Case No: 1302355/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs S Dave (Kacha)

Respondent: CU Recruitment and Admissions Limited

Heard: by Cloud Video Platform (Midlands West)

On: 31 October, 1, 2, 3, 4, 7 and 14 November 2022

Before: Employment Judge Faulkner
Ms L Clark
Mr R White

Representation: **Claimant** - in person
Respondent - Ms M McGee (Counsel)

JUDGMENT

1. The Respondent contravened section 39 of the Equality Act 2010 by discriminating against the Claimant because of illness suffered by her as a result of pregnancy, by treating her unfavourably as follows:

1.1. Failing to respond to her enquiries about a check-in meeting for her 2019/2020 performance review up to and including 23 October 2020.

1.2. Failing to hold a final check-in meeting for that performance review, by 24 November 2020.

The Claimant's complaints in these respects were brought within such further period after expiry of the statutory time limit as the Tribunal thinks just and equitable.

2. The Respondent also discriminated against the Claimant because of her pregnancy or because she was exercising or sought to exercise the right to ordinary or additional maternity leave, by treating her unfavourably as follows:

2.1. Failing to give her a check-in meeting for performance development review purposes and/or for maternity leave purposes prior to the Claimant commencing maternity leave on 1 February 2021.

2.2. Thereby putting the Claimant in the position where she had to send the Respondent an email on 28 January 2021 setting out information she would otherwise have discussed at such a meeting.

2.3. Failing to inform the Claimant that on 29 January 2021 it had completed her January 2021 performance review and rated her as "meeting requirements".

The Claimant's complaints in these respects were not however brought within such further period after expiry of the statutory time limit as the Tribunal thinks just and equitable. The complaints were dismissed on that basis.

3. The Respondent did not contravene section 39 of the Equality Act 2010 by discriminating against the Claimant because of illness suffered by her as a result of pregnancy, because of her pregnancy or because she was exercising or sought to exercise the right to ordinary or additional maternity leave, by treating her unfavourably in the other respects alleged by the Claimant. Those complaints are dismissed.

4. The Respondent did not contravene section 39 of the Equality Act 2010 by discriminating against the Claimant because of her race. The Claimant's complaint in this respect is therefore dismissed.

5. The Respondent did not contravene section 39 of the Equality Act 2010 by applying a provision, criterion or practice (its no-detriment policy in relation to pay) which was discriminatory in relation to the Claimant's race.

6. The question of remedy in relation to the complaints at paragraph 1 above will be considered at a separate Hearing, details of which have been agreed with the parties.

REASONS

1. The Judgment in this case was sent to the parties on 15 November 2022. These Reasons are provided in response to a request from the Claimant made on the same date.

Hearing

2. At the start of the Hearing, as I had done at a Case Management Hearing in November 2021, I informed the parties that I had an historic connection with Coventry University ("the University"), of which the Respondent is a subsidiary. I repeat, with appropriate amendments, what I noted in the Case Management Summary resulting from that earlier Hearing.

3. At some time prior to February 2016, and probably ending a year or two earlier than that, I regularly advised the University on employment matters when in private practice as a solicitor though, as far as I recall, not in relation to tribunal litigation. In doing so, I had some dealings, though not regularly, with Ms Christine Malin, who was one of the witnesses for the Respondent at this Final Hearing. After moving to a different firm in private practice in February 2016, I had only very occasional contact with the University, though no longer with Ms

Malin (again, as far as I can recall). I believe I may have provided one or two brief pieces of advice to the University at that second firm, and I had one conversation, or possibly a couple of conversations, with Ms J Oguize at some point after February 2016. She had no substantive involvement in this case that I was aware of but was named as the Respondent's contact on the ET3 Form and was present at this Hearing.

4. I was more than satisfied that it was appropriate for me to continue as the judicial panel member for this Hearing, on the basis that I had at no point had any contact with the Respondent nor with any of the other witnesses, my contact with the University was largely historic and I played no part in advising on the transfer which is referred to in our findings of fact below, nor can I recall being previously aware of it. I had said at the Case Management Hearing that I could make sure that a note was placed on the Tribunal's file to say that I should play no part in the Final Hearing. Neither party wished me to do so. I invited the parties at this Hearing to make submissions, should they wish, as to why I should not be part of the panel, and made clear that if such submissions were made and rejected, that would in no way count against them. Neither party wished to address us on this issue.

5. The parties agreed a bundle of 469 pages, with a small number of additional documents being submitted during the Hearing. We read witness statements of and heard evidence from the Claimant and (for the Respondent) Ms Malin (formerly a People Partner with Coventry University Group and now retired), Rob McGowan (formerly Group Director, Recruitment and Admissions), Dylan Cozens (Regional Manager – UK and Europe and previously the Claimant's line manager), Stefanie Walton (Regional Director UK & Europe) and Kully Passi (Operations Support Manager). Appropriate arrangements had been made prior to the Hearing to enable Mr McGowan to give evidence by video from Australia, where he now lives.

6. We made clear that we would only read those parts of the bundle to which we were taken by the parties either in their statements (excluding the notes of the Claimant's grievance hearing or its outcome) or in oral evidence. The Claimant had previously written to the Tribunal about showing videos during evidence. She confirmed at the start of the Hearing that she could do so by sharing her screen (as the parties were attending remotely) but in the end did not do so. Page references below are of course references to the bundle. Alphanumeric references relate to the statements, so that for example SD5 would be paragraph 5 of the Claimant's statement and RM3 would be paragraph 3 of Mr McGowan's statement. All of our findings of fact below were based on the evidence we considered as just summarised and, where there was a dispute between the parties, on the balance of probabilities.

7. The Hearing was listed for six days. We lost a significant amount of time on the first and second days dealing with the amendment applications discussed below and some further time on the third day whilst new documents were dealt with. As a result, evidence and submissions did not conclude until late on day 5 and there was insufficient time for us to deliberate and deliver judgment on day 6. Judgment was delivered on the morning of day 7. It was not possible in the end to deal with remedy on that day, given that the Claimant's case for financial compensation arising from her successful complaints could not have been anticipated by the Respondent in its evidence, so that an adjournment was required.

Amendment applications

8. At SD14, the Claimant indicated that in addition to the indirect race discrimination complaint in the list of issues below, she was complaining that the percentage pay increase applied by the Respondent to her, and colleagues', salaries constituted indirect race discrimination. At SD15, she indicated that she was complaining that her performance rating (for 2019/20) being the same as her White British colleagues was an act of direct race discrimination. The Respondent contended that these were amendments to the Claim. The Respondent itself made an application to amend its justification defence.

9. In deciding the applications, we had regard to **Selkent Bus Co Ltd v Moore [1996] ICR 836**, the relevant Presidential Guidance and **Vaughan v Modality Partnership [2021] ICR 535**, as well as the overriding objective. We did not consider any time limit issues, as those could be determined as part of the substantive case if what the Claimant sought to pursue was permitted.

The Respondent's application

10. This was allowed by consent. The amendment was to paragraph 18 of the Amended Grounds of Resistance (pages 32 to 33), adding the following words after the words "TUPE transferred": "for fairness and to ensure that no employee suffered a detriment by being paid a lower salary".

The Claimant's application – direct race discrimination

11. The only complaint of direct race discrimination recorded in my Case Management Summary in November 2021 was that the Respondent subjected the Claimant to a detriment on or around 17 December 2020 by Mr Cozens' email of that date, in which she says he refused to discuss her performance rating and her pay for 2019/2020. The comparators were Danny North, Kate Iwaniszewski and Janice Roden.

12. The Claimant confirmed orally her intention to also pursue a complaint of direct race discrimination related to the outcome of her 2019/20 performance review in December 2020, specifically that her White comparators - Danny North and Kate Iwaniszewski – had a lesser workload than her and achieved less than her yet were given the same rating. The less favourable treatment was therefore said to be that the Claimant had to do more work and achieve more than her comparators to get the same rating.

13. We first considered whether this was an amendment or simply a labelling of something that was already present in the Claim Form. We reviewed the Particulars of Claim in detail. The first section summarised the complaints and said explicitly that the performance review outcome for 2019/20 was discrimination based on pregnancy (our emphasis). It was the Claimant's pay (again, our emphasis) that was said in that section to give rise to discrimination based on the protected characteristic of race. The second section related to the performance review outcome and was all said to be covered by the protection afforded by the Equality Act 2010 ("the Act") for pregnant employees (once again, our emphasis).

14. It was a sentence in the fourth section of the Claim Form that the Claimant relied on for her case that the complaint about the rating was already pleaded as direct race discrimination. In the third paragraph of that section (the first two paragraphs merely reiterated some of the factual matrix regarding performance issues already covered in the previous sections), she said, "Additionally, it concerns me that I was rated the same as my white colleagues when our workload was different", going on to say how she exceeded her targets. The next section went back to how her pay was fixed on transfer to the Respondent in April 2019 and how the same issue affected other Black Asian and Minority Ethnic ("BAME") employees, so again was not concerned with the review but with pay.

15. It was highly relevant to note:

15.1. Whilst as she reminded us, and as we took into account, the Claimant is a litigant in person, she is evidently highly intelligent. It was noteworthy for example how capably she marshalled her submissions on her amendment applications in just thirty minutes, having been given (apparently for the first time) an explanation of how amendment applications work. This is relevant because in preparing her Particulars of Claim she explicitly referred to the Act, discrimination and protected characteristics and as just summarised explicitly drew attention to what she was alleging amounted to acts of discrimination. This did not include identifying the 2019/20 review as an act of direct race discrimination.

15.2. That of course fed into the detailed discussion at the Case Management Hearing before me in November 2021 where, as my note records, the Claimant was given an explanation of the difference between direct and indirect discrimination, and even when the discussion of the protected characteristic of race focused on the pay issue, was able to make clear that she wished also to complain about direct race discrimination related to Mr Cozens allegedly refusing to discuss her performance rating and pay, without referring to the rating itself. This indicates very clearly how the Claim Form should be read.

16. In summary therefore, we disagreed with the Claimant and regarded this as the addition of a new complaint. Hinting at the possibility of a complaint by saying that the Claimant was concerned that she was rated the same as white comparators was not sufficient to identify a complaint of direct race discrimination in the context of a document in which complaints of discrimination were explicitly identified, noting also that there was a clear opportunity to identify the complaints in full at the Case Management Hearing a year ago.

17. The second question therefore was whether the amendment should be permitted, as to which:

17.1. The Claimant accepted she should have raised the point before, even as a litigant in person. For completeness, we made clear that we did not regard the Respondent as bound to raise it sooner themselves, on seeing the Claimant's statement. It is the responsibility of the party seeking to pursue complaints to properly identify them.

17.2. The complaint raised new areas of enquiry for the Respondent, specifically the question of the performance reviews of the two comparators (which does not arise in the pregnancy discrimination context where no comparator is required),

which it would legitimately wish to assess in detail, as to workloads and achievements.

17.3. Further, we were told that Ms Iwaniszewski left the Respondent in December 2021, and that performance review documentation is only kept for three months post-termination. That raised the question of potentially serious evidential prejudice for the Respondent.

