



## EMPLOYMENT TRIBUNALS

Claimant

**Mary Nicholls**

v

Respondent

**Darwin Group Limited (1)  
Charles Pierce (2)**

**Heard at:** Birmingham via CVP      **On:** 12, 13 & 14 April 2022

**Before:** Employment Judge Wedderspoon

**Members :** Mr. R. Virdee  
Ms. S. Din

**Representation:**

**Claimant:** Mr. A. Francis, Counsel

**Respondents:** Miss. T. Hand, Counsel

## RESERVED JUDGMENT

1. The claim of direct sex discrimination by way of dismissal is well founded and succeeds.
2. The claim of direct sex discrimination namely of deciding to conduct an investigation into the claimant's conduct or performance is well founded and succeeds.
3. A remedy hearing will take place on the next available date after 17 June 2022 listed by CVP for 1.5 days.
4. By 30 May 2022 the claimant has leave to update her schedule of loss (if so advised) and serve on the respondent.
5. By 13 June 2022 the respondent has leave to update its counter schedule of loss (if so advised) and serve on the claimant.

## REASONS

1. By claim form dated the claimant brings complaints of direct sex discrimination. The case was subject to an open preliminary hearing on 15 June 2021 before Employment Judge Butler who held the Tribunal has jurisdiction to hear the claims.
2. The agreed list of issues to be determined by the Tribunal are as follows :-

Direct Sex Discrimination – Equality Act 2010 section 13

(1) Did the First and/or Second Respondent do the following things:

- a. Decide to conduct an investigation into C's conduct and/or performance
- b. Dismiss the Claimant

It is accepted by R1 and R2 that this occurred.

(2) Was that less favourable treatment of the Claimant in comparison to an appropriate male comparator? The Claimant relies on a hypothetical comparator in materially the same circumstances as her own.

(3) If the Claimant was treated less favourably than a hypothetical male comparator would have been treated, was that because of her sex?

Remedy

(4) Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

(5) What financial losses has the discrimination caused the Claimant?

(6) Has the Claimant taken reasonable steps to mitigate her loss?

(7) If not, for what period of loss should the Claimant be compensated?

(8) What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

(9) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

(10) Did the Respondent unreasonably fail to comply with it?

(11) If so is it just and equitable to increase any award payable to the Claimant, by up to 25%?

(12) Is there a chance that C's employment would have ended in any event? If so, should their compensation be reduced as a result?

(13) Should interest be awarded and if so, how much?

The hearing

3. The Tribunal was provided with an electronic copy bundle of 207 pages, agreed chronology, list of key people and key documents. The claimant gave evidence. The respondent relied upon the evidence of Charles Pierce, Managing Director of the respondent and Spencer Stokes, a construction director.
4. The Tribunal read the witness statements and the list of key documents prior to the commencement of hearing the case.
5. At the end of day 1 the claimant requested a copy of the personal development review of her colleague Maria. This was provided by the respondent and added to the bundle on day 2.
6. Due to the amount of evidence to consider, the Tribunal was unable to deliberate and deliver a judgment on the final day of the hearing and reserved its decision.

FACTS

7. The respondent is a construction business. The construction industry is a male dominated industry. At the time of the claimant's dismissal, the respondent's workforce numbered 100 employees and it consisted of 25% women. According to the Office of National Statistics the construction industry is made up of 12.5% of women. The respondent had a diversity policy but provided no training to its employees about the issues of diversity.
8. The Tribunal heard conflicting evidence from the claimant and Mr. Stokes as to the presence of sexism within the respondent's business. The Tribunal deals with this in more detail below but it accepted the claimant's evidence that sexism in the construction industry is prevalent and that the claimant had experienced explicit and implicit sexism across all levels in the company, from directors, down to junior staff as well as third party contacts. The Tribunal was not satisfied that the mere progression of the claimant in the respondent's business was inconsistent with the presence of sexism in the industry or in the respondent's organisation. The Tribunal further accepted that the claimant was a recipient of stereotypical put downs concerning her perceived lack of technical knowledge on a build. The Tribunal found that the claimant was told "you don't know what you are talking about" when she was trying to explain something. The Tribunal also accepted that on one particular occasion a male construction director was reported for ringing up one of the female junior commercial administrative assistants to tell her how he loved her voice. When this was raised there was a lack of appreciation by the respondent of the difficulty of a junior member of staff to speak up and possibly risk losing her job.
9. On 1 May 2018 the claimant was employed by the first respondent as a Senior Commercial Administrator on a salary of £25,000. On 10 July 2018 (page 113) Richard Pierce informed employees of the decision to restructure the senior management of the company with immediate effect. With effect from 11 July 2018, Lee Taylor and Richard Pierce were to take control of team 1 in the commercial department which was to consist of Ben Alton and the claimant. From 16 August 2018 (p.117) the claimant received a salary of £32,000. This salary increase was accompanied by a letter stating "*I would like to thank you for your hard work to date and look forward to your continuing commitment to the commercial team and Darwin group.*"
10. From 13 November 2018 (p.122) the claimant was promoted to the role of project co-ordinator. Mr. Pierce wrote to the claimant "*I would like to thank you for your hard work to date and look forward to your continuing commitment to Darwin Group.*" She had responsibility for two administrators. On 19 November 2018 (p.123) it was confirmed that the claimant had successfully completed her probation period.
11. After the Christmas break, on 7 January 2019, the claimant was asked by Richard Pierce, joint Managing Director to take on the role of Project Manager. Her salary increased to £40,000 (p.124). She was provided with a BMW company car, private fuel and responsibility for a team of 16.
12. In February 2019, the first respondent announced a restructure and the claimant (p.125) was promoted to Head of Project Delivery and received a salary increase to £45,000. Her line manager changed to the second respondent, the brother of Richard and joint Managing Director, Mr. Charles Pierce.

