Case Number: 2200306/2019
2204551/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS S PLUMMER**
MR D KENDALL

BETWEEN:

Ms Z Thomas

Claimant

AND

ACAS

Respondent

ON: **29, 30 and 31 October and 1, 4 and 5 November 2019**
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr S Margo, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

a) The claim for failure to provide itemised payslips succeeds.
b) All other claims fail and are dismissed.

REASONS

1. By claim forms presented on 12 May 2018 and 29 January 2019 the claimant Ms Zoe Thomas claims unfair dismissal, race discrimination, maternity/pregnancy discrimination, victimisation and failure to provide itemised pay statements.

The issues

2. At a preliminary hearing before Employment Judge Walker on 9 April 2019 the parties were ordered to agree a list of issues by 26 April 2019.

3. There was a list of issues in the bundle which was agreed. The claimant had been represented by solicitors until about two weeks before the hearing and was represented at the time the issues were agreed. The

issues were confirmed with the parties at the outset of this hearing:

Constructive Unfair Dismissal

4. Did the respondent breach the implied term of mutual trust in confidence by allegedly:

    a. Not consulting the claimant before deleting her role in August 2017;

    b. Not automatically offering the claimant the 'new' Grade 8 role without going through the competitive process

    c. Not confirming the claimant's temporary promotion as permanent after a year or within a reasonable amount of time thereafter, which policy was not introduced until August 2015;

    d. Not returning the claimant to the specific role and grade she had been on before she took maternity leave on her return following an internal restructure when the original role no longer existed;

    e. Not providing the claimant with support for her CIPD training when requested in March 2017 by emailing to Pat Rees and Sharon Leid;

    f. Discriminating against the claimant as set out below;

    g. Not upholding her grievance or carrying out remedial action for the part upheld on 13 April 2018;

    h. Not investigating the claimant's grievance promptly or properly as set out in subparagraph 9(ix) below re: non-statutory ACAS Guidance on Workplace Investigations;

    i. Not providing her with itemised pay-slips since November 2017 following implementation of a new payroll system, allegedly failing to pay her for Keep in Touch days or allegedly failing to provide information to make applications for SSP or other benefits since November 2017;

5. Do the above events, either singularly, or combined (ie the last straw doctrine) amount to a repudiatory breach entitling the claimant to resign and claim constructive dismissal? The last straw relied upon was the return to work meeting on 13 December 2018;

6. If the respondent was in repudiatory breach, was it a causative of the claimant's decision to resign?

7. Did the claimant affirm the breach so that she lost her right to resign and claim constructive dismissal?

Direct Race Discrimination

8. The claimant identifies herself as of Asian/Jamaican origin and relies upon her colour, being black.

9. Did the following occur, and if so, do they amount to a detriment:

   i. Allegedly dismissing the claimant;

   ii. Not confirming the claimant as a permanent Grade 9 role, or not confirming after a reasonable time or around one year as per the respondent's temporary promotion and substitution policy which was introduced in August 2015:

      i. from July 2005 to June 2007 (the claimant having returned from maternity leave June 2007);
      ii. from December 2007 to January 2011 (the claimant having returned from maternity leave January 2011);
      iii. from June 2013 to 2014 (when covering the Grade 8 Equality manager post).

   iii. Not providing the claimant with CIPD training when she requested it in March 2017 by email to Pat Rees and Sharon Leid; The claimant withdrew this at the end of her evidence on day 2.

   iv. Not putting the claimant down to attend the CIPD conference in March 2017 by Pat Rees and Sharon Leid; This was withdrawn against Ms Leid but not Ms Rees at the end of the claimant's evidence.

   v. Allegedly not consulting with the claimant regarding deletion of her post in August 2017;

   vi. Deleting the claimant's post in August 2017;

   vii. Not automatically appointing the claimant to the 'new role' of Diversity and Inclusion Business Partner in the HR department after her post was deleted in August 2017;

   viii. Allegedly failing to follow the ACAS Code of Practice 2015 on Disciplinary and Grievance procedures: by unreasonably delaying meetings, decisions or confirmation of those decisions. The grievance was raised on 16 October 2017, decision given on 14 April 2018, appeal raised 27 April 2018 and decision to appeal provided on 5 October 2018;

   ix. Allegedly not investigating the claimant's grievance properly or at all in line with the ACAS non-statutory external guidance on Conducting Workplace Investigations, in that:

x. In step 1 of the Guidance, 'preparation for the investigation', allegedly failing to provide Terms of Reference, inconsistent with the grievance; failing to providing a timeline for the investigation; failing to appoint an external investigator following a request by the claimant;

xi. In step 4 of the Guidance, 'gathering evidence', the respondent failed to: interview the claimant regarding her grievance; or interview relevant witnesses;

xii. In Step 5 of the Guidance, 'writing an investigation report', the respondent failed to take the claimant's evidence into account; or provide corroborating evidence to support the conclusions; the report also failed to address all or any of the points the claimant raised in her grievance;

xiii. Allegedly failing to allow the claimant to return to her role after maternity leave in December 2018 / January 2019 at her substantive grade.

10. If so, was the claimant treated less favourably than others in circumstances that were not materially different?

11. If so, was that less favourable treatment because of the claimant's race?

Pregnancy and Maternity Discrimination

12. Did the following occur, by the respondent:

a) Allegedly dismissing the claimant;

b) Allegedly not allowing the claimant to return to a temporary promotion role after maternity leave in June 2007 and January 2011 where the relevant policy had not been introduced until August 2015;

c) Not providing the claimant with CIPD training when she requested it in March 2017 by emailing Pat Rees and Sharon Leid;

d) Not putting the claimant down to attend the CIPD conference in March 2017 by Pat Rees and Sharon Leid;

e) Allegedly not consulting with the claimant regarding deletion of her post in August 2017;

f) Allegedly failing to communicate with the claimant whilst she was on maternity leave in 2017 by allegedly failing to undertake Keeping in Touch meetings to keep her up to date with developments in the department or other attempts to engage with the claimant particularly around the reorganisation;

g) Allegedly failing to allow the claimant to return to her role after maternity leave in December 2018 / January 2019

Pregnancy/maternity discrimination

13. If 12(a) to (g) occurred, did this amount to unfavourable treatment?

14. If so, was that unfavourable treatment during the protected period because of the claimant's pregnancy; or because she was on maternity leave; or because she was seeking or sought to exercise her right to maternity leave?

Direct maternity / pregnancy discrimination – section 13 Equality Act

15. Is section 13 excluded by section 18(7)?

16. If paragraph 12(a) to (g) occurred, did they amount to detriments?

17. If so, was the claimant treated less favourably than others in materially the same circumstances?

18. If so, was that less favourable treatment because of pregnancy or maternity?

Victimisation

19. The claimant's grievance of 16 October 2017 and ET1 of 12 May 2018 were the protected acts. The respondent accepted that they were protected acts.

20. Was the claimant subjected to the alleged following detriments:

a. failing to investigate her grievance properly or at all; or
b. failing to uphold her grievance;
c. failing to pay her for Keep in Touch days;
d. failing to provide her with itemised pay slips;
e. failing to give her information requested to apply for SSP benefits.

21. Paragraphs 20 a. to e. are in respect of the grievance of 16 October 2017, and paragraphs 20 c. to e. are in respect of the ET1 of 12 May 2018.

22. If so, was the claimant subjected to those detriments because she brought the grievance or the first tribunal claim?

Comparators

23. The claimant relies on the following named comparators or alternatively a hypothetical comparator, (the respondent does not accept these as

being relevant comparators). Unless the comparators gave evidence or featured significantly in the evidence, they have been referred to by initials only:

a. Sherri Dewsbery (white, given temporary promotion, confirmed in post; attended CIPD conference)
b. JC (white, given temporary promotion, confirmed in post)
c. TW (white, given promotion although had not passed panel sift, confirmed in post)
d. Nicki Osbourne (white, undertaking CIPD training, attended CIPD Conference)
e. Cate Rees (white, undertaking CIPD training)
f. AA (White, undertaking CIPD training)
g. CM (White, Previous HRBP, has been promoted more rapidly)
h. AS (given external investigator, outcome of grievance within 3 months)
i. Isabel Alverez (how the grievance was dealt with)

24. The claimant relies on the treatment of the following BAME employees whom she says were given temporary promotions but not confirmed in their posts:

a. RR
b. ZD
c. PO
d. KP
e. SO
f. JL

25. The above named in paragraph 24 are not relied upon as comparators, but as evidence that BAME staff were treated in a similar manner to the claimant showing the existence, on her case, of a policy, practice or procedure.

Time Limits

26. Are the claims in time, including whether any discrimination against the claimant because of race or maternity amounted to a policy or practice extending over a period of time for the purposes of section 123(3) Equality Act 2010 – a continuing act?

27. Alternatively is it just and equitable to extend time? The claimant relies upon her illness and/or the length of time taken by the respondent in dealing with the internal grievance procedure.

Itemised Pay Statements

28. Has the respondent failed to provide the claimant with itemised pay statements contrary to section 8 ERA 1996? The claimant's case was that when she reduced from full pay to half pay 12 April 2018. The pay

slips the claimant says she did not receive were for 2018: April, May, July and August but received June 2018. Just before this hearing the claimant said she received the missing pay slips. The respondent's case is that they were not sent out in April and May 2018, but were posted out late. The claimant having now seen the payslips takes the view that she was not underpaid.

Compensation

29. What compensation should the tribunal award to the claimant, if any, including any uplift for failure to follow the ACAS Code of Practice and any claim for personal injury.

Witnesses and documents

30. The tribunal heard from the claimant and Ms Isabel Alvarez del Rio who worked for the respondent in HR from May 2006 until 12 July 2019.

31. The claimant produced statements from Ms Kimberley Bingham, the Head of Strategy from 2006 to 2012 and Mr Steve Williams the Head of Equality from 2001 to September 2016. Their evidence was not challenged by the respondent so they were not called and their evidence stood.

32. For the respondent the tribunal heard from four witnesses (i) Ms Julie Dennis, Head of Diversity from 1 August 2017, (ii) Ms Sharon Leid, Organisation and People Development Lead and claimant's line manager from 1 March 2017, (iii) Mr Rob Mackintosh, Director of Organisational Development and HR and (iv) Mr Paul Dowse, Director of Digital, Data and Technology and the appeal officer.

33. The respondent produced a witness statement from Ms Victoria Sapsford (last name Butcher at the material time), Regional Director, South East, London and East and the grievance officer. On day 2 we were told that Ms Sapsford had been signed off sick and on day 3 we were told that she was not fit to give evidence and would not be attending the hearing. The respondent did not seek a postponement and said that they wished to proceed.

34. The respondent also provided a witness statement for Ms Sherri Dewsbery, who is on secondment into the role of Organisational Development and HR and who attended the tribunal to give evidence. The claimant said she had no questions for Ms Dewsbery. We told the claimant that if she chose not to cross-examine Ms Dewsbery then her evidence would stand, as unchallenged. We asked the claimant to consider during a break whether she was sure that she did not wish to challenge Ms Dewsbery's evidence. She confirmed after a break that she did not wish to challenge this evidence.

35. There was a bundle of documents of over 800 pages (with numerous supplementary pages) and two small supplemental bundles from the respondent with around an additional 130 pages.

36. We had an opening statement from the respondent with a timetable which was discussed at the outset on day 1 and agreed between the parties. We also had a cast list, a chronology and a glossary of terms from the respondent.