17.4. There was some reference to what the comparators did in the Respondent's statements (particularly that of Mr Cozens) but this was only fleeting and in response to matters the Claimant herself had raised in documentation she wanted included in the bundle.

17.5. It was not relevant that the Claimant raised this matter in a grievance. What mattered was what was raised before the Tribunal and what the Respondent anticipated it would be dealing with in this forum, not internally.

17.6. Of course, there was some prejudice to the Claimant in not allowing the amendment, as there always is, but it was also noteworthy that the amendments permitted by EJ Choudry included complaints related to the January 2021 "Meeting Requirements" assessment by Mr Cozens and that this was only put forward by the Claimant as a complaint of pregnancy/maternity discrimination, not race discrimination. This confirmed that the correct interpretation of the original Particulars of Claim was as we have set out above – that it was pregnancy which was the focus of the Claimant's concerns about performance reviews and not race.

17.7. We canvassed with the parties the possibility of having to adjourn this Hearing if the amendment were allowed, for the evidential reasons given above. Ms McGee did not say she would apply for an adjournment, as her client was clearly keen to have the case heard, but that did not mean that pressing ahead would have been fair on the Respondent, leaving it with the potential holes in its evidence we have referred to.

17.8. Delay in getting the case concluded was a factor for the Tribunal to consider. The Tribunal panel could have been available as soon as mid-March 2023, but that was without considering the availability of witnesses and Ms McGee. The events in question relate to two years ago; whilst statements are prepared and the bundle in place for the complaints already identified, there was the prospect of memories fading on the issues already before us and thus impairing the quality of the oral evidence. In any event, even a relatively short delay would not have dealt with the evidential prejudice to the Respondent of Ms Iwaniszewski's departure and the deletion of performance information.

18. Accordingly, we concluded that the balance of injustice and hardship meant that the Claimant's application should be refused.

The Claimant's application – indirect race discrimination

19. The complaint of indirect discrimination recorded in my Case Management Summary from November 2021 concerns whether the Respondent applied to persons not of BAME race a provision, criterion or practice ("PCP") of employing all employees transferred into its employment on their previously existing pay. The Claimant's case is that this put BAME persons including herself at a

particular disadvantage, in that their pay was lower than White colleagues even though they were doing the same role. We acknowledge that some people object to the term "BAME", but that is how the case was put by the Claimant and that was therefore the way we decided it.

20. As indicated above, at SD14, the Claimant asserted that the percentage salary increase the Respondent applied with each annual performance review put BAME colleagues previously employed by Coventry University College Limited ("CUC") at an unfair disadvantage because White colleagues were transferred on a higher salary and so the pay gap between them was ever widening. The Claimant confirmed orally her wish to complain that the application of a percentage increase in this way was a further act of indirect discrimination.

21. Again, the first question we considered was whether this was an amendment to the Claim. The Claimant submitted it was not because in the penultimate section of her Particulars of Claim she referred to the Respondent adopting a "commercial focus" in which salaries change because of performance and said that the pay gap would increase for her and her BAME colleagues.

22. The first thing to note, as above, is that the Claimant did not say in the Particulars of Claim that the commercial focus was itself an act of indirect discrimination. We repeat what we have already said about how otherwise in the Particulars of Claim the Claimant was clear about what constituted her discrimination complaints. Secondly, she was given a very clear opportunity at the Case Management Hearing in November 2021 to identify her complaints and did not identify this matter at all. Again, that was a strong indication of how the Particulars should be read. We again concluded that a reference to something in the Particulars of Claim was not sufficient to identify a complaint of discrimination, particularly in the context of complaints being otherwise clearly identified and notably in this instance where it is not at all clear that the Claimant was saying that the salary reviews themselves were based on a discriminatory practice as opposed to being the result of the original allegedly discriminatory practice of staff transferring on their existing pay rates.

23. We thus concluded that an amendment was required if this complaint was to proceed and went on to considered whether it should be permitted. As to that:

23.1. The Claimant accepted the failing on her part at the Case Management Hearing, acknowledging that I made clear to her what was required.

23.2. She could not explain why the matter was only drawn to the Tribunal's and the Respondent's attention now, apart from her being a litigant in person (which we took into account).

23.3. It was clearly a new complaint which opens up new areas of enquiry, as Ms McGee submitted, related to how pay rises of particular colleagues were determined. That would inevitably have taken some time for the Respondent to properly consider and was plainly not addressed in its witness evidence.

23.4. Referring back to what the Claimant said in this part of the Particulars of Claim, the issue she raised in relation to pay arose from the fact that she and all of her colleagues were slotted into their post-transfer roles on their existing salaries. We could not see therefore any disadvantage to the Claimant in

refusing this amendment. She accepted that the new complaint of indirect discrimination depended entirely on that which was already before us and that both would succeed or fail together. Moreover, we could not see that adding the second complaint could make any difference to the compensation the Claimant might receive if she succeeded in the first complaint. The Respondent accepted that compensation for that complaint would not be limited to the period up until the first salary reviews took place.

24. All of the above, added to what we have already said about delay, led us to conclude that the balance of injustice and hardship again firmly favoured the refusal of the application to amend.

Issues

25. The amendment applications having been dealt with as above, the issues for the Tribunal to decide were as follows, as agreed with the parties.

Pregnancy/maternity leave discrimination

26. The first issue in relation to pregnancy/maternity leave discrimination was whether the Claimant was subjected to one or more of the following detriments:

26.1. Having to chase the Respondent to arrange a final check-in for her 2019-2020 performance review by Mr Cozens, up to and including 23 October 2020.

26.2. Not having a final check-in for that performance review, which she says should have taken place by 24 November 2020 at the latest.

26.3. Not being given the opportunity to present evidence at a final check-in that she was exceeding the requirements of the role and worthy of an Exceptional Performance Award, by 24 November 2020 when Mr Cozens prepared the outcome letter she received on 4 December.

26.4. Being given a “meeting requirements” rather than an “exceeding requirements” review outcome on 4 December 2020, thus missing out on an Exceptional Performance Award.

26.5. Mr Cozens confirming that decision by e-mail on 16 December 2020.

26.6. The Respondent failing to give her a final check-in meeting for performance development review (“PDR”) purposes and for maternity leave purposes prior to her maternity leave commencing on 1 February 2021.

26.7. Having to email Mr Cozens on 28 January 2021 setting out information she would have liked to discuss at that meeting.

26.8. The Respondent failing to inform her on 29 January 2021 that Mr Cozens had completed a “Viewpoint” for her performance and rated her as “meeting requirements”.

26.9. The Respondent failing to respond to her email of 5 September 2021 regarding completion of that Viewpoint and the rating.

26.10. Having to chase a performance review outcome letter on 23 December 2021 (the final PDR outcome for the performance year 2020/21).

26.11. Having to chase a response to her email of 5 September 2021 on 28 December 2021.

26.12. The Respondent not replying to her email of 5 September 2021.

27. If the Claimant was subjected to one or more of those detriments, the second issue was whether this constituted unfavourable treatment. This was not conceded by the Respondent.

28. If there was unfavourable treatment, the third issue was whether the Respondent treated the Claimant unfavourably in the protected period because of her pregnancy or because of illness suffered as a result of her pregnancy or because she availed herself of maternity leave. It was accepted that the Respondent knew she was pregnant when she went off sick in August 2020 and that it knew the absence was because of pregnancy-related sickness.

29. As to time limits, if the complaint at paragraph 26.5 above succeeded, the Respondent accepted that it was presented in time. It did not accept that any act of pregnancy discrimination which the Claimant was able to establish from paragraphs 26.1 to 26.4 above constituted conduct extending over a period ending with 16 December 2020 so that they too would be deemed to have been brought before the Tribunal in time. Accordingly, it was agreed that if the complaint at paragraph 26.5 did not succeed, then in relation to any other successful complaint, the Tribunal would have to decide whether it was brought within such further period after the usual time limit as the Tribunal considered just and equitable, and/or whether it was conduct extending over a period ending with any such complaint.

30. The matters at paragraphs 26.6 to 26.12 above were deemed as presented on 27 November 2021, when the Claimant made an application to amend her Claim, which was granted by Employment Judge Choudry. Accordingly, in relation to the alleged detriments at paragraphs 26.6 to 26.8 (if any or all of these complaints succeeded), it was necessary for the Tribunal to consider whether they constituted conduct extending over a period ending with any of the later complaints and/or (if none of the later complaints succeeded) whether they were brought within such further period after the usual time limit as the Tribunal considered just and equitable.

Direct race discrimination

31. The first issue in relation to direct race discrimination was whether the Claimant was subjected to a detriment on or around 17 December 2020 by Mr Cozens' email of that date, in which she says he refused to discuss her performance rating and her pay.

32. If so, the second issue was whether in that respect the Respondent treated the Claimant less favourably than it treated or would have treated the Claimant's comparators who must be in not materially different circumstances to the Claimant – see section 23 of the Act. Her comparators are Danny North, Kate Iwaniszewski and Janet Roden.

33. If so, the third issue was whether the less favourable treatment was because of the Claimant's race.

34. There was no time limit issue.

Indirect race discrimination

35. It was agreed that the Respondent applied to persons of BAME race and to persons not of BAME race a PCP of employing all employees transferred into its employment on their previously existing pay. The Respondent agreed that this was a racial group for the purposes of section 9(3) of the Act.

36. The first issue was therefore whether the PCP put BAME employees at a particular disadvantage when compared with persons who are not of BAME race. The Claimant says that it was predominantly BAME employees who were paid at lower rates as a result of the PCP.

37. If so, the second issue was whether the Claimant was put to that disadvantage.

38. If so, the third issue was whether the PCP was a proportionate means of achieving one or more legitimate aims, namely, to ensure no employee suffered a detriment as a result of the transfer, to set pay fairly and to make good use of the Respondent's financial resources.

39. There was no time limit issue in relation to this complaint either.

Facts

40. The Claimant describes her race as Indian. The Respondent is a wholly owned subsidiary of the University, dealing with student recruitment and admissions for the whole of the CU Group.

Transfer

41. The Claimant began employment in early 2019 with CUC at the University's campus in Coventry, as a Recruitment and Liaison Assistant. Her role was to market the University's offering in Coventry, Scarborough, and London to prospective students. Her annual salary was £22,708. A transfer to the Respondent was in view on the Claimant commencing employment with CUC. She transferred into the Respondent's employment on 1 April 2019, taking up the role of Regional Recruitment Specialist ("RRS"), along with various colleagues and others who transferred from other subsidiaries of the University and from the University itself. She is now a Student Success Coach.

42. Employees holding other roles were also transferred into the Respondent in April 2019, but they were not relevant to this Claim. The rationale for setting up the subsidiary and transferring staff in this way was that all staff within the CU Group engaged in recruiting UK and European students would be employed by one company, to ensure that prospective students could make applications to any part of the Group through one channel. Those who transferred into the role of RRS had previously held different job titles and roles, including that of Senior Recruitment Officer ("SRO") employed by the University. Prior to the transfer, staff in subsidiary companies shared the same or very similar terms and

conditions, whilst those in the SRO role were employed on University terms, which would generally be regarded as more generous in various respects.

