Level 3. She remained an Expert Level 2. On 14 March 2018 (213) she raised a grievance. It referred to meetings with Drs Pron and Blouin on 16 January 2018 and 21 February 2018, which had not resolved matters.

33. First it complained that due to the stress of being wrongly blamed for the errors of Chemist A, and the physical and emotional stress of being a new mother she had, in March 2017 asked not to have line management responsibilities on return. She then heard no more. In September or October 2017 she had heard from a colleague that it had been announced that Dr Pron was taking her role and that she would be losing her team leader

position. A few weeks later she heard that she was to be removed from her office and relocated, but that neither Drs Pron nor Bluoin had informed her of this.

34. Secondly that she was told on her return that she would be a smartie team leader, and that this amounted to half her old role and that only when or if the team expanded. Dr Blouin had told her that he could not give her back her old role, as Dr Pron had it, and that while he could swap the smartie team leader role for the chemistry function leader role he did not want to do so as he felt that she was better suited to the smartie team leader role. In his oral evidence Dr Bluoin agreed that these statements were correct.

35. Thirdly Dr Hanson was unhappy that she left for maternity leave as GG11, and returned as an Expert Level 2 alongside new starters in the team. All her peers had been promoted to Expert Level 3 or Management Level 3 roles, but she had not been given this opportunity when she returned from maternity leave.

36. Fourthly Dr Hanson complained that in March 2017 Dr Blouin had downgraded her 2016 assessment from A to B by reason of things which were not her responsibility and which had occurred after she had left for her maternity leave. As a result, she said, she now had a lower grade, reduced bonus and reduced pay rise.

37. On 01 May 2018 Dr Harding gave an outcome, by letter. As to the first he considered that there were instances of poor communication during maternity leave. He would be following up with Dr Blouin and others and intended to implement measures to prevent such issues in future. He did not (then or now) give any idea what such measures might be.

38. As to the second, Dr Harding observed that the OPV team had doubled in size while Dr Hanson had been off on maternity leave. Some changes had occurred which would have happened whether Dr Hanson was on maternity leave or not. Dr Blouin had taken under his personal control the patents committee work which Dr Hanson had previously undertaken. There was now a matrix structure. In her case, with a small team she would have needed to have direct reports, and the removal of them was her wish.

39. As to the third, grading changes, Dr Harding stated that Dr Hanson had been mapped across accurately. Dr Hanson had not been pushing for promotion. She had not been within the pool of promotion candidates. She was within the group of people who had development potential within current role level, and so had not lost out.

40. As to the fourth, the downgraded 2016 appraisal grade, this was not dealt with. Dr Harding stated that he wanted to separate this from the maternity related matters so as to be able to deal with those more swiftly. That would continue as a separate grievance. Whether he did this or not, and if he did with what result, we were not told.

41. This claim started on 27 April 2018, before the grievance was determined. Dr Harding was somewhat nonplussed by this, apparently unaware of the strict time limits in Employment Tribunal claims.

42. Ultimately, and after these events, Merck made a strategy decision to reverse the decision to make OVP a key expansion area, and to concentrate on OLED technology with an existing customer base, and where it had an existing position to defend and top to enhance. That meant that the smartie teams were wound down. Also, the Korean and US research bases were closed.

Conclusions as to facts found

43. Dr Hanson has good reason to feel aggrieved about the outcome of her 2016 appraisal, for reasons already given.

44. Dr Hanson does have good reason to say that she was not consulted properly about changes during her maternity leave, notably that Dr Pron was her successor and the announcement to colleagues as to what she was to be doing, in October 2017, before she was told. There were some emails to and from Dr Pron and Dr Hanson could have asked her as her friend and colleague in the team). Those emails are about the future, and Dr Pron could have been used as a channel of communication by Dr Hanson if she had concerns. Also Dr Hanson's husband is also a chemist with Merck, and it was reasonable for those in Merck to think that Dr Hanson had at least an idea of what was going on. That does not remove the necessity for an employer to communicate with an employee on maternity leave, and it would be totally inappropriate to rely on one spouse keeping another informed unless in a proper management relationship.