37. We had written submissions from both parties to which they spoke and which are not replicated here. All submissions were fully considered together with any authorities relied upon, whether or not expressly referred to below.

Findings of fact

38. The claimant commenced employment with the respondent on 26 February 2001 as a casual employee as a Pay and Benefits Adviser in the HR department. When she joined she was part CIPD qualified. The claimant joined as a Grade 11 in the pay team. By 19 February 2002 she was made permanent.

39. The respondent operates opportunities for Temporary Promotion (TP) and substitution. On the claimant's evidence the difference was substitution was for a short time covering the officer's absence for sick leave or holiday whereas temporary promotion would be where there was no other person covering the role, for example if the respondent was looking to recruit or for maternity cover. This was not accepted by Ms Dewsbery, whose evidence was not challenged. Her evidence at paragraph 14 of her statement, was that substitution did not involve carrying out the full range of duties of that post, but only deputising for a short period. There was also no process required for substitution whereas a temporary promotion had to be advertised. We accept Ms Dewsbery's unchallenged evidence on this point.

40. In 2015 the respondent's Board recognised that some employees were spending long periods in temporary promotion and their policy was changed in July 2015 in order to address this. Ms Dewsbery's unchallenged evidence was that from 2015 temporary promotion could enable conversion to the Grade without the need for a further selection process subject to the following conditions (i) an ongoing need for the post, (ii) sufficient budget for the post and (iii) the individual being assessed as meeting or exceeding the post in terms of performance. Unless exceptional reasons existed to allow the individual to remain on temporary promotion the post had to be re-advertised or the individual reverted to their substantive grade (bundle page 759).

41. At the end of 12 months where there was justification to making the

temporary promotion permanent this could only happen where the post was advertised and the individual underwent a competitive interview. Transitional arrangements were put in place for those under the old temporary promotion regime.

42. From 1-14 September 2003 the claimant was placed in Grade 10 as a substitute employee and then temporarily promoted to Grade 10 from 15 September 2003.

43. By December 2003 the claimant was promoted to Grade 10. From 18 July 2005 she was temporarily promoted to Grade 9 working full time to cover for absent officer Ms Pat Rees. This temporary promotion lasted for two years (pages 19-23 Supplementary Bundle 2).

44. In 2006 the claimant made a formal application for a substantive Grade 9 post.

45. She went on maternity leave from October 2006 to May 2007 during a period of temporary promotion to Grade 9. When the claimant returned from maternity leave in May 2007 she was told she would be reverting to Grade 10 and she returned part time at 25.5 hours. Prior to this she had been full time. She was upset not to be returning to the Grade 9 role but made no complaint.

46. In 2007 the claimant applied for a temporary promotion in a dual role at Grade 9 as HR Policy Manager role and Learning & Development Manager. She was successful so that within a few months she was back in a Grade 9 role. This temporary promotion lasted three years. It was a full time role. She did not make any official complaint about the return to work at Grade 10 for six months before successfully obtaining the Grade 9 temporary promotion. Her evidence was that a grievance would "*not have been looked upon kindly*" and she said she feared victimisation.

47. The claimant was on maternity leave from August 2009 to August 2010. The end of maternity leave in August 2010 was immediately followed by a period of parental leave so that the claimant was due to return to work in November 2010. She then took some annual leave and returned in January 2011 for two days per week and reverted to grade 10.

48. We saw an email from Ms Pat Rees to other HR colleagues at page 223 regarding the claimant's return to work. The email was dated 11 November 2010. The claimant's evidence was that Ms Rees telephoned her to say that she could not return in a Grade 9 role because it was being covered by Ms Sherri Dewsbery. The claimant decided that she would return two days per week. The email from Ms Rees told colleagues that the claimant was "*happy*" with this but the claimant said she was not. Ms Rees agreed that the clamant could stay on Grade 9 pay for annual leave during December 2010 before reverting on her

return in January 2011 to Grade 10. The claimant's evidence was she was happy to be paid at Grade 10 during the annual leave but unhappy at not returning to Grade 9 to continue the work she had been doing.

49. The claimant was asked if she complained at the time. She said she "*mentioned*" this to Ms Rees at the time but did not put in any formal grievance. The claimant did not know until she returned to work that the Grade 9 work was continuing and being covered by Ms Dewsbery. The claimant accepted that she did not make a formal complaint.

50. By May 2011, within five months of her return, the claimant was back on a temporary promotion to Grade 9. She reverted to Grade 10 in December 2011.

51. From March 2012 for ten months until about February 2013 the claimant was seconded to BIS. From October 2012 she was project managing a number of Equality and Diversity projects alongside her work with BIS (Supplementary Bundle no. 2 page 35). Once again this was a temporary promotion at Grade 9. The secondment started full time and moved to part time. The claimant worked for a couple of days a week at BIS and a couple of days a week at the respondent.

52. We had a copy of the claimant's end of year review (appraisal) to 31 May 2012 (page 63 Supplementary Bundle 2). The claimant was graded by Ms Pat Rees as "*fully effective*". The categories are unacceptable performance, effective with some development needs, fully effective and exceptional. Ms Rees noted that the claimant operated "*most effectively*" at a Grade 9 role (page 64) in the temporary promoted post.

53. The claimant's review on herself was at page 462. It was in positive terms. She said that she did not put in anything negative or anything she was unhappy about because it would be considered when she applied for other internal posts. She said she was happy her career was moving on to new challenges.

54. In June 2012 the claimant applied for a substantive Grade 9 role. Her application was supported by Ms Pat Rees. The claimant was unsuccessful in her application. In about September 2012 she applied for a Grade 10 Delivery job because she said she was keen to come out of HR to develop herself as this was not happening within HR. She decided to withdraw from that Grade 10 application as BIS were keen to keep her on the secondment and she was enjoying the work, at Grade 9 (email page 219, copied to the claimant).

55. The end of year review set out the claimant's future career plans and aspirations (page 60) which included becoming CIPD qualified and the

Personal Development Plan to finish CIPD from September 2012.

56. In June 2013 the claimant substituted for an Equality Manager who had left and who was a Grade 8. The claimant queried substituting at Grade 9 but doing Grade 8 work and was told that the role was being reviewed. Based on our findings above, we find that substitution does not involve covering the full range of the duties. In 2014 the role was advertised as a substantive grade 8 and was filled by Ms Jane Worrell.

57. The claimant was due to revert to Grade 10 for 2 days per week and was doing the Grade 8 role, she raised the pay issue with Ms Rees who supported her to be paid at Grade 9 for part of the week (email page 220).

58. The claimant said she was told she could not be given a temporary promotion at Grade 8 so she would be substituted at Grade 9. The claimant's evidence was that she was told by Ms Pat Rees that she was not allowed to apply for the post even though she had been doing the job. The tribunal did not hear from Ms Rees who retired in 2017.

59. In 2015 the claimant's evidence was that she was told by Ms Pat Rees and Mr Steven Williams that she should drop half of her role as Equality Manager and should apply for the Grade 9 HRBP position.

60. On 25 August 2015 the claimant became a permanent Grade 9 HRBP (letter page 737) having been successful at interview. This was a 0.5 role. The remainder 0.5 of her employment was as an Equality and Diversity Manager, also at Grade 9.

61. The claimant could not point to any suitable jobs that should have been offered to her during her maternity leave, that were not offered.

<u>Time point</u>

62. The claimant accepts that she did not raise a formal grievance before August 2016. She said she was aware of Employment Tribunals but was not aware of time limits. She accepts she was seeking union advice. She said she did not look in to how Tribunals worked. Until 2016 she thought she would only raise it as an informal complaint.

63. In evidence the claimant described herself as a "*specialist HRBP*" who would have benefitted from the CIPD training, in her role advising senior managers and other employees on HR matters. She has a degree from the University of East London in HR, in which she did a module in employment law. She had union representation throughout the events in question. She was part CIPD qualified from 2001. We find it implausible

that she had no knowledge that there even was a time limit, let alone what that time limit was. We find on a balance of probabilities that the claimant knew about the three month time limit or ought reasonably to have known about it. She had assisted Ms Jones in at least one employment tribunal case. She took no reasonable steps to investigate the issue of time limits.

64. With the historic matters of her returns from maternity leave in 2007 and 2011, the respondent has an absence of documentary evidence to assist on the matter due to the passage of time. Ms Pat Rees retired in 2017 two years before this hearing so the respondent did not have her evidence.

Maternity leave and maternity cover in October 2016

65. The claimant went on maternity leave on Monday 17 October 2016 for a year. She was due to return on 15 October 2017. The claimant was working on two roles at 0.5: these were Equality and Diversity (subsequently called Diversity and Inclusion) Business Partner role and an HRBP role.

66. In the days leading up to her maternity leave the claimant began handing over to her colleague Ms Isabel Alvarez and others by sharing the work around. She was told by Ms Nadine Smith, Senior HR Policy Manager, by email on Tuesday 11 October 2016 that she should hand over her work to Ms Cate Rees (page 49-50). The claimant replied that she had done a handover with the HRBPs and in particular to Ms Alvarez. The claimant said that others wanted the role for developmental opportunities. She said it was just a suggestion but Ms Smith should be aware of the dynamics and how it might be seen.

67. Ms Smith said that those to whom the claimant had been sharing out the work, including Ms Nicky Lawal and Ms Celine Marrett who each had an apprentice whereas Ms Rees did not. Ms Lawal and Ms Marrett were going on a coaching programme and Ms Cate Rees was not.

68. Ms Cate Rees who was to provide the maternity cover for the claimant's role is the daughter of Ms Pat Rees, the then Assistant Director of HR. Ms Cate Rees was also a Grade 9 HRBP.

69. Ms Smith said that she was happy for Ms Alvarez to cover but was conscious of not overloading her. She set out the reasons why the decision had been made. The claimant replied on 12 October (pages 47-48) saying she was disappointed about the lack of consultation with regard to her maternity cover. She thought there were other colleagues who could benefit from the developmental opportunity. Ms Smith was upset by the response (her reply page 47) saying that it indicated that she had been "*treating people with favouritism*" or that she was

prejudiced.

70. Ms Lucienne Jones, the HR Director, called the claimant about this email correspondence and they spoke about it the day before the claimant went on maternity leave. Ms Jones sent an email to the claimant on 14 October at 18:28 hours saying that there would be options for her on her return from maternity leave and she hoped that the claimant would choose HRBP work (which was half of her current 50:50 role), page 360A. We find that this gave the claimant notice that there were changes afoot and her job might be affected.

71. On 1 November 2016 Ms Sharon Leid joined as the claimant's line manager, although the claimant had not met her and was not expressly told that Ms Leid had become her line manager. On 1 December 2016 Ms Nicki Osborne became full time cover for the claimant's maternity leave.

72. The claimant complains that there was no appropriate communication with her during her maternity leave and that she was "*ostracised and treated with contempt*". By way of examples we find that there was contact from Ms Pat Rees on 18 January 2017 (page 226), 1 February with the Chief Executive's Bulletin (page 178), 2 February regarding an HRBP conference (page 54) referred to in more detail below, 2 March with an updated from Ms Jones (page 176), on 7 March with the Chief Executive's Bulletin (page 146) telling her about an event the next day – which we find was very short notice when the claimant was on maternity leave – but was nevertheless keeping her in contact. The claimant considered that there were job opportunities she was not told about and that she was "*out of sight and out of mind".* When asked, she could not point to any specific job opportunities that she had not been told about.

