# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Ms Kerry Hughes** | **v** | **Network Rail Infrastructure Ltd** |

**Heard at**: Watford

**On**: 14 -17 January 2019 & 8-11 July 2019

**Before:** Employment Judge Manley
**Members:** Mr Miller
Mrs Smith

**Representation**

**For the Claimant:** In person
**For the Respondent:** Ms A Carse, Counsel

## RESERVED JUDGMENT

1 The claimant was entitled to equal pay with the named comparator during her secondment from 31 August 2015 up to April 2016 and until her expected return from maternity leave in March 2017.

2 The claimant was treated unfavourably because she took maternity leave when she was not appointed to the permanent role of Senior Procurement Manager; suffered a reduction in her maternity pay and was not informed of job opportunities.

3 There was a fundamental breach of contract by the respondent. The claimant resigned in response to that breach and was unfairly dismissed.

4 The claimant was not treated unfavourably because of maternity leave and/or pregnancy in the failure to carry out a risk assessment, the '*good*' score she received on appraisal, the grievance process or any failures about well-being managers and occupational health.

5 There was no direct or indirect sex discrimination.

6 There was no unreasonable failure by the respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

7 A hearing to determine remedy has already been agreed to take place on 9 and 10 October 2019. Orders are made at the end of this judgment to facilitate an effective hearing.

# REASONS

## Introduction and issues

1. This matter was relatively complex. The merits hearing commenced in January and was then adjourned by agreement until July 2019. The claim forms were presented in January and June 2017, in which the claimant brought claims for sex, pregnancy and maternity discrimination and constructive unfair dismissal.

2. There was also a claim which was later identified as being properly a claim for equal pay. At a preliminary hearing in May 2018, the issues were set out and agreed and appear below.

*"5. Unfair dismissal claim*

*5.1 The claimant resigned her employment on the 2 March 2017. Her case is that the receipt of the respondent's formal grievance appeal conclusion outcome on the 2 March 2017 was the last straw in a series of events that the claimant alleges meant that the respondent was in breach of the implied contractual term of mutual trust and confidence.*

*5.2 Was the respondent in breach of contract?*

*5.3 Was the breach of contract fundamental in that it was sufficiently serious such that the claimant was entitled to terminate it without notice by reason of the employer's conduct?*

*5.4 Did the claimant resign within a reasonable time of any such breach?*

*5.5 Did the claimant resign because of any such breach of contract?*

*I record that the respondent's case is that the claimant would have resigned in any event due to her relocating.*

*5.6 Was the dismissal fair?*

*5.7 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?*

*5.8 In the event that the dismissal is found to be procedurally unfair, does the respondent prove that if he had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?*

*5.9 Has either party unreasonably failed to follow the guidance set out in the ACAS Code of Practice for Grievance Procedures.*

*6. Direct discrimination because of sex and/or pregnancy and maternity discrimination.*

*6.1 Has the respondent subjected the claimant to the following alleged treatment?*

*6.2 The respondent's refusal to award the claimant Band 2 benefits in her secondment role;*

*6.3 The respondent's failure to follow its own secondment process;*

*6.4 The respondent's failure to offer the claimant equal terms of pay and benefits in the secondment role;*

*6.5 The respondent's failure to provide written confirmation of the claimant's secondment, objectives and an agreed way of measuring the claimant's performance;*

*6.6 Requiring the claimant to do more than one role causing her undue stress and workload;*

*6.7 The respondent's failure to confirm the claimant's SPM role;*

*6.8 The respondent's decision to demote the claimant to her substantive role whilst on maternity leave;*

*6.9 The respondent's failure to pay Enhanced Maternity Pay at the SPM Band 2 rate of pay;*

*6.10 The respondent's decision only to grade her as "good" during her absence on maternity leave;*

*6.11 The respondent's failure to inform the claimant of organisational changes and job opportunities during her maternity leave;*

*6.12 The respondent's failure to follow the respondent's own time limits within the grievance procedure;*

*6.13 The respondent's failure to provide the claimant access to Well Being Managers and Occupational Therapy support during the investigation of the claimant's grievance;*

*6.14 The respondent's failure to carry out a risk assessment regarding the claimant's excessive workload whilst pregnant.*

*7. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparator: -*

*7.1 Richard Harries and/or hypothetical comparators.*

*8. Has the respondent treated the claimant as alleged unfavourably because of the pregnancy and/or because she is on maternity leave and/or because she was exercising her right to maternity leave?*

*9. If so has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?*

*9.1 If so, what is the respondent's explanation? Does it prove a non- discriminatory reason for any proven treatment?*

*10. Section 19: Indirect discrimination in relation to sex*

*11. Did the respondent apply the following provision, criteria and/or practice generally, namely?*

*11.1 Not extending a secondment contract or confirming in a permanent role for employees who are absent from work due to maternity leave and/or;*

*11.2 Only awarding a "good" grade to employees who are absent from work due to maternity leave;*

*11.3 Does the application of the provision put other women at a particular disadvantage when compared with persons who do not have this protected characteristic?*

*11.4 Did the application of the provision put the claimant at that disadvantage in that;*

*11.5 Her secondment contract was not extended;*

*11.6 She was not confirmed in a permanent role;*

*11.7 She only received a "good" grade which could impact the claimant's promotion prospects and/or bonus pay;*

*11.8 Does the respondent show that the treatment was a proportionate means or achieving a legitimate aim? Any facts in relation to this issue will be set out in the respondent's amended response."*

3. Those issues required an amended ground of resistance and that was provided on 31 May 2018.

4. That was the basis upon which the tribunal hearing commenced in January and we heard from all the apparently necessary witnesses at that January hearing. It became clear to the tribunal that certain aspects of the claimant's claim had been wrongly identified as claims for sex and/or pregnancy/maternity discrimination, rather than what they properly were, which were claims for equal pay. These are issues 6.2 and 6.4 and those were relabelled in the short case management summary which was sent to the parties when the January hearing was adjourned to the dates in July. It was clear that it was a claim under the like work provisions of the equal pay sections of Equality Act 2010 and that the respondent would be likely to rely on the material factor defence.

5. In accordance with orders made at the end of the first hearing, the respondent did present an amended response on 28 February 2019. There was also a short telephone case management discussion to ensure preparation for the adjourned hearing. It was made clear at that point that the proper comparison for the equal pay claim was with Mr Richard Harries during his secondment.

6. At the revised hearing in July there was a supplemental equal pay bundle and further witness statements. The respondent conceded that the claimant was engaged in like work with Mr Harries and pleaded the material factor defence. That was what we concentrated on the hearing in July.

**The Hearing**

7. As indicated above, there have been two substantive hearings on liability in this case in January and July 2019. At the January hearing we heard from the claimant and from Ms Carroll who was the claimant's line manager, until late August 2015. For the respondent, we heard from Mr Coombe, who was the Head of Commercial and for some time line manager of the claimant, from Mr Carter, who was Commercial Director and was the line manager of Mr Coombe and Ms Carroll and from Ms Eames who heard the claimant's grievance.

8. At the hearing in July on the equal pay claim, we heard again from the claimant and from Ms Carroll, from Mr Coombe and a further additional witness, Ms Hall, who was involved in the discussions as a union representative around "transparent pay" and is now an HR Partner for the respondent.

9. At the January hearing, the bundle of documents extended to 1,280 pages and the supplementary bundle for the equal pay July hearing were in the region of 120 pages. Although we did not look at all those documents, we were referred to a substantial proportion of them and some of them are relatively detailed.

**Relevant facts**

10. The claimant was first engaged by the respondent as a contractor for a specialist IT procurement programme in July 2013. The respondent is a well-known and large employer with approximately 35,000 staff. The respondent has several policies which are relevant to this case. We have seen its grievance policy and have been referred to the policy on maternity leave as, well as two versions of a document entitled '*internal secondment position statements*' dated April 2016 and July 2015. We have been referred to numerous e-mails to and from various people in HR at different times.

