Appeal No. UKEAT/0164/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 April 2019
Judgment handed down on 28 June 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

COMMERZBANK AG — APPELLANT

MS J RAJPUT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS LINDEN QC (of Counsel) Instructed by: GQ Employment Law 21 Ironmonger Lane EC2V 8EY
For the Respondent	MS KARON MONAGHAN QC & MS ELAINE BANTON (of Counsel) Instructed by: Bates Wells & Braithwaite LLP 10 Queen Street Place London EC4R 1BR

SUMMARY

SEX DISCRIMINATION

MATERNITY RIGHTS AND PARENTAL LEAVE

The Claimant brought complaints against the Respondent bank including direct sex discrimination, harassment (s.26 **EqA**) and maternity leave discrimination. The ET upheld the claims on the basis which included the conclusion that the decision-makers had acted on the basis of certain stereotypical assumptions about women and about women taking maternity leave.

The Respondent appealed the decisions on sex discrimination/harassment on the basis that it had been no part of the Claimant's case that the decisions were based on stereotypical assumptions; nor had the Tribunal suggested to the Respondent or its witnesses that it had such matters in mind in its consideration of the inferences to be drawn about the reasons for the conduct of which complaint was made. The reference to stereotypical assumptions had appeared for the first time in the Judgment; and accordingly, the Respondent and its witnesses had had no opportunity to challenge the existence of the alleged stereotypical assumptions or their application to the conduct of the decision-makers; and that this constituted unfairness.

The Respondent challenged one of the two findings of maternity leave discrimination, on the basis that the Tribunal had wrongly substituted a 'but for' test of causation for the subjective test required by s.18(4) **EqA**.

The EAT dismissed the appeal on maternity leave discrimination, holding that on a fair reading of the Judgment the Tribunal had applied the correct test of causation.

The EAT upheld the appeal on sex discrimination/harassment, holding that the Respondent and its witnesses should have been given prior notice and an opportunity to respond to the suggestion that it had acted on the basis of stereotypical assumptions and the failure to do so was unfair: **Hammington v Berker Sport Craft Ltd** [1980] ICR 248 and like authorities applied. The claims were remitted to be heard before a freshly constituted Tribunal.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Respondent against the decision of the London Central Employment Tribunal (EJ Tayler and members) sent to the parties on 22 March 2018, whereby certain of the Claimant's complaints of sex discrimination, harassment and maternity discrimination were upheld. The appeal in particular raises the question of the extent to which an Employment Tribunal is entitled to proceed in such cases on the basis of its experience that certain specifically identified 'stereotypical assumptions' are often held about women; and, if so, whether and to what extent fairness requires that a respondent and its material witnesses should be put on notice that the tribunal is proceeding on this basis.

Narrative

2. The essential narrative, sufficient for this appeal, may be taken from the Judgment. The Respondent is a German Investment Bank with a branch in London. In November 2012 the Claimant commenced employment with the Respondent as a Senior Compliance Advisor with the corporate title of Vice President (VP). She was designated to work in the Markets Compliance Department, providing regulatory advice to the Equity Markets and Commodities (EMC) business. Her job description included provision that she would deputise for the Head of Market Compliance (HOM), at that time Mr Nawshad Jooma, when appropriate. In May 2014 Mr Jooma designated the Claimant as Deputy to the HOM.

3. In November 2013 Ms Janine von Pickartz joined the Respondent as VP in Corporate Finance. In September 2014 Mr Kevin Whittern was appointed to the Department as Fixed Income and Currencies (FIC) VP.

4. In October 2014 Mr Jooma completed talent ratings for the Claimant and Ms von Pickartz. His scores indicated that they would be in readiness for the target position of HOM in 2 years and 1 year respectively.

5. In December 2014, Mr Stephen Niermann was appointed Head of Regional Compliance UK, based in London. In April 2015 Ms Julia Burch joined the Respondent as EMC Assistant Vice President.

6. In June 2015 the HOM role was advertised. At that time the Respondent's London recruitment policy encouraged internal progression. The Claimant, Ms von Pickartz and Mr Whittern applied for the role. All three were interviewed by Mr Niermann in July 2015. No records were kept of the interviews.

7. There had evidently been tensions in the Markets Compliance team which had involved Mr Jooma's management style and personality. In her witness statement Ms von Pickartz had described him as an 'aggressive bully' and the atmosphere in the team as 'tense and toxic'. In his witness statement Mr Niermann said that the criteria which he had applied for this appointment included that *'the candidate was sufficiently removed from the current politics and tensions within the Team to enable them to effectively run the department and get it working together again… I seriously doubted whether any of the VPs could carry out the… role - in my opinion, the environment in the Team was toxic and appointing someone from within would have just made it even worse.'*

8. Following Mr Jooma's resignation on 10 July 2015, the Claimant reported directly to Mr Niermann pending the appointment of a new HOM. Mr Niermann appointed Mr Whittern as 'point person', in preference to the Claimant or Ms von Pickartz. The reasons given by Mr

Niermann in his witness statement for this decision included that *'I saw Kevin as the most removed from the internal politics within the Team. I knew Jagruti and Janine were both very divisive personalities and Kevin seemed the most innocuous.'*

9. In cross-examination on this reference to divisiveness, Mr Niermann stated that *'after the departure of Mr Jooma they were coming into my office to put forward their positions, they were both intrusive… They were trying to forward their own interests giving the impression that things needed to be done immediately.'*

10. The Tribunal found that Mr Niermann made disingenuous and inconsistent statements about the respective status of Mr Whittern and the Claimant. It concluded that in reality Mr Whittern was treated as the Acting Head of the Department, thus in a role more senior than the Deputy role which Mr Jooma had given the Claimant.

11. In October 2015 the three candidates for HOM had second interviews, with the Respondent's Mr Dereck Rock, Branch Manager London. In the same month a potential external candidate, Mr Jon Dyos, had an informal meeting with Mr Niermann about the role. He and other external candidates were subsequently interviewed by Mr Niermann and other officers of the Respondent, in a more extensive process. The Tribunal concluded that this illustrated that the internal applicants were not treated as serious candidates for the role.

12. One of the interviewers, Mr Stephen Walsh (UK Head of Central Compliance), had interviewed two external candidates on 6 November 2015 and reported that he preferred Mr Dyos. As to the internal candidates, he considered the Claimant to be the best and to have the skills to undertake the role. He would have liked to see her appointed. By contrast, he considered Ms von Pickartz 'divisive'. The Tribunal said that Mr Walsh could give no rational

explanation of why he described her in that way, *'... suggesting, unconvincingly, that her advice could divide opinion.'*

13. On 13 November 2015 the Claimant announced that she was pregnant.

14. On 15 December 2015 Mr Dyos was offered the HOM role. This decision was made by Mr Niermann. Mr Dyos accepted.

15. The Claimant's waters broke at work on 4 March 2016. She attended hospital and then returned to work for a short time to try and finish off some work before maternity leave began. On 7 March her baby was born. In early March Mr Dyos met with Ms Burch to discuss how to deal with the Claimant's maternity absence. Ms Burch complained about the Claimant returning to work after attending hospital once her waters had broken. In his evidence Mr Dyos said that this was an example of the Claimant being *'controlling'*.