73. On 13 March the claimant was sent a further HR Newsletter (page 161). She was told that the Equality and Diversity function was to be renamed Diversity and Inclusion. The email gave the claimant notice that there was to be a review of the HR function and it would be reported back to the Board.

<u>The CIPD training and the HRBP conference</u>

74. On 2 February 2017, Head of HR Ms Pat Rees emailed a number of people in HR about an HRBP conference on 28-29 March 2017. She asked the claimant if she was interested as part of her KIT days. The claimant said she would love to attend both days for KIT days (page 100). We find that Ms Rees proactively brought this opportunity to the claimant's attention during her maternity leave and consequently there was no intention to exclude the claimant from this training.

75. On 13 March 2017 in an email to Ms Pat Rees the claimant asked if she

could study for the CIPD whilst on maternity leave. She suggested that she could do this as half KIT days and catch ups with the team (page 99). She did not say in that email that she would like more regular contact during her maternity leave. Ms Rees passed the request to Ms Leid to deal with. Ms Leid dealt with Learning and Development so she was the right person to deal with it and in addition she was by then the claimant's line manager.

76. On 28 March 2017 Ms Leid sent an email to the claimant (page 102) to introduce herself and to invite the claimant to the monthly HR Business Partner meetings which she was leading as they were about to begin some Organisational Development. The invitation was for the claimant to join as part of her Keeping In Touch days. We find that the respondent was keeping in touch with the claimant during her maternity leave and she was not "*ostracised and treated with contempt*". Ms Rees had not informed the claimant in advance of the new line management responsibilities, so the claimant did not know that Ms Leid had become her immediate line manager. This was poor practice not to inform the claimant of the new line management structure.

77. In the 28 March email Ms Leid said: "*I can see that you would like to undertake the CIPD but I am not sure this will be possible as you are currently on maternity leave and no-one else at the moment is doing it".* In the same email Ms Leid offered the claimant the opportunity to attend HRBP meetings with a view to upskilling the Business Partners.

78. Ms Leid said it was unusual to request funding to study whilst on maternity leave but "*Lets discuss".* This was offered either as a face to face meeting or by telephone. The CIPD qualification was desirable but not essential for promotion to the next grade. The claimant thought the request for a verbal discussion was a "*ruse to avoid an audit trail".* Ms Leid was shocked at this suggestion. She said she very much wanted to meet with the claimant who was a new employee to her and she wanted to understand more about the request, how it would benefit the claimant and how it would benefit the organisation.

79. The CIPD qualification, unlike many other training courses on offer, is a huge time commitment. Ms Leid has done it herself. Ms Leid wanted to understand how they could manage the time commitment and support the claimant, for example she might need time off for study. We find nothing unusual about her request to discuss this with the claimant and we find it was not a "ruse" to avoid an audit trail but a proper managerial response to the request for a substantial training commitment both as to time and expense.

80. The claimant told Ms Leid that she understood that Ms Nicki Osborne, who was providing her maternity cover and Ms Cate Rees, the daughter of the HR Director, were both currently studying for the CIPD

qualification. The claimant was surprised to have been told by Ms Leid that "*no-one else at the moment is doing it*". The claimant considered Ms Leid to have lied to her (her statement paragraph 23).

81. Ms Leid had asked the question of Ms Susan Martins, the Learning and Development Lead, who administered the budget and reported to Ms Leid and this is what she had been told. When the claimant said that Ms Osborne and Ms Cate Rees were doing CIPD Ms Leid checked the position and found out that they were. We find that Ms Leid did not lie, she simply reported to the claimant what she had been told by Ms Martins. It would have been good practice for her to have checked for herself, given that she was the budget holder.

82. From the subsequent grievance interview notes with Ms Jones (pages 264-265) we find that Ms Osborne was on the CIPD training whilst the claimant was on her maternity leave and Ms Cate Rees had also been approved for this training. Ms Leid in her witness statement at paragraph 9, said it had been approved for Ms Osborne because she had very limited experience in the HR field and that the training would give her the grounding needed. Ms Leid made no comment on the approval of the funding for the training for Ms Cate Rees and in oral evidence said she did not know how this had been approved. Ms Leid said there were budgetary constraints and the training was expensive.

83. In her grievance investigation interview with Mr Tasheira (on which we say more below), Ms Leid said (notes page 280) said that she had "*seen some favouritism – there are some people who are favoured a little too much*". She told the investigating officer that she did not know why she had not been told that Ms Cate Rees was doing CIPD, she said it may have been an oversight and that Ms Osborne was maternity cover and she could not explain why she was doing the CIPD. She said it was Ms Pat Rees or Ms Lucienne Jones who made the decision.

84. The allegation of race discrimination in not providing CIPD training was withdrawn against Ms Leid on day 2 of the hearing.

85. When the claimant arrived at the HRBP Conference on 28 March it transpired that she had not been booked on to it. Those staffing the conference continued to query it but allowed the claimant in to the conference pending this. Ms Dewsbery telephoned Ms Pat Rees, who told her that she had "*no record of the claimant requesting a place*". The claimant had sent a very enthusiastic email at page 100, sent whilst on maternity leave, saying she would love to attend. Payment was organised; the claimant was already attending the conference. In an email at 13:02 hours the claimant told Ms Pat Rees what had happened and said that she was "*sure it was an oversight*".

86. Ms Rees apologised profusely in a reply (page 98) and said she did not get or read the claimant's email (page 100). Ms Rees checked her

emails and told the claimant in a later email that same day (page 156) and would phone the event to confirm. The claimant did not accept that Ms Rees was telling the truth in these emails. By 14:52 hours it had been sorted out with the conference provider and at 15:02 Ms Rees emailed the claimant to say: "*all sorted*" (page 154).

87. We take the view on all the facts and on a balance of probabilities that this was an oversight. It is what the claimant said to Ms Rees in her email at 13:02 hours.

88. Also on 28 March 2017 Ms Rees followed up the claimant's query about the CIPD training (page 142). She offered to chat about it. The claimant said in evidence that she did not understand why there was a need to chat about it. She simply replied: "*Thanks Pat".*

89. We find that this made it difficult for Ms Rees to know that the claimant was not happy that her request for CIPD training had been passed on to Ms Leid, because she did not say so. The claimant felt it was a way of refusing her when it was a simple request she had made many times. The claimant had been told in one of the update emails, of 2 March 2017, that Ms Leid was now leading on the HRBP skills development so we find she was the appropriate person to deal with it. The allegation of race discrimination in relation to attendance at this conference, was withdrawn against Ms Leid on day 2 of the hearing.

90. The claimant said that others requested CIPD training and this did not have to go through Ms Leid. The others were Ms Cate Rees and Ms Nicki Osborne and Ms Isabel Alvarez and one other whose name she could not remember.

91. Ms Leid joined the respondent on 1 November 2016 so we find that any approval of CIPD training requests prior to that date, was the responsibility of the former post holder Ms Pat Rees. Ms Leid's evidence, which we accepted, was that there was no proper handover of the management of the claimant from Ms Pat Rees. The decision on CIPD was a matter for Ms Pat Rees, Ms Lucienne Jones or Ms Anne Feelhally (based on Ms Dewsbery's statement paragraph 20). As we set out in our findings below, we accept and find that the reasons for Ms Osborne being approved for CIPD were as set out in Ms Dewbery's evidence (again statement paragraph 20).

92. We did not hear evidence from any of the managers who were said to have approved Ms Cate Rees's CIPD training. Ms Leid in her investigatory interview with Mr Tashiera on 1 February 2018 (page 280) considered that she had seen some favouritism. She said "*there are some people that were favoured a little too much. But I don't know that this is about their ethnicity. When I joined some had more opportunities than others and I would wonder why they are involved with this and*

thought it's because they are liked. But this has all now changed – I challenged it from day 1. I don't understand why I wasn't told that Cate was doing CIPD. It may be an oversight but it didn't make sense to me. And Nicki was just covering for mat leave – why was she doing CIPD – how do I explain that. It would have been Pat or Lucienne who made the decision about them doing CIPD".

93. We have made findings based on Ms Dewsbery's evidence in relation to Ms Osborne. In relation to Ms Cate Rees, we find that a lack of an explanation from the respondent, Ms Leid's comments that she saw favouritism and the fact that one of the decision makers was her mother Ms Pat Rees, leads us to find that there was favouritism in the approval of Ms Cate Rees for CIPD training. Where the approval and funding of an employee for CIPD training, which is a heavy commitment, is for the daughter of an Assistant Director in the same Directorate, this should be completely transparent with a clear audit trail. This was not the case.

Restructuring

94. We saw an email dated 23 March 2017 from Ian Wood, the Director of Strategy, to Lucienne Jones and copied to Ms Julie Dennis, saying that he had spoken to the claimant before she went on maternity leave about the "review" and the potential for changes within the team and about her returning to an HRBP in OD/HR after maternity leave (page 116). This showed us that the claimant was informed about the upcoming review.

95. On 31 March 2017 Ms Lucienne Jones, the HR Director sent a long email to the claimant titled "KIT [Keeping in Touch] ACAS update". The purpose of the email was given as to inform the claimant of the "*bigger picture*" with regard to the Equality and Diversity function, by then called Diversity and Inclusion and the HR Business Partner (HRBP) function (page 103). In that email she said:

Julie [Dennis]'s recommendations to reshape the team, to better meet the needs of Acas going forward, internally and externally, were also accepted in principle, subject to a review of the detail (Julie will be working on job descriptions on her return to leave, which she'll share with you when they're ready) and subject to discussions with yourself and Jane [Worrell], as well as our trade unions. Any new posts will of course be advertised, and we will provide you with vacancy information when it's ready….

….. A discussion with you soon would be helpful, to hear your thoughts about your future career. Depending on what you would like to do in the future, there may also be other roles which could fit your aspirations and your skills set. In other words there are several opportunities – just a case of what you want to do and what best fits your skills set and the reshaped services.

I look forward to hearing from you regarding a meeting date or a time for a call….. If it is easier for you to talk after the children go to bed, I can make time in the evening to catch up.

96. The claimant did not respond to this email. She said in evidence that she might not have read the whole email. Again this made it impossible for Ms Jones and other managers to know that the claimant had any concerns about what was explained to her in this email because she said nothing in reply. If she failed to read it fully, then this is not the fault of the respondent. The email suggested a meeting, video conference or telephone call to give the claimant *"the opportunity to share [her] thoughts*" about what she would like to do on her return. We find that the respondent was that the respondent was keeping in touch with her during her maternity leave and she was not "*ostracised and treated with contempt*".

97. Ms Jones told the claimant that she had been given approval for a full time Grade 9 HRBP for Strategy and Corporate Services. She said that post needed to be full time. Ms Jones said she had also been given Board approval for two Grade 8 HRBPs and she was working on the Job Descriptions.

98. We find that this email of 31 March 2017 was the first formal notice to the claimant of the forthcoming restructure that affected her department and potentially her role and that the respondent offered her the opportunity to respond to it and "*share her thoughts*". The claimant did not respond to it.

<u>The 1 August 2017 meeting</u>

99. In a text message on 13 June 2017 (page 126) from Ms Jane Worrell to the claimant, Ms Worrell said "*I've emailed this morning about meeting up with me and Julie sometime soon*". Julie was Ms Julie Dennis who was joining on 1 August 2017.