11. The claimant became formally employed by the respondent in July 2014 as a Category Manager which was a band 3b post. She told us there was no formal interview for that position. Her line manager was Ms Carroll who was Head of Commercial – Technology. Her line manager was Mr Carter, the Commercial Director.

12. Around the same time as this, Mr Coombe, who was at that time the Senior Strategic Sourcing Manager, was in discussions with Mr Richard Harries who was also then in a band 3 role. An opportunity arose for a secondment to a Senior Procurement Manager ("SPM") post, which was a band 2 role. Mr Coombe decided to offer this six-month secondment to Mr Harries. Mr Coombe told us that he was the person who discussed this secondment and the level of remuneration with Mr Harries. In the event Mr Harries was seconded and that secondment was extended through to 30 August 2015. He commenced a permanent post in the same role on 1 September 2015.

13. Mr Coombe accepted that the job description for this role was the same as the claimant's for the secondment she later undertook, which we will come to. Although Mr Coombe told us about some differences between the tasks carried out by Mr Harries as against the claimant, the respondent is not relying on those to suggest it was not like work and we do not really need therefore to go into those details. Mr Coombe discussed the level of remuneration with HR and he was told that he had a wide discretion about the level of pay within the pay bands he could offer. These indicated that the range for band 3 was between £32,000 - £75,000 and for band 2 between £46,000 - £99,000 (page 34 EQP bundle). Mr Coombe's evidence was that he did not see this document setting out this range; he just took advice from HR. He made Mr Harries a starting offer of £65,000 which was an increase on Mr Harries' salary then of £57,784.

14. One of the significant differences that we heard considerable evidence about during the tribunal hearings, was that band 2 posts also attracted

some additional benefits. Those included a car allowance and medical insurance for the whole family, rather than for the employee alone. We have concentrated, almost exclusively, on the value of the car allowance, which it is agreed was a payment of £6,000 per annum which was simply added to the regular salary payments. Mr Coombe told us that, during negotiations, Mr Harries referred the fact that he would normally get a car allowance on a band 2 post and suggested a figure of £450 per month (with a 13-period year). Mr Coombe told the tribunal that he believed that he could not offer a car allowance during secondments but that he did decide to increase the offer to Mr Harries by £5,850 giving Mr Harries, at that time, a salary of £70,850. The way in which the respondent referred to any pay over the substantive salary was by calling it "*HQ Special*" on the payslips. Mr Harries therefore received an "*HQ Special*" sum of £1,101 per month. Mr Coombes' evidence was that he was clear that this "extra" was not a car allowance, but he did refer to it being a car allowance in a document that he prepared at the time for the purposes of recovering the salary within budget (page 106 EQP bundle). His explanation was that he called it that because Mr Harries had mentioned a car allowance but that it was not actually a car allowance.

15. The document Mr Coombe refers to in relation to this matter has been considered several times over the course of this hearing. This is the *"internal secondment position statement*". The version which was in the bundle for the July hearing is at page 106b and c (EQP bundle). It is worth reading clause 4, which we were referred to. It reads as follows:

> *"The secondee will retain their existing salary, role clarity job band or grade and benefits package of their substantive role during the period of secondment.*
>
> *However, if the secondment is to a higher band or pay range, the employee will be paid an allowance to increase their pay to within zone 1 of the pay range for the job they are to be seconded into for the duration of the secondment.*
>
> *If an individual is eligible for such an allowance during a period of secondment, this additional pay will be separated out on their pay slip"*

Later in that section, it reads:

> *"the secondee will receive a secondment appointment letter confirming the secondment and its terms".*

The document in the EQP bundle is dated July 2015, which is obviously after the discussions that Mr Coombe had with Mr Harries in mid-2014. At the hearing in January we saw another very similar document apart from one difference but that is dated April 2016. The respondent's witnesses suggested in their witness statements that this statement meant that benefits attached to a seconded band would not be paid. Ms Hall's witness statement at paragraph 10 states:- *" (the statement) sets out that a secondee is not entitled to enhanced benefits during their secondment*". The

tribunal cannot read the statement in that way. It is silent on enhanced benefits where the secondment is to a higher band, as in the case of both the claimant and Mr Harries.

16. The tribunal did not hear from Mr Harries but the claimant did ask him during her employment whether he had received what are known as the band 2 benefits and he told her that he did. When he replied in an e-mail though, he was not that clear about whether he received the benefits or not.

17. In June 2015, Ms Carroll resigned from her position as Head of Commercial which was a band 2 post. There was then a discussion involving Ms Carroll and Mr Carter with the claimant about her carrying out some (or all) of Ms Carroll's work. The claimant's case is that she was asked to cover the whole of that role, but it is not clear to us whether that was said clearly in those terms. In any event, this led to the claimant beginning to take at least some of the work from Ms Carroll on handover. By late-July, Mr Carter had informed the claimant that there had been some discussions elsewhere about the Head of Commercial role and that it might be advertised as a band 1 role. There was nothing very definite or put in writing about what the arrangements were to be for that Head of Commercial role. The claimant made it clear that she was interested in the role and did carry out some, if not all, aspects of that role when Ms Carroll left at the end of August.

18. On 30 July Ms Carroll sent an invitation to her team which invited expressions of interest for another SPM role at band 2. She was then on leave, and on her return in mid-August, she discussed with Mr Carter, and it was agreed that they would offer the seconded band 2 SPM role to the claimant. They discussed a salary of £68,000. In Ms Carroll's witness statement to the tribunal for the January hearing, she did not say directly that she had mentioned the band 2 benefits to the claimant but in her statement for the equal pay hearing, she said that she did mention them to her. Ms Carroll had to submit a change of role request on the HR system and she inputted £68,000 and made no reference to the associated benefits. Ms Carroll's evidence is quite clear that when she discussed the matter with the claimant, she said that she would get the band 2 benefits, as well as the salary. We accept that evidence. Ms Carroll has been consistent about that, she referred to it in paragraph 17 of her first witness statement, in her oral evidence at the January hearing and again in July. The tribunal finds, on the balance of probabilities, that Ms Carroll referred to the benefits but provided no detail. The claimant honestly believed, with good reason, that she would get the salary and the band 2 benefits, especially the £6,000 per annum car allowance. Indeed, that is supported by Mr Carter, who recalled a discussion with the claimant in October when she told him that Ms Carroll had told her that her salary would be £68,000 plus benefits.

19. One of the issues which began to emerge in the January hearing, and was discussed in more detail was the reference to something called "*transparent pay*". This has become the basis for the material factor defence for the equal pay claim, the respondent having conceded that the claimant was engaged on like work with Mr Harries, and that he was paid more on

secondment than she was. There was no reference to transparent pay as a reason for Mr Harries' different pay in the first ET3, nor indeed in the amended ET3 in May 2018. It really emerged in that January hearing and is referred to in the amended ET3 of February 2019. The tribunal understands the facts about that to be as follows.

20. Ms Hall told us that in 2011, there were discussions with the staff association ("TSSA") about a change in pay bandings to ensure "*fairness consistency and transparency of pay for employees performing roles at equivalent levels and responsibility within Network Rail"*. Various pieces of data were gathered, and analysis showed that there was wide discretion for managers to set pay and this led to inconsistency. There was therefore joint working between the respondent and TSSA which took place over several years. This led to the bands being split into zones with zone 1 being the starting zone for new entrants and internal moves; zone 2 for recruitment in exceptional circumstances; and zone 3 being the top zone for each pay range. An explanation of the new pay structure provided to staff appears between pages 37 to 55 of EQP bundle. Page 44 shows that at band 2b Zone 1 is between £64,000 - £72,000.