13. Mr. Pierce praised the claimant's performance. On 21 February 2019 (p.88) the second respondent emailed the claimant *"I spoke to RM earlier following his visit with you all today. He was extremely complimentary about what he saw today. He thought that you all demonstrated great control over the project and also felt that you are dealing with the school personnel very well. This is high praise from an ex headteacher who whilst always highly enthusiastic and motivational does not hand out praise unless it is deserved. Well done all, a great start to the project. Keep it up. Charlie"*. The second respondent accepted in evidence that the claimant was awarded this because she was performing to a high standard and he regularly praised her performance. At this time the claimant's team consisted to two women and seven men
14. Further, on 3 July 2019, the second respondent emailed the claimant *"Jamie mentioned you'd had a rough day. Keep preserving with getting St. Cats over the line. It has been a learning experience in how we need to finish jobs and I've no doubt that you will be ahead of the curve for Holme Grange. Keep your head up, keep the organisation and structure in place, keep dogging the suppliers and you will get there and it will be another great achievement for you. You are doing a good job, make sure you relax this evening and then get stuck back in tomorrow.."*
15. On 25 March 2019 (p.129), the claimant's salary increased to £50,000 with effect from 1 March 2019. On 6 November 2019 (p.131) the claimant's salary increased to £55,000 which was back dated to 1 July 2019. These increases in salary took place during the second respondent's management of the claimant and with his approval.
16. The Tribunal concluded from this evidence that the claimant was very competent and a "rising star" in the business hence her rapid progression in the business within a short period of time.
17. In about October 2019 the claimant and the second respondent met to discuss an email the claimant had sent to a colleague Rod Stacey, site manager. A suggestion was made that the claimant had deliberately concealed information from the directors to cover up wrongdoing. Mr. Stacey had emailed copying in the directors of the respondent about where could he put signage up and the claimant had responded that he should come to her first rather than the directors. When the claimant explained that her response was in the context of her constant dialogue with Mr. Stacey by phone and by email, giving him updates or running items past him the second respondent accepted the claimant's explanation. The directors were being bombarded with small issues on a daily basis The respondent relies upon this in its defence to this claim but the Tribunal noted that the claimant received an increase in pay of £10,000 in the same month as her meeting with the second respondent. In the circumstances the Tribunal rejects the contention made by the respondent in this litigation that it perceived this issue as a major concern about the claimant.
18. Further, the Tribunal rejects that the claimant raised a maternity policy at this meeting and prefers the claimant's oral evidence that she raised this matter in July 2019. The Tribunal rejects the contention that the claimant was informed that Mr. Stacey handed in his notice about this issue; the Tribunal preferred the direct evidence of the claimant that this matter of Mr. Stacey's resignation had not been raised with her at the time. Further under cross examination the second respondent said having discussed it with the claimant he was prepared to accept there was a misunderstanding. It was not mentioned at the PDR either; the Tribunal concludes that it was not such a big deal.