100. On 6 July 2017 Ms Worrell emailed the claimant to invite her to this meeting but the purpose of the meeting was not stated (page 107). The claimant replied by saying that she was sure she could manage to make arrangements for her children so they could meet. It was indicated that it was a Keeping in Touch day and an opportunity meet Ms Dennis who was due to join as a permanent member of staff on 1 August 2017 (having previously done some work for the respondent on a secondment).

101. On 18 July Ms Worrell asked the claimant if she had any thoughts about where to meet on 1 August. The claimant replied the same day saying she thought it a lot easier if she came up to Euston with the baby. Ms Worrell said she wanted to avoid extra stress for the claimant so if she had a restaurant in mind, but it was up to her. She suggested that the

claimant may wish to show off the baby. On 25 July the claimant suggested Golders Green and it was the claimant who made the suggestion of Starbucks (page 127). The text messages made no mention of the purpose of the meeting. The texts were informal and friendly.

102. The meeting took place on 1 August 2017 at Starbucks in Golders Green. It was Ms Dennis's first day in post although she had previously worked for the respondent on secondment from BIS, two days per week. The claimant attended the meeting with her baby.

103. The claimant said that at the meeting she was told that her role had gone and that a Grade 8 role was being created. Ms Dennis in evidence agreed that she told the claimant that her Grade 9 part time role (0.5 of her post) was no longer present because of the restructure and that part of her role was moving to become a full time Grade 8 role. There was also a Grade 9 full time post for her to return to which was similar to the post she carried out before her maternity leave.

104. The claimant does not accept she was told this. She says she was told at the meeting that the 0.5 E&D part of her role "*no longer existed*". The claimant accepted in evidence that she was not told that her entire role was going, but the 0.5 E&D part of the role. She was not told that she would be without a job.

105. Ms Dennis explained to the claimant that they had funding for a full time Grade 9 post - which was her post to return to from maternity leave and which was a similar post to the one she carried out before her maternity leave. Ms Dennis also told the claimant that she would be able to build in some Diversity and Inclusion (formerly E&D) elements into that Grade 9 role and the 0.5% funding of her E&D role would be moved to enable them to create a full time Grade 8 post – for which the claimant was encouraged to apply.

106. It was subsequently accepted in the claimant's grievance outcome of 13 April 2018 (page 298) that the purpose of that meeting should have been made clear to her. We agree. It was poor practice to give the claimant no prior notice of the important matters that were to be discussed in that meeting so that it could have taken place in a more professional setting with the claimant having an opportunity to arrange childcare.

107. On 4 August 2017, following the meeting, Ms Dennis sent an email to the claimant with a presentation delivered to the Transformation Board setting out the Diversity and Inclusion team restructure. It also attached the Job Description for the Grade 8 vacancy which was to be advertised shortly. The claimant was given two weeks advance notice of this, prior to anyone else. We find that Ms Dennis was very keen for the claimant to apply for it. She had heard great things about the claimant's passion

and skill in diversity work and was very keen to retain her skills. Ms Dennis said that the next step would be for her to meet with Ms Leid to discuss her return from maternity leave and also gave her mobile number if the claimant wanted to chat with Ms Dennis direct (page 115).

108. The claimant told Ms Dennis in an email on 4 August that she was unable to retain much of what was spoken about at the 1 August meeting and felt underprepared. She thought the purpose of the meeting was as an introduction of Ms Dennis who was new and to help her catch up on what had been going on. The claimant did not know that the meeting was meant to be a consultation meeting with regard to the future of her job role.

109. The claimant asked a number of questions about the restructure and said that her Grade 9 part-time role was no longer present in the new team so she was worried about this. The claimant asked a large number of questions in this email and sought confirmation and clarity on a number of issues yet at all points going forward, she declined all offers of further meetings and telephone discussions.

110. Ms Dennis was shocked to read the claimant's 4 August email. She had not understood the claimant to have been upset at the 1 August meeting. She replied at length within about 3 hours (pages 110 – 112) firstly telling the claimant that she would be able to start her CIPD qualification on her return to work (page 111). She also said that her understanding was that the claimant had already been told by Ms Jones that the E&D part of her role was moving to create a full time Grade 9 post. We find that this is a reference to the 31 March 2017 email referred to above, which the claimant was not sure she had fully read. She also understood that Ms Leid had made several attempts over the last few months to contact the claimant to arrange a meeting. Ms Dennis had done the same by asking Ms Worrell to set up a meeting for them all to meet. She hoped that arrangements for that meeting would be made soon.

111. We find that the claimant was given every opportunity to apply for the Grade 8 role. She had worked at that Grade so it was by no means out of reach even as a promotion from her existing Grade 9. She was also given the opportunity to have input to shape the role she wanted on her return from maternity leave. This is an opportunity that not many employees are given.

112. Ms Dennis was clear that the claimant was not in a redundancy situation. Her role had not "gone". The 0.5 role in E&D was moving, she was still to return to a full time Grade 9 role where she was to have an opportunity to shape the role that she wanted so that they could make best use of her skills. In addition she was given advance notice and encouragement to apply for the new Grade 8 role and they were keen to retain her skills. Organisations and job roles do not necessarily stand still and half of the claimant's job was affected by the restructuring during 2017.

113. On 10 August 2017 Ms Dennis sent the claimant a further update. She told the claimant (page 119) that the Grade 8 D&I Business Partner role was going live on Monday (14 August 2017). The claimant did not accept that this was an encouragement to her to apply. We find that by giving the claimant two weeks advance notice of the role and a reminder when it was to go live, it was a strong encouragement to apply. The claimant did not apply.

114. The claimant's witness, Ms Alvarez was also an HRBP. She left the respondent in July 2019. Her evidence was that the respondent also failed to consult her about the 2017 restructure because she was off sick. Her evidence was that "*HR forgets to consult [the claimant] and I"* (statement paragraph 5). We find that the chain of communication was dysfunctional. Ms Alvarez who was of a different racial group to the claimant and not on maternity leave was either not consulted or not properly consulted.

<u>The grievance of 18 August 2017</u>

115. The claimant lodged a grievance on 18 August 2017 (page 57) sent to Ms Susan Clews, the Chief Operating Officer and now Chief Executive. The claimant sent the grievance to Ms Clews because she was outside HR. The claimant complained in that grievance of pregnancy and maternity discrimination, gender discrimination and race discrimination. She set out five main headings of complaint. It was sent via the claimant's union representative Ms Holbourne, who described it as a holding grievance with fuller details to be sent.

116. The five heads of complaint were (i) the CIPD training continually being put off or looked into (ii) her post being regraded to a higher grade advertised in her absence whilst on maternity leave – this was a reference to the creation of the new full time Grade 8 role for which she had been encouraged to apply in relation to 0.5 of her job role (iii) the way in which she was kept in touch which she considered was very informal often seeming like an afterthought – she gave the example of the conference in March 2017 (iv) she said that "*the above most recent incidents and treatment during my maternity leave only consolidates how I feel HR have conducted themselves in relation to my development and related opportunities*" and (v) it was having a detrimental effect on her health.

117. Ms Clews responded on 24 August to the claimant's union representative Ms Zita Holbourne, with a copy to the claimant saying that the grievance should be raised in the first instance in line with their policy, informally with the line manager and that if that did not resolve matters, then a formal grievance was the next stage (page 57). If it was about the manager, it should go to the countersigning officer to keep decisions at the lowest most appropriate level possible.

The grievance procedure

118. From our consideration of the grievance procedure at page 337, we could see no express requirement that a grievance had to be raised informally in the first instance. It expresses an emphasis on informality and that management and unions agree that it is "*better*" to resolve it without the need to resort to a formal procedure. At paragraph 1.5 it says that a formal complaint about bullying and harassment, either as an alternative to an informal complaint or because an informal complaint has not resolved matters, should be made through the grievance procedure.

119. The informal process (procedure point 5) provides for a meeting with the line manager within 5 working days.

120. Paragraph 6.1 provides that should the informal approach prove unsuccessful a meeting with your Assistant Director will be arranged within 15 working days. If the person hearing the grievance considers it necessary, that meeting can be adjourned for a further meeting, additional investigation or to consult HR, and then reconvened "*up to a maximum of 15 working days later*".

121. The outcome should be sent no later than 5 working days after the last meeting (paragraph 6.3 bundle page 340).

122. Ms Holbourne replied on her return from leave on 4 September saying that it had already been raised informally (page 56).

123. The grievance was formally acknowledged on 5 September 2017 by Ms Rees (page 55). Ms Rees said she would like to arrange a hearing with the claimant to consider it as part of the formal grievance process and asked the claimant what suited her and her union representative. The claimant did not respond to this email. Her evidence was that this was because she had named Ms Rees in the grievance and she thought that Ms Rees should not have emailed her about it. The claimant did not make any reply to this effect so it was difficult for the respondent to know what her position was through her silence. It would not have been difficult for her to say something along the lines of "*As I have named you in my grievance I think it is unsuitable for us to meet, but I would be happy to meet with someone else to take my grievance forward*".

The expected return from maternity leave

124. On 26 October 2017 Ms Dennis sent an email to the claimant referring to an earlier email from Ms Jones regarding the transformation in OD&HR. she mentioned a team meeting on Monday 16th October the anticipated date of the claimant's return from maternity leave and said "*As I clarified in my email to you on 4 August you will be returning to your current role*

as Grade 9 HR Business Partner. Since I have not received a response from you regarding this email I am assuming you are happy to return to this role". She offered the claimant a meeting on 10 October 2017 to discuss the review and more importantly what this meant in relation to her role.

125. On 3 October 2017 (page 121) the claimant replied declining the meeting on 10 October and said that as her maternity leave finished on 15 October she would be happy to discuss those opportunities then. She asked for a hardcopy of in any agenda for the meeting and any other relevant documentation. What she did not do, was to say she was not willing to return to the Grade 9 HRBP role.

126. On 4 October 2017 Ms Leid emailed the clamant saying she would return to work as a Grade 9 HR Business Partner (page 659) on Monday 16 October 2017. The claimant was not happy about this and replied on 13 October saying she was not sure what was meant. She said she had a doctor's appointment first thing on 16 October and would be in after that (page 658). Ms Leid emailed on 16 October itself, the expected date of the claimant's return saying that she thought her email had been clear but confirming that the claimant would be returning as an HRBP.

Grievance of 16 October 2017

127. The claimant did not return from maternity leave on Monday 16 October 2017 as she was signed unfit for work, initially until 31 October. This was followed by further fit notes covering November and December. The condition noted on the medical notes was stress and depression. The claimant did not return to work at any point after her maternity leave.

128. The claimant lodged a more detailed grievance on 16 October 2017 (page 60-69). It was sent to Mr Robert Mackintosh Director of Organisational Development and HR. It complained of pregnancy and maternity discrimination, gender discrimination, race discrimination, nepotism, victimisation and lack of transparency and made express reference to a breach of the Equality Act 2010.

129. She complained about the approach to keeping in touch, the response to her requests for training and development essentially the CIPD training, the "*continued informal approach*" all of which she considered to be "*extreme racial prejudice"* and her treatment on return from maternity leave "*ha[d] been the last straw*" she said she was not willing to endure "*this ongoing campaign of gender and race discrimination any longer*". She said that as a remedy to the situation she would be willing to consider a Grade 8 post within the respondent or outside but not within OD&HR and "*financial remuneration*". She said she would also consider an appropriate redundancy package.

130. On 13 November 2017 Mr Mackintosh asked Ms Victoria Sapsford, Regional Director, South East, London and East to deal with this grievance. She was relatively new to the respondent having joined in June 2017 and was outside the HR team so Mr Mackintosh considered that she was suitably independent. Ms Sapsford believed she was asked to hear the grievance because she worked outside the HR function, which was sensible.