45. Dr Hanson did not want line management responsibility. That was so before the 2016 appraisal was altered. To return to a job without it was what Dr Hanson wanted. Nor was Dr Hanson unhappy about the fact of Dr Pron being her line manager. When off on maternity leave, Dr Hanson was relaxed about what she did on her return and whether it was as Expert Level 2 or Expert Level 3. What Dr Hanson was not happy about was her perception that the smartie leader roles were of lower status, and that 10 of 12 people had been promoted to Level 3 and she had not (and the only other was Chemist A).

46. We have been taken through all 10 by Dr Harding. There were a variety of different reasons for the promotions. Dr Tan was successful in an open competition. Dr Adlem was said to have years of experience, was on the patent committee, was COSSH spillage team and was lab manager, a role enhanced by reason of the issue leading to Chemist A's departure. His next level was by reason of patent strategy. He had originally been mapped to level 2. Dr Mitchell was promoted to a higher grade as a manager. Dr Weider led research into photovoltaic chemicals. Another, Dr Morley assumed greater responsibility for new projects. Dr Baine was the expert for a key customer. Dr Morse was not disputed to have taken an enhanced role. The promotions were over a period, Dr Baine at the end of 2016, Dr Tan early 2018. There is no evidence to support the contention that there was a general promotion excluding the claimant. While Dr Hanson was on maternity leave the world turned and people moved on for various individual reasons.

47. We did find surprising the observation by Dr Harding that Dr Hanson had not previously been pushing for promotion as any reason not to promote her now. People's life goals change, and it is not just the pushiest who ought to be promoted. Dr Bloiun said that he was *"suspicious"* of her motives for seeking promotion as he thought it might have been to minimise lab time to avoid contact with chemicals that might be prejudicial to fertility. First it is unclear why this might be improper, if so, but second as Dr Hanson had elected for the expert route that was inconsistent with such a motivation. However neither of these is related to maternity or pregnancy detriment.

48. Merck correctly point out that Dr Hanson had early on said what she did not want, but not what she did, and that she was relaxed about what she did and at what level until December 2017, and she was due to return at the start of 2018: this left very little time. In September 2017 Dr Hanson was saying that there was still plenty of time until January, and it was Merck (Drs Pron and Blouin) who were pressing for input from Dr Hanson. There was no meeting until mid 11 December 2017 which leaves little time for a return on 02 January 2018. Therefore later on Merck cannot be criticised for not being more direct about communication, although (as he accepted in the grievance and in his oral evidence to us) Dr Blouin was unwise to take one rather distressed email (87) of 04 March 2017 as meaning an unwillingness to be contacted throughout maternity leave.

49. A "B" grading does not necessarily impede promotion: Dr Harding told us that he has just been promoted to site manager of Chilworth after a B grade in his last appraisal.

The matters said by Dr Hanson to amount to unlawful discrimination

50. These are four:

50.1. Transferring function leader responsibilities to another employee;

50.2. Failing to consult and inform about transfer of function leader responsibilities;

50.3. Giving her a less responsible role on return from maternity leave;

50.4. Not promoting her to Grade (Level) 3.

Applicable law

51. The statutory provision is Section 18 of the **Equality Act 2010** which refers to pregnancy and maternity discrimination:

> **"18 Pregnancy and maternity discrimination: work cases**
>
> **(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
>
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —**
>
> **(a) because of the pregnancy, or**

> **(b) because of illness suffered by her as a result of it.**
>
> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**
>
> **(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).**
>
> **(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—**
>
> > **(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;**
> >
> > **(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.**
>
> **(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—**
>
> > **(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or (b) it is for a reason mentioned in subsection (3) or (4)."**

Burden of Proof

52. Section 136 of the Equality Act 2010 deals with the burden of proof:

> ***"(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."***

53. Indigo Design Build & Management Ltd & Anor v Martinez (Sex Discrimination : Direct) [2014] UKEAT 0020_14_1007 (10 July 2014) at paragraph sets out that the test is as set out in **Onu v Akwiku** [2014] ICR 571 and **Johal v Commissioner for Equality and Human Rights** [2010] UKEAT/0541/09 (HHJ Peter Clark). The part of *Onu* quoted with approval in *Indigo* is:

> **"42. What constitutes the 'grounds' for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in *Nagarajan* called his 'mental processes' (p. 884 D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had 'a significant influence'. Nor need it be conscious: a subconscious motivation, if proved, will suffice. Both the latter points are established in the speech of Lord Nicholls in *Nagarajan*: see pp. 885-6.**
>
> **43. The distinction between the two kinds of case is most authoritatively made in the judgment of Lady Hale in *R (E) v Governors of the JFS* [2010] 2 AC 728, at paras. 61-64 (pp. 759-760), though it is to be found in the earlier case-law: I would venture to refer**

> **to my own judgment, sitting in the EAT, in *Amnesty International v Ahmed* [2009] ICR 1450, at paras. 32-35 (pp. 1469-70).**
>
> **44. The present case is plainly not of the 'criterion' type. Mr Robottom in his skeleton argument contended otherwise, but the contention is, with all respect to him, unsustainable. The various acts of which Ms Onu complains – underpayment, being required to work excessive hours etc. – are not inherently based on her immigration status. If her immigration status was (part of) the grounds for those acts it is only because, in the mental processes which led to their doing them, Mr and Mrs Akwiwu were significantly influenced by it."**

54. Paragraphs 61-64 of *JFS* cited above:

> *61. Despite this difference of opinion, the decisions in Birmingham and James have been applied time and time again. They were affirmed by the House of Lords in the victimisation case of Nagarajan v London Regional Transport [2000] 1 AC 501. As Lord Nicholls of Birkenhead said, at p 511: "Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign".*
>
> *62. However, Lord Nicholls had earlier pointed out that there are in truth two different sorts of "why" question, one relevant and one irrelevant. The irrelevant one is the discriminator's motive, intention, reason or purpose. The relevant one is what caused him to act as he did. In some cases, this is absolutely plain. The facts are not in dispute. The girls in Birmingham were denied grammar school places, when the boys with the same marks got them, simply because they were girls. The husband in James was charged admission to the pool, when his wife was not, simply because he was a man. This is what Lord Goff was referring to as "the application of a gender-based criterion".*
>
> *63. But, as Lord Goff pointed out, there are also cases where a choice has been made because of the applicant's sex or race. As Lord Nicholls put it in Nagarajan, "in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator" (pp 510-511). In James, Lord Bridge was "not to be taken as saying that the discriminator's state of mind is irrelevant when answering the crucial, anterior question: why did the complainant receive less favourable treatment?"*
>
> *64. The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of "anterior" enquiry, into what caused the treatment in question, is also plain. It is that which is also explained by Lord Phillips, Lord Kerr and Lord Clarke. There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else – usually, in job applications, that elusive quality known as "merit". But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing. As Lord Nicholls went on to say in Nagarajan, "An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did . . . Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(a) " (p 512)."*

55. Guidance was given in Madarassy v Nomura International Plc [2007] EWCA Civ 33, at paragraphs 6-14. That approved what was stated in IGEN

Ltd & Ors v Wong [2005] EWCA Civ 142, at paragraphs 6-37. *Igen v Wong* set out a helpful discussion:

''Discussion.

71. *We would add this. There still seems to be much confusion created by the decision in Igen v Wong. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the Employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race.*

72. *The Courts have long recognised, at least since the decision of Lord Justice Neill in the King case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. Igen v Wong confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in Igen.*

73. *No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in Network Rail Infrastructure v Griffiths-Henry (at para.17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.*

74. *Another example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator - whether there is a prima facie case - is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 at paras 7-12, it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage.*

75. *The focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race".*

76. *Whilst, as we have emphasised, it will often be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the Employer. But where the Tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.*

77. *Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the Tribunal focuses only on the second stage. Rather the risk is to an employer who may be found*

not to have discharged a burden which the Tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the Tribunal to reach a finding of discrimination even if the prima facie case had not been established. The Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance."

The four matters said to be discrimination:

56. The Tribunal found that the facts proved called for an explanation from Merck and assessed those explanations as below:

(i) Transferring function leader responsibilities to another employee

57. Dr Hanson did not want to continue in her role without alteration. She did not want line management responsibility, by reason of being unfairly criticised for Chemist A. We have agreed with Dr Hanson that she was unfairly criticised for Chemist A's actions. This was 20/20 hindsight, with no reason for her to think his messiness was other than an inconvenience for others, and where she had no responsibility for the lab in question, which she had not entered for some time by reason of her pregnancy.