16. The Tribunal concluded that once the Claimant left on maternity leave her role was in reality taken over by Ms Burch. On 14 March 2016 the Claimant asked to join a whiteboard meeting by remote access. She wanted to update the team on the birth of her baby and to clarify any issues with the handover. Before the meeting she found that she could not access the Respondent's computer system. The Tribunal accepted Ms von Pickartz's evidence that, when told that the Claimant was standing by to be dialled in, Mr Whittern and Ms Burch insisted that the meeting was over and there was no need for her to be put through.

17. On this issue of working during maternity leave, Mr Niermann said in his witness statement that he appreciated the Claimant for all her subject matter expertise and judgment *'...*

but I put this down to Jagruti's unhealthy obsession with work which I had come to notice during the time I was covering the Team.'

18. On 4 April 2016 Mr Dyos began work as HOM. He continued with the arrangement whereby Mr Whittern was treated as point person. The Tribunal accepted that he continued to be treated as the senior member of the team. Ms Burch continued to cover the Claimant's role, with assistance from Ms Sheralee Bailey who had been recommended by the Claimant as possible maternity cover and started work on 11 April 2016. On 12 April 2016, Mr Niermann sent an email about a discussion with Mr Dyos concerning a flat structure for the Markets Compliance team. Mr Dyos believed that its effect would be that the Claimant ceased managing Ms Burch. The Tribunal concluded that this was effectively what occurred on the Claimant's return from maternity leave.

19. While the Claimant was on maternity leave, issues arose about the disconnection of her internet access and her wish to attend the Team's Quarterly Review Meeting (QRM) in May 2016. As to the latter, Mr Dyos strongly discouraged the Claimant from doing so, insisting that Ms Burch was attending with him and that she was not required. The Tribunal accepted that this was active discouragement and rejected his solicitous explanation that *'being a father myself, I know what the early days of having a newborn baby involves*'.

20. On 2 June 2016 the Claimant met with Mr Niermann to discuss her return to work. She sought feedback on her application for the HOM role. He stated that he wanted someone who would *'hit the ground running'*. He did not mention that the role required more management experience than she had, or that Mr Dyos was selected for that reason.

21. On 19 August 2016, Ms Bailey left the Respondent's employment; and Ms Burch thereupon undertook all the Claimant's duties until her return. On the same day the Claimant met Mr Dyos and the Team. She expected a formal handover and update of ongoing work, but was told by Mr Dyos that all matters had been overseen by Ms Burch and that none was required. The Tribunal concluded that the reality was that Ms Burch, with some support from Ms Bailey, had performed the Claimant's role during her absence and was not willing to return to a supporting role.

22. On 7 September 2016 the Claimant returned to work. Later that month, after informal discussion between Mr Niermann, Mr Dyos and another, new entries were made on the talent development and succession planning chart. Against the target position of HOM, the scores now showed the readiness of the Claimant, Ms von Pickartz and Mr Whittern as respectively 2-3 years, 2-3 years and 1-2 years.

23. The Tribunal observed that although (i) Mr Dyos had accepted in cross-examination that, in considering readiness for promotion, potential was perhaps more important than performance and that (ii) Mr Whittern was shown as having less potential than the Claimant and Miss von Pickartz, the scoring showed him as being closer to readiness for promotion. This demonstrated the real advantages he had gained from having been made point person/acting head.

24. In his witness statement Mr Dyos had explained Mr Whittern's closer 'readiness' on the basis that *'Kevin's personality (being easy to get along with and being a good communicator) made him more ready than either Jagruti or Janine*'. The Tribunal observed that this implied that the Claimant and Ms von Pickartz were not easy to get along with, and poor communicators, for which there was no supporting evidence.

25. At a meeting on 21 November 2016 between the Claimant and Mr Dyos, he said that he had expected some difficulties on her return from maternity leave because Ms Burch had been 'running it on her own' during her absence. On 7 February 2017 Mr Dyos told the Claimant that he did not know that she was formally designated as deputy; and that on his appointment he had been told by Mr Niermann that Mr Whittern was the Deputy Head. On 30 March 2017 the Claimant lodged a first grievance.

26. In the meantime, on 1 February 2017 a new organisation structure was produced that included a new role of Head of Eastern and Western Europe Compliance. The Claimant was told that she was entitled to apply and expressed interest in the role. On 28 July 2017 it was advertised for 7 days, rather than the usual 21 days minimum period under the London Recruitment policy. The Claimant did not see the advertisements because she had not noticed that her email alert was switched off; and in consequence did not apply. On 20 September 2017 Mr Dennis Rogalla was appointed to the role.

27. On 24 October 2017 the Claimant lodged a grievance about this appointment. Following a grievance hearing meeting, this was rejected on 15 December 2017.

The Judgment

28. The Tribunal set out the relevant law over 28 detailed paragraphs. The Respondent makes no criticism of this.

29. The next section of the Judgment was headed 'Analysis'. The Tribunal noted that the key complaints related to the appointment of Mr Whittern as point person/Acting Deputy Head of Markets Compliance; the appointment process for the new HOM; the treatment of the

Claimant during her maternity leave; the recruitment process for the Eastern and Western Europe Compliance role; and the manner in which her grievances were dealt with.

30. The Tribunal observed that the determination of discrimination claims rests primarily on the drawing of inferences; and that in certain cases s.136 **Equality Act 2010** is a tool for that purpose. However, it could be conceptually difficult to separate treatment from which an inference might be drawn from the explanation for that treatment; and that *'A holistic approach to drawing inferences is sometimes more effective, considering the totality of the evidence to decide the reason for treatment.'* [136].

31. The Tribunal then noted the Respondent's acceptance that, as in much of the banking sector, there was a significant under-representation of women in more senior roles. In the Respondent's case this was so at level L3, the level of the HOM and above. In the London office there had been no promotion of a woman to a L3 level in Compliance since 2012. It noted the evidence of Dr Jessica James (Managing Director, Senior Quantitative Research) that, if women are only disadvantaged by a small percentage at each step, there is a compounded disadvantage as they climb. It observed that a relatively small hand-up to an employee may have substantial and long-lasting effects; and that, where such advantages and promotions occur in an opaque environment, there is much more risk of discrimination occurring. Noting the absence of any written records of the decision to make Mr Whittern point person/Acting Head, or of the interviews of the internal candidates who applied to be HOM, the Tribunal stated that this was just the type of opacity that can allow discrimination.

