EMPLOYMENT TRIBUNALS

Claimant: **Ms F Ali**

Respondent: **The Home Office**

Heard at: **London South Employment Tribunal (hybrid hearing)**

On: **6 – 10 February 2023**

Before: **Employment Judge Dyal sitting with Ms B Leverton and Mr S Townsend**

Appearances:

For the claimant: **Ms David, Counsel**

For the respondent: **(1) Mr Wetherell, solicitor (day 1 only)**
(2) Mr Duffy, Counsel (days 2 – 5)

RESERVED JUDGMENT

1. The complaint of pregnancy discrimination succeeds.

2. All other complaints fail and are dismissed.

CASE MANAGEMENT ORDERS

1. The parties should liaise to seek to agree remedy.

2. If the parties are unable to agree remedy within 28 days of this document being sent to them, they must write to the tribunal asking for a remedy hearing and proposing directions.

REASONS

Introduction

1. The matter came before us for its final hearing.

2. The issues were agreed at a Preliminary Hearing before Employment Judge Dyal on 21 July 2022 and recorded in his case management summary.

3. There have been a number of developments since then:

   3.1. the Respondent has admitted that the Claimant was a disabled person within the meaning of s.6 Equality Act 2010 at the relevant times and has identified the legitimate aim relied upon for the purposes of the s.15 Equality Act 2010 complaint.
   3.2. On day 2 of this hearing, the Claimant applied to amend the PCP relied upon for the purposes of the indirect discrimination claims. The amendment was allowed by consent.

4. Thus the issues, as updated, are as follows:

> 1. Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)
>
> 1.1 Did the respondent treat the claimant unfavourably by doing the following things:
> 1.1.1 Withdraw a job offer in respect of the CIO-Criminal Investigator Anti Corruption Criminal Investigations Unit role. The decision was communicated to the Claimant on 22 January 2020.
> 1.2 Did the unfavourable treatment take place in a protected period?
> 1.3 If not did it implement a decision taken in the protected period?
> 1.4 Was the unfavourable treatment because of the pregnancy?
> 1.5 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?
> 1.6 Was the unfavourable treatment because of pregnancy?
>
> […]
>
> 3. Discrimination arising from disability (Equality Act 2010 section 15)
>
> 3.1 Did the respondent treat the claimant unfavourably by:
> 3.1.1 Refusing to move the Claimant to a vacant role in Criminal and Financial Investigations as a ‘managed

move' on or around 13 January 2022 on the stated basis that she lacked the required investigative experience.

3.2 Did the following things arise in consequence of the claimant's disability:

3.2.1 The Claimant was absent from work from around September 2020 to May 2022 on disability related sick-leave. Accordingly she was not gaining investigative experience during that period of time.

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.4.1 requiring recent operational experience in criminal investigations in serious and complex immigration crime to be considered suitable for a managed move into a vacancy in the Capability and Compliance Unit.

3.5 The Tribunal will decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 could something less discriminatory have been done instead;

3.5.3 how should the needs of the claimant and the respondent be balanced?

3.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

4. Indirect discrimination (Equality Act 2010 section 19)

4.1 The claim is indirect sex and/or indirect disability discrimination.

4.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

4.2.1 requiring recent operational experience in criminal investigations in serious and complex immigration crime to be considered suitable for a managed move into a vacancy in the Capability and Compliance Unit.

4.3 Did the respondent apply the PCP to the claimant?

4.4 Did the PCP put women and/or disabled people at a particular disadvantage when compared with men and/or people who are not disabled in that they are more likely to be at work so more likely to gain the required experience for a managed move to a vacant role.

4.5 Did the PCP put the claimant at that disadvantage? She says it did and is the reason she did not get moved to the vacant post in January 2022.

4.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

	4.6.1	to fill vacancies with suitably skilled and experienced employees to maintain operational efficiency and meet business needs
4.7	The Tribunal will decide in particular:	
	4.7.1	was the PCP an appropriate and reasonably necessary way to achieve those aims;
	4.7.2	could something less discriminatory have been done instead;
	4.7.3	how should the needs of the claimant and the respondent be balanced?