21. There is no reference in the document which we saw, which is dated July 2015, to any additional benefits. As we understand it, in or around July 2015, managers were made aware of the new pay structure and asked to have it in mind when they negotiated pay although it did not come into effect formally until 1 September 2015. Ms Carroll gave evidence that when she was negotiating the claimant's seconded remuneration in July 2015, she did have the transparent pay structure in mind and that she was attempting to offer a salary which was close to that of Mr Harries. She therefore made an offer of £68,000 believing that it fell within zone 1 and that the benefits fell outside that range and would be paid in addition. Ms Hall and Mr Coombe agreed that the transparent pay structure did not include any added benefits. Ms Carroll expected that the claimant would end up with remuneration of £74,000 which she understood was the level at which Mr Harries was being paid. Although we do not have precise figures for Mr Harries' pay at 31 August 2015, the claimant has done some calculations and believe that his total salary at that point was a little over £73,000.

22. The claimant did not get a letter setting out what she was entitled to but accepted the seconded position. At the same time, she also applied for the Head of Commercial role but was unsuccessful. There were no other successful candidates in that recruitment. Ms Carroll's final day as Head of Commercial was on 28 August. Shortly before she left, she needed to give gradings for the performance review and she did so for all her team, including the claimant, giving them a "good" score. She said in the e-mail to Mr Carter that she had had to give a "good" because there were no agreed objectives for the team as at that point. It appears not to be in dispute that the claimant was given the systems authority to contract at Head of Commercial and SPM level at this point, there being no replacement as Head of Commercial.

23. On 31 August the claimant began her secondment for six months which would terminate on 1 April 2016. The claimant's category manager post remained vacant and the tribunal accepts that the claimant did continue to do some of that work as well as her SPM work and indeed a significant part of the duties of the Head of Commercial for some time. Mr Carter appeared to accept that the claimant was doing some 'extra management' and her appointment apparently needed his approval when the claimant raised the fact that she was not yet being paid for the secondment in mid-September.

24. In October or November 2015, Mr Coombe began a 'dual role' as Head of Commercial as well remaining in his substantive role as Compliance & Insurance Manager which was expected to be on a temporary basis. The claimant was not formally informed that Mr Coombe was her line manager.

25. On 20 October the claimant informed Mr Carter and Mr Coombe of her pregnancy. She was still chasing payment by the respondent for her secondment and was asking for it to be confirmed in writing. For example, the claimant wrote, on 21 October to Mr Carter and to Mr Collis who was an HR Business Partner, as follows:

> *"I have been informed by Lydia I will not be receiving a confirmation letter for my secondment, I am a little surprised as it commenced on 31 August, salary and package was offered by Kate and approved by Jim. I have been offered the role until April 2016, however I do not have confirmation from HR of this change and payroll have not made any changes to my salary.*
>
> *Would you please organise a letter ASAP as I am on the third month of my secondment and have not let had a letter from HR or my salary changed?*
>
> *My role changed immediately and the system was changed with my new title and the A2C/A2V changed to Head of Commercial (to help cover Kate leaving and no replacement)."*

The claimant chased that letter on 27 October and Mr Collis asked for the claimant to receive details in writing although these were never provided.

26. Also, on 27 October the claimant raised several issues with Mr Carter in an e-mail (page 507 and 508). The claimant expressed some embarrassment at having to raise concerns and said that she needed help to get them resolved. She first raised the issue of no written confirmation of her package or changes to her employment contract, in spite of having chased. She also said that she had an 'exceeded' score for end of review but was worried that there were no objectives in place for scoring for the current year. She set out her concerns about going on maternity leave and that she might be moved back into a band 3 role because there was no way to measure her success. She said that she had been undertaking three busy roles, Head of Commercial, SPM and Category Manager. She said that she

felt there needed to be some role clarity and that this needed to be discussed with Mr Coombe. She also said:

> *"I am currently working an average 10-11 hours a day and have been for the last three months, which doesn't include evenings and weekends. This is not sustainable, especially now I am expecting a baby. The work is busy mainly due to me trying to cover the three roles (HoC, SPM and Category Manager – it is not sustainable)."*

She said that she appreciated that Mr Coombe was only working part time in the HoC role and that she was trying to reallocate work to her team but that she was keen to 'objectively' agree her performance and was worried that her opportunities would be limited as a result of her pregnancy.

27. Mr Carter replied apologising that some matters were outstanding and provided some clarity. He said this about the lack of a letter about the secondment;

> *"HR confirmed that as this was done through manager self-service, you would not receive a separate letter, but clearly you should have been paid correctly. Your salary is £68k and I will get HR to confirm in writing the associated benefits."*

He went on to say that the objectives of the team were common and said that they should arrange to have '*an interim'*, by which he meant an interim review meeting. He also said that they should arrange to speak to Mr Coombe and said that he agreed that it was unsustainable to work 10-11 days (although he wrote days, he probably meant hours).

28. On 28 October somebody in HR sent forms to the claimant to complete for private health care and for the car allowance. The claimant, having contacted Mr Harries, received the email referred to above at paragraph 16, although by this time Mr Harries was in his permanent SPM role. By November 2015, the claimant's pay finally increased to reflect the salary of the seconded role, but it included nothing for benefits.

29. The claimant was then off work for a week with a pregnancy related illness, and this meant the interim review which had been suggested by Mr Carter was cancelled.

30. In her second witness statement, the claimant said that she met Mr Carter on 8 December 2015 where they discussed Mr Harries' pay and he said that he believed that Mr Harries did get band 2 benefits. Mr Carter made no reference to this meeting in his witness statement but at the tribunal hearing he disagreed that he had said that Mr Harries did have the benefits. Mr Carter disagreed that he said firmly that she was to be appointed to the SPM permanent post. Mr Carter agreed that he had discussed, with Mr Coombe, the likelihood of the claimant being appointed on a permanent basis although he said no final decision had been taken. Mr Carter's evidence that it was for Mr Coombe to progress this.

31. Mr Coombe's evidence about the discussions regarding the claimant undertaking the permanent role is set out in his first witness statement between paragraphs 21 and 29. He said that he discussed it with her at an early stage of the secondment. The claimant's recollection when she was giving evidence was that she was to be confirmed in the post based particularly on conversations with Mr Carter.

32. Mr Coombe told us that he believed it was a requirement that there needed to be a formal recruitment selection process before a formal offer could be made. The respondent's policy says that a manager may make clear in an advertisement that there is a preferred candidate. He therefore had discussions with a Ms Desmond (Lydia), who was the Resourcing Business Partner about his intentions with respect to the permanent post. As early as December 2015 a business justification form had been completed for this change which reads this;

> *"alternatives for recruitment*
>
> *Kerry Hughes has undertaken this position as a secondment for the last six months. We would like to make Kerry Hughes permanent for this role as preferred candidate. The current commercial team has been reviewed and it is felt that there are no other potential candidates for this role with the right skill set to undertake responsibilities in this role. There is no one in the displaced list"*

33. On 13 January, Ms Desmond e-mailed this request to the Resource Approval Panel, who did approve it, and on 18 January she wrote to Mr Coombe as follows:

> *"Hi Glen – please see attached the approvals. I do need to advertise this for two weeks, but I will include the 'preferred candidate' wording. I rec support will raise this for you if you can let me know once they have confirmed this has been done I can get things moving.*
>
> *I would suggest that in the meantime, you go ahead and interview Kerry so we have the notes to hand prior to her going on maternity leave. That way as soon as the advert is sent I can process her perm offer. Is this all ok?"*

34. A little earlier Ms Desmond had also emailed Mr Carter, to say that the submission had been approved - *'this is the senior procurement manager position to make Kerry Hughes permanent in the role'*.