43. Ms Malin was the key People Support officer for the transfer project. She told us that the University's Reward Team job-evaluated each role, with external advice, reviewing old and new job descriptions, jobs being evaluated into pay bands and salary benchmarking also being carried out. Initially it was thought that the Recruitment and Liaison Assistant role would be removed (CM7), which we assume means those in that role would have been in a redundancy situation, because the Respondent was not sure it slotted into the RRS role within the new structure. After consultation however the role was not removed, though some of its responsibilities went to Operations Support Assistants; it was thought that the RRS role would provide a development opportunity for the Claimant and other former Recruitment and Liaison Assistants.

44. All of those who transferred were placed on terms similar to those in subsidiary companies, so that for example a deal had to be reached to reduce former University employees' holiday entitlement. As to pay, the post-transfer terms simply said, "You will be placed on a spot salary within a job family band" (pages 426-7).

Pay

45. The Claimant was notified just before the transfer that once employed by the Respondent, she would remain on £22,708, at level 6. In March 2019, she raised a question about this with the University's People Support team, as the Respondent's Advisory Pay Range document (page 288) referred to a minimum salary of £25,600 and a top salary of £32,000. In response, Ms Malin said in an email to colleagues on 1 April 2019 (page 437) that everyone was slotted into roles on their existing salaries and that "all staff are paid within the salary bands which are broader than the Advisory Pay Ranges that were shown". The Claimant says she did not get that email, which we accept as it was not addressed to her. She accepts however that she got a response on the People Portal and was told that the Respondent was using "spot salaries" and that staff would be above and below the Advisory Pay Range. A spot salary is a personal salary for an individual rather than one determined by a pay scale.

46. What the Claimant was told was consistent with pages 405ff (the Respondent's Pay and Reward Principles 2020) which said that employees were employed on the basis of a spot salary which fell within a broad advisory pay range associated with each role. There was opportunity for an Equitable Pay Review, both of the Advisory Pay Ranges by reference to the external market and in respect of pay equity generally across the company. This was a separate process to any pay review based on individual performance.

47. The Claimant's case was that she and other BAME colleagues earned less than former employees of the University, specifically Danny North, Kate Iwaniszewski and Janice Roden who are White and were previously SROs. A total of seventeen employees transferred into the RRS role – see page 23 for their respective races and their pay at the point of transfer. Employee B did not disclose her race to the Respondent. Mr McGowan considered her to be of BAME race, though Ms Malin and Mr Cozens could not say. Although Ms Malin was not clear if Employee I, noted as "White and Black African", is BAME, Mr McGowan and Mr Cozens said that she is.

48. The pay position is more nuanced than BAME employees being paid less than White British employees which, as we return to below, is doubtless why the complaint about pay was brought as one of indirect rather than direct race discrimination. Employee G was highest paid, at £36,187, Employee D the next and Employee A the third; Employees D and G are White British, whilst Employee A is Bangladeshi. Employees B, J and M were paid the same as the Claimant; employees J and M are White British.

49. Not all of the seventeen RRSs were working in Coventry (the central region). Those based at Coventry were Mr North, Ms Iwaniszewski, Ms Roden, Employees B, H and I and the Claimant. The Claimant's case was that these alone were relevant for pay comparison purposes, as their responsibilities were different to those in other regions. She says the work done by RRSs in the central region was more than that undertaken by their counterparts in London or Scarborough, because for example they were involved in a larger-scale launch event and a campus visit. She also says that former CUC staff had more varied and demanding roles than their former SRO colleagues in Coventry, because they were engaged in widening participation events for example, whereas those who were formerly SROs were only marketing the University (page 160). In September 2019, she relocated so that she was physically working alongside former University employees. In SD22 she says she saw a discrepancy in both workloads and consistency in standards. She gave us the example of the former SROs going to events without a University banner.

50. Mr McGowan did not accept the Claimant's evidence on this point. He was very clear that all RRSs were doing the same role, wherever they were based. He managed people in different locations and was responsible for ensuring consistency of objectives. According to him, there were some regional variations in the role, even within the Midlands itself, but the core role was the same – building relationships, raising interest, nurturing it and enrolling students. He described the role in the Midlands as somewhat easier than that for colleagues elsewhere, because it is a region where the University's brand is more well-known and so more business development is required in the other regions. There might be more student interaction in the Midlands, but there is much less business development. Mr Cozens also insisted that the roles were the same, both across the regions and within the central region, saying that all RRSs were marketing all campuses and had the same targets for leads and attendance at events. We return to the nature of the roles in our analysis below.

51. The average pay of the seventeen RRSs at the point of transfer, including the two whose race is not known, was £26,787. 62.5% of BAME employees were paid higher than this average, reducing to 55.5% if one assumes Employee B is BAME and Employee K (whose race was also not disclosed) is White British. 57.1% of White British employees were paid higher than the average or 50% if one makes the same assumptions about Employees B and K. Taking only those in the central region, the average salary was £27,864 and 75% of the White British and 20% of the BAME employees were above that average.

52. Ms Malin told us that as well as historically different pay scales and terms of employment between the University and its subsidiary companies, time in the role would also have affected pre-transfer salaries, but the essential principle guiding pay rates post-transfer was a policy of "no detriment". Both she and Mr Cozens accepted that former SROs were not seen as senior to other RRSs – that

is what Mr McGowan also said – but told us that it would take time for the Claimant and those in the same job as her pre-transfer to grow into the full role. Ms Malin sought to explain the no detriment policy as being about protecting jobs and considering the Respondent's resources. Mr McGowan referred to the process of staff transferring under the TUPE Regulations resulting in protection of their pay, where a role in the company close enough to their existing role could be identified. The Respondent did not consider reducing salaries or otherwise flattening out the pay of the RRSs; it did not test in consultation whether that would have resulted in people leaving.

53. In October 2019, the Claimant told Mr Cozens (by then her new line manager) that she was interested in an advertised RRS role with pay "up to £32,000" – see page 282. Another team member expressed the same interest. Mr Cozens said they could not apply for a role they were already doing and informed the Claimant that if she was successful, her salary would transfer with her. £32,000 was the highest salary for the role, but what would be paid would depend on the successful candidate's level of experience. Mr Cozens told the Claimant to speak with Mr McGowan if she wished to discuss the pay position. According to DC7, one candidate was offered £32,000 and the second one £28,000, due to previous experience working for a university. Both are White.

54. In December 2019, the Claimant met with Mr McGowan to discuss her pay – see page 73. Mr McGowan informed the Claimant that her pay would be increasing to £25,600, backdated to September 2019 – see page 74. This was the start of the reward year, and the Respondent's standard practice for implementing pay increases. At RM5 Mr McGowan says, "I explained the pay and reward principles and how the Claimant could increase their salary through high performance" and that the new salary figure had been arrived at as it was the start of the published Advisory Pay Range; it was not linked to performance reviews, although the resulting letter from Mr McGowan to the Claimant (page 74) referred to an Exceptional Performance Award. Mr McGowan explained that this was the vehicle suggested by People Support to implement his recommendation of a pay increase, which he said resulted not from an Equitable Pay Review (notwithstanding his comment at his interview for the purposes of the Claimant's later grievance, page 246, paragraph 4) but because he had heard the Claimant had raised pay issues with her line manager, and because he saw the increase as being in both parties' best interests. In other words, the Equitable Review was the context for the increase, but not the reason. The Claimant assumed from the conversation, and from Mr McGowan's reference to exceeding targets going forwards, that if she did so, this would result in another substantial pay increase.

Performance review 2019/20 and sickness absence

55. Under the Respondent's performance review process, ratings are given by an employee's line manager. There is then a moderation process, whereby the Director and People Support review all employees' scores. Managers have regular training to ensure they provide objective ratings. The top rating is "Exceeding Requirements" and the next is "Meeting Requirements". It is accepted that there would be a range of levels of performance within the broad category of "Meeting Requirements" and the Claimant accepted that those "Exceeding Requirements" would inevitably be few and far between. The Claimant also accepted that it was the Respondent's view that "Meeting Requirements" rendered someone a high performer.

56. According to page 407 (part of the Pay and Reward Principles document), to "Exceed Requirements" overall for a year, an employee must exceed them in at least two of four "Viewpoint questions" in each of the two Viewpoints (six-monthly assessments in January and August). To be assessed as "Meeting Requirements" overall for the year, they must meet or exceed requirements in all four questions in the final round for the year whilst not meeting the criteria for "Exceeding Requirements".

57. The Viewpoint questions are at page 463, and it was agreed that they go beyond performance against objectives, so that meeting objectives for performance is not the sole measure of yearly performance. As noted above, there are two Viewpoints each year; there must also be at least four "check-ins" (discussions of performance) per year. This is set out in the Respondent's PDR document from pages 461 to 464, which the Respondent says was produced in 2019 by its Reward Manager. The guidance notes at pages 465 to 469 (which do not seem to be part of the same document as pages 461-4) say that when employees are going on leave of absence, such as maternity leave, assessment of performance will be based on the check-ins and Viewpoints on the system up to that date. The Claimant suggested that this latter document was produced specifically for this case. There was little for us to go on, but because it is consistent in broad terms with what Mr Cozens told the Claimant in August 2020 to the effect that her absence would not affect her review (see below), and because it is a detailed document and the Claimant only suggests one paragraph has been inserted for the purposes of this case, on balance we concluded that it was produced when and as the Respondent says.

58. On 19 November 2019 Mr McGowan emailed all of the Respondent's employees, including the Claimant, regarding the performance review process. His email included (by forwarding an email from Ms Malin) reference to the first Viewpoints round in January 2020. In a later email on the same day, Mr McGowan described what was needed to get an "Exceeding Requirements" rating as set out above and said that the January 2020 Viewpoints round was open. The Claimant accepted she would have known all of this had she read the emails.

59. The Claimant's objectives were set by Mr Cozens in December 2019 – pages 71-72. He used check-ins, conversations and time spent with team members on a regular basis to inform the ratings he gave them. At page 225, paragraph 7 (his interview in relation to the Claimant's later grievance) he indicated that he only recorded on the system anything of note that came up in a check-in and not everything an employee said.

60. In the Claimant's January 2020 Viewpoint, Mr Cozens determined that she was "Meeting Requirements" in all areas. This meant that even at that point, the Claimant could not achieve an overall "Exceeding Requirements" rating for the year. That Viewpoint is not the subject of any complaint before the Tribunal, though it featured heavily in the evidence and so we have made findings of fact about it accordingly. It is sufficient in this respect to simply record the parties' respective accounts; we did not need to resolve any conflicts of evidence on these matters.

61. The Claimant says she did not know the Viewpoint had been completed because she had the day off when Mr Cozens did it. She says she only found out months later and at this point did not know about Viewpoints or what they

were. In addition to the November 2019 emails from Mr McGowan above, she accepts however that it is likely she received an automatic email to say that the Viewpoint had been done. Page 253 (Mr Cozens' grievance interview) shows that he consulted Ms Walton about the rating and that Ms Walton agreed it. The Claimant says Ms Walton could not have known about her performance as she had only been employed since November 2019. Ms Walton's evidence on that was not entirely clear, but she effectively said that she trusted her managers to get it right; she says that when Mr Cozens asked her about the Claimant, she looked at the information supplied, and nothing alerted her to any issues.