Stereotypical assumptions

32. The Tribunal then turned to the question of stereotypical assumptions which are at the heart of this appeal. Its identification of these assumptions needs to be set out in full. Thus:

"174. Discrimination may result from the stereotypical assumptions that disadvantage women. Traits that are considered as positives in men may be seen as negative when they are exhibited by women. Men are often praised for their hard work and determination, whereas in this case it is notable that Mr Niermann referred to the Claimant's "unhealthy obsession with work".

175. Men are often praised for ambition and wishing to progress whereas Mr Niermann stated when trying to explain what he meant by the word "divisive", when applied to the Claimant and Ms von Pickartz, said that when they discovered that Mr Jooma was leaving they came to his office and tried to put their positions forward which he considered was "intrusive". He criticised them for trying to "further their own interests". When put to them that an alternative word that might better describe what he was referring to was "forceful" he accepted that that might well be the case. Men are often lauded for being forceful personalities whereas Mr Niermann saw it as a negative when demonstrated by these two women. We appreciate that English is not Mr Niermann's first language so were careful to ensure he had adequate time to seek to explain precisely what he meant.

176. Men are often praised for their commitment to work whereas it is notable that a number of the Respondent's witnesses have spoken of the Claimant in a pejorative manner for returning to work after her waters broke and she had attended hospital. It was clear that her baby was likely to come earlier than expected and she attempted to finish off some work before she left. While it is understandable and reasonable for her colleagues to be concerned for the health of a pregnant woman and her baby, the Respondent has not explained why they spoke of the Claimant in such pejorative terms saying she "had to be forced out of the office". Mr Dyos referred to this being an example of the Claimant being "controlling". Some of the Respondent's witnesses spoke of their experience as fathers as if it would allow them to judge the situation better than the Claimant could herself.

177. There can also be a tendency, particularly where advantages are awarded without transparency, for people who select to prefer those who look like themselves. It is telling that Mr [Dyos] suggested that the explanation why Mr Whittern was recorded in 2015 as the person closest to promotion was because of his "personality", that he was "easy to get along with" and "a good communicator". There was nothing to suggest that the Claimant and Ms von Pickartz were poor communicators and to the extent that there was tension in the office that resulted from Mr Whittern having been made point person/acting head without transparency, and the continued pretence that this was of no real significance.

178. Another aspect of a tendency to prefer those who are like oneself can be to prefer their explanation for problems.

179. There can also be a stereotype that women are too emotionally involved in office relations or politics. This stereotype was demonstrated by Mr Niermann describing the Claimant and Ms von Pickartz as "divisive". He seemed almost unable to explain why he used the term. The only thing he could come up with was that they wished to put themselves forward as possible replacements for Mr Jooma. The word divisive was repeatedly used in this case, but only about women. Mr Walsh was unable to give a rational explanation why he referred to Ms von Pickartz as divisive, suggesting unconvincingly that she divided opinion. There was an assumption that the "toxic" relations in the office must be the fault of the "divisive" women.'

33. The Tribunal then referred to the difficulties which had occurred during the period when Mr Jooma was HOM. Although conscious that it had not heard evidence from Mr Jooma, the evidence from the Claimant and Ms von Pickartz was that these problems resulted from his management style. Despite that evidence, Mr Niermann had quickly formed a negative view of them. It was hard to understand his complaint in his witness statement that they had made '*tendentious'* comments that they had been *'micromanaged'* by Mr Jooma. Thus *'He rejected what two women had told him about Mr Jooma and preferred to side with another man'*; and

had concluded that their complaints were self-serving and that the poor relations in the Department must be the fault of the two *'divisive'* women [181].

34. The Tribunal found that Mr Whittern had been treated by Mr Niermann as the senior member of team; that Mr Niermann had been disingenuous in suggesting that the point person/Acting Head role was of no great significance; that he did not tell the truth about the situation to the Claimant and Ms von Pickartz; and that he had wanted from the start to make Mr Whittern the effective acting head of Department. It concluded that Mr Niermann's preferential treatment of Mr Whittern, as senior person and his appointment as point person/acting head, was in each case an act of direct sex discrimination. Thus: *'He did so, to a significant extent, because he made stereotypical assumptions about the Claimant and Miss Von Pickartz being 'divisive' that were gender related. Gender was a significant and material factor in the decision taken by Mr Niermann to favour Mr Whittern over the Claimant'*[183]. He did not tell the Claimant and Ms von Pickartz the truth about the situation *'...because he considered them to be divisive. This involved gender stereotyping them as explained above'* [184]. This treatment violated the Claimant's dignity and constituted harassment within the meaning of s.**26 Equality Act 2010**.

35. As to the Claimant's application for HOM, the Tribunal concluded that she had not been fairly considered. From an early stage Mr Niermann had decided that he was not at all likely to award the position to an internal candidate. However, *'We do not consider this initially excluded Mr Whittern. It did exclude the Claimant and Miss Von Pickartz. From the outset there was no realistic prospect of them being appointed. Again, this is because of the stereotypical characterisation of them by Mr Niermann as being 'divisive' women and because Mr Niermann resented them seeking to put themselves forward which he saw as a negative for these two women, whereas we do not consider he would have criticised a man in similar*

circumstances. We find that this was direct sex discrimination. These stereotypical assumptions would not have been made against the Claimant if she was a man' [185]. Open and fair recruitment should have been applied. What would have happened in those circumstances was a matter for the hearing on remedy.

36. As to the claim of discrimination in respect of the Head of Eastern and Western Europe Compliance role, the Tribunal concluded that this was not the result of sex or maternity discrimination harassment or victimisation. The Claimant was not considered for the role because she did not apply. Her circumstances were materially different to those of the successful applicant Mr Rogalla [195].

37. As to the claims of maternity discrimination, the Tribunal held that the discouragement of the Claimant from attending the QRM was because of assumptions made about what a woman should do while on maternity leave. It was outside the compulsory maternity leave period. There was no reason why she should not attend. It was an act of maternity discrimination [190]. There is no appeal from that decision.

38. The Tribunal then held that when the Claimant left for maternity leave Ms Burch had taken over nearly the entirety of her role. As for Ms Bailey, rather than providing maternity cover by doing the Claimant's job, she had provided support advice and supervision to Ms Burch. That explained the absence of handover on the Claimant's return. There was no real intention of handing back the work to the Claimant. She had not been permitted to conduct the managerial aspect of her role. The Tribunal concluded: *'We consider that was done because the Claimant was on maternity leave. We consider that it represents maternity discrimination. The maternity leave was not just a circumstance in which…Ms Burch's role naturally developed but advantage was taken of the Claimant's absence on maternity leave to pass*

significant elements of her role to Ms Burch. Thereafter we find that the Claimant was side-lined as Ms Burch line manager on her return from maternity leave and her role was diminished. That is continuing and we consider it is ongoing maternity discrimination' [192].