35. Mr Coombe's evidence to the tribunal was that he intended to interview the claimant before maternity leave which was due to commence (with a period of annual leave) towards the end of January. In his witness statement at paragraph 27 he said this:

> *"this was an incredibly busy time within the team and I simply ran out of time to interview Kerry before her maternity leave started."*

He gave various details of how busy the team were stating that they were "*quite frankly frantic*" and went on to say this:

> *"there was no decision taken to disadvantage Kerry because she was pregnant and about to go on maternity leave – there was just far too much to do without enough time to do it and this was just something that, due to circumstance, ended up taking a back seat."*

36. Mr Coombe accepted that "*in retrospect*" he should have had the discussion with the claimant before maternity leave, but he did not have time to do it. His belief was that the claimant would know that she still needed to go through the internal recruitment process.

37. The claimant's evidence on this was that she understood that the matter had been agreed. She had not been told formally that a process needed to be followed. She also said that she had a conversation with Mr Carter shortly before she went on maternity leave which led her to believe that the matter was sorted. Mr Carter told us that there was an occasion when he saw Mr Coombe and there was point when he indicated '*thumbs up to Kerry'* and that there was a *'thumbs up'* in reply which he believed meant that the claimant had been successful in appointment of the permanent role. This led him to say something very quickly to the claimant when he was about to catch a train where he said something like *"I'm glad everything got sorted*". On this basis, the claimant believed that she would be appointed permanently when the secondment ended in April. We accept that that was the claimant's understanding of the position as she had not been told that an interview process would take place. In any event, all the indications are that, if the claimant had been interviewed before she went on maternity leave, given the comments about the lack of other candidates, she would almost certainly have been appointed.

38. Shortly before going on maternity leave, the claimant needed to grade herself on the review form and did so as "*developing in role*" because she was fairly new in the secondment. The respondent had also needed to find somebody to cover her maternity leave. Mr Dennant had been temporarily seconded to the SPM role and the claimant helped with that handover.

39. As she was leaving to go on annual and then maternity leave, she sent an e-mail on 29 January which included her handover notes and said: "*if you really need me I am on ……"* and then gave her personal e-mail address. For some reason, which the tribunal has had difficulty fully understanding, Mr Coombe took that to mean that the claimant did not want to be contacted while she was away so that he could not therefore progress anything about the permanent appointment. He believed that he was holding the permanent role open until the claimant returned.

40. The claimant had her second child on 16 March 2016. On that same day, the claimant sent a photograph of her new baby son to Mr Coombe and Mr Carter. She set out some details of the baby and his birth and sent a photograph of him. At page 956 this wording appears:

> *"Is there any update re the confirmation of my post (Senior Procurement Manager), do you need me to do anything? Love and best wishes to all"*

41. Mr Carter and Mr Coombe's evidence is that they did not see that wording when they received the e-mail on 16 March – it is not clear why they did not but the tribunal accepts that they did not see it for some reason. It is possible that it appeared on another page. No reply was given.

42. There was no other communication with the claimant until she noticed in April that her maternity pay was reduced to the salary of her substantive post of category manger at band 3. This led her to contact HR to find out what had happened. Ms Sothcott from HR had met with the claimant and wrote to Ms Desmond. The claimant had complained that she had had no contact from Mr Carter or Mr Coombe. She believed everything was approved for her to take the permanent role. Ms Desmond replied (page 597) to say that:

> *"I had a feeling her promotion hadn't been closed off. Leave it with me, I will get it sorted and get her salary back dated"*

43. There were then some chasing e-mails between people in HR and Ms Desmond chased Mr Carter on 29 April, asking for the interview notes as she understood that they would be backdating the salary. Mr Coombe replied as follows:

> *"I have not actioned a promotion as no interviews have been carried out. Kerry was on secondment for six months and so I would have needed to advertise and interview but pressure on time scales meant that this was not possible prior to her leaving on maternity leave. Mark was seconded into the SPM role in Kerry's absence and I felt it inappropriate to appoint Kerry into this role whilst on maternity leave whilst Mark has been seconded – it would have provided little motivation for Mark in this role if he felt there was no opportunity towards the end of it."*

44. Mr Coombe then referred to other possible vacancies and concluded:

> *"so as not to discriminate against any party and to ensure all individuals had equal opportunity, I was intended to release the IRC for the B2 SPM role centrally when Kerry was back at work. I am happy to take guidance on what can and can't be done in this scenario."*

Ms Desmond replied

> *"Thanks for the update. Prior to Kerry going off she was due to be interviewed and I could have put the offer in place. But I understand the reasoning behind this not happening.*
>
> *Can one of you get in touch with her to explain please as she is under the impression she was given a promotion".*

45. In June 2016 Mr Dennant's secondment was extended. Mr Coombe did not contact the claimant as suggested by Ms Desmond until he was prompted again by Ms Desmond on 7 June. He sent a short e-mail to the claimant on that day suggesting that they meet up to discuss as he understood *"you have some queries with regard to your role*".

46. The claimant replied on 10 June saying:

> *"I appreciate e-mail isn't the best way to communicate, however, I am looking for an update regarding the Senior Procurement Manager role. Glen, prior to my maternity leave, you were going to confirm my band 2 secondment as permanent. In fact, Jim and Lydia also discussed this with me and advised it would take effect whilst I am on maternity leave which would mean my secondment pay would not revert back to the band 3 role.*
>
> *I haven't received any confirmation this change has been processed, so I have looked at my online payslip and notice my money has been reduced to band 3 role from April. Can you please share and update at your earliest opportunity?"*

47. On 20 June Mr Coombe replied. He confirmed that there had not been a permanent appointment to the SPM role and says this:

> *"Prior to you going on maternity leave, we discussed your interest in this role and I did not have time to publish the perm IRC and get interviews scheduled and so rather than make an appointment in your absence, I have kept the role vacant whilst seconding another member of the team whilst you are on maternity leave. I remember that prior to you going on maternity leave, you provided me with a copy of your interview notes from the interview you had with Jim for Head of Commercial but I am not able to use these as it was for a different role. As such, the role remains vacant and on your return from maternity leave I shall advertise the role internally on a permanent basis so you get every opportunity to apply".*

He then told her about another band 2 role based in London. The claimant replied on 20 June saying that she was shocked by the contents as she thought she was going to be confirmed whilst she was on maternity leave.

48. The claimant heard in July that she had been given a grading of '*good'* for that year. There was a meeting on 21 July between the claimant and Mr Carter and Mr Coombe. There are no notes of that meeting and it is clear

from all people who attended that the claimant was very upset about what had happened. Mr Carter or Mr Coombe told the claimant that she could apply for the permanent post; there was no suggestion at this stage about her being '*the preferred candidate'*. Although that had been discussed between Mr Coombe and Ms Desmond earlier in the year, before the claimant went on maternity leave, the claimant was unaware of it then and there was no mention of it in July 2016. Mr Carter and Mr Coombe said they had understood that the claimant was interested in the permanent role although they disagreed that she had been led to believe that it would be processed whilst she was on maternity leave. Mr Carter did recall having the conversation about everything being sorted but said that he had misunderstood, thinking that matter had been concluded. There was no real resolution from that meeting and on 23 September the claimant decided to submit a formal grievance.