62. The Claimant also says that Mr Cozens would not have known about her performance in September and October 2019 before he became her line manager. He says he spoke with Alan Dobson, her previous manager. There is no record of that conversation in the bundle, though Mr Cozens mentioned it in the grievance interview (page 222, paragraph 6), which suggests it took place. Mr Cozens felt that Mr Dobson helped him understand what the Claimant had been doing, though the Claimant says she had no check-ins with Mr Dobson for him to know what work she was completing.

63. On 10 March 2020 (page 83) the Claimant received an annual bonus letter because she was rated as a High Performer. Her case is that she exceeded requirements for the 2019/20 year overall. Her evidence in support of this contention was as follows:

63.1. At page 282 there is a document setting out RROs' achievements in relation to the number of leads they pursued. The Claimant says she exceeded the target for the number of leads for the Autumn and Spring terms of 2019/20 whilst others, except for Danny North, did not. The Respondent accepts that the Claimant was a top performer against this measure, though Ms Walton told us it should not be difficult in the central region.

63.2. Pages 168 and 169 show evidence of the Claimant training colleagues; Mr Cozens said this is simply an example of the support all colleagues would be expected to offer to their peers.

63.3. At pages 205 to 210 is the Claimant's record of additional responsibilities she says she took on from February 2019 onwards, things which she says other staff were not doing, together with evidence of her showing leadership and examples of high performance.

63.4. She says that Ms Iwaniszewski and Mr North did not complete their "unique objectives", whilst she did.

63.5. On 18 June 2020 – page 88 – she got a one-off non-consolidated payment of £1,000 for her involvement in a project concerning Greenwich School of Management.

63.6. At page 90 is an email dated 26 June 2020 from Ms Walton to the rest of the recruitment team praising the Claimant's work. Ms Walton said she sends many such emails.

63.7. At page 96 are two photos taken by the Claimant at events in Autumn 2019 which she says shows that she worked to a better standard than her White

colleagues previously employed by the University. Mr Cozens did not accept that this is evidence of a higher standard of performance.

63.8. Mr Cozens also said that the Claimant's evidence at pages 105-6 (email exchanges in December 2020 related to helping a prospective student with their personal statement for applying to university) was a typical conversation anyone in the team would have had.

63.9. At DC29, Mr Cozens says that the Claimant's territory action plan is a standard template, not something that was over and above her role. This document is at page 170ff, for the 2021 undergraduate cycle; it is not stated when it was prepared, but it must have been well before then.

63.10. The Claimant accepted that "Exceeding Requirements" relates to being proactive, such as identifying new ways of doing things. She gave the example of introducing "tear-pads" (paper notepads) to enable students to quickly raise questions with her when attending an event. Mr Cozens and Ms Walton told us that this was not an innovation as they had been used before, within the University pre-transfer.

63.11. The Claimant also said that she took a lead on a project to seek to convert students who were doing courses below degree level into degree level students. She and Mr Cozens had agreed that her role was not to complete the project, as she would be going on maternity leave six months in, but to produce a plan (so that this seems to have related to 2020/21). She told us she achieved that goal – pages 371-2. Mr Cozens said that the project was simply part of the Claimant's role.

64. The Claimant told the Respondent she was pregnant, on or around 7 July 2020. She was off because of sickness from 12 August to 8 October 2020; it was pregnancy related. On 25 August 2020, she emailed Ms Walton and Mr Cozens and said she was willing to attend what she described as the "final check-in" for 2019/20 even whilst sick, if not to do so would have a negative effect on her performance review – page 91. Ms Walton did not see the email as something she needed to respond to, as Mr Cozens was the line manager, and in any event, she saw check-ins as being on a rolling cycle so that there was no such thing as a final check-in from her perspective. Mr Cozens informed the Claimant she could not have a check-in as she was off sick, she could have one on her return to work and that this would not affect her pay increase or bonus – page 100.

65. In her August 2020 Viewpoint (page 269), the Claimant exceeded requirements on all four questions. Mr Cozens says – DC13 – that this was due to her hard work in the first few months of the pandemic. All team members got the same overall rating in August. Others would have received an automatic email communicating their Viewpoint rating for August 2020; the Claimant did not as she was off sick.

66. She attended a return-to-work meeting with Ms Walton (Mr Cozens was on leave) on 12 October 2020. It took place by telephone; there are no notes. Ms Walton made clear there was no pressure to return to work, but the Claimant wanted to do so. Ms Walton told us she also agreed the Claimant could take her son to nursery, and collect him, in working hours and that she could also adjust her hours depending on the symptoms of her pregnancy-related sickness. In addition, she says that she agreed that if the Claimant was needed for parents'

evenings or after school events, someone from a different territory would cover it. The Claimant denied that account, saying that she at no point asked for adjustments to accommodate family responsibilities. We did not find it necessary to resolve whether these discussions took place, although considering the message at page 101 (see below) it seems likely something regarding evening events was discussed and agreed.

67. During the course of the meeting with Ms Walton, the Claimant raised the question of the final check-in. After the meeting she sent an email to Ms Walton (page 99) as a reminder, saying again she did not want to be disadvantaged in her performance review. Ms Walton replied that she had left this with Ms Passi and so did not reply further. Ms Passi (KP3) passed the Claimant's enquiry to People Support who later told Ms Passi that it had been dealt with at the final moderation meeting. Ms Passi could not tell us what the result of it "being dealt with" was and confirmed she was not asked to contact the Claimant, so that she could not say if the Claimant ever received an answer to her points about this check-in. We concluded that she did not.

68. On 13 October 2020 a message was sent internally – page 101. Between who is unclear, but it said, "Sapna has just returned from sick leave and is pregnant too". There is then some redacted text, and it concludes, "delivery [of] some of our scheduled outreach programmes after the school day has finished needs to happen to get better participation numbers and Sapna has removed herself from this". Ms Walton did not know who wrote the message, but insisted she happily agreed what is set out above regarding flexible working arrangements; she accepted however that it could be read as not painting the Claimant in the best light. We were not able to conclude who sent it and did not think it necessary for us to do so. Further, although a somewhat pointed message, we determined that it added nothing to our determination of the Claimant's pregnancy complaints.

69. The Claimant again raised her question about the final check-in via a subsequent email to Mr Cozens on 23 October 2020 – page 104 – asking him if he had any updates on it and whether there was anything she needed to action from the previous year before focusing on the present year's objectives. A call between the Claimant and Mr Cozens took place on that date. Mr Cozens says the Claimant's email was discussed, but the Claimant says there was no discussion of the final check-in at all. Mr Cozens' oral evidence on what took place at the meeting was somewhat unclear. When asked what was discussed at the meeting, he said working arrangements, what the Claimant had missed whilst off sick and priorities going forwards; he did not mention the Claimant's question about the check-in, until prompted. Given that oral evidence and the Claimant's adamance about the point, we concluded on balance that it was not discussed.

70. Mr Cozens told us that in any event there was no need for the final check-in because the overall score for the year could not be changed given the January rating. He said he offered the Claimant the possibility of the check-in on her return to work when he messaged her in August (page 100), because this was still in the relevant performance year, albeit with only a week left of it. He said that once she actually returned to work, he felt they were too far into the new performance year. He understood that the absence of the final check-in meant that the Claimant did not know how he had arrived at her final rating for the year but did not feel it was "necessarily a disadvantage" at the time and was unaware

that she did not know that her January rating meant she could not achieve "Exceeding Expectations" overall. He also said that she could have seen the overall outcome on the Clear Core Review system, which is where objectives, performance evidence, Viewpoints and so on are recorded. No final check in took place. Ms Walton told us that missing a check in if an employee is on maternity or sick leave does not disadvantage them because they have a valid reason for missing it.

71. On 4 December 2020, the Claimant found out that Mr Cozens had rated her "Meeting Requirements" overall for 2019/20 – page 150; this was approximately when other team members would also have found out, as it was the usual time of year for those communications. Mr McGowan wrote to the Claimant (page 442) on 24 November 2020 (the letter was received on 4 December) to confirm the rating. As a result, the Claimant got a 1% pay increase to £25,856, backdated to 1 September 2020. All of Mr Cozens' team members got the same overall assessment for that year.

72. Departing briefly from a chronological account, at page 341 there is an email sent by Mr McGowan to all of the Respondent's employees in January 2022 regarding that month's Viewpoints, saying that the Respondent has high expectations of all employees, so that "meeting expectations is a reflection of high performance in your role", with "exceeding expectations" being even higher than that, namely "operating at a level consistently above and beyond the expectations and seniority of their role" He added, "Viewpoint outcomes should carry no surprises but be part of an ongoing conversation with your line manager". The Claimant suggested the email was sent with her complaints to the Tribunal in mind. This is another point we did not think it necessary to decide. As already indicated, "Meeting Expectations" is clearly seen as a high level of performance. Ms Walton agrees – SW9 – saying that this is a good rating, with exceeding expectations (SW11) being going beyond the scope of the role.

73. On 7 December 2020, Mr Cozens and the Claimant spoke, the Claimant saying that she felt her rating was inaccurate. Mr Cozens said he would look into it. The Claimant emailed Mr Cozens on 9 December 2020 – page 108. Mr Cozens says – DC23 – that he felt the Claimant was building a case against him, telling us this was because she wanted everything in writing. In the email at page 109, on 16 December 2020, after seeking advice from the People Team and Ms Walton, Mr Cozens confirmed to the Claimant that he decided the ratings as her manager; that whilst she was exceeding requirements in the latest review she was rated as meeting them in January – he did not explain the consequence of that; and in summarising what it was to meet and exceed requirements, said that to be exceptional an employee not only does everything phenomenally but consistently reaches beyond the job description. He concluded by saying he would work with the Claimant to involve her with more senior responsibilities so as to demonstrate she was exceeding expectations but if she wanted to increase her salary to a much higher level quickly, she would need to apply for a more senior position with the Respondent when one became available.

74. The Claimant replied (page 110) on the same day. She asked at what point she should have been exceeding requirements, said she understood the difference between that and meeting requirements, and that she believed she had shown extraordinary skills for her position, taking on extra work, performing leadership roles, coaching colleagues, and so on. She asked for an explanation

of why she had not exceeded requirements in the previous rating (that is in January 2020) and asked about a way of appealing her rating before going on maternity leave.

75. Mr Cozens set up a Teams meeting but it did not take place as the Claimant was not available during the only slot when Mr Cozens was free on that day. On 17 December 2020, Mr Cozens emailed the Claimant and said (page 111) – "I am comfortable with the rating that I have given you … the process has finished for this year and there is nothing further for me to discuss with you". He says he was ending any opportunity to change the rating or provide further evidence. He accepts the tone might have come across as shutting down discussion, but there was no possibility of changing the rating. This is the email which the Claimant says was an act of direct race discrimination. Mr Cozens says that none of the Claimant's comparators challenged their 2019/20 rating, which we accept as unchallenged evidence.