39. As for the grievances, these had been dealt with genuinely by Dr James who was *'seeking genuinely to reach proper conclusion on the grievance'* and *'performed a genuine opinion to the best of her abilities.'* Thus, the complaint of victimisation was dismissed [199].

Appeal on maternity leave discrimination

40. Before dealing with the principal issue in this appeal, I consider the discrete ground on the finding of maternity leave discrimination in respect of the Claimant's replacement by Ms Burch. Mr Thomas Linden QC submits that the Tribunal wrongly applied a 'but for' test to the issue of causation. In finding that the delegation of her work to Ms Burch without intending to return it to the Claimant was *'done because the Claimant was on maternity leave'*, and that the failure to restore it to the Claimant on her return was *'ongoing maternity discrimination'*, the Tribunal had done so on the basis that the Respondent had taken the opportunity presented by her maternity leave. Thus: *'...advantage was taken of the Claimant's absence on maternity leave'* [192].

41. By s.18(4) **Equality Act 2010**: *'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.*' In concluding merely that the Respondent had taken the opportunity of the Claimant's absence on maternity leave, the tribunal failed to answer the question 'reason why' question posed by s.18(4): cf. **Chief Constable of the West Yorkshire Police v Khan** [2001] ICR 1065 per Lord Nicholls at [29]. The Claimant had to establish that the decision-maker had acted for the subjective, conscious or

subconscious, reason that the Claimant had taken maternity leave. The reason and motivation here were to promote Ms Burch's career and to keep her happy, not to disadvantage the Claimant because she had been on maternity leave. In effect the Tribunal read s.18(4) as if to substitute 'in circumstances where' for the word 'because'. It was relevant to that error that the Tribunal did not identify a decision-maker (cf. **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 at [36]).

42. This was to be contrasted with the unappealed finding that there had been maternity discrimination in respect of discouraging the Claimant from attending the QRM [190]. Although the Tribunal again did not identify a decision-maker, the effect of its finding was that the subjective reason for the discouragement was an assumption about what a woman should do while on maternity leave.

43. For the reasons advanced by Ms Karon Monaghan QC, I do not accept that the Tribunal fell into error on the issue of causation. It did not confuse the opportunity for an act with the subjective reason for its occurrence or thereby recast the language of s.18(4). On the contrary, in stating that *'The maternity leave was not just a circumstance in which Ms Burch's role naturally developed but advantage was taken of the Claimant's absence on maternity leave to pass significant elements of her role to Ms Burch'*, the Tribunal was taking care both to identify and avoid any such error. On a fair reading of the Judgment, its conclusion was that the subjective reason for what happened was that the Claimant had been on maternity leave. In substance this was no different to its conclusion in respect of the discouragement for the Claimant to call into the QRM. In neither case did the Tribunal apply a 'but for' test.

The Appeal on Stereotypical Assumptions

The Respondent's Submissions

44. Mr Linden noted that, for the purposes of the sex discrimination and harassment claims, the Tribunal had identified the decision-maker as Mr Niermann. It was then necessary for the tribunal to consider Mr Niermann's reasons for making his decisions; and ask whether, consciously or subconsciously, he was significantly influenced by the Claimant's gender. This involved the drawing of inferences, where appropriate, from findings of primary fact. It had to be a reasoned conclusion based on evidence, not *'a mere intuitive hunch'*: **Chapman v Simon** [1994] IRLR 124 per Peter Gibson LJ at [43].

45. Whilst acknowledging that these were not mutually exclusive, Mr Linden distinguished approaches to this question based on (i) s.136 **Equality Act 2010** and (ii) stereotype arguments. In the former case, the decision-maker would give his explanation and be cross-examined, e.g. 'why do you say divisive?' In the face of an inadequate answer, the submission would be that this was not the true reason, conscious or unconscious. If the account were accepted, the claim would fail. Thus, in **Law Society v. Bahl** [2003] IRLR 640, Elias P (as he then was) stated *'The inference may also be rebutted…by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified, albeit genuine, reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason'* [97].

46. Conversely, a stereotype argument did not involve a challenge to the reasons given (e.g. divisiveness), but an acceptance of that reason and the submission that it was held and operative because of an assumption, e.g. that women are divisive and men are not. The present case had

been argued on the former basis, i.e. not by reference to stereotypes, but by challenging the language of explanation and inviting the inference that the subjective reason was in fact conscious or unconscious discrimination on the grounds of gender.

47. The Supreme Court decision in **European Roma Rights Centre v. Immigration Officer at Prague Airport (United Nation's High Commissioner for Refugees intervening** [2005] 1 AC 1 was a good example of a case where prejudice about the attributes of the members of the protected group led to assumptions made about the individual member of the group. The Supreme Court approved the statement of Laws LJ in his dissenting judgment that *'...the reality is that the officer treated the Roma less favourably because Roma are (for very well understood reasons) more likely to wish to seek asylum and thus, more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible.'* In approving that statement Baroness Hale added *'The person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But "what may be true of a group may not be true of a significant number of individuals within the group"*[1] *...The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group'* [82]. The dispute in that case was not about the reason for the officer's conduct, but whether the reason was the consequence of applying a stereotype and thus direct discrimination.

48. As an established example of a stereotype, Mr Linden pointed to the **EHRC** '**Code of Practice: Employment**' (2011) which has to be taken into account: **Equality Act 2006**, s.15(4). In respect of age discrimination, this gave the example of an employer not considering a 60-year-old manager for promotion in the belief that someone's memory deteriorates with

[1] Citing **Equal Opportunities Commission v. Director of Education** [2001] 2 HKLRD per Hartmann J at [86].

age: *'The employer's conduct is influenced by a stereotype view of the competence of 60 year olds. This is likely to amount to less favourable treatment because of age.'*: para.3.15.

49. As the Code also identified, the use of particular language could be evidence of discrimination, pointing e.g. to a particular view about women: *'... prejudice can affect the way an employer functions and the impact that generalisations, stereotypes, bias or inappropriate language in day-to-day operations can have on people's chances of obtaining work, promotion, recognition and respect'*: para.18.22. Thus, particular language could be relevant to an argument based on the drawing of inferences and/or by reference to stereotypical assumptions. However, the use of particular words was not necessarily the same as stereotyping.