The grievance meeting

131. Ms Sapsford wrote to the claimant on 20 November 2017 inviting her to grievance meeting (page 72). This was two months after the August grievance and more than a month after the 16 October grievance.

132. The grievance meeting took place on 29 November 2017 at a hotel. The claimant was accompanied by her union representative and Ms Sapsford had a notetaker with her. The notes were at pages 74-80. It took just over three weeks for the notes to be typed up and sent to the claimant on 22 December 2017. This was explained by Ms Sapsford as due to the note taker having to do her day job as well as the notes. It is not clear why they did not choose a notetaker who had capacity to produce the notes within a reasonable time frame or to give the note taker the dedicated time to do so.

133. The claimant said there was only a limited time for the grievance which was held in a hotel. The claimant felt she was pushed for time because of the room booking and even though she was asked at the end of the meeting if she had anything else to say, she replied: "*no thank you*" (page 80). We find that if the claimant had more to say, she should have said so. If the meeting could not conclude on 29 November 2017 for timing reasons, it could have been reconvened on another date. If the claimant had more to add in her grievance meeting, it was incumbent upon her to tell the grievance officer and not tell her she had nothing more to say. She also had a trade union representative who could have said something on her behalf.

134. In an email of 22 December Ms Sapsford told the claimant that Mr Tashiera from the Finance Department had been appointed as the investigation manager (page 81). Unfortunately he was on leave until 4 January 2018. Ms Sapsford said that once he returned, they would agree the Terms of Reference for the investigation. The respondent's grievance procedure (page 337 onwards) does not impose any requirement for agreeing Terms of Reference. She also said that they would agree the timescale for concluding the grievance process although this did not happen.

135. The claimant was not interviewed by Mr Tashiera. She considered that the failure to be interviewed by Mr Tashiera was an act of race and

pregnancy/maternity discrimination. We find that she was interviewed by Ms Sapsford who was the grievance officer so there was no failure to investigate with her. At the end of the meeting (notes page 80) the claimant suggested witnesses Mr Williams and Ms Bingham whom she told the tribunal were not interviewed. The claimant said to Ms Sapsford that it "*might be useful*" to contact them. She did not tell Ms Sapsford what they might add, particularly as they had both left the respondent's employment.

136. The claimant did not say what Mr Williams and Ms Bingham would have contributed that could or would have made a difference to the grievance outcome. We had short witness statements from these two individuals for this tribunal hearing. Their evidence was not challenged. Ms Bingham worked as the Head of the Strategy Unit from September 2006 to March 2012 and the claimant worked in her team for 8 months in 2011, six years prior to the grievance. We find she had no up to date first-hand evidence with which to assist the investigation. She left the respondent's employment 4.5 years before the claimant raised her grievance.

137. Mr Williams was the Head of Equality from 2001 to September 2016. His statement for this hearing said that he knew the claimant was good at her job and was keen to advance her career and that he thought she "*appeared*" to be passed over for training whilst on maternity leave. Apart from saying it might be useful to contact him, the claimant did not tell Ms Sapsford or Mr Tashiera what he might add or expressly that she wanted him to be a witness for her within the investigation. She only said it might be "*useful*" to contact him. Mr Williams had already left their employment a year before she raised the grievance. We draw no adverse inference from the failure to interview either Ms Bingham or Mr Williams.

138. On 10 January 2018 (page 501) the claimant told Ms Rees that she wanted all future communication to be through her trade union representative Ms Holbourne.

139. The claimant, via her union representative, expressed some concerns that the investigator, Mr Tashiera had some connection to those involved in the grievance issues. Ms Sapsford did not agree and was content that he was a suitable investigating officer as he worked in Finance rather than HR. Ms Holbourne told Ms Sapsford on 22 January that although the claimant was disappointed about this, she did not want any further delay because the process was causing her a lot of stress (page 84). If the claimant had wanted Mr Tashiera removed from the investigation and with the benefit of union advice, this was the opportunity to say so.

140. The claimant's concern was that Mr Tashiera reported to Mr Rob Mackintosh, the Director of three areas, Finance, Estates and People.

The claimant considered this too close a connection to HR and considered that Mr Mackintosh was keeping overall control of the grievance process in order to "*supress*" it and that he also did this because of her colour and because she was on maternity leave. The grievance procedure itself provides for the employee's Assistant Director or Director to hear the grievance (point 6.1 page 340). The claimant did not know Mr Tashiera, he worked in Finance and reported to Mr Henry O'Carroll and not directly to Mr Mackintosh. There is always going to be some HR involvement in the grievance. We find that the appointment of Mr Tashiera was not because of the claimant's race or because she was on maternity leave.

141. On 25 January 2018 Ms Sapsford sent Ms Holbourne a copy of the Terms of Reference and said that Mr Tashiera had already commenced his investigation. She said she would update with timescales once he had scheduled interviews with those concerned (page 83). The Terms of Reference shared with the claimant were at page 87.

142. Ms Holbourne expressed some concern that the scope of the Terms of Reference was "*narrow and limited*" and not covering all aspects of the grievance (page 380). Ms Sapsford said that Mr Tashiera was considering the whole grievance. Ms Holbourne raised some procedural issues which Ms Sapsford said were not directly related to the grievance and should be put to the HR Director (page 378).

143. Mr Tashiera's investigatory interviews did not take place until February 2018. He interviewed Jane Worrell, Julie Dennis, Lucienne Jones, Nadine Smith, Pat Rees and Sharon Leid.

144. On 5 March 2018 Ms Holbourne chased Ms Sapsford for an update on the investigation (page 377). On 6 March Ms Sapsford passed this query to Mr Tashiera. He replied on 8 March saying he hoped to have a draft with Ms Sapsford by Monday 12 March. His first draft was at page 282-290 sent to Ms Sapsford on 12 March.

145. On 13 March 2018 the respondent was notified that the claimant had commenced Early Conciliation.

146. Ms Sapsford acknowledged in her witness statement (paragraph 15) that the grievance process had been delayed beyond their policy and she had not agreed any timescales with the claimant. She did not consider the delay unreasonable. Ms Sapsford said in her witness statement (paragraph 13(ii)) that the investigation was undertaken within the "*quickest time possible".* It was not. The grievance was raised on 16 October 2017 and Mr Tashiera did not see witnesses until February 2018 and the grievance outcome was not until April 2018. This is poor practice particularly set against the timelines in the respondent's own grievance procedure.

Grievance outcome

147. Ms Sapsford's grievance outcome, dated 13 April 2018 was at pages 297-299. The investigation report was attached to the outcome letter (page 317 onwards).

148. The claimant was given 10 days in which to appeal which she was shocked to note given the months she had waited for her grievance outcome (her email page 305A).

149. Ms Sapsford agreed that there was evidence of an unstructured approach to her management and that staff should have known who was dealing with the claimant. She accepted that there were things that could and should have been done better. The claimant was very unhappy that the investigation Terms of Reference were not agreed with her and in her eyes did not properly reflect her grievance.

150. Ms Sapsford said that there was no evidence to substantiate claims of bullying and harassment but there was evidence that the processes and "*approach to engagement*" could have led the claimant to feel she was suffering a detriment.

The grievance appeal

151. On 27 April 2018 the claimant appealed the grievance outcome to Ms Clews (page 382-388). She complained amongst other things that the amount of time the process had taken had impacted her mental health. She complained that the Terms of Reference did not accord with her grievance. She thought they were "*made up*" and "*flawed*". The claimant heavily criticised the process. She said she was now in a position where she was taking medication. She asked for a response within the next 10 working days.

152. Mr Paul Dowse, Director of Digital, Data and Technology was appointed as the appeal officer. He was an Executive Board Director. It was unusual for the respondent to appoint an Executive Board Director to hear a grievance appeal and we find that this was an indication of the seriousness with which they took the claimant's grievance. He emailed the claimant on 4 May 2018 (page 393) to say he had been appointed and he would be obtaining and reviewing records over the next fortnight. He said he would then be in touch to agree a date to meet.

153. Mr Dowse wrote to the claimant inviting her to a meeting. Dates of 15 and 23 May were offered and eventually the date of 7 June was agreed as suitable for all. On 6 June Ms Holbourne queried whether Mr Dowse had connections with Ms Dennis, the Head of the Diversity and Inclusion

Team and who had conducted the 1 August meeting at Starbucks. Mr Dowse confirmed that they had worked together at the Land Registry and that they knew each other there in a professional capacity as she was Head of Diversity and he was the BAME Board Champion (page 407 also on 6 June). He said he did not think this caused any issue with his impartiality. Ms Holbourne continued to object to Mr Dowse and had email correspondence with Ms Clews, the Chief Operating Officer, who set out her reasons why she considered Mr Dowse to be suitable. This included his seniority as an Executive Board member, that he was relatively new to the organisation and others such as Mr Ian Wood and Ms Clews herself were ruled out. Ms Holbourne said that if there was evidence of impartiality in the appeal they would wish the appeal to be reheard. They went ahead with the appeal but indicating their continued disagreement with the appointment of Mr Dowse. We find that it would have allayed the claimant's concerns if they had chosen another appeal officer.

154. The grievance appeal hearing took place on 3 August 2018. Mr Dowse sent the claimant the draft notes of the meeting on 7 August 2018. The appeal outcome was not sent to the claimant until 5 October 2018, in which Mr Dowse partly upheld her appeal. Mr Dowse explained in evidence the reason for this delay. He had alerted the claimant to the fact that he was due to have an operation. He was admitted to hospital on 8 August and was off work for a couple of weeks. He returned to work towards the end of August. When he returned to work he noted that he had not received the claimant's comments on the draft notes of the meeting. It turned out that this was because her comments had inadvertently been sent to someone else in the organisation named Paul, but not to Mr Dowse. It was 3 or 4 September 2018 before he saw her comments.

155. Very unfortunately on 4 September 2018, ACAS suffered a serious cyber attack that brought down their IT systems. As the Director of Digital, Data and Technology - in short he held responsibility for IT – the vast majority of his time and attention was taken up with this. HR continued to chase him for his grievance appeal decision but it was not until 4 October that he was able to deal with it. He accepts that this was a very long period and outside of their policy. We find that this was not because of the claimant's race, her maternity leave or the fact that she had raised the grievance, but because of the set of circumstances described above. We find that the reasons given by Mr Dowse were the genuine reasons for the delay in issuing the grievance appeal outcome.

156. In partially upholding the claimant's appeal he accepted that the 1 August meeting was too informal and should not have happened in a coffee shop. In his outcome letter he offered the claimant a meeting to explain his decision. He wanted to see what could be done to speed the claimant's return to work. The claimant did not take him up on this. The

claimant again considered that the original Terms of Reference were not right and that there was "*maladministration*" of the grievance so that the appeal was not dealt with properly. The claimant considered the entire grievance process flawed because the Terms of Reference were not agreed with her and thus she took the view that the grievance did not cover all the matters she had raised. We find that even though Terms of Reference were not agreed, the substantive grievance issues were considered. Mr Dowse upheld her points of appeal in relation to the 1 August meeting and decided that the approach to Keeping in Touch was "*unstructured and lacking"*. We agree with this. The other points of appeal were not upheld.