Grievance

76. There was no specific mechanism to challenge a rating, and so the Claimant was advised she would need to pursue a grievance. She did so on 14 January 2021. Her grievance meeting was on 25 January 2021. As already indicated, Mr Cozens and Ms Walton were also interviewed as part of the investigation. There is no complaint about the conduct or outcome of the grievance, though we were taken to the grievance interviews at several points in the evidence as illustrative of other matters.

77. At page 125, paragraph 22, the Claimant referred to her and Mr Cozens constantly discussing the work she was doing. She still maintained before us however that she was disadvantaged by not having a final check-in because it would have allowed any gaps in those regular discussions to be identified. She also says that had they met, Mr Cozens may have revisited the January Viewpoint, or at least given her clear reasons not to do so.

78. On page 233, at paragraph 10, Ms Walton set out what she regarded as "Exceeding Requirements". She elaborated in oral evidence on an example she gave at page 235 (paragraph 13), of Emily Day coming from Scarborough campus to Coventry over a weekend to train a team of temporary staff helping with Clearing in August 2020, no-one having volunteered from the central region. Everyone was involved in Clearing, but Ms Day exceeded requirements by coming to Coventry and doing so over a weekend.

79. Ms Walton told us she did not see any evidence of the Claimant exceeding requirements as she sees it. The Claimant was involved as a lead for one of the workstreams in something called the High Performing Team initiative, but Ms Walton said this was simply about bringing people together, capturing and reporting conversations and so was not evidence of exceeding requirements; in any event, she thinks those who led workstreams may have volunteered to do so. In oral evidence, she said that being proactive to get the required student numbers was at the "Meeting Requirements" level, but at page 233, paragraph 8, she referred to this as "Exceeding Requirements". She told us it depended on the tactics being used – getting the numbers proactively is part of the job, but becoming very well-known and wanted in a school or college would be exceeding requirements. At page 233, paragraph 10, Ms Walton accepted that Mr Cozens

struggled to communicate to his team what constituted "Exceeding Requirements".

Maternity leave

80. The Respondent's Maternity Policy (page 274) says "prior to your departure on maternity leave your manager will meet you (to discuss maternity rights, possibility of flexible working, level of contact during leave)". The Claimant declined a check-in which had been planned for 1 February because she had to bring forward her maternity leave to that date for medical reasons, as she informed the Respondent on 19 January 2021. No pre-maternity leave meeting took place nor was she offered any replacement check-in for 1 February.

81. On 28 January 2021 (page 345), the Claimant emailed Mr Cozens and Ms Walton, outlining the level of contact she wanted during her leave (she wanted emails sent to her work and personal addresses) and saying she had updated Clear Core Review as her final check-in before her leave, thus detailing the work she had done to that point. She says having to send this email was a further detriment, which would have been avoided by a meeting as above.

82. The Claimant was on annual leave on 29 January 2021 and her maternity leave began on 1 February as noted above. On 29 January, Mr Cozens completed the Claimant's January 2021 Viewpoint without telling her. He says he completed all Viewpoints for his team on that day. Although there is no evidence for this in the bundle, we were inclined to accept that this was his practice. He says he had all the information he needed to answer the Viewpoint questions for all of the team and so did not meet with any of them to communicate the outcome. A meeting was not required by the policy, so again we accepted his evidence. For the Claimant, the information Mr Cozens had to hand included the number of leads and events and her work on particular projects such as Greenwich School of Management.

83. The Claimant says that because the Respondent knew on 19 January 2021 that she would be going on maternity leave early, she does not accept that Mr Cozens could not have met with her before her leave. Mr Cozens told us that the meeting did not take place because the Claimant's maternity leave was brought forward, telling us also that the meeting planned for 1 February 2021 was intended to be both the meeting under the Respondent's Maternity Policy and the Claimant's check-in, though he accepted that perhaps the two should have been separate. His evidence was that there was no space in his diary and even if there had been, he was too busy to meet with the Claimant. He did not tell the Claimant that was the case. Ms Walton agrees with the Claimant that a meeting should have taken place. Mr Cozens' diary was not in the bundle, nor were we presented with any evidence of his schedule in the second half of January or indeed any other period. We will come back to his reasons for not meeting with the Claimant in our analysis.

84. The disadvantage the Claimant complains of was not being able to have a conversation with Mr Cozens, to discuss any reasons for his differing with her on her rating. The January 2021 Viewpoint rated her as "Meeting Requirements". Her colleagues would have received an automated email communicating their outcome. Of course, the Claimant did not, as she was on leave. Mr Cozens says that it was an oversight not to communicate the Claimant's outcome to her.

85. On 23 February 2021 (page 346), Mr Cozens emailed the Claimant in response to her email of 28 January, saying she would not be disadvantaged in the year's performance review as the number of check-ins and Viewpoints would be based on how many months she had been at work for during the year and a rating would be given as such. This email was not copied to her personal address; Mr Cozens again said this was an oversight. When asked why the Claimant went from exceeding to meeting requirements, he told us that this was the level she was working at based on the work she had completed in the review period. Others also went from exceeding to meeting requirements.

86. The decision in respect of the Claimant's grievance was made on 12 March 2021; it was not upheld. The Claimant did not appeal, though an appeal was offered (page 257); she says that this was because of strict timescales for bringing her case to the Tribunal.

87. On 3 June 2021 (page 292), Mr Cozens emailed the Claimant details of some job opportunities (this was something she had requested). This was copied to her personal address, Mr Cozens explaining to us that it was sent correctly this time because it was a new email and not a reply to one from the Claimant. Whilst on leave, she applied for a new role and on 17 August 2021 gave Mr Cozens notice of resignation from her RRS role (page 394).

88. On 5 September 2021, the Claimant found out about and questioned her January 2021 rating – page 327 – in an email to Mr Cozens. She described in the email having been marked down for each Viewpoint question, asked for justification and why the ratings were different to June 2020 as she was not sure she understood what had changed. She says having an explanation was important to her and not getting one was a detriment. She says she felt as though she did not matter when she did not get a response.

89. Mr Cozens says – DC39 – that he was nervous about responding as he was aware of the allegations the Claimant was making (there was a Tribunal Claim by this point) and wanted support. He also felt it was not necessary to reply given that the Claimant was moving to a new team. As shown at page 443, on 6 September 2021 Mr Cozens emailed People Support, forwarding the Claimant's email and saying he did not wish to engage with her. He told us he was being cautious. People Support replied saying that the Claimant should be given a rationale for her rating, as Mr Cozens was the line manager who gave the rating – "as such, you will need to engage on this matter. Receiving the explanation is within her rights". Mr Cozens says it was an oversight that he did not write to the Claimant.

90. On 23 December 2021 (page 448), the Claimant emailed Mr McGowan, Ms Walton and Mr Cozens asking if the Performance Review Outcome letters had been sent. Mr McGowan replied on the same day. He could not tell us why the Claimant did not receive the letter before, saying this was Mr Cozens' or Ms Walton's responsibility. They say it was the responsibility of the Claimant's new line manager, as People Support issue letters to line managers using existing organisation charts; there was no evidence before us of when any such chart or record changed for the Claimant, whether by this point or only on her return from maternity leave, although neither party was able to say with clarity when the Claimant became employed in her new role. Ms Walton says sometimes mistakes are made in issuing the letters and gave us an example of one such recent mistake that had come to her attention. The Claimant does not complain

about her new manager not sending the letter, if it was his responsibility. The outcome of the review was "Meeting Requirements", but there was no pay rise as the Claimant was by then in, or heading to, her new role.

91. On 28 December 2021 the Claimant replied to Mr McGowan, chasing up an answer to her 5 September email. Mr McGowan replied (page 326) to say Ms Walton and People Partner, Andreea Willmott, were best placed to look into it. He accepts it was important to give the Claimant an answer. As seen at pages 446-7, on 6 January 2022 Ms Willmott asked Mr Cozens to provide a justification for the rating, Mr Cozens replying that he had rated the Claimant as meeting requirements because she was meeting requirements. Ms Willmott replied that the Claimant was asking for justification of the rating. Mr Cozens then gave a little more detail, saying that the Claimant could have arranged attendance at more events to generate more leads, and could have suggested and executed more ideas on how to recruit students. Ms Willmott then said, "we will need to justify objectively what has changed since she was last rated as an exceptional performer", and that this needed to be detailed and based on objectives. She asked if Mr Cozens could say what the Claimant could have done to achieve a higher rating. Mr Cozens then asked if he could have access to the Claimant's records as he was no longer her manager. The reply was that she should be referred to Mr McGowan if she requested further information.

92. Ms Walton has been a working mother for over 21 years and says she understands the challenges this presents and strongly advocates women's rights to have a fulfilling career and meet their obligations as mothers – SW16. Mr Cozens is "proudly mixed race", has young twins and his wife too experienced a complicated pregnancy.

93. After ACAS Early Conciliation from 12 March to 23 April 2021, the Claimant submitted a Claim Form on 21 May 2021. She says she did not complain about the alleged detriments from January 2021 onwards in that Claim Form because she was awaiting the grievance outcome, had a very difficult childbirth with serious complications (in early February) and did not find out about the January 2021 Viewpoint until 5 September and so did not grasp that she was being "treated unfavourably" (SD53) until then.

Law

Burden of proof

94. Section 136 of the Act provides as follows:

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

(2) If there are facts from which the court [which includes employment tribunals] *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".

95. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material

facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931,** updating and modifying the guidance that had been given by the Employment Appeal Tribunal ("EAT") in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

96. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

97. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden, it is necessary for the Respondent to prove that the treatment was in no sense whatsoever on the grounds of race or pregnancy. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

98. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

99. The implications of **Hewage** were considered by the EAT in **Field v Steve Pye and Co (KL) Ltd and others [2022] EAT 68**. The EAT said that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored. In such a case, where a tribunal moves straight to the "reason why" question it could only do so on the basis that it has assumed the claimant has passed the stage one threshold, so that the burden was now upon the respondent in the way described above. The EAT went on to say that if at the end of the hearing the tribunal concludes that there is nothing that can suggest that discrimination has occurred and the respondent has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the "reason why" question, but in fact the complaint would fail at the first stage. If having heard all of the evidence the tribunal concludes that there is some evidence that could indicate discrimination, but nonetheless is fully convinced that the impugned treatment was in no sense whatsoever because of

the protected characteristic, it is permissible to reach a conclusion at the second stage only, but there is much to be said for properly grappling with the evidence and deciding whether it is sufficient to shift the burden of proof. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage.

Direct discrimination

100. Section 39 of the Act provides, so far as relevant:

"*(2) An employer (A) must not discriminate against an employee of A's (B)— …*

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service … //(d) by subjecting B to any other detriment".

101. Section 13 of the Act provides, again so far as relevant, "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". The protected characteristic relied upon in this case is race. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

102. The Tribunal must therefore consider whether one of the sub-paragraphs of section 39(2) is satisfied, whether there has been less favourable treatment than an actual or hypothetical comparator, and whether this was because of the Claimant's race.

103. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as she was. As Lord Nicholls said in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Race being part of the circumstances or context leading up to the alleged act of discrimination is insufficient.

104. In most cases – such as **Nagarajan** – the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan** and **Igen**).

Indirect discrimination

105. Section 19 of the Act provides that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. This is the case when, according to section 19(2):

(a) A applies, or would apply, [the PCP] to persons with whom B does not share the [relevant protected] characteristic [here race],

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

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

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

106. Again section 23 must be taken into account – see above.

107. We considered the decisions in **Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27** and **Allen v Primark Stores Limited [2022] EAT 57**, in addition to **Ryan v South-West Ambulance Service NHS Trust**. The Claimant has the burden in respect of the first three steps in section 19(2). The PCP is accepted, so we need say nothing further about that. As to the other two steps, we draw the following principles from the above cases:

107.1. It is for the Tribunal to determine the pool which will be used to determine whether section 19(2)(b) ("group disadvantage") is satisfied.

107.2. All workers affected by the PCP should be in the pool. The EHRC Code states, "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively" – paragraph 4.18.

107.3. The pool must test the PCP.

107.4. More than one pool may be perfectly logical and therefore permissible.

107.5. Section 23 requires that those in the pool must not be in materially different circumstances.

107.6. The required link to establish indirect discrimination is not between the protected characteristic and the group and individual disadvantage but between the PCP and the disadvantage.

107.7. It is not necessary to establish why the PCP causes the disadvantage – the reasons for such disadvantages, if identifiable, can be many and varied and are often innocuous.

107.8. Not every member of the disadvantaged group must suffer the disadvantage.

107.9. The individual and group disadvantage must correspond.

108. As to proving particular disadvantage, in **Essop** Baroness Hale noted that "the new formulation [in the Act] was not intended to make it more difficult to establish indirect discrimination: quite the reverse … It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could

comply [with the PCP] and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages".

Justification

109. A complaint of indirect discrimination will be defeated if the Respondent can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim – "justification" for convenient shorthand. For reasons that will appear in our Analysis below, it is not necessary for us to set out the case law on this issue.

Pregnancy/maternity discrimination

110. Section 18 of the Act deals with pregnancy and maternity discrimination and in so far as relevant for this case provides:

"*(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –*

(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it …

(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 …

111. There are two crucial differences between direct discrimination as defined by section 13 and discrimination as defined by section 18. First, section 18 does not require a comparison of any description – what is dealt with there is unfavourable and not less favourable treatment. Under section 13, a comparison so as to establish less favourable treatment is very much required. Secondly, the protection from discrimination defined by section 18 relates to a specific period – the protected period – whereas there is no such limitation in section 13, except of course that provided for by section 18(7) which broadly speaking says that treatment complained of in the protected period falls within section 18 and not section 13.

112. The Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held (albeit in the disability context) that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others. In determining whether the Claimant has been subjected to a detriment, "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment? An

unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**).

Time limits

113. Section 123(1) of the Act provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it. Section 123(4) says that in the absence of evidence to the contrary a person is to be taken to decide on failure to do something*, (a) when they do an act inconsistent with doing it or otherwise (b) "on the expiry of the period in which [they] might reasonably have been expected to do it*".

114. For reasons which will be clear in our analysis, it is not necessary to set out a summary of the law in relation to section 123(3). The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**, though extending time does not require exceptional circumstances. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

115. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ. 640** Leggatt LJ in the Court of Appeal said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a Respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

116. **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** approved **Morgan**. In that case, a race discrimination complaint was dismissed when three days out of time. Two key factors in the Court of Appeal upholding the decision were that the events in question occurred

a long time beforehand, and that the claimant in that case was a very educated man who had taken legal advice.

Analysis

117. We began our analysis with a few preliminary observations. The first was that we could only decide the complaints before us, as set out in the issues listed above. We did not take an inflexible, literalist view of what each complaint said and was concerned with, but in fairness to the Respondent, in the interests of an orderly Hearing and in compliance with long-established case law – see **Chapman v Simon [1994] IRLR 124** and more recently **Chandhok v Tirkey [2015] ICR 527** – those are the complaints we had to decide, not other, differently worded complaints that might have been put to us.

118. Secondly, whatever the form of alleged discrimination, taking the relevant sections and case law summarised above into account, there were three key questions in relation to each matter, though different tests applied in relation to each form of discrimination:

118.1. First, it was for the Claimant to establish that she had been subjected to a detriment or unfavourable treatment. As indicated in summarising the relevant case law above, there is nothing to be gained from distinguishing those two terms. Further, establishing either is not a high bar; the question we had to consider was could or might a reasonable person regard what did or did not happen as detrimental or to their disadvantage? Whilst an unjustified sense of grievance is not a detriment, one might ask if the Claimant was in as good a position as others.

118.2. Secondly, the reason for the treatment afforded to a claimant in direct race and pregnancy discrimination cases is the key question. The burden was on the Claimant to prove facts from which the Tribunal could conclude discrimination had taken place, assuming no adequate explanation from the Respondent and without reaching a definitive determination. We reminded ourselves that race or pregnancy simply being part of the background or context to what took place would not be enough, but the protected characteristic does not have to have been the sole or even the main reason for the treatment; it is enough that it was more than a trivial influence and it does not have to have been deliberately or consciously such an influence.

118.3. Thirdly, if the burden passed to the Respondent, we had to ask ourselves whether it had discharged that burden. This required it to lead cogent evidence to show that the protected characteristic in no sense whatsoever influenced what it did or did not do.

Direct race discrimination

119. There was a single complaint of direct race discrimination, namely whether the Claimant was subjected to a detriment on or around 17 December 2020 by Mr Cozens' email of that date, in which she says he refused to discuss her performance rating and her pay.

120. The Claimant could reasonably regard the email as a detriment. She was clearly seeking explanations of her performance rating and was not satisfied that

they had been provided. Furthermore, there was no appeal process notified to her at that stage. A reasonable person might regard the closing down of a discussion in relation to such matters as being to her disadvantage.

121. That said, it was clear that the complaint must fail on two grounds:

121.1. First, the Claimant had not identified comparators, real or hypothetical, satisfying the requirements of section 23 of the Act. Those named did not complain or raise questions about their ratings – that was the Respondent's evidence and unsurprisingly the Claimant was not able to, and did not, suggest otherwise. It was precisely the Claimant's challenge to and questions about her rating that Mr Cozens refused to discuss further; the fact that the comparators did not raise any such challenges or questions was therefore plainly a material difference for section 23 purposes. The Claimant failed to establish less favourable treatment accordingly

121.2. Further, the Claimant herself seemed to recognise in closing submissions that she had not established, or even put, a prima facie case that what Mr Cozens did was because of race. She seemed to acknowledge that she was in fact saying that Mr Cozens' refusal to discuss her rating further was related to pregnancy, maternity leave or pregnancy-related sickness, which was not a complaint she had pursued before the Tribunal. There was no evidence that the sending of or content of the email was because of race. The reason for the email and its content was that Mr Cozens simply had nothing to add to what had previously been discussed, and in all likelihood did not want to engage in further discussion of the matter as a result.

122. We return to that in analysing the pregnancy/maternity complaints below, but for these purposes, the complaint would have failed on that basis also. The Claimant did not prove facts from which we could conclude, even in the absence of an adequate explanation, that she had been less favourably treated because of race.

Indirect race discrimination

123. This was clearly the correct way to characterise the complaint regarding pay, even though the Claimant's evidence and cross-examination of the Respondent's witnesses often strayed into the territory of direct race discrimination (understandably so, given that she was not legally represented). What was plainly challenged was the Respondent's no-detriment policy. It was not suggested by the Claimant at any time – we think correctly – that the reason for the differences in pay was race, for example historically in the pay differences between subsidiary company employees and employees of the University. The challenge was to the no detriment policy, to the effect that it created a particular disadvantage for BAME staff compared to White British staff. That was properly a complaint of indirect discrimination.

124. The PCP was accepted, and so we say nothing more about that.

125. The first issue therefore was whether the PCP put BAME employees at a particular disadvantage when compared with persons who are not of BAME race. The Claimant says that it was predominantly BAME employees who were paid at lower rates as a result of the PCP. As indicated in our summary of the law,

whether that was the case is tested by identifying a pool of employees to whom the PCP applied. We only had salary figures for the transfer date, 1 April 2019, and the present day, but it was agreed that any later discrepancies arose from the PCP and so nothing turned on that.

126. We identified the key principles for defining the pool from the case law rehearsed above to be as follows:

126.1. It is for the Tribunal to determine it.

126.2. All workers affected by the PCP should be in the pool.

126.3. The pool must test the PCP.

126.4. More than one pool may be perfectly logical and therefore permissible.

126.5. Section 23 of the Act requires that those in the pool must not be in materially different circumstances.

127. The Claimant's case was that the pool should be just those RRSs in the central region, as RRSs in other regions did different jobs. The Respondent's case was that the pool should include all fifteen RRSs whose race can be identified out of the seventeen who transferred. We preferred the Respondent's case for the following reasons:

127.1. The Claimant also argued that the former SROs (that is those who were previously University employees) in the central region had different workloads and less wide-ranging responsibilities than her and her colleagues formerly employed by CUC Ltd in that region. On her case, to be consistent, they too should have been outside the pool. She did not argue for that, for obvious reasons.

127.2. Other than her own assertion that the roles were different in practice, the Claimant did not lead evidence on the differences between the work of RRSs in the central and other regions that could have led us to conclude that including them all in the pool would infringe section 23. In submissions, she pointed to the Respondent's evidence about Ms Day referred to in our findings of fact, but it was clear that Ms Day was deemed to have exceeded requirements in that respect not because Clearing was not part of her role but because of her willingness to travel some distance and work over a weekend. Moreover, it was not said by the Respondent that working during Clearing in this way would have been expected of central region RRSs; indeed, we noted that it had requested volunteers, which suggests otherwise. In short, what the Respondent said in relation to Ms Day in no way contradicted its case that all RRSs, in all regions, were doing effectively the same work.

127.3. We noted that the Respondent did not lead documentary evidence on the commonality of work between regions, but all RRSs had the same job title, and whilst there were bound to be some differences between them, we were particularly struck by Mr McGowan's evidence explaining the additional challenges in business development because of brand issues in regions outside the central region, which offset the fact that central region staff were dealing with larger student numbers.

127.4. It was noteworthy that in her submissions, the Claimant described central region and other RRSs' work as "slightly different".

128. All those RRSs who transferred into the Respondent's employment in April 2019 were affected by the PCP and no material differences between them were identified. We therefore concluded that all seventeen, or at least the fifteen whose race can be identified, should be in the pool.

129. To test any particular disadvantage, it seemed to us that seeing who was above and below the average RRS salary was the best method. We flagged that approach to the parties early in the Hearing, and no alternative assessment was suggested; in fact, in its submissions the Respondent adopted it.