19. At the end of 2019 the second respondent introduced personal development reviews. These were diarised for every quarter in 2020.
20. Mr. Stokes and Mr. Pierce informed the Tribunal that they had a conversation in about December 2019 about the claimant's commitment, integrity and attitude towards colleagues. These alleged discussions are inconsistent with the personal development review carried out by the second respondent on 15 January 2020 when the second respondent listed as a positive the claimant's commitment (see page 133). The Tribunal rejected the evidence about alleged concerns as it was so at odds with the comments by the second respondent to the claimant at the review meeting.
21. On 15 January 2020 (p.133) the claimant and the second respondent met for a professional development review. The meeting identified a number of strengths of the claimant namely "robustness in protecting the company's interests and the ability to push back when required; communication within the team and with clients' delegation of tasks within the team; procurement and dealings with suppliers; worth ethic and commitment. A number of areas were identified as requiring improvement namely "technical knowledge, practical construction, specialist design and use of Microsoft project; ensuring that the fine line between delegation and abrogation is not misjudged; ensuring that rolling up the sleeves and getting stuck in is still happening as and where required to improve the team performance; keeping closer tabs on procurement schedules to ensure that the project does not suffer; operating a clearer RDD process so the customer is fully informed of what they are getting and DGL's position is fully protected." When the claimant challenged the second respondent about the rolling up sleeves comment because she felt it was unfair and she had put in long hours. He stated it was a "general management point". In the short and long term goals of the employee the claimant noted "*would like more comfort around thing such as maternity leave to ensure long term commitment to the company will not require large personal sacrifices.*" The claimant raised this with the respondent so to ensure that her career progression would not be hampered in anyway by her maternity leave. The second respondent said that the company would support her plans but the atmosphere changed in the meeting and the Tribunal finds that the second respondent was annoyed that the claimant had raised it. The manager identified "to ensure lines of responsibility are clear between your role and Directors." This was sent to the claimant on 20 January 2020 (page 133-4) and the claimant said she was happy with it.
22. There was a dispute of fact between the claimant and the second respondent as to when the claimant had first raised the issue of maternity leave. The claimant stated in her oral evidence that it was about July 2019 and the second respondent said it was about October 2019. There was no mention in the claimant's witness statement of a previous discussion. The Tribunal accepted the claimant's explanation that at the meeting on 15 January 2020 the issue was personal to her and on a previous occasion in June/July 2019 weekly senior management meetings, she and her colleague had raised it as a general point. The Tribunal was not satisfied that page 99 on a so called to do list "*speak to the board about maternity leave policy on 6 January 2020*" was credible note.
23. There was a significant change in the relationship between the claimant and Mr. Pierce following the claimant raising the maternity leave policy. He became

- distant, went on annual leave and did not acknowledge the claimant. Prior to this the claimant used to speak to the second respondent daily.
24. On 28 February 2020 the second respondent emailed the claimant and other managers (p.136) because the smoking policy was not being followed and asked that it was. The claimant like others was taking more than two breaks a day; it was a company wide issue (as accepted by the second respondent under cross examination).
25. On 3 March 2020 Spencer Stokes emailed Jamie B Davies about events on 25 February 2020 when it was suggested that the claimant and Tamsin stayed at the hotel when a RDD meeting had been set up for 9.15; at 5pm the claimant arrived home (this is third hand)..being spied on what context reporting He also stated that Paul Knight approached the cell 1 desks about a week before that and asked the claimant when the next progress meeting at Claremont was booked for as he would like to attend. Mary warned Paul Knight off from going for reasons I am not sure unfortunately as he could not hear. When Nick and Dan had been speaking about canopy at Hastings and the requirements for it. Mary stood up and in front of everyone around the desk and told them both it wasn't relevant to their current works and should shut up. Mary to Nick for being on his phone although he was emailing on his work phone *"There have been many more but I can't remember in full detail as these have been over time and don't want to put something that is no accurate. I can confirm that there has been many instances in the way things are said to people that come across as Mary is justifying her role but unfortunately the respect for Mary within the cell has gone, I can only go off what I've heard through discussions had round the able – it might be something that you have a one to one with and see if they would open up."*
26. On 3 March 2020 there was an exchange of emails between Spencer Stokes Jamie Davies about the claimant (page 140). In respect of the meeting on 11 February 2020 it was stated *"I assumed that she was on the way back to Shropshire but Mary instead chose to stay as the others left, had a cigarette and then left site at approximately 1.45 p.m. I assumed she was on the way to the same meeting with the others. It transpired that she didn't attend the meeting I assume she travelled wherever.."*The second respondent accepted at under cross examination that if he did not know where the claimant was this was not damaging and there may have been a second side of the story. However, Mr. Pierce at the material time did consider the fact the claimant did not attend the meeting as a negative against her without getting her side of the story. Further in respect of the comments about 18 February 2020 (page 140) the claimant was referred to being on her mobile phone. The second respondent under cross examination conceded that whilst travelling the claimant would have to use her mobile phone to conduct her job; again at the material time the second respondent did not consider this but viewed the claimant in a negative light.
27. The second respondent also relied upon a criticism of the claimant as telling others to shut up. Although the second respondent disputed that coarser language was used in the industry by males, the Tribunal found that it would likely to have been and saying shut up was not a big issue.
28. Charles Pierce asked Jamie Davies *"can you get a bit more clarity from Spencer around the timing of what happened on 25 Feb and also the context of the conversation had with Paul Knight about not attending the next client*