50. Mr Linden of course accepted that there were certain widely held stereotype beliefs about those with protected characteristics. In relation to women, these included that they are less physically strong; that they are likely to take time off, or need to have flexible working arrangements, for reasons related to childcare; that they are more likely to be the secondary earner in their household, etc. If the evidence in a given case showed that the decision-maker held such a belief, it might be a short step to a conclusion that he applied it in making a decision about a woman; but that would depend on the context and the evidence in the particular case. A long-established example of sex discrimination based on a stereotypical assumption was: **Coleman v Skyrail Oceanic Ltd** 1981 ICR 864, CA: *'I am satisfied that the dismissal of a woman based upon an assumption that men are more likely than women to be the primary supporters of their spouses and children can amount to discrimination under the **Sex Discrimination Act 1975**'*: per Lawton LJ at 870D-E.

51. In a case based on stereotyping arguments, it was necessary to establish that (a) there was an established stereotype about the nature or attributes of those who have the same relevant

protected characteristic as the complainant; (b) that the decision-maker held that attitude, consciously or subconsciously; and (c) that he was significantly influenced by that belief in deciding to act in the manner complained of, i.e. on the basis that the complainant would share the perceived attributes of the group, rather than relying on the evidence about the particular individual.

52. In the present case the Tribunal had purported to identify widely held beliefs about, or attitudes to, women and men [174-179]. These included what it said was a recognised stereotype *'...that women are too emotionally involved in office relations or politics. This stereotype was demonstrated by Mr Niermann describing the Claimant and Ms von* [Pickartz] *as 'divisive'*: para.179. This was not a recognised or established stereotype; and in any event, it was not clear how an assumption about emotional involvement in office relationships or politics was demonstrated by the description of the two women as 'divisive'. The existence of that supposed stereotype had then been central to the Tribunal's conclusion that Mr Niermann had discriminated against, and harassed, the Claimant on grounds of her gender [183-185]. In this way the Tribunal had accepted Mr Niermann's evidence that he considered the two women to be divisive; but then concluded that this was due to him holding the stereotypical assumption which it had identified.

53. This contrasted with the way in which the case had been presented on behalf of the Claimant. In respect of the sex discrimination/harassment claims it was not pleaded or argued that there were the social attitudes or stereotypical assumptions asserted by the Tribunal in its Judgment, nor that these were held or applied by Mr Niermann or by anyone else at the Respondent. No such case was identified in the agreed list of issues; nor was such a case put to Mr Niermann or advanced in closing submissions. As was confirmed by the agreed notes of evidence, the Respondent's witnesses had been challenged in cross-examination about the

language which they had used to describe the Claimant (e.g. 'divisive', 'controlling', etc.); and her Counsel Ms Banton had made closing submissions thereon. However, their essence was to challenge the credibility of the explanation given by the witnesses; and to contend that the inference must be that the true reason was discriminatory. The case was not put on the basis of acceptance that Mr Niermann held a genuine view that the Claimant was e.g., 'divisive', and submission that this was because of a stereotypical assumption about women. Mr Niermann had likewise been questioned by the Tribunal about his view that the Claimant was 'divisive'; but again, it was not suggested that this view may been held on the basis of an assumption that women were likely to be more emotionally involved in office politics and relationships.

54. Mr Linden acknowledged that in the case on maternity leave discrimination Ms Banton had cross-examined Mr Dyos in express terms that he had discriminatory assumptions about a woman going on maternity leave; and that this had led to the unappealed finding that the discouragement from attending the QRM was because of assumptions made about what a woman should do while on maternity leave. However, that was a distinct allegation and finding.

55. Thus, there were two essential and interwoven grounds of appeal. First, that there was no evidential or other basis for the supposed stereotypical assumption on which the Tribunal had relied in its findings on sex discrimination/harassment. Secondly, that fairness required that where such a case was being presented and/or or considered on such a basis, the respondent and its witnesses must be given proper notice of that case and the opportunity to answer it. No such notice or opportunity had been given.

56. As to the evidence, Mr Linden accepted that there may be stereotypical attitudes within a particular culture which are so well known that their existence falls within the ambit of judicial

notice. He cited the two categories of judicial notice identified in **Phipson on Evidence** (19th ed.): *'...facts...so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry.'*; and *'Others...noticed after enquiry, such as after referring to works of reference or other reliable and acceptable sources'* (3-02). In that second category the party seeking judicial notice of a fact had the burden of establishing that the matter was so notorious as not to be the subject of reasonable dispute; and that *'the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy'* (**Phipson** at 3-017). This could include the material in **EHRC** or Home Office Codes; and perhaps more widely through internet sources. However, no such evidence had been produced for the critical supposed stereotype expressly relied on by the Tribunal in support of its decision; nor for the necessary further ingredient that Mr Niermann held such belief and had been influenced by it in his conduct.

57. Whilst noting the general rule that judges may not act on their own private knowledge or belief regarding the facts of the particular case (**Phipson** para.3-04), Mr Linden acknowledged that judicial notice has a potentially wider scope where a specialist Tribunal is dealing with a case falling within its own particular sphere of competence: 3-19. In the case of the employment tribunal, as industrial jury, this had included the example of a Tribunal taking into account *'its own knowledge and experience as three men of a certain age'* on an issue of incontinence: **Kirton v. Tetrosyl Ltd** [2003] ICR 37 at [10]. In such a case *'The tribunal like any 'jury' making findings of fact draws on its own experience of life in the context of the evidence which is presented to it. It is clear that the tribunal's experience was simply an element taken into account in evaluating the expert medical evidence and the factual evidence given by the applicant'* [12].

58. However, this was all subject to the duty of fairness. In **Kirton**, Counsel for the claimant/appellant had expressly invited the members of the tribunal to take into account their own knowledge and experience; and the Respondent's employers had taken no objection to that course [10]. Where a tribunal was contemplating taking account of its own particular knowledge of relevant matters, this must be brought to the attention of the parties and their representatives: **Hammington v Berker Sport Craft Ltd** [1980] ICR 248; **Dugdale v Kraft Foods** [1977] ICR 48; **Phipson** 3-19; **Harvey on Industrial Relations and Employment Law** P1 [889]. As Talbot J observed in **Hammington**: *'The essence…of the use of such specialised knowledge and information and experience is that it is to be used…for the purpose of weighing up and assessing the evidence and if necessary interpreting it. What must not be done is using that knowledge to substitute for the evidence given in court that derived from that knowledge; nor must it be used for producing some fact of evidence which is not evidence before the court with which the parties have not had an opportunity of dealing.'*: p.252D-E; also, 253F.