130. As our findings of fact show, whether one uses fifteen or seventeen transferred RRSs (taking an informed view of the race of those who did not disclose it having heard the parties' evidence), BAME staff were not put to a particular disadvantage on this measure. In fact, the percentage of BAME staff paid higher than the average was greater than the percentage of White British staff. It is true that the two highest paid individuals in the group were White British, but there were White British staff on the lowest pay and some BAME staff on higher levels of pay, hence our factual conclusions. We were satisfied therefore that this way of analysing the effect of the PCP properly tested whether it had the required discriminatory effect. We concluded that it did not. The Claimant did suffer individual disadvantage, but as no group disadvantage was established, that was not sufficient to succeed in her complaint.

131. The complaint failed accordingly. There was no need for us to go on to consider justification.

Pregnancy/maternity discrimination

132. It was accepted that all the acts or omissions of which the Claimant complained fell within the protected period, so that there was nothing further to be analysed on that point. All of the detriments (or instances of unfavourable treatment) were connected with the Claimant's performance reviews. We noted a number of points by way of preliminary comment:

132.1. The principles used by the Respondent for assessing staff performance were published as early as November 2019 and the Claimant could have read them.

132.2. As was acknowledged in evidence, it must be the case that there can be a broad spectrum of levels of performance that could properly be rated as "Meeting Requirements" and it must equally be the case that generally speaking it would be rare to exceed requirements.

132.3. It was not for the Tribunal to assess the Claimant's performance and decide whether she was meeting or exceeding requirements. Our task was to test the evidence put before us to see whether it could be said, in the absence of an adequate explanation that – on the relevant complaints – what the Respondent did or failed to do was influenced by the Claimant's pregnancy, pregnancy-related sickness or maternity leave.

132.4. It was nevertheless evident that what is needed to exceed requirements is not entirely clear, given that there were somewhat varying explanations in the evidence we heard and saw from the Respondent's witnesses on this point. The Respondent cannot be expected to put into its policy exhaustive details of what would need to be achieved in each post within the organisation to get that rating, but some more published detail would be advisable so that all staff have greater clarity on what is needed.

132.5. It might also be helpful to make clear that it is for employees to post on Clear Core Review the details of the achievements they want to be taken into account in the Respondent giving them their ratings, given that managers cannot be expected to record it all from check-in meetings.

133. We then took each detriment/unfavourable treatment in turn, noting that some of them substantially – in some cases, wholly – overlap with each other, a point which we had to carefully consider in reaching our conclusions.

1. Having to chase the Respondent to arrange a final check-in for her 2019-2020 performance review by Mr Cozens up to and including 23 October 2020.

134. The first question was whether this could properly be said to have been unfavourable treatment.

135. We noted that Mr Cozens did not hold meetings with his team members to give them their Viewpoint ratings (he was not required to do so under the PDR policy), but that is not what this complaint is concerned with. Whilst it was not necessary for us to consider whether there was any such thing as a "final check-in", it is clear that Mr Cozens agreed that the Claimant would have a check-in once she returned from pregnancy-related sickness – that is plainly set out in his message at page 100. No such check-in was arranged.

136. The Claimant's email to Mr Cozens of 25 August 2020, sent whilst she was off sick, did not chase for a check-in; it simply said that she was willing to have one whilst off work. She did however have to chase up her wish to have such a meeting, in the end on three occasions – at her meeting with Ms Walton on 12 October 2020, by email later that day (in which she expressly said she did not want to be disadvantaged, which she plainly thought she might be by not having a check-in) and on 23 October 2020 to Mr Cozens, asking if there was anything she needed to action. A meeting took place on 23 October 2020, but on our findings of fact the Claimant's enquiry remained unaddressed.

137. We accept that chasing an email is routine in most organisations, but having to do so on three occasions without a reply of substance is sufficient to surmount the low bar of establishing unfavourable treatment. Given that it was the result of the Respondent not responding to her enquiries, a reasonable person might think it detrimental to have to do so.

138. Turning to the reason the Claimant had to chase for the check-in meeting, the question was whether she had proven facts from which we could conclude, in the absence of an adequate explanation, and without having to reach a definitive determination, that this was in some way influenced by her pregnancy-related sickness. Her initial email of 25 August 2020 and Mr Cozens' reply show that the

Claimant mentioned the check-in explicitly because she was on sick leave. As will become clear in relation to detriment 2, to which this complaint is very much related, the reason she had to chase having a check-in was also because she had been on that sick leave; she would likely not have had to do so had she not been on sick leave. Most pertinently, it was plain from Mr Cozens' evidence that the reason the check-in did not take place was because the Claimant's sickness lasted longer than he had anticipated when he sent the message at page 100. As he put it, the length of the Claimant's absence took her well into the new performance year.

139. In our judgment, this was not just a coincidence in time, such that it could be said that the pregnancy-related sickness was simply the context for what happened. Rather, Mr Cozens' evidence makes clear that this was the reason, or at least a sufficient influence on his thinking, that led him to conclude that a check-in for 2019/20 was no longer appropriate. It can reasonably be inferred from that explanation that this was why the Claimant was chasing an answer to her questions to no avail.

140. That was sufficient to pass the burden to the Respondent and it had no explanation for why the Claimant did not get a response, which necessitated her various enquiries. Ms Passi was simply unable – through no fault of her own – to offer any explanation of what it meant that the matter was resolved through the moderation process; and in any event this does not seem to have been communicated to the Claimant.

141. The Respondent did not discharge the burden of proof that had passed to it. The complaint therefore succeeded. We will deal with time limits below.

2. Not having a final check-in for that performance review, which she says should have taken place by 24 November 2020 at the latest.

142. A similar analysis applied to this complaint, it being very obviously intimately connected to the first. The Claimant explained to our satisfaction why not having a further check-in was a detriment – she wanted a conversation with her line manager to understand the Respondent's position, put her perspective and simply engage with her employer about her performance review. She was thus deprived of something she sensibly viewed as valuable. We heard no evidence from either party as to whether others had that opportunity, but a reasonable person might regard not having it as detrimental.

143. As noted in relation to the first complaint, Mr Cozens said that the meeting would take place on the Claimant's return to work from pregnancy-related sickness absence, but no such meeting took place because she returned too far into the new performance year. That is a statement that it did not take place because she was off sick. It is not necessary – whether in relation to the first complaint or this – for Mr Cozens to have consciously drawn a link between the Claimant's sickness lasting for so long and it being pregnancy-related, otherwise of course very few discrimination complaints could ever be made out. The fact is that the Claimant's sickness absence was the reason in Mr Cozens' mind that no such meeting took place and that sickness absence was pregnancy-related.

144. The case law makes clear that there are some cases where the burden of proof has nothing to offer. Given Mr Cozens' explanation for his omission in this

respect, this seemed to us to be one of those cases, but even if analysed in accordance with the burden of proof provisions, the Claimant certainly proved facts from which we could conclude that her pregnancy-related sickness played a part in her being subjected to this unfavourable treatment and it was clear that the Respondent could not make out that not holding the meeting she wanted was in no sense whatsoever because of that sickness. We did not think it was an answer to this analysis to suggest, as Ms McGee did in submissions, that another employee on sick leave unrelated to pregnancy would have been treated in the same way, given the special protections the law provides for pregnant women.

145. This complaint succeeded; we will deal with time limits below.

3. Not being given the opportunity to present evidence at a final check-in that she was exceeding the requirements of the role and worthy of an Exceptional Performance Award, by 24 November 2020 when Mr Cozens prepared the outcome letter she received on 4 December.

146. This complaint can be distinguished from the first two. On one reading, it is about the opportunity to present evidence at a final check-in and on that basis would be unfavourable treatment and related to the Claimant's pregnancy-related sickness, for the reasons we have given in relation to complaints 1 and 2. When read fairly and carefully however, that is not what the alleged unfavourable treatment was. The treatment in question was not being unable to present evidence, but being unable to present evidence <u>that the Claimant was exceeding the requirements of the role and worthy of an Exceptional Performance Award</u>. This complaint was fundamentally therefore about the outcome of the last Viewpoint for 2019/20 and arguably also about the Claimant's overall rating for that year.

147. As our findings of fact make clear, the Claimant was assessed as "Exceeding Requirements" in the final Viewpoint for 2019/20 and, as we will come to with complaint 4, the overall rating for the year had already been determined by the rating in January 2020. Assessed in that way, it cannot have been unfavourable treatment not to have been able to present evidence that she was exceeding the requirements of the role so as to secure a higher rating, either for the Viewpoint itself (because she got the highest rating) or for the year as a whole (as it was impossible for her to do so).

148. Accordingly, this complaint did not succeed.

4. Being given a "meeting requirements" review outcome rather than an "exceeding requirements" outcome on 4 December 2020, thus missing out on an Exceptional Performance Award.

149. This complaint was plainly about the Claimant's overall rating for 2019/20. It clearly related to the whole assessment of her performance for that year. As we have noted more than once, very few employees would receive an exceeding requirements rating, by its very nature, and "Meeting Requirements" is agreed to reflect a high level of performance. It seemed doubtful to us therefore, in the context of how the Respondent's system for performance assessment works, that an employee could reasonably conclude that it is to their detriment not to have their performance rated at that highest level.

150. We did not have to definitively determine that point however, because this complaint had to fail on the basis of the reason why the Claimant received the overall rating she did. Even though she was rated as "Exceeding Requirements" in the last Viewpoint for 2019/20, the overall rating resulted from the fact that she had been rated "Meeting Requirements" in January 2020. There could be no challenge to that rating, at least not on pregnancy grounds, as it was not given in the protected period. We add that the Claimant knew or ought to have known this was the position she was in, given Mr McGowan's November 2019 emails and the auto-email she would have received in January 2020 after the Viewpoint itself. It was not necessary for us to go further, but we make clear that we were also not satisfied that the Claimant had shown on the evidence before us that she had to work harder than colleagues, if that was her case, to get the "Exceeding Requirements" rating. There was no evidence of that and we were satisfied, having heard the Respondent's witnesses comment on the matters the Claimant put forward in support of her own assessment of her achievements, that the Respondent saw her as a capable performer but not exceeding the requirements of the role in the way required to get the highest rating.

151. This complaint did not succeed.

5. Mr Cozens confirming that decision by e-mail on 16 December 2020.

152. This was essentially the same as matter 4, relating to communicating the rating to the Claimant. There was no complaint about the tone of the email for example or its effect other than as identified in complaint 4. Our conclusions were the same. The complaint did not succeed.

6. The Respondent's failure to give the Claimant a final check-in meeting for PDR purposes and for maternity leave purposes prior to her maternity leave on 1 February 2021.

153. As before, the first question was whether this was unfavourable treatment. Again, nothing turned on the parties' differences about whether there is such a thing as a final check-in. We also accepted that there was regular contact between Mr Cozens and the Claimant. Ms Walton accepted however that there should have been a meeting, and we agreed. Although we noted and accepted that Mr Cozens did not hold, and was not required to hold, meetings to communicate Viewpoint outcomes, what this allegation concerned was a check-in meeting and we were not told that other employees did not have them. An employee could reasonably conclude that not having such a meeting just before departing the organisation for up to a year was to her detriment. She was deprived of something she reasonably regarded as valuable. As the Respondent pointed out, the Claimant did leave detailed information in her email of 28 January, but as the Claimant put it, a meeting was an opportunity for a conversation about the matters she raised in that email (which we will come back to in dealing with complaint 7).