*progress meeting. Also is Spencer willing to divulge about comments made in the team that shouldn't be said?"*

29. On 5 March 2020 Mr. Morgan emailed with a record of the claimant's movements (page 144). Included in the email was reference to "*lunch at Bicester*". This is a shopping complex. The second respondent at paragraph 24 of his statement considered that the claimant had been shopping. However Mr. Morgan did not state that; this was an assumption by the second respondent. The Tribunal found that this assumption was made because the claimant was a woman. The file note produced dated 23 July 2021 about a meeting between the second respondent and Mr. Morgan (page 154) referred to a number of shopping trips but this document was produced some 16 months after the events and the Tribunal was not satisfied that this record represented the conversation at the material time.
30. Although the evidence of the second respondent to the Tribunal was that he did not take Mr. Stokes evidence or other male colleagues complaints about the claimant as gospel, the Tribunal found that he did. The criticisms about the claimant were accepted by him and he did not bother to enquire with the claimant her explanation or whether the criticisms were correct. The criticisms of the claimant represented a significant fall from grace and the good performance record of the claimant but the second respondent was content to accept them from male colleagues; no female employee managed by the claimant complained about her.
31. Mr. Stokes also stated in the email dated 3 March "*..I like Mary as a person and this isn't a vendetta or has any alternative motive behind it. I even like the concept of women holding high positions within the company as it looks good to clients but the way things have been going something is needed to be said. There is a serious lack of work and deceit coming from that role which is being noticed and for me who wants cell 1 to be the best doesn't sit well..*" The second respondent did not pick Mr. Stokes up on this statement. The Tribunal found that the view expressed by Mr Stokes namely "*I even like..*" inferred a serious lack of appreciation of competent women reaching high positions in the company because of their ability as opposed to his opinion of being a token to impress clients.
32. On his return to the office in March 2020 the second respondent did not speak to the claimant at all. On 9 March 2020 the claimant was dismissed with immediate effect (page 106). She was attending a training course and at about 10.30 a.m. she was asked by the second respondent to go with him to a private room. He informed the claimant that the trust was broken and therefore she could not continue her employment with the respondent. The claimant asked the second respondent for an explanation but he refused to answer and asked the claimant to leave. He escorted her to her car and told a junior member of staff to fetch her bag. He stated that the claimant she was not permitted to make contact with anyone and she would be sent a letter. The respondent wrote to the claimant and stated  
*"I write to confirm that your contract of employment with Darwin Group Limited is terminated with effect from Monday 9 March 2020. Your employment has been terminated in line with current legislation whereby no reasons have to be declared. You will be paid in lieu of notice which is one month's salary in accordance with your contract of employment and you are therefore not required to attend work during this period. You will have accrued 6 annual leave days up to and including your notice period. According to our records you have*

*already taken 5 days which leaves 1 day of untaken holiday to be paid. All monies owed to you will be paid into your bank account in the normal way and your P45 will be posted to you....I would like to take this opportunity to wish you every success for the future..”*