157. The claimant's case was that HR tried to "*supress*" her grievance by keeping it within HR and not disclosing what she considered were conflicts of interest among those involved in deciding her grievance. It is frequently the case with an internal grievance procedure, that individuals know or know of the people involved. It is an internal grievance procedure and although the claimant suggested that it should have been dealt with externally (submissions paragraph 30), there is no obligation upon employers to do so. She gave no examples in evidence of where this had happened to others, for example of a different racial group or who had not been on maternity leave. Her comparator Ms Alvarez, an HRBP, who is of a different racial group and was not on maternity leave, did not have her grievance dealt with by external officers. The claimant said in submissions that it was usual practice to use external officers or to take it outside the London Region but this was not put before the tribunal in evidence. In the list of issues the claimant relied upon comparator "AS" as being given an external investigator but we were not presented with any evidence on this process by either side.

158. Mr Dowse offered the claimant a further meeting which she declined. He upheld part of her appeal. We find that this was not an attempt to supress the grievance.

159. In submissions (paragraph 8) the claimant said that the respondent failed to consult the ACAS Code in carrying out the appeal process. Her contentions and cross-examination all surrounded the non-statutory Guidance and not the Code which is a different matter.

<u>The claimant's resignation</u>

160. On 6 November 2018, solicitors then instructed by the claimant wrote to the respondent's solicitors stating their view that the grievance appeal outcome letter did not engage with the subject matter of the grievance or the issues raised. They also said that the claimant was not fit to have a meeting to discuss remedying the grievance and returning to work. She was signed off sick until 7 January 2019 (letter page 450).

161. On 13 December 2018 the claimant had a meeting with Mr Mackintosh at

the Wesley Hotel in Euston. This was the first time Mr Mackintosh had met with the claimant. At that meeting he told her that she had been offered both her roles on return from maternity leave, she said she was not and she considered that all trust and confidence had been broken.

162. In a letter dated 14 December 2018 between solicitors, the claimant was offered two potential roles immediately to facilitate her immediate return to work. These were the Grade 9 HRBP role in OD&HR or an individual Conciliator role also at Grade 9 which would have a completely different line management structure. Both jobs were offered on a phased return basis (letter page 315P). The claimant was aware of these job offers prior to her resignation.

163. The claimant resigned by letter dated 21 December 2018 addressed to Mr Mackintosh (page 315R). Her first claim, commenced on 12 May 2018, was already well advanced. She said that she had tried to no avail to get her grievance fairly heard and that she took the view that there had been a fundamental breach of her contract. She said that the situation was making her ill. Mr Mackintosh did not receive the letter until 9 January 2019 because it went to his junk mail. The claimant said in her resignation letter that the respondent had failed to address her grievance. We find that it was addressed, partially upheld by Mr Dowse, but did not give the claimant the full outcome that she wanted.

164. The claimant continued to raise the matter of "*the removal of my post or consultation regarding the thinking behind this*" while she was on maternity leave and the denial of training for the CIPD qualification. As we have found above, she had been told by Ms Dennis in her email of 4 August 2017, some 16 months earlier, that she would be able to start her CIPD qualification on her return to work (page 111).

Comparators

165. The claimant had nine personally named comparators who are mostly referred to by their initials. She did not cross-examine the respondent's witnesses on the comparator's circumstances other than two of the HR comparators (Ms Osborne and Ms C Rees)

166. In relation to TW, the claimant's case was that she was quickly confirmed in post following a temporary promotion. Ms Dewsbery's evidence was that TW was a substantive Grade 10 working in Bury St Edmunds and was not in HR at the time and was also working in a regional office which was not part of the Strategy and Corporate Services. She was in a different role as an ACAS Conciliator. She secured a temporary promotion as a Conciliation Manager from 10 November 2014 to 31 March 2016.

167. TW then moved to her substantive Grade 9 from 1 April 2016 to 30 May 2016. She then had a period of substitution into a Grade 8 Conciliation

Manager's role from 31 May 2016 to 2 June 2016 covering absences and then secured permanent promotion to a Grade 9 trainer from 1 April 2017 following a competitive interview.

168. On 2 October 2017 she secured a further temporary promotion as a Grade 8 into a development role. She then reverted to Grade 9 when unsuccessful at interview for a Senior Advice/Collective Conciliator role in December 2018.

169. The respondent said that her circumstances were not similar or comparable to the claimants. We agree because Ms Dewsbery's evidence on the point, at paragraphs 16-24 of her witness statement, was not challenged.

170. Mr JC worked in the Strategy Directorate and obtained a temporary promotion to Grade 9 from his substantive Grade 10. This is a separate Directorate to HR. The post was advertised on 23 December 2013 and his was the only application received. The temporary promotion was for four months ending on 30 June 2014. He was made permanent Grade 9 on 1 April 2015 and in March 2018 was promoted to Grade 8. He no longer works for the respondent. Ms Dewsbery said that he was considered an exceptional performer. Her evidence on this was unchallenged and therefore we find it was as she said.

171. Ms Osborne was the claimant's maternity leave cover. She was the Strategy and Structural Changes HR Business Partner. As we heard in evidence, the role was subject to the restructuring programme in 2017. Ms Dewsbery's evidence was that her substantive role was "*complex at the time and there were lots of structural changes*" so CIPD training "*was considered to be necessary for her to ensure competence in the role*". This was unchallenged evidence.

172. Ms Cate Rees was approved and funded for CIPD training. Ms Dewsbery did not deal with this. She said that other managers Ms Jones and Ms Anne Feelhallly, made the decisions about Ms Cate Rees.

173. AA is no longer employed by the respondent. She worked at Grade 10 and was promoted to Grade 9 in roles that were not connected with the HR Directorate. Ms Dewsbery's unchallenged evidence was that these were completely different roles and in her view AA was not an appropriate comparator. As we had no evidence to the contrary we find that this was the case.

174. CM was part-time HRBP. She was considered competent and an exceptional performer and secured promotion to Grade 8 in June 2015 to Sponsor and Senior Governance Manager. She had dotted line accountability to HR only in terms of development. She was a competent and exceptional performer – again we find this on Ms Dewsbery's unchallenged evidence.

175. AS presented a grievance in 2018 after she had left the respondent's employment. This is different to the claimant situation where the grievance was presented within employment. We find that this is a materially different circumstance to the claimant whose case is built around being in employment and/or on maternity leave at the material times.

176. Ms Isabel Alvarez was an HRBP managed within the London, South East and Eastern region and from whom the tribunal heard evidence. She presented a grievance in November 2017 and the outcome was given on 15 October 2018. Her employment with the respondent ended in July 2019. Her grievance took an equivalent amount of time to the claimant's grievance. She is of a different racial group to the claimant and was not on maternity leave at the material time. Ms Alvarez did not give evidence as to her own grievance procedure. We find based on the claimant's own comparator that she was not less favourably treated because of her race or her maternity leave.

177. The claimant accepted in cross-examination that all but three of her comparators did not work in HR and had different line management. The three who were HR employees were Ms Dewsbery, Ms Osborne and Ms Cate Rees. In her list of comparators the claimant relied upon Ms Dewsbery and Ms Osborne attending the CIPD conference in March 2017. So did the claimant. She was not "barred" from attending. There was an issue over payment for her place, but she accepted and we find, that she was allowed to attend whilst the payment issue was sorted out between Ms Pat Rees and the conference provider. She was not treated less favourably by not being permitted to attend. We accept that it was awkward and embarrassing for her to turn up to the conference and find that her place had not been paid for but this was rectified once the error came to light. We find it was an oversight on Ms Pat Rees's part, the claimant had acknowledged as much in her email of 28 March at 13:02 hours (page 98). It was not because of the claimant's race or maternity leave. Ms Rees was very apologetic in response.

<u>BAME employees relied upon for evidential reasons</u>

178. The respondent's witnesses were not questioned about the circumstances of the following individuals, put forward by the claimant in the list of issues. We make the following findings on the evidence we had from the respondent.

179. KP was given a temporary promotion from Grade 9 to Grade 8 from May to October 2018 in a different area of the business. Prior to his temporary promotion he was given a period of substitution from December 2008 to January 2009.

180. PO works in IT and was promoted to Grade 9 from 1 April 2016. He

undertook a period of substitution on 31 October 2017 to Grade 8.

181. SO works in finance and undertook a week of substitution to Grade 10 in April 2008. He was temporally promoted from grade 9 to Grade 9 from 1 August 2008. He secured a permanent promotion to Grade 9 on 16 April 2013.

182. RR worked in finance starting a Grade 11 in 2002, was temporally promoted to Grade 10 in May 2003 and on 29 September 2003 was promoted to Grade 10 and promoted to grade 9 in November 2011.

183. We had no evidence from either side about ZD named in the list of issues above, so we can make no findings about ZD.

184. JL was a Grade 10 IT technician with a period of temporary promotion from September 2005 to August 2006. She now works in a Grade 9 role following transformation of the IT Directorate.

185. In his witness evidence Mr Dowse gave the tribunal an analysis of statistics brought together for the purpose of this hearing set out at pages 483A-E. It was data concerning white and BAME staff with regard to conversion to a permanent role from a temporary promotion to see if there was a wider problem within the organisation. This was not the impression he gained from the data extracted from the payroll system where the information is recorded for temporary promotions. He found on the data set out on those pages within the bundle that:

    i. On 37 occasions BAME staff were temporally promoted, eight were permanently promoted which amounts to approximately 21.6%
    ii. Of 247 occasions of white staff being temporally promoted, 23 were permanently promoted amounting to 9.3%
    iii. Of 14 occasions of temporary promotion where there was no response.
    iv. Of 5 occasions of staff who preferred not to disclose their ethnicity and were temporally promoted, two were permanently promoted amounting to 40%.

186. Mr Dowse was not challenged on this evidence and we find that the statistics are as he said.

<u>Payslips</u>

187. The claimant had been off sick since 16 October 2017. She was informed by Ms Leid in an email of 26 April 2018 that she would be moving to half pay from 12 April 2018. The claimant's said that this was telling her retrospectively but we find that it was not. The payroll cut-off date was the 12th of the month so had all gone according to plan, she would have received and apportioned month's pay for April at the end of

that month. However, it would have been better practice to notify the claimant about a month in advance, to forewarn her that she was moving on to half pay.

188. In April 2018 the respondent moved to a new payroll system. Mr Mackintosh as the Director of Finance, Estates and People, held responsibility for this. He joined the respondent in mid-September 2017 about six months before the change was due to come into place. He told the Chief Executive when he joined that this was quite a big risk in terms of migrating the entire payroll system within six months but the decision had already been made. It was a very tight timetable.

189. The claimant's reduction to half pay was due to come into place on 12 April 2018 which coincided with the monthly payroll cut-off date. The reduction was not processed in time so she was paid full pay for April, in error. The respondent therefore recouped the overpayment in her pay for May 2018. We find that this was quite proper because the claimant had been overpaid and she had been told in Ms Leid's email of 26 April that she was moving down to half pay.

190. The claimant queried whether there should have been a repayment plan but we find that when the error is made in only one month's pay, is picked up immediately and recouped in the following month, it is not the same as an ongoing period of overpayment where a large sum may need to be repaid over a period of time. This was not an unlawful deduction from wages but a swift recovery of an overpayment.

191. The tribunal asked Mr Mackintosh whether similar pay problems happened to others around the time of the changeover in the payroll system. He said that it did and we find given the extent of the change that was taking place, on a balance of probabilities others were affected.