59. The supposed stereotypical assumption about emotional involvement in office politics/divisiveness was at the heart of the Tribunal's decision. However, it had purported to identify other assumptions which were properly open to challenge. Thus, whilst it might be the case that *'men are often praised for their hard work and determination*, there was no well-established stereotype that women are or are not criticised for the same reason; likewise, with the suggestion that women are seen as having *'an unhealthy obsession with work'*.

60. That the Tribunal was wedded to its theory, that Mr Niermann had acted on the basis of a stereotypical assumptions about 'divisive' women, was further emphasised by the fact that it had done so notwithstanding his evidence that he had seen Mr Whittern as *'the most removed from the internal politics within the Team'* and *'the most innocuous'* [48]. Thus, contrary to the theory, there was no suggestion that Mr Whittern had been seen as divisive or emotionally

involved in office politics but that (unlike the women) this had not been seen as a problem by Mr Niermann.

61. Furthermore, in taking the holistic approach [169] sanctioned by authority[2] the Tribunal wrongly placed reliance on the attitudes of others to draw inferences about Mr Niermann's reasons for his decisions. Thus, it relied on the evidence of Mr Dyos referring to the Claimant as *'controlling'* [176]; and on his explanation that Mr Whittern was recorded in 2015 as closest to promotion because of his personality and that he was a *'good communicator'* [177]; whereas Mr Dyos had played no part in those decisions. Mr Linden accepted that there may be cases where findings are made about the culture of an organisation which then may inform the process of drawing inferences. However, there was no such evidence or finding in the present case. In the example of Mr Dyos, he had joined the Respondent four months after the decision to appoint him and even longer after the decisions about Mr Whittern.

62. On the issue of divisiveness, there was also inconsistency between the Tribunal's record of the evidence of Mr Walsh that he considered Ms von Pickartz (but not the Claimant) to be divisive (para.60); and its apparent conclusion that he shared the assumption that the toxic relations in the office were the fault of 'the divisive women' (para.179).

63. The Respondent and its witnesses had thus been deprived of the opportunity to respond to the contentions in respect of stereotypical assumptions which had appeared for the first time in the Judgment; and in particular to contend that there was no such stereotypical assumption of the type which had influenced the Tribunal's decision; and that Mr Niermann had not acted on the basis of any such assumption. Fairness required that the claims of sex discrimination and harassment should be heard afresh and by a different tribunal.

[2] See e.g. **Fraser v. University of Leicester** (UKEAT/0155/13/DM) at [74] and authorities cited therein.

Claimant's Submissions

64. Ms Monaghan noted that it was not suggested that the Tribunal had misdirected itself in law or that its primary findings of fact were perverse. The case was that the decision was nonetheless flawed because of the reliance on stereotyping. However, the Respondent had every opportunity to deal with the underlying matters; and the appeal illustrated the dangers of adopting an over-analytical approach to the decision of a tribunal.

65. In **Dr Anya v. University of Oxford and Another** [2001] ICR 847, the Court of Appeal had in the context of a race discrimination case reiterated the potential significance of conscious or unconscious assumptions in decision-making. Thus, citing **King v Great Britain China Centre** [1992] ICR 516: *'Few employers will be prepared to admit such discrimination even to themselves. In some cases, the discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in'* [pp.528-529]. The possibility of such was assumptions equally to be found in sex discrimination cases, e.g. in the use of language such as 'divisive', 'controlling' or being a 'poor communicator'; or 'not fitting in'.

66. For this purpose, the specialist knowledge and experience of the Tribunal judge and members were of particular importance. Their experience of such cases gave them a specialist ear for the language deployed by decision-makers and a specialist skill in the inferences which it might be appropriate to draw. Thus, a good degree of deference must be shown to the exercise of their judgment. In **Anya**, citing **Querishi v Victoria University of Manchester** (now belatedly reported at [2001] ICR 863), the Court of Appeal noted the difficulty of discharging the burden of proof in the absence of direct evidence and the special difficulties in the case of alleged institutional discrimination which may be inadvertent or unintentional; the potential need when drawing inferences from primary facts to consider not only the acts which form the subject matter of the complaint but also other acts alleged to constitute evidence

pointing to a discriminatory ground for the relevant act or decision; and the need to avoid a 'fragmented approach' to the evidence : per Sedley LJ at pp.853-854. In **Anya** it was also observed that judgments between comparably well-qualified candidates were *'...notoriously capable of being influenced, often not consciously, by idiosyncratic factors, especially where proper equal opportunity procedures have not been followed. If these are to any significant extent racial factors, it will in general be only from the surrounding circumstances and the previous history, not from the act of discrimination itself, that they will emerge'* [21].

67. In **Seldon v Clarkson Wright & Jakes** [2009] IRLR 267, Elias P, sitting with members, observed in similar vein: *'Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that tribunals must leave their understanding of human nature behind them when they sit in judgment'* [73].

68. In **Geller v Yeshurun Hebrew Congregation** [2016] ICR 1028, the claimant's grounds of appeal against the dismissal of her claim of sex discrimination included that the Tribunal failed to take account of the possibility of subconscious or unconscious discrimination in its refusal to acknowledge her as an employee; and that this belief may have been based on or influenced by *'stereotypical assumptions based on her gender - i.e. that women are not breadwinners'* [25]. Allowing the appeal, Kerr J held that, in the circumstances of that case, it was necessary to consider subconscious or unconscious discrimination; and remitted the matter accordingly. The judge rejected the contention that this and other arguments had not been argued below or put in cross examination to their witnesses, holding that the case as advanced on appeal was *'...no different in essence from what was pleaded in the ET1 grounds and accepted by the tribunal as constituting the claimant's case…'* [43]. This all reaffirmed that the potential relevance of stereotypical assumptions was a matter for the expertise of the tribunal,

which was best placed to spot the indicators, including use of language, which raised 'alarm bells' for discrimination. This did not require a case to be positively put to the respondent or its witnesses, particularly where (as here) it was all part of a bigger picture.

69. This was supported by the approach in **Kirton**, where the EAT observed that the Tribunal, like any jury making findings of fact, was drawing on its own experience of life in the context of the evidence presented to it. In **Harvey**, under the heading 'Use of specialised knowledge by tribunal members' the distinction was drawn between (i) application of their specialist knowledge in a general way for the purpose of explaining and understanding the evidence which they hear and in order to fill gaps in the evidence about matters which will be obvious to them but which might be obscure to a layman and (ii) use of that knowledge and experience in a specialist manner where one or other of the lay members has a specialist knowledge or experience of a particular matter which is under consideration in the case they are hearing. In the former case no special rules applied to the use of the knowledge; only in the latter was there the obligation to bring it to the attention of the parties [888-889, citing **Kirton**, **Hammington** and **Dugdale**].