49. This appears at page 644 of the bundle and referred to discrimination, specifically sex and maternity discrimination. She said this:

> *"In summary, I was verbally promised a role following a secondment (Senior Procurement Manager) but not confirmed in post. My secondment ended whilst I was on maternity leave. Rather than confirming my new role I was told it would be open for me to apply for when I returned to work. This in itself is discrimination".*

50. She set out other concerns which included a reference to demotion to a substantive post with no communication; receiving a good appraisal when she had previously exceeded scores; differential treatment to male peers and failure to follow policies. She said that the discrimination had caused her considerable stress in an already stressful period and that she "*was worse off now than I had I not been on maternity leave, I have been treated significantly different to a male peer undertaking the same job in the same team".*

51. An immediate response to that was sent on 23 September. It said it would be copied to Mr Blackley who had taken over from Mr Carter (who had left on a secondment to the Cabinet Office), and a formal letter of acknowledgment was sent on 26 September. It then took a little while for someone to be appointed as the investigating manager. The claimant wrote on 10 October referring to the respondent's grievance procedure, particularly where it states, "*The hearing will be held as soon as possible and a date agreed for the hearing within seven working days of the submission of the grievance".* There was no meeting arranged within seven days of the submission of the grievance and the claimant felt that she needed to escalate it which she did on 11 October to the HR Director.

52. On 12 October she was invited to a meeting but there were various delays with respect to the appointment of a manager so that eventually Ms Eames was assigned later in October. In the meantime, the claimant had asked for a wellbeing manager and an Occupational Health referral. Mr Collis from

HR replied saying that he could not appoint either a wellbeing manager or a referral to Occupational Health as that needed to go through a line manager.

53. A grievance hearing was held with the claimant and Ms Eames on 3 November. Ms Eames said that she was relatively inexperienced and told the claimant this which made the claimant feel a little anxious.

54. The claimant asked for an update on 14 November and Ms Eames responded that day saying she was trying to look into it as soon as she could. The claimant made substantial alterations to the minutes which were taken on 16 November and asked for a further update on 24 November. Ms Eames said that there was a delay because of witness availability but then indicated to the claimant that she would be in a position to have a reconvened hearing and conclude the investigation in mid-December. The claimant sent considerable e-mails over the next few days for Ms Eames to consider and eventually a meeting was arranged for 21 December for the outcome. Ms Eames upheld some of the grievance points but there were no real suggestions for how matters could be remedied. The claimant received the written outcome of the grievance on 23 December, and it appears at pages 1011 to 1013, of the bundle. That short letter includes a longer grievance report.

55. The claimant submitted an appeal against that grievance outcome and Ms Elken was appointed to deal with it. A hearing was arranged on 18 January and, as a way to try to resolve matters, Mr Coombe was spoken to see whether he could think of anything to offer the claimant. Mr Coombe confirmed on 27 January that the claimant could be offered a return to the band 2 secondment for a 12-week period so that she could apply for the permanent role when it was advertised. This offer was communicated to the claimant with an offer of mediation on or around 2 February. The claimant decided to reject that offer, some of her email reads this:

*"I have given the offer some serious thought, however, I wish to decline. My rationale:*

1. *Firstly, this is a secondment. I had (prior to maternity leave) been advised that I would become permanently into the post.*
2. *My experience of secondments in Network Rail has left me never wanting to undertake a secondment again in the organisation.*
3. *I am now very sensitive, I even concerned that you offered me the role verbally with no written offer. Whilst I have no reason mistrust you, I feel absolutely no confidence or trust in Network Rail. After all, I would never have guessed this would have happened to me with my proven professional track record and what I had thought were great relationships with managers, Jim and Glen.*
4. *I have also reflected on your comment in the appeal hearing regarding actions and disciplinary will take place post my grievance hearing outcome. Essentially, we cannot talk any more about this and I totally respect that……*

*5 I do not believe mediation is achievable……."*

56. There was then to be a conclusion of the appeal hearing and the claimant met with Ms Elkin on 17 February 2017. After that hearing, the claimant was sent the outcome letter on 17 February although it is understood that she did not receive it until 2 March. That did not uphold the grievance although she was offered formally the chance to return to the band 2 secondment for 12 weeks.

57. On 2 March Mr Coombe wrote to the claimant asking for her return to work date and she replied with a letter of resignation on 2 March. The claimant states in that letter that there has been "*a fundamental breach of contract and breach of trust of which I truly believe had I not been pregnant on maternity leave I would not have suffered"*. She referred to Network Rail's failure to adhere to their grievance procedure which had contributed to the breach of trust and confidence. She set out the offer to reinstate her etc and says, "*I do not accept this offer, I do not believe it is fair, equitable or workable, it's worth highlighting that Shona all accepts in the minutes which accompanied the resolution offer, that she agrees "process and grievance has taken you too long to offer you mediation or another role*". That was the conclusion of the claimant's employment.

58. In the claim form presented in January 2017 the claimant referred to a comparison with Mr Harries and the different financial benefits as between them. She amended those in her complaint in August 2017 and stating:

*"I was not treated in the same way as my male colleague, Richard Harries"*

She ticked the box at section 8 of the claim form for "sex (discrimination), including equal pay".

59. The first grounds of resistance were presented on 21 February 2017. The respondent did not reply directly to an equal pay claim and denied liability for sex or maternity leave discrimination.

60. In the first amended ET3, presented on 31 May 2018, the respondent dealt with the alleged difference in treatment between Mr Harris and the claimant (paragraph 12), in that it denied that Mr Harries had received the band 2 benefits. At paragraph 27, it argued that the claimant's claim for sex discrimination could not proceed as it was incorrectly pleaded, but in the alternative, it pleaded reasons for the alleged different treatment of Mr Harries as follows.

61. First, at sub-paragraph (a) it was denied that he was awarded the band 2 benefit and reads *"In any event, the respondent's secondment statement states that "where relevant, a salary enhancement will be paid but does not make any assertion with regard to enhanced benefits".* At sub-paragraph (b), it was denied there was any differential between the claimant's pay and Mr Harries' or that it was because of the claimant's sex. It continues - *"If there was any pay differential, this was determined by the claimant's and Mr*

*Harries' reflective line managers within the applicable banding and based on the claimant's and Mr Harries' respective levels of experience and was not because of the claimant's sex"* and finally at sub-paragraph (c) the respondent denied the failure to follow a secondment process would amount to less favourable treatment and argued that that was because of an administrative error.

62. In February 2019, after the equal pay issues had been clarified, the respondent presented a further amended ET3. At paragraph 33 of that amended response the respondent, having denied in paragraph 32 that Mr Harries received a sum equivalent to band 2 benefits, alleged that the claimant could not compare her benefits package to his.

63. It also pleaded that there was a material factor which was not the claimant's sex. At sub-paragraphs a, b and c these explanations were provided:

> *"a) Mr Harries' basic salary in his substantive role was less than the claimant's and given the additional responsibility assumed during the RH secondment a greater enhancement was required to ensure Mr Harries was remunerated appropriately and in line with other Senior Procurement Managers during the RH secondment;*
>
> *b) Mr Harries was initially offered a lower enhancement during the RH secondment but it was subsequently agreed to increase the enhancement following a period of negotiation led by Mr Harries (which was unconnected with his sex); and*
>
> *c) At the time of RH secondment, the respondent had greater flexibility in terms of the level enhancement it could offer during a secondment and to pay more generally than was the case than during the claimant's secondment to the role. This was because of the instruction of transparent pay in roles of bands 1 to 4 with effect of 1 April 2015. This was unconnected with Mr Harries' sex. It is admitted that Mr Harries' pay did not reduce following April 2015. This was in line with the respondent's commitment not to change existing terms and conditions so that no one could take a pay cut as a result of the instruction of transparent pay."*

64. Evidence contained in witness statements from Mr Coombe and Ms Hall for this hearing made reference to the transparent pay zones and indicated that the claimant could not have received the £6,000 for car allowance on top of the £68,000 agreed, as that would put her over the zone 1 limit. However, it emerged during the hearing that those benefits were not to be included in the calculations for the zones and were separate from it. That explanation therefore cannot be valid.