192. The claimant's case was that when she reduced from full pay to half pay on 12 April 2018 she did not receive certain pay slips. The pay slips she says did not receive were for April, May, July and August 2018 but she received the payslip for June 2018. The claimant said she was sent the missing pay slips a few days before this hearing. The respondent's case is that they were posted out late. The claimant, having now seen the payslips, accepts that she was not underpaid.

193. The claimant notified Mr Mackintosh on 31 May 2018 that she had not been paid correctly and had not received her payslips for April or May. She said that she had only just received her payslip for March.

194. On 6 June 2018 Ms Danielle Smith, Head of Pay and Workforce Planning, emailed the claimant saying that they could email the payslips over once they had received a password from her for security reasons. At the same time as changing the payroll system, the respondent was

moving to a new system of self service for payslips. This meant that if an employee was at work and he or she could log on and access their own payslip from the new self-service system. If they were not at work, such as on maternity leave or long term sick leave this presented some initial difficulties. In her email of 6 June, Ms Smith explained to the claimant that those on long term sick had also not been able to access their payslips. We find that this was not less favourable treatment because of maternity leave or race. It was poor practice. We find that everyone who was on sick leave or maternity leave or any other form of long term leave was similarly affected.

195. On 7 June 2018 Ms Smith told the claimant that a batch of payslips had been sent to her by first class post – the claimant did not receive them. The claimant sent the password she had been asked to provide but still did not receive her payslips.

196. Ms Dewsbery's unchallenged evidence (statement paragraph 36) was that the failure to send the claimant's payslips was "*not a deliberate oversight".* The respondent admitted in its Opening Note for this hearing that the claimant did not receive payslips for April and May 2018.

197. We find that the reason the claimant was not sent her payslips on time was because of problems with the new system of self service for payslips and that she unfortunately did not receive them by post. We find that this had nothing to do with her race, her maternity leave or the fact that she had raised a grievance.

The relevant law

198. The applicable law in relation to constructive dismissal is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if …….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 the employer's conduct*"

199. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221***, CA. The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*."

200. In ***Malik v Bank of Credit and Commerce International SA 1997 IRLR 462*** the House of Lords affirmed the implied term of trust and confidence as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage

the relationship of confidence and trust between employer and employee".

201. In ***Baldwin v Brighton and Hove City Council 2007 IRLR 232*** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word "and" by Lord Steyn in the passage quoted above, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be "*calculated or likely*".

202. Conduct by an employer that simply amounts to unreasonable conduct is not enough to breach the implied term: ***BG Plc v O'Brien 2001 IRLR 496 (EAT).***

203. The claimant relied (submissions paragraph 40) upon the decision of the EAT in ***Ramphal v Department of Transport 2015 IRLR 985*.** The EAT held that an investigating officer is entitled to call for advice from HR; but HR must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency. An employee facing disciplinary charges and a dismissal procedure is entitled to assume that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability, and that he should be given notice of any changes in the case he has to meet so that he can deal with them. In ***Ramphal*** there was a finding as to a "*dramatic shift"* in the dismissing officer's views about the culpability of the claimant and the sanction that might be imposed after what appeared to be intervention from HR.

204. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that 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.

205. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

206. Section 18 of the Equality Act deals with pregnancy/maternity discrimination. No comparator is required. The relevant parts of the section are set out below.

(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……

(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……

(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).

207. The standard reason why test must be applied to maternity discrimination cases. In ***Indigo Design Build and Management Ltd v Martinez EAT/0020/14*** the EAT (Richardson J) held that failure to provide a notification or a risk assessment relating to pregnancy or maternity leave in that case could be, but was not necessarily, "because of" pregnancy or maternity leave. It could, for example, be a simple administrative error (see judgment paragraph 34). The same process of reasoning was required in such a case as is required in any other discrimination case. The EAT overturned the ET's finding of pregnancy/maternity discrimination and remitted it back to the Tribunal for reconsideration.

208. This was applied in the subsequent decision of the EAT in ***South West Yorkshire Partnership NHS Trust v Jackson EAT/0090/18*** in a case where the claimant was on maternity leave while a redundancy exercise was being carried out. An important email requiring her to fill in a redeployment document and return it to HR as soon as possible was sent to her work email address which she was not accessing. As a result, she did not get notice of the email or fill in the form for several days. Although this did not cause any substantial harm it caused her legitimate concern. This was unfavourable treatment. The ET also found that the unfavourable treatment was "because" she was exercising her rights to maternity leave and thus amounted to discrimination under section 18(4) Equality Act. The appeal in was allowed because the ET did not consider causation properly in the light of the decisions in ***Indigo Design*** (above). Although the unfavourable treatment would not have

happened "but for" the fact that the claimant was on maternity leave, the ET had not considered whether this was the "reason why" she had been treated unfavourably. There was no finding that the fact that she was on maternity leave had operated on the respondent's mind.

209. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

210. Section 136 of the Equality Act deals with the burden of proof and provides that 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.

211. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

212. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

213. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

214. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

215. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. *The judgment of Lord Hope in* ***Hewage*** *shows that* it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish

discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

216. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

217. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) 8 the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

218. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

219. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: *"The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed"* (paragraph 52).

220. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

221. In ***Sougrin v Haringey Health Authority 1992 IRLR 416*** the Court of Appeal held that the employer's grading decision (which affected pay)

was a one-off act with the continuing consequences. A continuing act should be approached as being a rule or a regulatory scheme which during its currency continues to have a discriminatory effect.

222. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

223. Section 8 ERA 1996 provides that a worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement. The matters to be stated in the payslip are set out in section 8.

Conclusions

Direct pregnancy/maternity discrimination – section 13 Equality Act

224. So far as the claim for direct discrimination is concerned, section 18(7) of Equality Act makes it clear that a woman cannot bring a claim for direct discrimination under section 13 if the discrimination falls within the scope of section 18(2) - (4) (pregnancy/maternity discrimination). For this reason the claim for direct pregnancy/maternity discrimination fails as a matter of law and is dismissed.

The time point

225. The following was put as direct race discrimination: Not confirming the claimant as a permanent Grade 9 role, or not confirming after a reasonable time or around one year as per the respondent's temporary promotion and substitution policy which was introduced in August 2015:

    i. from July 2005 to June 2007 (the claimant having returned from maternity leave June 2007);
    ii. from December 2007 to January 2011 (the claimant having returned from maternity leave January 2011);
    iii. from June 2013 to 2014 (when covering the Grade 8 Equality manager post).

226. As pregnancy/maternity discrimination these matters were relied upon as allegedly not allowing the claimant to return to a temporary promotion role after maternity leave in June 2007 and January 2011 where the relevant policy had not been introduced until August 2015;

227. The claimant accepts in relation to each of these three historic matters, that she made no complaint at the time. We have found above that she knew or ought reasonably to have known about the three month time limit and/or she took no reasonable steps to investigate the matter.

228. The ET1 was presented on 12 May 2018 so in respect of these three matters they are in round terms 11 years, 8 years and 4 years out of time. This means that claims in relation to these matters are very substantially out of time.

229. The claimant became a substantive Grade 9 on 25 August 2015 so that any claim in relation to not confirming her as a Grade 9 crystallised at the very latest on that date. It is not a continuing act with any other matters relied upon. Once she became a permanent Grade 9, the failure to make her a permanent Grade 9 did not continue.

230. We find that these claims are out of time and the tribunal has no jurisdiction to hear them. It is not just and equitable to extend time. Our finding is that the claimant knew or ought reasonably to have known about the time limit and we have found above that the respondent no longer has the relevant documentation due to the passage of time and that Ms Pat Rees is no longer in their employment which places them at a disadvantage in responding to any such historic claims.

Constructive unfair dismissal

231. The claimant relied on the following acts as fundamentally breaching the implied term of trust and confidence together with the meeting of 13 December 2918 as the final straw.

a. Not consulting the claimant before deleting her role in August 2017. We have found above that Mr Ian Wood spoke to her about the upcoming changes prior to her going on maternity leave. She was sent a very important email of 31 March 2017 (page 103/104) which she admitted she did not fully read (set out above) which offered a meeting or a call and asked for the claimant's thoughts. Ms Jones said that depending upon what the claimant wanted to do in the future, there were opportunities. This email let the claimant know what was happening and sought her input. It was a very accommodating email in terms of even offering the claimant the opportunity to speak after working hours. The claimant did not respond. Efforts were then made to set up a meeting with the claimant and this did not take place until 1 August 2019. We find against the claimant on this, there was no failure to consult with her. We find there was a lack of engagement from her.

b. Not automatically offering the claimant the 'new' Grade 8 role without going through the competitive process. We find that the claimant did not have a right to be automatically offered the Grade 8 role. She was given advance notice of the role, two weeks prior to anyone else and we have found that she was strongly encouraged to apply and she chose not to. If she wanted this job,

she did not help herself by failing to apply. It was not a breach of contract to offer her the job without any competitive interview. She was given a head start in the process.

c. Not confirming the claimant's temporary promotion as permanent after a year or within a reasonable amount of time thereafter, which policy was not introduced until August 2015. The claimant was appointed to a permanent Grade 9 role on 25 August 2015. We find that a resignation on 21 December 2018 was not in response to matters preceding 25 August 2015 (at least three years prior) and that the claimant had affirmed any such alleged breach of contract in this respect.

d. Not returning the claimant to the specific role and Grade she had been on before she took maternity leave on her return following an internal restructure when the original role no longer existed. We find that the claimant was offered a Grade 9 role so there was no difference in the Grade to which she was to return from maternity leave. Half of her job role remained the same. The difference was that the restructure meant that 0.5 of her role had changed and she had been notified of these changes in the 31 March 2017 email to which she did not respond. Organisations do not stand still during a period of maternity leave. A restructure took place. The claimant did not have a cast iron right to return to exactly the same job. We have found that the respondent tried to consult with her. They offered her a suitable alternative to her 0.5 role and very much sought her input on how that should be shaped to match her skill set and areas of interest in Diversity and Inclusion.

e. Not providing the claimant with support for her CIPD training when requested in March 2017 by emailing to Pat Rees and Sharon Leid. The claimant was told by Ms Dennis at the 1 August meeting and confirmed in the email of 4 August 2017 (page 111) that she could start her CIPD training on her return to work. By the time the claimant resigned, she had been given approval some 16 months earlier for her CIPD training.

f. Discriminating against the claimant as set out below. We make our findings on this below.

g. Not upholding her grievance or carrying out remedial action for the part upheld on 13 April 2018. We have found that the grievance was partially upheld by Mr Dowse on appeal. There is no contractual right to have a grievance upheld. The part upheld was agreement that the 1 August meeting should not have taken place as it did and her Keeping in Touch was unstructured and lacking. It was not clear to us what remedial action she was seeking in relation to this.

h. Not investigating the claimant's grievance promptly or properly as set out in subparagraph (i) below re: non-statutory ACAS Guidance on Workplace Investigations. We agree that the grievance was not investigated promptly, but it was investigated. The difficulty with relying on the Guidance is that it is Guidance and not a contractual right. We consider it poor practice that the respondent did not comply with its own Guidance and this sets a poor example for other employers. It was not however a breach of the implied term of trust and confidence.

i. Not providing her with itemised pay-slips since November 2017 following implementation of a new payroll system, allegedly failing to pay her for Keep in Touch days or allegedly failing to provide information to make applications for SSP or other benefits since November 2017. Our finding and the claimant's own case as confirmed to the tribunal on day 1 of this hearing was that she did not receive her payslips for April, May, July and August 2018. It was not her case that she was not provided with payslips "since November 2017" and we have found that it was the four payslips in 2018 that were not provided. The claimant produced no evidence, for example from the DWP, that they required copies of her payslips for benefit purposes. Our finding is that the missing payslips was attributable to the new payroll system and affected a number of staff, if they were long term absent for some reason. This was not personal to the claimant and although it was regrettable, it was not a breach of the implied term of trust and confidence.