33. The second respondent told the Tribunal the company did not have to give a reason; it was standard. The Tribunal was not satisfied this was an adequate explanation to maintain secrecy as to the reason to dismiss the claimant in particular when she had been such a successful and had progressed so rapidly in the business.
34. On 18 March 2020 the claimant made a subject access request (page 106A) seeking personal data concerning (a) an apparent lack of trust in me by my manager Charles Pierce which supposedly led to my dismissal together with any other issues with my performance or conduct as perceived by Charles Pierce or anyone else in the company (b)the contracts department's structure and/or restructure and the overall contracts department's organisation chart, including details of promotions, planned redundancies and other terminations of employment; (c)any data or concerns I have raised throughout my employment with my manager Charles Pierce or HR, including about maternity benefits for female staff (d)my employment performance appraisals (e)the company's decision to terminate my employment including the reason for this decision to terminate my employment including the reason for this decision and when it was made.” At page 107 the respondent confirmed that both Richard T H Pierce and the second respondent were involved in terminating the claimant's employment.
35. The respondent produced a document at page 155-6 on 23 July 2021 about a meeting which was alleged to have taken place in March 2020 to discuss the claimant and also about a discussion about maternity leave on 11 November 2020. The Tribunal treated this document with caution as it was replicated along time after the events and was identical in terms of paragraph 21 of the second respondent's witness statement. The Tribunal determined it was not satisfied that these discussions took place as indicated in a document produced 18 months later
36. The respondent replied on 9 June 2020 (page 107) stating *“apologies once again for the delay in our response which as you are aware is due to the corona virus. Please find enclosed the documents you requested. I also set out the information you requested ; (a)I can confirm that Richard T. H. Pierce and Charles Pierce were involved in the decision to terminate your employment (b)the data provided is contained in emails and there are documents from your personal file. The data falls into the following categories : employment records and performance information (c) The purposes for which this data is processed are in line with our privacy notice as follows; -business management and planning, conducting performance reviews, managing performance and determining performance requirements, making arrangements for the termination of our working relationship. The sources of the data are the email accounts of the employees listed in your request and your personnel file. The data has been disclosed to myself and Richard TH Pierce....”*
37. The respondent raised a number of matters which they say they took into account in deciding to dismiss. The respondent's evidence is that Mr. Stokes was concerned about the claimant's performance, lack of commitment, dishonesty and attitude. Mr. Stokes is now in the same position of the claimant.



38. The second respondent's evidence was that he reassured the claimant that the issue of maternity was to be raised at a directors' meeting the claimant having raised this issue in October 2019. The Tribunal has already found that the claimant raised the issue generally with other colleagues in or about June/July 2019 and not October 2019. The second respondent sought to support this allegation by a note produced on 3 August 2021 about the meeting in 2020. However, the Tribunal was not persuaded that this note captured any credible discussion about the issue as there is no actual minute of that meeting to evidence the same. The second respondent did make some enquiries about maternity provisions with Harvinder of the respondent as noted in emails dated 12 February 2020. The issue of a maternity policy was not progressed. The respondent's explanation for this was COV19 and the commission for the build of nightingale hospitals. The Tribunal accepts that this partially explains the reason for the non progression of the policy. However, the Tribunal finds in part this was not progressed because it was not taken seriously by the respondent. The Tribunal makes this finding because the actual amendment to the policy was not actually that significant (page 148-151) Since the claimant's employment was terminated four employees have taken maternity leave (pages 152-3 and 163 to 168).

### The Law

39. Section 13 (1) of the Equality Act 2010 states "*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*".
40. Section 23 (1) of Equality Act 2010 states "*On comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.*"
41. Pursuant to section 13 of the Equality Act 2010 the Tribunal should concentrate primarily why the Claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails; see paragraph 11 of **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) UKHL 1**.
42. Less favourable treatment is because of the protected characteristic if either is inherently discriminatory or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind; **Nagarajan v London Regional Transport (1999) IRLR 572**.
43. Section 136 (2) and (3) of the Equality Act 2010 states "*(2)..If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the Court must hold that the contravention occurred; (3)But subsection (2) does not apply if A shows that A did not contravene the provision.*"

44. Section 136 (2) of the Equality Act 2010 envisages a two-stage approach to the burden of proof in discrimination claims. The Claimant has the initial burden of proving a prima facie case of discrimination and if this hurdle has cleared the burden shifts to the Respondent to provide a non-discriminatory explanation (**Ayodele v Citylink Ltd and anor 2018 ICR 748**).
45. If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efofi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.
46. To establish a prima facie case, the Claimant has to show that she was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:  
*'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination'.*  
(**Madarassy v Nomura International plc [2007] ICR 867** at [56] per Mummery LJ); **Laing v Manchester City Council (2006) ICR 1519**.
47. The tribunal should not assume that an inadequate or unsatisfactory explanation for prima facie discriminatory conduct could entitle the Employment Tribunal to conclude that there was discrimination without considering whether any explanation for the conduct which was not indicative of racial discrimination; **Teva (UK) Limited v Goubatchev (UKEAT/0490/08)**.