70. Turning to the Judgment, this had to be examined as a whole. Ms Monaghan pointed to its cumulative findings of primary fact, which were all building blocks for the overall inference of unlawful discrimination. These included that no record was kept of the interview with the Claimant (cf. **Anya** and the potential significance of the absence of proper procedures); the selection of criteria after the first round of interviews; the absence of process for the appointment of the point person; Mr Niermann's judgment that Mr Whittern was most removed from the internal politics, i.e. a viewpoint comparable to 'not fitting in'; his evidence that the Claimant and Ms von Pickartz were *'intrusive'*, trying to forward their own interests; the lack of candour and changing accounts about the status of Mr Whittern; the formal interview process

for the external candidates for the HOM post; Mr Walsh's unconvincing evidence that Ms von Pickartz was divisive; Mr Niermann's evidence that the Claimant had an *'unhealthy obsession with work'*; and the talent ratings in September 2016 which marked down the Claimant's readiness for the HOM post to 2-3 years.

71. As to the stereotypical assumptions identified at [174-179], these were all matters within the knowledge and expertise of the Tribunal members. The conclusion that there was discrimination in the comparative treatment of Mr Whittern [183] properly took account of the identified stereotypical assumption that women are too emotionally involved in office relations or politics and that this was demonstrated by Mr Niermann's description of the Claimant as *'divisive'*, a term which he seemed unable to explain; and which had been used repeatedly in the Respondent's evidence, but only about women. As to the finding in respect of the HOM role [185], this properly took account both of the stereotypical characterisation of women as divisive; and also, the further stereotype which marked down women (but not men) who were seen to push themselves forward.

72. In taking account of their experience in this way, and their knowledge of the warning signs betrayed by particular use of language, the Tribunal was properly using its experience and specialist knowledge in the way identified in **Harvey's** first category; and which required no specific notice to the parties. This was to be contrasted with the strict requirements of judicial notice identified in **Phipson**.

73. As to the presentation of the Claimant's case, the agreed notes of evidence demonstrated that the underlying allegations of sex discrimination and the challenge to particular use of language had all been squarely put to the Respondent's witnesses. This indeed involved a challenge to their credibility, but the challenge was equally relevant to conscious or

A subconscious stereotyping. The two approaches were not mutually exclusive. There was no need to use the words 'stereotype assumptions' when putting such a case.

B 74. By way of examples, Ms Monaghan pointed to cross-examination of Mr Dyos on his evidence that the Claimant was *'controlling'* and that Mr Whittern was a *'good communicator'*; to questions put in express terms that he had discriminatory negative assumptions about a woman going on maternity leave; and to a series of questions to Mr Niermann by Counsel and C the Tribunal members on his description of the Claimant as *'divisive'* and as having an *'unhealthy obsession with work'*. It was put to him that, by comparison with the evidence of jokes about Mr Niermann working while on paternity leave, this involved *'double standards'* D on his part.

75. Ms Monaghan accepted that Mr Dyos' statements could not assist the case in respect of E Mr Whittern's position or the appointment. However, the questions and submissions on maternity leave discrimination were relevant to the overall picture on sex discrimination. All in all, the case was fully and fairly put. There being no challenge to the legal directions, nor that the findings of primary fact were perverse, there was no basis to interfere with the decision. F Conversely, if the matter was to be remitted, it should be to the same tribunal, as happened in **Geller**.

G **Analysis and Conclusions**

76. Two matters in this appeal are beyond question. First, that for all the reasons discussed in the authorities, and most particularly through the judgment of Baroness Hale in the **Roma** H case, discrimination in respect of any protected characteristic has normally to be proved by inference rather than direct evidence. Secondly, that the Employment Tribunal is entitled (and

to an extent required) to draw on its experience when considering whether it is appropriate to draw the inference in the particular case.

77. This process will include assessment of the particular use of language by decision-makers explaining and justifying their decisions. In the experience of the tribunal members, this may be an indicator that, consciously or unconsciously, the decision was made on discriminatory grounds. Furthermore, the particular use of language may be an indicator that the decision-maker was acting on a belief or assumptions about people who share the relevant protected characteristic, without considering whether that was so in respect of the complainant in question. As Baroness Hale stated in the **Roma** case, *'The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group'* [82]. If satisfied that there is such a potential assumption, the tribunal then has to consider whether it was an assumption which, consciously or unconsciously, was held by the decision-maker; and if so whether it influenced his decision.

78. In some cases, there will be no dispute about the prevalence of particular stereotypical assumptions in society generally, see e.g. the example in **Geller**. Likewise, Mr Linden was careful not to dispute a range of potential stereotypical assumptions about women. In other cases, such as the present, there may be dispute in respect of an assertion that a particular assumption is often held.

79. The existence of stereotypical assumptions may fall within the first category identified in **Phipson**, i.e. as a fact *'so notorious or well-established to the knowledge of the court that they may be accepted without further enquiry'*; or within the second category of matters which may be noticed after enquiry. In the latter case, *'...the matters judicially noticed must be indisputable, and may be taken from accepted writings, standard works and serious studies and*

enquiries': 3-02. The burden of proof is on the party seeking judicial notice of the fact (3-17). As Mr Linden acknowledged, examples of this will include the matters identified in the **EHRC Code**, e.g. at para.3.15.

80. Furthermore, as I accept, these requirements for judicial notice are to some extent moderated in the case of specialist tribunals, which of course includes Employment Tribunals; and more particularly those which hear discrimination claims and have a body of knowledge from their experience from hearing and assessing the evidence in such claims. I accept Ms Monaghan's submission that the best source of law for the present question is to be found in the authorities discussed in **Harvey** under the heading 'Use of specialised knowledge by tribunal members' [888-891] and in particular **Hammington**, **Dugdale** and **Kirton**.

81. However, I disagree with her submission that a tribunal's use of its experience of stereotypical assumptions falls into the category of knowledge which may be applied in a general way without prior notice to the parties. On the contrary, this is at best specialist knowledge (or at least belief) which, if it is to be relied on for the purpose of drawing inferences about the conscious or unconscious reasoning of the decision-maker, must be disclosed to the parties and their advisers; and to any witness whose decision-making is in question. Without such notice, the Respondent and its representatives will not be in a position to challenge or test the alleged stereotypical assumption, either as to its general existence or as to its application in the case of the decision-maker. Likewise, a witness must be given the opportunity to answer the suggestion that he or she was influenced by such an assumption.

82. This is all necessary for two interrelated reasons. First, as a matter of basic fairness. Secondly, in order to ensure that, where a case is advanced and/or is being considered by a tribunal on a basis which includes reference to stereotypical assumptions, this is (i) properly

tested at each stage, i.e. the general and the particular; and that (ii) the relevant witness has a proper opportunity to meet the allegation that he or she has acted on discriminatory grounds. For this reason, the requirement of notice applies equally to a case where it is uncontroversial that a particular assumption is often held.