232. The claimant's case is that the last straw was the 13 December 2018 meeting with Mr Mackintosh. It was a meeting at which they disagreed about what she had been offered on return from maternity leave. We have found above that the respondent offered her a suitable role for the 0.5 and the other 0.5 remained the same and thus they acted in good faith.

233. We find for the above reasons that whether singularly or cumulatively, there was no fundamental breach of the implied term of trust and confidence. The respondent did not act in a manner which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and the claimant was not constructively dismissed. Although there were instances of poor practice and inefficiency on the part of the respondent, it did not amount to a fundamental breach of the implied term of trust and confidence.

<u>Direct race discrimination</u>

234. The claimant relied upon the following as acts of direct race discrimination:

i. Allegedly dismissing the claimant: We have found above that the claimant was not constructively dismissed.

ii. We have found above that the claim for not confirming the claimant as a permanent Grade 9 role prior to 25 August 2015 is out of time.

iii. Not providing the claimant with CIPD training when she requested it in March 2017 by email to Pat Rees and Sharon Leid; The claimant withdrew this at the end of her evidence on day 2.

iv. Not putting the claimant down to attend the CIPD conference in March 2017 by Pat Rees and Sharon Leid; This was withdrawn against Ms Leid but not Ms Rees at the end of the claimant's evidence. We have found above that in relation to Ms Rees it was an oversight and not because of the claimant's race.

v. Allegedly not consulting with the claimant regarding deletion of her post in August 2017: We have found above that the respondent sought to consult with the claimant and she did not engage with them. This fails on the facts.

vi. Deleting the claimant's post in August 2017: We have found above that the claimant's entire post was not deleted. Half of her post remained the same and 0.5 was subject to the restructure. She was offered suitable alternative employment in relation to that 0.5 and was offered the opportunity to have input into the newly designed 0.5 role to suit her skills and interests.

vii. Not automatically appointing the claimant to the 'new role' of Diversity and Inclusion Business Partner in the HR department after her post was deleted in August 2017: We have found that the claimant was not entitled to be automatically appointed to the Grade 8 role, she was given exclusive advance notice of the role and strongly encouraged to apply for it, which she chose not to do.

viii. Allegedly failing to follow the ACAS Code of Practice 2015 on Disciplinary and Grievance procedures: by unreasonably delaying meetings, decisions or confirmation of those decisions. The grievance was raised on 16 October 2017, decision given on 14 April 2018, appeal raised 27 April 2018 and decision to appeal provided on 5 October 2018. We have found that there were delays in the grievance process and the process went well beyond the time frame in the respondent's own procedure. We find that the delays were unreasonable, for example officers could have been appointed who had more capacity to take on the work, or to be released from other duties so that they could attend to it. Also, appointing officers due to go on holiday or about to have surgery was not the best course. The respondent could not help the cyber attack which Mr Dowse had to deal with. The process was poorly managed and planned. We have made a finding above that her

comparator Ms Alvarez who is of a different racial group, had a grievance process of an equivalent length of time. This leads us to conclude that the management processes were poor and this was not because of the claimant's race.

ix. Allegedly not investigating the claimant's grievance properly or at all in line with the ACAS non-statutory external guidance on Conducting Workplace Investigations. We have found that the claimant's grievance was investigated. There were delays due to poor management practices.

x. In step 1 of the Guidance, 'preparation for the investigation', allegedly failing to provide Terms of Reference, inconsistent with the grievance; failing to providing a timeline for the investigation; failing to appoint an external investigator following a request by the claimant. The respondent established Terms of Reference for the investigation but did not agree this with the claimant. We have found in any event that the substance of the grievance was investigated. The Guidance is only guidance and is not part of the respondent's policy or contractual. As it is Guidance produced by the respondent for use nationally by all employers, it is almost impossible to understand why they do not follow it themselves. However, they provided an explanation and we have found above that it was not because of the claimant's race. It was poor management practice. The same applies to the guiding principles on a timeline set out in the Guidance (bundle pages 766-767). The Guidance provides that it "may" be appropriate to appoint an external consultant in exceptional circumstances but this is not mandatory. The failure to appoint an external officer was not because of the claimant's race.

xi. In step 4 of the Guidance, 'gathering evidence', the respondent failed to: interview the claimant regarding her grievance; or interview relevant witnesses. We have found that the claimant was interviewed, by Ms Sapsford on 29 November 2017 and we have found that although she said it might be "useful to contact" Mr Williams and Ms Bingham, who had both left the respondent's employment, she did not expressly tell the respondent that they were relevant witnesses and what they could contribute and we have found that the failure to interview them was not because of her race.

xii. In Step 5 of the Guidance, 'writing an investigation report', the respondent failed to take the claimant's evidence into account; or provide corroborating evidence to support the conclusions; the report also failed to address all or any of the points the claimant raised in her grievance. We have found above that the respondent considered the claimant's grievance but they did not reach an outcome that was to her satisfaction. This was not an act of direct race discrimination.

xiii. Allegedly failing to allow the claimant to return to her role after maternity leave in December 2018 / January 2019 at her substantive grade. We have found that the claimant was able to return from maternity leave and her substantive Grade 9.

235. In relation in particular to delays, we find that there was enough for claimant to make out her prima facie case and the burden of proof passed to the respondent. We have found for the reasons set out above that we have had a sufficiently cogent explanation from the respondent to find, that on the matters upon which the claimant succeeded on the facts, that the actions were not because of her race.

Direct discrimination because of pregnancy/maternity – section 18 Equality Act

236. The claimant relied upon the following acts as being unfavourable treatment because she was on maternity leave; or because she was seeking or sought to exercise her right to maternity leave.

a) Allegedly dismissing the claimant: We have found that the claimant was not dismissed.

b) Allegedly not allowing the claimant to return to a temporary promotion role after maternity leave in June 2007 and January 2011 where the relevant policy had not been introduced until August 2015. This issue was out of time.

c) Not providing the claimant with CIPD training when she requested it in March 2017 by emailing Pat Rees and Sharon Leid. This was withdrawn as race discrimination but not as pregnancy/maternity discrimination. Our finding above is that on 1 August 2017 and confirmed in an email on 4 August 2017 the claimant was told that she could do her CIPD training on her return to work from maternity leave so this issue fails on its facts. The claimant also failed to respond when Ms Leid said "*Lets discuss"* in relation to any request to do this before her return from maternity leave.

d) Not putting the claimant down to attend the CIPD conference in March 2017 by Pat Rees and Sharon Leid. This was withdrawn as race discrimination against Ms Leid only but not as pregnancy/maternity discrimination. We have found above that she attended the conference and the payment issue was an oversight by Ms Rees which was sorted out on the day by lunchtime. Ms Rees apologised to the claimant. This was not an act of direct race discrimination.

e) Allegedly not consulting with the claimant regarding deletion of her post in August 2017. This fails on its facts for the reasons set out above.

f) Allegedly failing to communicate with the claimant whilst she was on maternity leave in 2017 by allegedly failing to undertake Keeping in Touch meetings to keep her up to date with developments in the department or other attempts to engage with the claimant particularly around the reorganisation. The respondent themselves acknowledged in the grievance process both at grievance outcome and appeal outcome level that the approach to Keeping in Touch was unstructured and lacking. The respondent admitted that there should have been clarity around who was managing the claimant and this should have been better communicated to her. We find that this was inefficient management and not because of the claimant's pregnancy or maternity leave. We make this finding based on the ***Indigo Design*** and ***South West Yorkshire*** cases (above) and on a consideration of the "reason why" the treatment happened. It is not a "but for" test and we recognise that the claimant was on maternity leave when the lack of keeping in touch happened, but the reason for it was not because she was on maternity leave but because managerial processes were lacking.

g) Allegedly failing to allow the claimant to return to her role after maternity leave in December 2018 / January 2019. We have set out our findings of fact on this above and for the reasons already given we find that this was not because of pregnancy or maternity but it was because of the restructuring of the department.

Victimisation

237. The claimant's grievance of 16 October 2017 and ET1 of 12 May 2018 were accepted by the respondent as protected acts. The claimant relied upon the following detriments because of having done these protected acts:

a. failing to investigate her grievance properly or at all; or
b. failing to uphold her grievance;
c. failing to pay her for Keep in Touch days;
d. failing to provide her with itemised pay slips;
e. failing to give her information requested to apply for SSP benefits.

238. The respondent's submission was that it was a circular argument in relation to issues (a) and (b) above, as the argument must be that there was a failure to investigate the grievance because the claimant brought the grievance and a failure to uphold the grievance because she brought the grievance. We have in any event found against the claimant on (a), the grievance was investigated although it was not investigated in a timely manner. Furthermore, the grievance was partially upheld on appeal and there is no automatic right to have a grievance upheld. We find that (a) and (b) were not acts of victimisation.

239. On (c) we had no evidence that there had been a failure to pay the claimant for her Keeping in Touch days. The claimant did not make out her case on this and the burden of proof did not pass to the respondent. We find that (c) is not made out as an act of victimisation.

240. We have made findings above as to the payslips and the failure to provide these for April, May, July and August 2018 and it was not because the claimant had raised a grievance, or after 12 May 2018 had brought her first claim. Item (d) is not an act of victimisation.

241. As with (c) above the claimant did not make out her case on this, we had no evidence to support this and the burden of proof did not pass to the respondent. We find that (e) is not made out as an act of victimisation.

242. The claim for victimisation fails and is dismissed.

Payslips

243. The statutory right to an itemised pay statement under section 8 ERA 1996 is a right to be given by the employer, at or before the time which any payment of wages or salary is made, an itemised pay statement setting out the gross amount of the wages, the amount of any deductions and the purpose for which they are made and the net amount of wages payable.

244. Due to the respondent's systems changes in April 2018, the claimant was not provided with her payslips at or before the time her April, May, July and August 2018 pay was made. This was not intentional on the part of the respondent but there was a failure nevertheless. The respondent did not have a system in place to allow the claimant, who was not attending work during 2018, to log on and access her self-service payslip. She did not receive the copies by post and only received them a few days before this tribunal hearing. Accordingly we make a declaration that there was a failure to comply with section 8 ERA for April, May, July and August 2018.

245. Accordingly section 12 ERA as to remedy applies. This provides that where there are any unnotified deductions during the period of 13 weeks immediately preceding the date of application for the reference, that being the date of the ET1, the tribunal may order the employer to pay a sum not exceeding the aggregate of the unnotified deductions. This therefore relates to any deductions made in the 13 week period going back from 12 May 2018.

246. We encourage the parties to settle the aspect of remedy so that the time and cost of a remedy hearing can be avoided. Clearly if this cannot be settled the remedy hearing will take place and will be reduced to a two hour allocation.

247. Although this tribunal has not found in the claimant's favour on the discrimination and constructive unfair dismissal claims, we feel bound to comment that given the identity of the respondent, they should be a beacon of good practice for all employers and in this case they most definitely were not. We express our hope that the matters we have identified will be recognised and acted upon by the senior management team and the Board.

Employment Judge Elliott
Date: 5 November 2019

Judgment sent to the parties
06/11/2019

For the Tribunal