58. That criticism was what caused her to want to leave line management and opt for the expert track. Her role was taken by Dr Pron, unaltered. Dr Hanson did not object to Dr Pron becoming her line manager. Therefore this cannot be detriment by reason of maternity or pregnancy.

59. She was allocated the smartie leader role, but it is not clear what she could have done instead, and the role was one suited to her considerable abilities.

(ii) Failing to consult and inform about transfer of function leader responsibilities

60. There was some management inadequacy about the level of consultation. Dr Bloiun was candid in an email that he should not have taken Dr Hanson's email of 04 March 2017 (87) as a wish not to be contacted throughout maternity leave. The exchanges about the downgrade from A to B (for such it was) had been somewhat bruising for both of them. He felt antagonistic towards Dr Hanson, as is revealed in his email of 11 December 2017 (136). He left it to Dr Pron: but also Dr Hanson gave no reason why she could not manage either 05 or 06 December 2017 to meet Dr Blouin in person. One is left with the conclusion that neither was particularly keen on meeting the other. This was not pregnancy or maternity related, but to do with the downgrading to B in the 2016 appraisal.

61. Dr Hanson did not want the role that she had before going on maternity leave. Dr Pron was an acceptable line report for her.

62. Dr Hanson did not want discussion about her role until late on in her maternity leave. It was not Merck's fault there was no discussion until mid December 2017. The flexible working request was processed swiftly, and fully

granted. There was no detriment.

(iii) Giving her a less responsible role on return from maternity leave

63. Dr Hanson felt that she should have been able to retain her scientific role in her old job, and shed the line management, as she had returned 3 days a week, and before she left for maternity leave her scientific work was about 60%. There had been a shift to a matrix management, so that a manager could have managed, and she could have continued to lead the science. However it was Dr Bloiun in Darmstadt who was responsible for the project, and it was Dr Pron who undertook Dr Hanson's role.

64. In practice, despite the new *"matrix"* structure the role undertaken by Dr Hanson did not change: and Dr Hanson did not want it. Dr Pron also undertook the hr side of the role – and so the entirety of Dr Hanson's previous post. That was because Dr Bloiun was in Darmstadt. There was not a manager to dovetail with Dr Pron. It was not practicable to split the role to 3 days chemistry and 2 days line management. Dr Hanson did not want the line management part of the role. Leaving the whole role with Dr Pron was perhaps inevitable.

65. The evidence of the witnesses for Merck was that the *"smartie"* roles were not considered to be lesser roles. The Tribunal is cautious about accepting self serving evidence it was plainly the view of Dr Hanson that they were. However she agreed that they were properly level 2 roles, but says that she should, in her view, have been a level 3.

66. Therein lies the difficulty for Dr Hanson, for she was at ease with a Level 2 role until she realised that every one else (for one can discount Chemist A) had been promoted to Level 3. She also accepted that the other smartie leaders were, while new to Merck, competent and experienced chemists.

67. The role Dr Pron had assumed was the whole of Dr Hanson's previous role, and Dr Hanson did not want that role, in that form. The *"smartie leader"* was an important role, and the more so since there had been 6 such roles, reduced to 4 by combining 2 of the roles with 2 others: Dr Hanson's *"smartie"* was one of the enlarged ones. The roles eventually did have lesser importance, but that was because Merck decided to reverse its previous strategy of seeking to make PV a major new growth area for the company, and to focus on OLED technology instead. Had the decision been otherwise the roles may confidently have been expected to have been very important indeed, to devise ways of getting an important new product to market: the essence of *"cutting edge"* work. That the work subsequently became less important is unrelated to the personal characteristics of anyone involved, but by reason of a reappraisal of the market.

(iv) Not promoting her to Grade (Level) 3

68. During her maternity leave Dr Hanson accepted that she would be managed by Dr Pron, who had previously been part of her team: this was a line management reversal. It is not a good starting point for an aspiration for promotion.

69. It is significant that until Dr Hanson saw that everyone else had been promoted she was not concerned at whether she would return as a Level 2 or Level 3 expert. In her email of 20 October 2017 (138) Dr Hanson was relaxed about whether she returned as a Level 2 or Level 3: it all depended on what Merck needed, and *"I am interested to see what is possible"*. It is the comparison with others that she found objectionable. That does not mean that it cannot be discrimination, but if so that is not for the absolute reason that she is not a Level 3, but depends on others being treated better than was she, and the reason being pregnancy or maternity related.