154. We turn therefore to the reason for the treatment and the question of whether the Claimant had proved facts from which we could conclude, in the absence of an adequate explanation, that the Respondent subjected her to the treatment because of her maternity leave and/or pregnancy. It is agreed the meeting did not happen because the Claimant brought forward her maternity leave due to pregnancy complications and as she points out it is notable that Mr Cozens found time to carry out her – and it appears others' – Viewpoints on the very first day of

her leave, 29 January 2021. It could very obviously reasonably be concluded therefore that the Claimant had shown a prima facie case that her maternity leave was not just the context for the meeting not taking place but the reason, again noting that it does not have to have been consciously in Mr Cozens' mind – though on our findings of fact it certainly seems to have been.

155. The next question was whether the Respondent had shown that not meeting with the Claimant was in no sense whatsoever due to her pregnancy and/or maternity leave. Mr Cozens' case was that he had no time in his diary from 19 to 28 January, but apart from his assertion, this was not established on the evidence, for example by the production of his diary or some recollection of what he was actually doing in this period. We did not find that a convincing or cogent explanation and we note also that he did not tell the Claimant he had no time to meet her. We were wholly unsatisfied therefore that the Respondent had discharged the burden of proof.

156. This complaint succeeded; we will deal with time limits below.

7. The Claimant having to send an email to Mr Cozens on 28 January 2021 setting out information she would have liked to discuss at that meeting.

157. This complaint was very much linked to complaint 6. It was clearly unfavourable treatment. The Claimant had to compose the email on her last day before her leave and told us it took her a long time to do so, as we could readily accept. The need to send the email would have been avoided by a meeting. She could therefore more than reasonably regard having to prepare the email, given the reasons she had to do so, as unfavourable. The Respondent did not ask her to prepare the email, but its omission in relation to the meeting made it virtually inevitable that the email would have to be prepared.

158. As with complaint 6, the Claimant was subjected to this treatment because her maternity leave was brought forward due to pregnancy complications and the email was sent because Mr Cozens did not arrange a pre-maternity leave meeting. As already noted in relation to complaint 6, that was more than sufficient on the Claimant's part to call for an explanation from the Respondent. The Respondent relied on the same explanation as for complaint 6. We viewed it in the same light. Accordingly, this complaint also succeeded; we will deal with time limits below.

8. The Respondent's failure to inform the Claimant on 29 January 2021 that Mr Cozens had completed a Viewpoint for her performance and rated her as "meeting requirements".

159. We noted that in this instance there was no challenge to the rating as such. The complaint was that Mr Cozens did not tell the Claimant that he had completed the Viewpoint and did not tell her he had rated her in this way, as is clear from the Claimant's amendment application (page 64) and EJ Choudry's Case Management Summary (page 457).

160. Was this unfavourable treatment? It was important to the Claimant to know what her rating was, as we could imagine it would be to most employees. Not being told about it could reasonably be regarded as unfavourable. Her colleagues received an auto-email, the Claimant did not, and so she was not in as good a position as them and she had expressly made clear (page 345) that whilst on leave

she wanted information on anything affecting her personally and her role. She did access her work emails whilst on maternity leave, but unsurprisingly only much later, and so her being able to do so in theory does not mean that the treatment was not unfavourable.

161. What was the reason she was subjected to this treatment? No issue was taken by the Respondent that the Claimant was on annual leave, not maternity leave, on 29 January 2021, unsurprisingly because in any event her maternity leave began on the next working day, and she still did not receive the information. The fact that the Claimant was on maternity leave was more than just the context for her not receiving the information. She was overlooked or forgotten in this respect precisely because she was on leave. Particularly given her express request to be sent such information, that was sufficient to call for an explanation from the Respondent.

162. The Respondent's only explanation was to say that it was an oversight. We did not regard that as satisfactory, particularly in light of the express wording of the Claimant's email about the need for communications during her leave. We add as further context that Mr Cozens was not able to explain why he was able to send an email to the Claimant's personal address in June but not on 23 March.

163. This complaint was also well-founded; we will deal with time limits below.

9. The Respondent's failure to respond to the Claimant's email of 5 September 2021 regarding completion of that Viewpoint and the rating.

164. Mr McGowan accepted that the Claimant should have had an answer to her email. The Claimant was in a position where she did not understand why her rating was lower than the previous round and could legitimately raise questions about it. Not getting answers to questions about these matters can reasonably be regarded as unfavourable treatment, because one's performance review rating is not a trivial matter.

165. Again, we concluded that the Claimant had established a prima facie case of discrimination for the same reasons as in relation to complaint 8, particularly given the content of her email of 28 January, sent just before her leave began, making clear that she wished to be communicated with about matters affecting her employment. On its face, in the absence of an adequate explanation, it appeared to be another instance of the Claimant's wishes being overlooked because she was on leave.

166. We were satisfied however that in this instance the Respondent provided an explanation that discharged the burden of proof at the second stage. As the contemporaneous emails (going into 2022) make clear, the reason there was no reply was principally that Mr Cozens did not want to engage on the matter further, as he made clear to People Support; he did not like, or at least felt uncomfortable, being challenged in this respect. It was clear to us that this would have been the case whether or not the Claimant had been on maternity leave, as exemplified by the comment in Mr Cozens' witness statement that the Claimant's grievance will be the only grievance that will ever be brought against him. That is a surprising comment, but it demonstrates his thinking and that his unwillingness to engage was nothing to do with the Claimant's absence on leave. Maternity

leave in this instance was, in light of the Respondent's explanation, no more than the context for the failure to reply.

167. This complaint failed accordingly.

10. The Claimant having to chase the performance outcome letter on 23 December 2021 (the final PDR outcome for 2020/21).

168. This was a short email, but it should be noted that the Claimant had to write it whilst she was on maternity leave, with other, statutorily protected, priorities. It was fair to assume that everyone else received their letters, or at least we were not taken to evidence to the contrary; she did not. Again, we noted too that she had requested in her email of 28 January 2021 that all important matters affecting her employment be sent to her; this was certainly in that category. The unfavourable treatment was in effect, not getting the letter, and we were satisfied it could properly be seen in that way.

169. Turning to the reason for it, the Claimant established that she received the equivalent letter for 2019/2020 on 4 December 2020, when she was at work and not on maternity leave. Here, she had reached the last day before the Respondent closed for Christmas and had not received anything. As she highlighted in submissions, the difference was that in December 2021 she was on maternity leave. In the absence of an adequate explanation from the Respondent, it could be inferred that again she had been overlooked because she was on maternity leave. The burden of proof thus passed to the Respondent.

170. Again however, we were satisfied that the Respondent had established a non-discriminatory explanation for its omission in this particular instance. There is a conflict of evidence on this point between Mr McGowan on the one hand (who said Mr Cozens or Ms Walton should have provided the letter) and Mr Cozens and Ms Walton who very adamantly said it was for the new line manager to do so. The Respondent did not provide evidence of the system or organisational charts on which People Support relied for distributing the letters to managers for onward distribution to staff. We concluded that in this instance however the inconsistency in the Respondent's evidence, coupled with the Claimant herself not being entirely clear when she officially started the new role, exemplified the lack of clarity on which the Respondent relied as the explanation for the failure to provide the letter to her. We were satisfied that was the explanation for the omission and that it was thus nothing to do with the Claimant's absence on maternity leave.

171. This complaint failed on this basis.

172. Complaints 11 and 12 repeated complaint 9 and failed on the same basis.

Time limits

173. The successful complaints of pregnancy/maternity discrimination were thus complaint 1, 2, 6, 7 and 8.

174. On the question of time limits, taking complaints 1 and 2 first, as the two successful complaints contained within the original Claim Form, they were plainly

presented out of time, because ACAS Early Conciliation did not start until 12 March 2021 and the complaints themselves related to 23 October and 24 November 2020. The last day on which the Claimant could have brought a claim about those matters or started ACAS Early Conciliation in respect of them – accepting that the two complaints are intimately linked – was 23 February 2021.

175. The Claimant gave birth on 4 February 2021, and we accepted her evidence about the traumatic build up to that. She was also waiting for the outcome of her grievance. The delay was not lengthy; ACAS Early Conciliation could properly have started on 23 February as we have said, and so assuming it would have lasted the same length as it in fact did, the delay was in the order of two to three weeks.

176. The Claimant's explanation for the delay, particularly having given birth and the specific circumstances surrounding that, was plainly a more than adequate explanation, even without the grievance. The Respondent did not identify any evidential or other prejudice arising from this short delay, other than of course having to defend the complaints. Weighing up the length of the delay, the reason for it and the absence of any prejudice to the Respondent, we concluded that the complaints had been presented to the Tribunal within such period after expiry of the time limit as was just and equitable. Complaints 1 and 2 of pregnancy/maternity discrimination therefore succeeded.

177. Complaints 6, 7 and 8, related to the end of January 2021. They were presented, by way of amendment, on 27 November 2021. That is a considerably longer delay, of around 10 months. The explanation for it can only partly relate to the difficult circumstances of the Claimant giving birth, and indeed to her being on maternity leave, not least because she was able to attend to correspondence with the Respondent well before the end of November 2021 and indeed brought her Claim to the Tribunal – without these complaints included – in May 2021, starting ACAS Early Conciliation on 12 March 2021.

178. She plainly knew about the matters giving rise to complaints 6 and 7 before her maternity leave and thus at the time she filed her Claim Form. As to complaint 8, she said she did not know about it until 5 September 2021. Her only explanation for the delay in bringing that matter to the Tribunal was that she was awaiting a response from the Respondent, but that did not explain why she only brought the complaint nearly three months later and the fact is she knew as at 5 September 2021 that she had not been informed of the rating; the fact of <u>waiting</u> for an explanation is what complaint 9 relates to, not complaint 8. Moreover, even though she only found out about the rating on 5 September, she knew that the Viewpoint rating was going to take place at around the time she went on maternity leave, as her email of 28 January 2021 made clear. She could properly have concluded it had not been sent to her when she commenced ACAS Early Conciliation on other matters in March 2021.

179. We noted again that the Respondent did not suggest any evidential prejudice had been encountered as a result of the Claimant's delay in presenting these complaints, and we were conscious that there is always prejudice to a claimant in refusing to extend time. That said, whilst exceptional circumstances are not required to do so, time limits are there for a reason and there can be no expectation that they will be extended. Given the length of the delays, the fact that the Claimant was and is evidently a very well-informed and very well-educated individual, the

fact that for the reasons we have given we do not find the explanations for the delays satisfactory – particularly when she was able to bring her Claim in May 2021 – and given the length of the delay, we did not think it just and equitable to extend time for complaints 6, 7 and 8. They were dismissed on that basis.

180. The net result of all the above was that complaints 1 and 2 of pregnancy/maternity discrimination succeeded. For the reasons indicated above, it was regrettably necessary to convene a separate Hearing to deal with remedy, on a date that was agreed with the parties.

Note: This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video.

Employment Judge Faulkner
Date: 5 December 2022

JUDGMENT SENT TO THE PARTIES ON

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.