### **Submissions**

48. Both parties provided written submissions and supplemented these with oral submissions.

#### **The respondent's submissions**

49. The respondent submitted that the claimant identified at a case management preliminary hearing on 15 June 2021 two acts of less favourable treatment namely a decision to conduct an investigation into the claimant's conduct and/or performance and her dismissal. The respondent's understanding of the claimant's case is that the reason for her dismissal was the raising of the respondent's maternity leave policy on 15 January 2020. Further the respondent submitted the promotion of the claimant in the respondent's workplace evidenced that the respondent was not an unfriendly place for women to thrive.
50. The respondent submitted that the claimant had initially said she raised issues about maternity leave on 15 January 2020. However, she had actually been raising this issue since July 2019 and yet she was promoted and not dismissed.

The claimant's colleague, Maria, it was agreed had raised the maternity policy issues too, The claimant's contentions were not credible.

51. Further the respondent submitted that the second respondent had taken on board the claimant's suggestions about a maternity leave policy; he had spoken to Mr. Adams and his father in December 2019 about improving the maternity policy. Mr. Pierce drafted a to do list on 6 January 2010 predating the claimant's practice development review meeting. Further the respondent raised it at the Goldfosters Directors meeting (see pages 160-161). An email chain dated 12 February 2020 to 19 February 2020 (page 102-105) shows that the matter had in fact been raised by Mr. Pierce to Harvinder Azad Group Finance Director who also oversaw HR. The introduction of the revised policy was by reason of COVID 19 and the contract to build nightingale hospitals.
52. The respondent was not adverse to women taking maternity leave; a woman took three separate periods of maternity leave over a three year period and this did not affect her promotion (page 75-86). Maria the claimant's colleague also raised maternity leave and was not dismissed.
53. The claimant was dismissed for her misconduct. The criticisms of the claimant were raised by Mr. Stacey and Mr. Stokes. The second respondent is clear that sex did not play a part in the decision to dismiss.

The claimant's submissions

54. The claimant relied upon the cases of **Glasgow City Council v Zafar (1997) 1 WLR 1659; Royal Mail Group Limited v Efofi (2021) UKSC 33; Igen Limited v Wong (2005) ICR 931; Nagarajan v London Regional Transport (1999) IRLR 572; Owen & Briggs v James (1982) IRLR 502; Geller v Yeshurun Hebrew Congregation UKEAT/0190/15; The Ocean Frost; Gestmin SGPS SA v Credit Suisse UK Limited 2013 EWHC 3560; Alesco et al v Bishopsgate et al (2019) EWHC 2839 (QB) and CLFIS (UK) Limited v Reynolds (2015) EWCA Civ 439.**
55. The claimant submitted that the respondent relies heavily on conversations with Mr. Morgan and Mr. Adams in connection with his decision to dismiss the claimant. However, the only record of those conversations appears to in document created at 18 months after the event explicitly for the purposes of the litigation. It was submitted that the claimant had progressed well in the respondent's business. She was a "rising star" having been promoted three times in her first year of service and her salary had doubled. No material concerns were raised by the respondent with the claimant at her performance review on 15 January 2020. At that meeting the claimant asked the second respondent about more senior roles at the company, explaining that she wanted some comfort around maternity leave to ensure a long-term commitment to the company would not require large personal sacrifices. At the time the respondent offered no enhanced maternity benefits. Some weeks later on 9 March 2020 the claimant was summoned to a private meeting room by the second respondent and was informed that trust had broken down with no details and was dismissed with immediate effect. Four days later she was received a dismissal letter backdated to 9 March 2020 which stated that she had been dismissed and that no reason would be given. The claimant relied upon a hypothetical comparator; a man who had (a)indicated an intention to start a family and take parental leave and (b)been the subject of the same purported concerns as those raised about the claimant's "conduct and behaviour".

56. The claimant submitted the inference that the claimant was treated less favourably because of her sex arises from the timing of her dismissal; the manner of her dismissal; the refusal of the respondent to give a reason for her dismissal; the nature of the construction industry (prevalent sexism); culture at the first respondent (sexism); no recognition of the said culture in the organisation; the lack of diversity training; unguarded comments such as those from Mr. Stokes "I like Mary as a person and this isn't a vendetta or had any alternative motive behind it. I even like the concept of women holding high positions within the company as it looks good to clients". It was submitted that the second respondent's evidence was that he and his father made the decision to dismiss the claimant. The Tribunal must consider that the conscious and subconscious motivation of all those responsible since a discriminatory motivation on the part of any of them would be sufficient to taint the decision. If the Tribunal has satisfied limb 1 of the **Igen** test the burden falls to the respondent to show a non-discriminatory motive. It was submitted that the respondent has failed to meet that burden.