70. Dr Hanson had reason to feel that she ought to be a Level 3 for Dr Lozman had earmarked her for Grade 12 in her existing job before he moved to a new one (53), and Grade 12 mapped across to Level 3: but Dr Pron does that job now, and as a Level 2.

71. It is also significant that at the management review of all staff carried out in November or December 2016. Dr Hanson was at the bottom, with only Chemist A below her. Dr Weider was candid in an email of 27 April 2018 (195) that he could not now recall why this was: given the other matters in her appraisal the Tribunal is certain that the Chemist A matter infected the view of others about Dr Hanson: it was in Q4 that the major incident occurred. It certainly damaged her chances of promotion, for even with Dr Harding's experience a grade B must be a handicap to overcome. It was not connected with her pregnancy or maternity leave.

72. Had Dr Hanson returned to her old role, 3 days a week, science only, there is nothing extra that might warrant promotion. It is counter intuitive to promote someone who has shed responsibility, not taken on more. The switch to the expert track does not assist Dr Hanson, as if she had resumed her old role but without line management there would have been no extra science to merit promotion.

73. The others (and it is all the others – 10 of 12, the other 2 being Dr Hanson and Chemist A) were promoted. However they all started at Level 2 and either moved jobs, were promoted in open competition or took on other responsibility. There was nothing generic about the promotions, which took place over a substantial period of time.

74. There was also an element of Chilworth chemists being regarded as being at lower grades than Darmstadt chemists, and the change to the new grading gave opportunity for them to achieve Level 3 status in new posts. This is not pregnancy or maternity related. Dr Hanson took a new post, but she does not say that this was a Level 3 post: indeed that it was not a Level 3 post to which she was allocated is also something she claims was less favourable treatment.

75. Dr Hanson complains in her grievance (184) that she was not given the opportunity for promotion on return from maternity leave. She was at the same grade level as the new starters in her team. Dr Hanson was clear (correcting a misapprehension of the Tribunal) that she did not say that her fellow smartie leaders were less experienced chemists, but rather that they did not have her 10 years in Merck. Dr Hanson was not placed in a role that was below where her abilities warranted, as others with similar skills were her

peers. Her complaint is that she was not afforded the opportunity to be a Level 3.

76. Here she runs into the problem that she shed management and suggests that she should have returned to her old job 3 days a week science only. That would not be a reason to promote her. It is not (the Tribunal is satisfied) that the tide came in and all boats rose, save hers. There was a reason each other person went from Level 2 to Level 3. In a sense Dr Hanson was denied this opportunity because she was not there to change her own role and seize the opportunity afforded by the new expert track, but that is not Merck subjecting her to less favourable treatment, but the world turning while Dr Hanson was a year away from the workplace. She could not expect (in her particular circumstances) to be promoted while away from work.

Overall conclusions

77. Dr Pron summed the matter up admirably in an email to Dr Blouin of 12 February 2018 that doubtless she never expected to be read in a Tribunal (161):

> *" Just had a chat with Lana. It seems that the detailed description of role and responsibilities sent by SW on Friday got her thinking. Basically she thinks that she was treated unfair, because:*
>
> 1. *When she left she was functional and HR lead*
> 2. *You separated these functions and applications*
> 3. *She wanted to be functional lead (without HR bit) and you didn't give it back to her*
>
> *Bottom line, she is pissed [off]."*

78. In his oral evidence Dr Blouin accepted as correct that which Dr Hanson put in her grievance (183-184): that he could not give back her old role (or a reduced version of it) as he had given it to Dr Pron, that he could swap her *"smartie"* role with the chemistry function leader role, but he did not want to as he thought her more suited to a project lead role. Her previous appraisals do show Dr Hanson as very good indeed at project management, and this was a rational management choice for someone returning after maternity leave, who wanted to leave the management track for the expert track, and whose expressed view had been relaxed – at Level 2 or Level 3 and doing whatever needed doing.

79. The 2 factors which soured this somewhat were the promotion of every one else, and the injustice of the B grading. Neither of these are detriment to Dr Hanson arising by reason of pregnancy or maternity and so the claim must fail.

Employment Judge Housego

Date: 15 April 2019