**The Law**

65. The discrimination and equal pay claims are brought under sections of the Equality Act 2010. The most relevant are as follows: - section 13 for the

direct sex discrimination claim; section 19 for the indirect sex discrimination claim; section 18 for the pregnancy and maternity leave discrimination claim and sections 64 – 69 for the equal pay claim. Those sections are reproduced below.

### 13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

### 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).

### 19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are— age;
disability; gender reassignment; marriage
and civil partnership;
race; religion or belief;
sex; sexual orientation.

## 64 Relevant types of work

(1) Sections 66 to 70 apply where—
(a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;
(b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.

(2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.

## 65 Equal work

(1) For the purposes of this Chapter, A's work is equal to that of B if it is— (a) like B's work,
(b) rated as equivalent to B's work, or (c) of equal
value to B's work.

(2) A's work is like B's work if—
(a) A's work and B's work are the same or broadly similar, and
(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—
(a) the frequency with which differences between their work occur in practice, and
(b) the nature and extent of the differences.

(4) A's work is rated as equivalent to B's work if a job evaluation study—
(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or
(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

(5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

(6) A's work is of equal value to B's work if it is—
(a) neither like B's work nor rated as equivalent to B's work, but
(b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.

## 66 Sex equality clause

(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

(2) A sex equality clause is a provision that has the following effect—
(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

(3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.

(4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).

**69 Defence of material factor**

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) "Relevant matter" has the meaning given in section 67.

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

66. For all the EQA claims the burden of proof provisions as set out in section 136 EQA apply as do the time limits in section 123 EQA. Section 136 reads:

**136 Burden of proof**

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

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

68. The tribunal must make findings of fact and apply the legal tests to those facts. The tests for direct discrimination were discussed in Igen v Wong [2005] ICR 931 and it is clear that all evidence before the tribunal can be

taken into account, not just that put forward by the claimant. The tribunal is mindful that it is unusual for there to be clear, overt evidence of direct discrimination and that it should consider matters in accordance with section 136 EQA. When making findings of fact, we may determine whether those show less favourable treatment and a difference in sex. The test is: are we satisfied, on the balance of probabilities that this respondent treated this claimant less favourably than they treated or would have treated a male employee. We are guided by the decision of Madarassy v Nomura International plc 2007 IRLR 246 reminding us that unfair treatment and a difference in sex does not, on its own, necessarily show discriminatory treatment.

69. The claimant here claims discrimination because of pregnancy or maternity under section 18 EQA. Under this provision, the claimant does not need to show less favourable treatment than a man. She has to show facts which show unfavourable treatment because of pregnancy or maternity leave.

70. If we are satisfied that the primary facts show a difference in sex and less favourable treatment or unfavourable treatment because of pregnancy/maternity leave, we proceed to the second stage. At this stage, we look to the employer for a credible, non-discriminatory explanation or reason for such less favourable or unfavourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable or unfavourable treatment occurred because of the claimant's sex or pregnancy/maternity leave.

71. For the indirect sex discrimination claim, the claimant is required to show that there was a provision, criterion or practice (PCP) which is apparently neutral but places her at a disadvantage because of her sex. If she shows there was such a PCP, the respondent can seek to justify it if it can show it was a proportionate means of achieving a legitimate aim.

72. The claim for equal pay falls under the like work provisions as in sections 65 (1) a) and (2) EQA above. The respondent has accepted that the claimant was carrying out like work to Mr Harries. The respondent relies upon the material factor defence in section 69 EQA. For these purposes we have considered Glasgow & Others v Marshall 2000 ICR 196 which is helpful in its guidance but was decided before Equality Act 2010. This says that for this defence to succeed it should be genuine and not a sham or perverse and that it should be significant, relevant and cause the variation. Clearly, such a defence needs to be 'material'. This means that it needs to be linked to the actual job being done. Although the word 'genuine' is no longer used in this defence, the respondent still has to show that that the factor was actually the reason for the difference in pay.

73. The claimant also claims constructive unfair dismissal under s95 (1) c) Employment Rights Act 1996 (ERA). The tribunal is concerned to decide whether there has been a dismissal in accordance with that section which states

*"For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)….only if)-*

*a)-*
*b)-*
*c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct"*

This is what has become known as "constructive dismissal". The leading case of Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 makes it clear that the employer's conduct has to amount to a redudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.

## Submissions

74. Both parties prepared excellent written submissions. They agreed to make their submissions in line with the list of issues and then we heard from them orally in relation to any outstanding matters. Although there was reference to case law in those submissions, this is mainly referred to above, or are leading cases that need no further explanation. There was really no dispute on the legal tests to be applied.

75. One case of some relevance was that in relation to the risk assessment claim at 6.14, and for those purposes, Ms Carse referred us to O'Neill v Buckinghamshire County Council UK EAT 0020009, which case itself referred to parts of Madarassy v Numura International plc 2007, IRLR 246. In particular, the judgment with respect to failures to carry out a risk assessment at paragraph 138 of that judgment, makes it clear that the tribunal should make an express finding of what would constitute a risk to health and safety for there to have been an obligation to carry out a risk assessment for a pregnant employee.

## Conclusions

Equal Pay

76. These are matters which were previously referred to as issues **6.2** and **6.4** in the list of issues and were then relabelled as equal pay. They read as follows:

*"6.2 the respondent's refusal to award the claimant band 2 benefits in her secondment role; and*

*6.4 the respondent's failure to offer the claimant equal terms of pay and benefits in the secondment role".*

77. It was clarified at the previous hearing and at the case management hearing that the comparison the claimant was relying was between herself and Mr Harries in their seconded roles. There was a suggestion during this hearing that she was also considering his pay in the permanent role but that is not part of this case. Factually, the initial questions can be answered fairly simply. The claimant was doing like work to Mr Harries and she was paid less than him. We have had some difficulty determining his precise pay at August 2015 but the respondent concedes that whatever it was, it was more than the claimant.

78. As a matter of fact, the claimant did not receive the band 2 benefits in her secondment role (except it seems the respondent might have awarded a bonus in accordance with band 2). The matter we concentrated on, and is the only one where we make clear findings of fact in relation to this matter, is the car allowance, which was worth an extra £6,000 per annum. The respondent did not pay that to her although we have found as a fact that she was offered that benefit and believed that she was to receive it. We have found that the respondent did not pay the claimant the same when she was seconded as an SPM as Mr Harries was receiving. We therefore need to look at the respondent's defence. It is said that there was a material factor which was not the claimant's sex.

79. The respondent has rather shifted its position on its reason for the difference in pay. Initially, as set out above, it did not suggest any difference which related to transparent pay. It did not appear in the pleadings or in the written witness statements which were exchanged before the January hearing. It emerged during that hearing when Mr Coombe was giving evidence about how he had negotiated Mr Harries' pay. As has been pointed out above, the respondent's first approach was to deny that Mr Harries had received the band 2 benefits. The tribunal is not entirely clear how much it matters whether the extra amount Mr Harries received was referred to as a car allowance. He may not have been told formally that he was getting those benefits, but he received a sum very close to £6,000. Transparent pay was not mentioned by the respondent until after it was discussed at the hearing in January. It appeared in its amended response and even then, the respondent seemed to rely on other alleged material factors, such as the need for a '*greater enhancement'* and that he negotiated his salary. The respondent's witness evidence was that transparent pay (which the amended ET3 stated had come into effect on 1 April 2015) came into effect on 1 September 2015 although it was informally applied before, had prevented the claimant receiving the same as Mr Harries.

80. These arguments do not withstand any scrutiny after the evidence was given. Ms Carroll said, and it was not disputed, that the zone ranges did not include any extra benefits and therefore it would have been quite possible for the claimant to receive the sum of £68,000 which is within zone 1 and also receive the car allowance of £6000. What is more, on Ms Carroll's evidence, that she was attempting to award the claimant the same as Mr Harries, transparent pay is not anything which would have prevented that.