### **Conclusions**

57. In respect of the respondent's submission that the claimant's case as confirmed at the previous preliminary hearing concerned only the two limited issues set out above and cannot be extended beyond that, the Tribunal reminded itself of the case law **Ijegede v Signature Senior Lifestyle Operations Limited (2022) EAT 4 and Serco Limited v Wells (2016) ICR 768** namely that a Tribunal/party is not entitled to vary a list of issues simply because it disagreed with it. The Tribunal did not understand the claimant to be seeking to vary the issues but due to the nature of discrimination claims and the fact that discriminatory treatment may be found by inference, it was inevitable in the battle ground of litigation that a case can develop on its facts. The Tribunal's understanding of the claimant's case is that it remains limited to the issues set out by E.J. Butler at the preliminary hearing but the claimant sought in cross examination to develop a theme of discriminatory behaviour by the respondent so to request the Tribunal to infer sex discrimination as to the two issues. The Tribunal reject any suggestion that it would vary the list of issues as identified at the preliminary hearing before Employment Judge Butler.
58. The Tribunal make some observations about the evidence. The Tribunal found the claimant to be straightforward and credible in her evidence. The Tribunal found Mr. Stokes evidence for the respondent to be very defensive. In particular, he denied ever hearing or witnessing any sexist behaviour in the building industry, a male dominated environment, he had been involved in for over 14 years. The Tribunal found this to be incredible.
59. In respect of the criticisms made against the claimant in this case by the respondent there was little contemporaneous documentation to evidence these at the material time. In fact, the evidence relied upon by the respondent was substantially documents created long after the events in time which gave the clear appearance that individuals in the respondent's organisation colluded to build a wealth of evidence (mainly with the assistance of the HR adviser) to defend the claim. This caused the Tribunal significant concern.
60. Further the Tribunal found there was limited contemporaneous documentary evidence about the progression of a maternity leave policy in the respondent's

business. The tribunal did not find that because another female progressed in the respondent's organisation having taken maternity leave that this meant necessarily that the respondent welcomed women taking such leave. The Tribunal determined that was a matter to be taken into account along with all of the circumstances of the claimant's case.

61. The Tribunal did not hear from the witness Mr. Pierce senior who the Tribunal was informed made the joint decision to dismiss the claimant. The tribunal found that this was a highly relevant matter to be taken into account following the decision of **CLFIS**.
62. On 19 January 2021 the respondent updated its maternity policy page 148. The amendments to it are limited. The Tribunal found that the COVID 19 pandemic and contract to build nightingale hospitals was only partially the reason that an updated policy was not progressed. The Tribunal considered the other part of the reason is that it was not considered as a serious issue by the respondent. The respondent also relied upon some notes at page 158 of a meeting at Goldfoster when it was alleged that the issue of maternity leave policy was raised. There are no full notes of this critical meeting.
63. Although this respondent had a diversity policy, it provided no training to employees about it. In the context that women fell within a minority in the business the Tribunal found that it was imperative that diversity training should have been provided to all the work force including senior managers and directors.

64. The Tribunal determined the issues as follows :-

(1) Did the First and/or Second Respondent decide to conduct an investigation into claimant's conduct and/or performance

This matter has already been conceded by the respondent.

(2) Did the First and/or Second Respondent decide to dismiss the Claimant.

Both respondents accept that this is the case.

(3) Was that less favourable treatment of the Claimant in comparison to an appropriate male comparator? The Claimant relies on a hypothetical comparator in materially the same circumstances as her own.

52. The Tribunal considers in the circumstances that an appropriate hypothetical comparator would be (a) a man requesting parental leave and (b) a man who had been subject to concerns about his conduct and behaviour.

53. The factual context is that the claimant was a competent and high flyer within the respondent's business and received a number of promotions and pay increases within a short period of time. The Tribunal does place significance on the timing of the claimant raising the issue of the maternity leave policy on a personal level in the meeting of 15 January 2020. Prior to this date the claimant and her colleague had raised the issue in general terms in July 2019 but at her performance review meeting the claimant personalised the issue to her and asked the second respondent whether advising the second respondent as to her plans to start a family with her fiancé at this point. After this point the Tribunal finds that the second respondent's attitude did change towards the

claimant. He did not speak to the claimant following his return to work in March 2020. The tribunal does take into account that one senior female colleague had taken maternity leave historically but reject that this inevitably means the respondent was unconcerned with the claimant raising the issue. The fact is the second respondent's attitude did change significantly against the claimant from the point of her personalising the request for a revised maternity leave policy.