83. I need hardly add that it could be no answer to say that the discriminatory reason may have been unconscious; and that in consequence the witness would be unable to make any useful comment. A decision-maker (or a respondent more generally) may well be able to give a response which demonstrates that he had the risk of such an assumption firmly in mind and therefore took care to ensure there was no confusion between his perceptions of (i) the group and (ii) the individual. Any other approach runs the risk that the tribunal may itself fall into the very same error of treating a relevant decision-maker not as an individual but merely as the member of a group.

84. Thus, in my judgment where the complainant does not advance the case based on stereotypical assumptions, but the tribunal on the basis of its experience and knowledge or beliefs is considering that this may have been relevant to the conduct of the decision-maker, the position is akin to **Hammington** and **Dugdale**. In those circumstances, it must give notice of the point to the respondent and its representatives; and the relevant witness(es) must be given the opportunity to respond to that suggestion. This requirement of notice must of course equally apply to a complainant who intends to rely on stereotype arguments in support of a claim of discrimination. Whilst I accept that this does not necessarily require the use of the phrase 'stereotype assumptions', and that what matters is the substance of the allegation that the decision-maker has acted on the basis of an identified assumption, the phrase is now so commonplace that it makes good sense to do so in the interests of clarity.

85. I therefore do not accept that the decision in **Kirton** is material. In that case, the complainant's Counsel invited the tribunal to take into account its own particular knowledge and experience and the respondent took no objection to that course. I also do not accept that the decision in **Geller** assists the Claimant. True it is that Kerr J held that the essence of the new arguments (which included the point about stereotypical assumptions) was no different from that which was pleaded and advanced below [43]. However, the objection was focussed on the taking of new points; not on fairness and the opportunity to answer. Furthermore, the respondent and its witnesses would be on notice of the new argument at the remitted hearing. I do not accept that the decision supports any general proposition that prior notice of such a case is unnecessary.

86. I accept of course that on appropriate evidence a tribunal may conclude that there was a particular discriminatory culture at a respondent; and that this may be relevant when drawing inferences as to the decision-maker. However, a respondent must equally be given fair notice of that case; and the witnesses be given the opportunity to respond to that suggestion. In any event, the Tribunal did not reach its conclusion on that basis.

87. In the present case, it is clear that the Tribunal's decision on the sex discrimination and harassment cases did depend in substantial part upon the conclusion that the decision-taker Mr Niermann had acted upon the basis of stereotypical assumptions about women. In respect of the comparative treatment of Mr Whittern, the relevant stereotypical assumption was that women, unlike men, are too emotionally involved in office relations or politics. The conclusion that Mr Niermann acted on basis of such an assumption was held to be demonstrated by his description of the Claimant and Ms von Pickartz as 'divisive' (paras.179, 183, 184). As to the HOM role, the Tribunal concluded that the decision was influenced by the same stereotype; and also by an

alleged assumption that it was a negative quality for women, but not for men, to put themselves forward for a position.

88. It is equally clear that no such case was put to the Respondent or its witnesses, whether on behalf of the Claimant or by questions from the Tribunal. The Claimant's case, including its closing submissions, did not include reference to these alleged stereotypical assumptions. Cross-examination included challenges to the credibility of the witnesses and their use of particular language (e.g. 'divisive', 'controlling', 'micromanaged' etc), in each case to challenge and test the evidence; and then to submit that the true inference was that the reason for the conduct was sex and/or maternity leave discrimination. Cross-examination on the latter did include the challenge that Mr Dyos was acting on discriminatory assumptions about a woman going on maternity leave. There is, of course a potential link between stereotypical assumptions about women on maternity leave and women generally. However, there was no other reference to the Respondent and its decision-makers acting on assumptions.

89. It is no criticism that the Claimant's case was presented as it was. The straightforward approach was taken of submitting that discriminatory inferences could properly be drawn from all the evidence, including that elicited in cross-examination. The references to stereotypical assumptions in respect of the sex discrimination/harassment claims first appeared in the Judgment.

90. In all the circumstances I conclude that it was unfair to reach these decisions without the Respondent, its representatives and witnesses being given the opportunity to challenge the existence of the stereotypical assumptions relied on by the Tribunal or their application to the decision-making of Mr Niermann. I also accept that the Tribunal's conclusion, that the assumption about emotional involvement in office politics was demonstrated by Mr Niermann's

references to ‘divisiveness’, would itself have been open to question if the Respondent had been given the opportunity to do so.

91. In reaching these conclusions, I do not accept that the Tribunal’s reliance on stereotypical assumptions can be dismissed as but a small part of a holistic decision. On the contrary, two of the identified assumptions were central to its reasoning in respect of the sex discrimination/ harassment claims. There is nothing in the critical paragraphs of the decision (183-185) which expressly states that any of the other suggested stereotypical assumptions, e.g. those said to be demonstrated by the language of ‘controlling’, ‘obsessed with work’, ‘poor communicator’ etc, influenced the decisions on these claims.

92. I also do not consider it relevant that there is no challenge to the Tribunal’s self-directions of law nor a perversity challenge to the primary findings of fact. The central appeal is that it was unfair to reach a decision on a basis which gave the Respondent and its witnesses no opportunity to challenge (a) the validity of the general assumptions which the Tribunal held to prevail or (b) the conclusion by way of inference that its decision-maker Mr Niermann was influenced in his conduct by such assumptions; and that, given the Tribunal’s particular focus on these, the overall result might have been different if that opportunity had been provided. That challenge is well-founded.

93. Furthermore, insofar as the Tribunal appears to have taken account of Mr Dyos’ evidence in respect of the reasons for the preferment of Mr Whittern over the Claimant (para.177), it was wrong to do so. As Ms Monaghan acknowledged, he had no involvement in that or the HOM decision, which preceded his arrival. The Tribunal’s conclusion that Mr Walsh’s use of the word ‘divisive’ was related to his perception of women (para.179) also appears to be at odds

with the earlier part of the Judgment which records his evidence that he would have liked to see the Claimant appointed HOM, whereas Ms von Pickartz was 'divisive' (para.60).

94. I therefore conclude that the appeal in respect of the direct sex discrimination and sex harassment claims must be allowed; and that, to the extent that they succeeded below, those claims must be remitted for a fresh hearing. In circumstances where the Tribunal evidently reached strong adverse conclusions about the Respondent and its witnesses, I think it clear that the remission must be to a freshly constituted tribunal. This is just the sort of case which gives rise to the 'second bite' risks identified in **Sinclair Roche & Temperley v Heard &Anor** [2004] IRLR 763. For the reasons given earlier, the appeal in respect of maternity leave discrimination is dismissed.