81. Although we accept that transparent pay procedure might well be relevant to this question, we cannot accept that it caused the variation in pay. It did not do so, because it still would have been possible for the claimant to receive the salary agreed and the car allowance (or the sum of £6000) and be within the transparent pay structure. For these reasons, the respondent's material factor defence is not made out. Transparent pay is not the reason for the difference in pay. The claimant was clearly entitled to pay equal to that of Mr Harries.

Direct sex and/or pregnancy and maternity discrimination

82. Turning then to the other matters which appear at **issue 6**, which relate to direct discrimination because of sex and/or pregnancy/maternity discrimination. We say immediately that we have not found any direct discrimination because of sex. We will come soon to our findings which relate to the claimant's pregnancy/maternity leave. But none of them relate to her sex.

83. We first decide what facts are made out and then decide whether they are facts which show unfavourable treatment because the claimant was either pregnant or exercised her right to maternity leave. The shifting burden of proof then requires us to consider whether the respondent has shown non-discriminatory reasons for any such treatment.

84. We therefore look at issue **6.3** which we take with issue **6.5** because these both relate to the secondment statement and the alleged failures of the respondent. As far as 6.3 is concerned, this seems to relate to what the claimant believes were failures more attributable to the recruitment and selection policy because she does not accept that this secondment statement was in fact in place. The tribunal finds that the secondment statement was in place, although we also accept that the claimant did not see it and it is also probable that some of the line managers did not see it at the relevant time. We therefore look to see if there is any breach of that statement and accept that there was a breach to provide written confirmation of her secondment, as set out in that policy. That policy does not set out anything about '*objectives and agreed way of measuring her performance*' so there can be no such breach there.

85. The tribunal finds that there was a breach of the secondment statement in that the claimant did not receive written confirmation of her secondment and its terms. The respondent's explanation for this appears to be something to do with a manager self-service process. That does not really excuse it, given that its own statement says there should be written confirmation. It is obviously much better practice for that to happen so that the employee can be clear about the agreement. However, although we criticise the respondent for its failure in that respect, we cannot say that we find that it is unfavourable treatment because the claimant was pregnant. It seems to us that the explanation is much more likely to be that there were errors in HR which led to the claimant not getting a letter and a misunderstanding that

one was not needed because of the way in which the secondment had been arranged through the manager self-service system. We are not sure whether Mr Harries received a letter and the claimant has not pointed us to anyone else who received such a letter. On the balance of probabilities, we do not believe that the failure to provide written confirmation was related to pregnancy. The claimant does not succeed on issues 6.3 and 6.5.

86. We now turn to issue **6.6** which relates to the claimant doing more than one role which she said caused her stress and increased her workload. We have accepted that the claimant did indeed carry out tasks under more than one role for a period of some months before she went on maternity leave. We have no evidence as to whether Mr Harries was doing more than one role, although we do have clear evidence, which we accept, that everyone working for the respondent in this department and at this level, appeared to be extraordinarily busy. We also know that Mr Coombe was carrying out more than one role later that year. Although it seems unfortunate that people were working as hard as they were, and this may have led to some of the difficulties that we will shortly come to, we cannot say that that is unfavourable treatment related to the claimant's pregnancy. The claimant does not succeed on issue 6.6.

87. We turn now to issues **6.7, 6.8** and **6.9**; the failure to confirm the claimant in the SPM role on a permanent basis which subsequently led to the decision that her maternity pay being reduced to that of her substantive role and not receiving enhanced pay. These can all be taken together. The tribunal have found that all these things did occur and indeed there is little dispute about it. The respondent has sought to explain how this came about, but the tribunal finds that this unfavourable treatment was because the claimant exercised her right to maternity leave. Mr Coombe gave clear evidence that his intention was to make arrangements to appoint the claimant to that permanent role. Although we were told that the respondent's procedures would mean some interview process, that clearly could have been arranged before the claimant went on maternity leave or when she had started annual leave. The e-mail communication with Ms Desmond makes it clear that it was the firm intention of the respondent that the claimant should be offered that role permanently and that when her secondment expired during her maternity leave she would have the permanent post. The only reason that that did not happen is because Mr Coombe ran out of time before the claimant went on maternity leave.

88. Whether we apply a test of what would have happened *'but for*' the maternity leave, or consider the unfavourable treatment was *because* of the maternity leave, the answer is the same. If the claimant had not gone on maternity leave, there is no doubt in our minds, and the evidence is quite clear that she was the preferred candidate, no one else was likely to be appointed. What is more, Mr Carter who had considerable influence at the time, believed that the claimant had been appointed on a permanent basis. Mr Coombe's explanation for failing to follow the matters up because the claimant had gone on maternity leave and had said something to the effect of *"if you really need me*" in an e-mail is simply not satisfactory. The tribunal

have no doubt that had the claimant been approached for an interview, even if she was on annual leave before her maternity leave, she would have agreed to attend an interview, if that what was required to put her in the permanent position.

89. The fact that Mr Coombe did not do this, led to the inevitable reduction of her maternity pay and her being told that she would revert to her substantive role. There is no question in our minds that that is unfavourable treatment and it is clearly connected to the claimant having taken maternity leave. The claimant succeeds on her claims under issues 6.7, 6.8 and 6.9.

90. Turning then to issue **6.10**, which is the decision to grade the claimant as *'good'*, again there is no dispute on the facts, this was her grading was. The question is why this grading was given and whether it is unfavourable treatment because she was on maternity leave. The tribunal has considered the evidence with respect to this matter in some detail. Although we can understand the claimant's disappointment at the grading given that her previous gradings had been '*exceeded*', we do not accept that it was connected to her being on maternity leave. Firstly, Ms Carroll who was very supportive of the claimant and indeed gave evidence on two occasions before the tribunal on her behalf, had already given an interim grading of good because the objectives were not in place. Whilst that may be the responsibility of the respondent which they had failed to implement, it cannot be said that that grading was in anyway incorrect. What is more, the claimant had said herself that she was 'developing in the role' and Mr Carter explained to us the process for giving such a grade which relied heavily on the previous grade given by Ms Carroll.

91. We did have some hesitation here because the claimant was told during the appeal process that that '*good*' was the 'default' grade given to people on maternity leave but that was not borne out in the evidence before us. We are also concerned because Mr Carter seemed to consider in, to some small degree, that he could only grade her as '*good*' because she had started maternity leave. That is clearly something that should not have been taken into account. Bearing in mind the claimant's own assessment, on balance we do not think that amounts unfavourable treatment. Again, criticism could be made of the respondent for the handling of this matter, but it does mean that it means to unfavourable treatment because she was on maternity leave. The claimant does not succeed on issue 6.10.

92. We turn then to the allegation at issue **6.11** which is the respondent's failure to inform the claimant of organisational changes and job opportunities during maternity leave. There were really no organisational changes that the claimant needed to be told about during her maternity leave so that it is not made out. We appreciate what she says that there was an apparent lack of interest whilst she was on maternity leave; Mr Coombe only responded to her when she wrote to him but that might have been a slightly misguided judgment of his because she was, of course, on maternity leave. We have already commented on how he misunderstood her comment in the e-mail about getting in touch.

93. We do accept that the respondent failed to tell the claimant about job opportunities and have seen that there were some job opportunities that arose during her maternity leave, specifically around the time that the claimant was complaining about her treatment from September to December 2016, before she returned from maternity leave. It is surprising that no efforts were made to inform her of those opportunities, but it is not possible for us to say whether the claimant would have applied or would have been successful if she had made those applications. It is clear to us that, if the claimant had been at work and not on maternity leave, she would have been aware of those opportunities as they were advertised on the intranet. Although Mr Coombe may not have been aware of this, the claimant did not have access to those systems when she was on maternity leave. She therefore did not see them and that is clear unfavourable treatment because she was on maternity leave. The claimant succeeds on that issue in relation to the failure to inform her of job opportunities.