54. The criticisms made by the claimant's male colleagues about her were out of sync with the competence and ability demonstrated by the claimant in her work for this business and the Tribunal finds were tainted by sex discrimination. The Tribunal has already set out above its findings as to the comments of Mr. Stokes and Mr. Morgan. The second respondent did accept these comments as gospel from male colleagues and failed to provide the claimant with any opportunity to respond to the allegations. The comments hinted at a token woman in a job and the stereotypical view that women go shopping in work time.

55. Albeit that the claimant and her female colleague had raised the issue of the improvement of maternity terms in the summer of 2021, the claimant personalised this in her meeting with the second respondent in January 2021. It was then made clear to the respondent that the claimant was wishing to exercise her right to maternity leave in the future. The second respondent was not happy with this and his reserved response and change of attitude to the claimant at this meeting once she had raised this is the Tribunal concluded was indicative of his displeasure that the claimant may wish to exercise this right whilst employed at a senior level of the business at this time. The Tribunal do find that this was a catalyst for the second respondent's decision to seek to investigate the claimant and accept criticisms from male colleagues and his rash decision to dismiss her. The claimant managed other women, no female employee made any complaints about the claimant's ability to do her job. The fact that another woman took maternity leave and was promoted (see pages 78,84,85 and 86) does not mean that the respondent did not discriminate against the claimant. The Tribunal finds that the claimant was subject to less favourable treatment in comparison to an appropriate male comparator.

(4)If the Claimant was treated less favourably than a hypothetical male comparator would have been treated, was that because of her sex?

65. On the facts found by this Tribunal it determines that the claimant was subject to investigation and dismissed because of her sex namely the raising of the issue of maternity leave on a personal level at the meeting on 15 January 2020. The Tribunal has not had the benefit of hearing any evidence from the joint decision maker Mr. Pierce senior which presents an evidential gap in the respondent's case.

66. The Tribunal has taken into account the following matters. There was a change of attitude by the second respondent towards the claimant following her raising of the maternity issue personal to her on 15 January 2020. The claimant's dismissal was swift; there was no opportunity for the claimant to provide any other side to the story painted about her by male colleagues. This was despite

the fact that the criticisms were at odds with the successful progression made by the claimant in the business within a short time and her noted competence. The respondent maintained a secrecy about the reason for dismissal. Although the claimant did not have two years service, the Tribunal concluded that an employee such as the claimant who has been such a rising star reasonably deserved to be told why the respondent was so swiftly removing her; it was a drastic step to take and inconsistent with the performance demonstrated by this claimant. The Tribunal does find although the respondent has better statistics in terms of working females in the construction industry than the general position, the industry does remain dominated by men and sexism is prevalent as well within the respondent's organisation. The comments made by Mr. Mr. Stokes and Mr. Morgan about the claimant, the Tribunal finds were tainted by sex discrimination. The respondent does not provide any diversity training to its employees.

67. The Tribunal concludes that the claimant has established a prima facie case of discrimination. The respondent has failed to provide an adequate explanation. The Tribunal has not heard any evidence from Mr. Pierce senior a joint decision maker. The suggestion that the claimant was dismissed (not for raising maternity leave) but for conduct is simply not made out. Reliance has been placed by the respondents upon criticisms made by male colleagues, Mr. Stokes and Mr. Morgan tainted by sex discrimination. No opportunity was given to the claimant, a high performing employee to answer those criticisms. The respondents failed to subject those criticisms to any interrogation or analysis or permit the claimant an opportunity to answer the allegations. The Tribunal concluded that this was because the male colleagues word was taken at face value over a woman in the workplace. The fact that another female progressed in the organisation and had taken maternity leave is a factor taken into account but does not without more persuade the Tribunal that this claimant was not discriminated against. The Tribunal considers all the circumstances of the case. The respondent did not progress the changes to the maternity policy with sufficient degree of seriousness. The changes to the policy took place a year later and were not substantial.
68. The Tribunal concluded that the change of the respondents towards the claimant took place when she raised the issue of maternity leave which was personal to her in January 2020; there was a change in attitude by the second respondent towards the claimant and the respondents were blindly content to accept criticisms of her by male colleagues. The claimant's claims succeed.

**Employment Judge Wedderspoon on 16/05/2022**