94. Turning then to issue **6.12** which is the respondent's failure to follow its time limits in the grievance process. This can only relate to a time scale suggested in the grievance procedure at paragraph 50 above. This is the question of the suggested time of seven days for a meeting to be arranged. The claimant's grievance was sent on 23 September 2016 and she was not offered a date for a hearing until 12 October, which is approximately three weeks. Her grievance was acknowledged immediately and there are no other time scales suggested in the grievance procedure. However, there is very little evidence before the tribunal that this was anything to do with the fact that the claimant was on maternity leave. We have had no evidence about how long it is before meetings were arranged for grievance hearings with this respondent, but we all have enough experience of hearings where we see very similar delays in processing these sorts of matters. We cannot say that this is a fact from which we could conclude that the unfavourable treatment was linked to her maternity leave. The claimant does not succeed on issue 6.12.

95. We then to the claimant's allegation at issue **6.13** about failing to provide her access to wellbeing managers and occupational therapy for support. We do not accept this is unfavourable treatment because she was on maternity leave because that is something that she could have followed up with her line manager if she had wanted to.

96. We turn finally under the direct discrimination to issue **6.14** about failure to carry out a risk assessment. This took the tribunal some time because the respondent (at page 133 of the bundle), states that it will carry out such a risk assessment with pregnant employees. What is more, Mr Carter and Mr Coombe gave evidence that they knew such a risk assessment should be done, although Mr Carter said that he was unaware that one had not been carried out by Mr Coombe. Mr Coombe said that he was too busy to do 1-to -1's and he acknowledged that no risk assessment had been carried out. That, on the face of it, might amount to unfavourable treatment because the claimant was pregnant.

97. However, having considered this with some care, we cannot say there was a risk identified in the claimant's working conditions which would lead us to say that it amounted to pregnancy discrimination. Although she does complain of working long hours, there is no statement that that would cause any particular risk to her or her unborn baby, even though it might amount to something that the respondent might have dealt with more convincingly. The respondent could be criticised for requiring employees, pregnant or otherwise, to work long hours, we cannot say that it is unfavourable treatment for pregnancy related reasons and the claimant does not succeed therefore on issue 6.14.

98. Issue **7** is the question of whether the claimant was treated less favourably than comparators and Richard Harries is named. As our conclusions above make clear, the tribunal finds that the claimant was entitled to a sex equality clause that she should have been paid the same as Richard Harries on secondment.

99. As to issue **8**, we have found that the claimant was unfavourably treated because of maternity leave in relation to the failure to confirm her appointment on a permanent basis; the consequent reduction in her maternity pay and the failure to notify her of job opportunities.

Indirect sex discrimination

100. Issue **11** is the claim for indirect discrimination in relation to sex. We can deal with this relatively quickly. The claimant cannot succeed in this. The suggested provisions criteria or practices (PCPs) set out at issues 11.1 and 11.2 do not stand any scrutiny. They are not PCPs which apply neutrally across the board as they relate only to people on maternity leave. In any event, the claimant has succeeded in a failure to appoint her in a permanent role as direct discrimination and we have made our findings in relation to the good grade with respect to that. That part of her claim is dismissed.

Unfair dismissal

101. We turn to the unfair dismissal claim which appears between issues **5.1** and **5.8.** The first question at 5.2 is whether the respondent was in breach of contract and 5.3 whether the breach was fundamental, such as to entitle the claimant to terminate it without notice.

102. Given our findings in relation to equal pay and maternity leave discrimination arising from the failure to confirm the claimant's position in a permanent role, there is little doubt that that amounts to a fundamental breach of contract. It hardly needs to be said that acts of discrimination and a failure to pay equal pay would amount to breaches of the implied term of mutual trust and confidence which itself is always considered a fundamental breach.

103. Those breaches occurred between the time the claimant knew she was being paid less than Mr Harries, which is sometime between October and

December 2015 through to when her maternity pay was reduced in April 2016, that she had not been confirmed in post around June 2016. The breach continued with the failure to tell her about job opportunities around September and November 2016 through the grievance process, which the claimant alleges was a last straw. Given our findings in relation to the fact that there had been discrimination and a failure to pay equal pay which continued until the claimant left the respondent's employment, we do not need to consider whether the outcome of the grievance process was a last straw. Given the clear breaches by the respondent, the claimant's refusal of a 12 week secondment was not unreasonable.

104. As far as the question at issue **5.4** is concerned about whether the claimant resigned within a reasonable time, the tribunal finds that she did so, given that she was pursuing matters through a grievance process where she hoped matters could be resolved. In fact, there were some attempts to do so but those failed. She clearly resigned because of breaches of contract; that is clear from her resignation letter and all the evidence before us.

105. Issue **5.5** suggests that the respondent might argue the claimant would have resigned because she relocated but that has not been pursued. Nor has the respondent pursued an argument that the dismissal was otherwise fair or whether she contributed to the dismissal or questions arising about procedural unfairness at issues 5.6 – 5.8.

106. The respondent having committed a fundamental breach of contract, the claimant resigned in response to that breach. This was a dismissal and an unfair dismissal.

107. Turning lastly to the issue at **5.9**, which is whether there was an unreasonable failure to follow the ACAS code of practice, the only question here is whether the respondent failed to follow the guidance. The respondent has not argued that there is any failure by the claimant. The tribunal have considered this and read the claimant's submissions on it. There is no specific reference to any particular requirement of the ACAS code with respect to grievances. In broad terms, the respondent's procedure follows that recommended in the ACAS code of practice. The claimant points out that there was a possible problem with the fact that the ACAS code suggests that matters should be dealt with promptly and sets out the length of time for the grievance to be finally determined. Although the tribunal has some sympathy with that view, and it is unfortunate that matters took as long as they did, we also accept that it was relatively complicated and involved the claimant raising issues about the first investigating officer and following an appeal process, as well as the officers trying to find a resolution. The ACAS code is simply not so prescriptive as to allow us to say that the steps taken under the grievance process, although it might not have been a perfect process, and slower than is ideal, amounted to a breach of the ACAS code. There was no unreasonable failure by the respondent to follow that code.

108. In conclusion then, the claimant has succeeded in those parts of her claim which relate to the failure to appointment her in the SPM role on a permanent basis because she had gone on maternity leave; the consequent reduction in her maternity pay and the failure to tell her about job opportunities whilst she was on maternity leave. She has also succeeded in her claim for equal pay and constructive unfair dismissal. Some of the claimed unfavourable treatment has not been found or was not because of pregnancy or maternity leave. Her claims for direct and indirect sex discrimination also do not succeed.

109. The matter has already been listed for hearing to determine remedy on 8 and 9 October 2019. To ensure an effective hearing, orders are made below.

# ORDERS

**Made pursuant to the Employment Tribunal Rules 2013**

1 Both parties should provide dates to avoid for a one-hour telephone preliminary hearing in September by **30 August 2019**. This will be to consider whether the remedy hearing should be split into two hearings, the first in October to determine issues of principle, such as the period of time for the calculation of loss of earnings and the amount for injury to feelings. A second hearing might then be needed for calculations of pension loss and other complex calculations.

2 The claimant shall send an updated schedule of remedy claimed to the respondent and the tribunal by **6 September 2019**.

3 The respondent will send a counter schedule of loss to the claimant and the tribunal by **20 September 2019**.

4 The parties will agree a list of issues for the October hearing which sets out what is agreed and what remains in dispute and send it to the tribunal by **4 October 2019**.

**CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further

consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

_____
Employment Judge Manley

Date: …….21/8/19……..

Sent to the parties on: .21/8/19.....

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For the Tribunal Office