5. As set out further below the Respondent made a number of concessions in relation to the issues. We comment and pay tribute to this approach. It enabled the hearing to focus on the real issues in dispute without any detriment to the Respondent's interests.

The hearing

5. *Documents before the tribunal*:

   5.1. Agreed bundle;
   5.2. Annual leave policy (admitted by consent on day 3);
   5.3. Witness statements for witnesses identified below;
   5.4. Opening skeleton argument of the Respondent;
   5.5. Closing skeleton argument of the Claimant.

6. *Witnesses the tribunal heard from*:

   6.1. The Claimant;
   6.2. Mr Scott Bailey, Assistant Director but at the relevant times Her Majesty's Inspector in the Anti-Corruption Criminal Investigations Unit;
   6.3. Ms Kemi Magbagbeola, Strategic HR Business Partner;
   6.4. Mr Roderick MacDonald, His Majesty's Inspector, Criminal and Financial Operations.

7. *Format of hearing:*

   7.1. On day 1, Mr Duffy was unable to attend at all owing to a family emergency. Mr Townsend was unable to attend in person so joined the hearing by videolink. After a brief discussion with the parties the tribunal spent the day reading and ultimately read everything that each party asked it to.
   7.2. The remainder of the hearing took place fully in person, save that closing submissions on liability were made by video-link (with just the panel in person) on day 4.

8. *Submissions*:

8.1. The parties relied upon their respective skeleton arguments and made oral closing submissions. These were helpful and we had careful regard to them.

Findings of fact

9. The tribunal made the following findings of fact on the balance of probabilities.

10. The Respondent is a large ministerial government department. The Claimant's employment began in January 2005 as an administrative officer. She was appointed as an Immigration Officer on February 2011. She worked in Criminal and Financial Investigations (CFI).

11. Over the years the Claimant acquired a lot of experience of investigating immigration crime. She also achieved the Professional Investigative Programme (PIP) Level 2 accreditation. This was a key qualification. It was an essential requirement for many roles.

12. The Claimant led the investigation of Operation Hove, a complex immigration crime investigation. It commenced in around 2015 and ended with the sentencing of the defendants in around November 2017.

13. The Claimant took her first period of maternity leave between December 2017 and October 2018.

14. From October 2018 onward the Claimant worked (full-time) compressed hours over 4 days, Tuesday to Friday, for childcare reasons. Initially, the Claimant was allowed to work from home 2 days per month. However, there was a general clampdown on home-working and the arrangement changed to ad hoc homeworking.

15. In the second half of 2019, three vacancies arose in the Anti-Corruption Criminal Investigations Unit (ACCIU) for the role of Chief Immigration Officer (CIO), Criminal Investigator. The job advert indicated that the role could be done on a flexible working, job share, full-time or part-time basis. This role was one level above the Claimant's existing Immigration Officer role. The Claimant applied for this role ('ACCIU role') in September 2019. She attended an interview on 11 October 2019 and was told she had been successful in the application on 16 October 2019. Mr Scott Bailey was the recruiting manager.

16. The Claimant and Mr Bailey began what proved to be lengthy email correspondence. It protracted over some months. The emails ranged over a number of topics. In large part they were of an administrative/due diligence nature with Mr Bailey carrying out routine checks in respect of the Claimant's identity, qualifications and the like.

17. On 23 October 2019, the Claimant notified Mr Bailey that she was pregnant and that her due date was 1 April 2020. She also asked when she would hear about a

start date for the ACU. Mr Bailey responded congratulating her. He did not respond directly about the start date.

18. In email correspondence on 31 October and 1 November 2019 the Claimant and Mr Bailey agreed to meet to discuss the Claimant's new role, her working pattern and role expectations during pregnancy.

19. On 4 November, Mr Bailey emailed the ACCIU's budget officer and told her that he expected the Claimant would be in post before Christmas.

20. On 6 November 2019, the Claimant and Mr Bailey met. At the meeting there was a discussion of what the Claimant's duties would be during pregnancy. In her existing role she had been moved to non-operational duties for safety reasons in light of her pregnancy. Mr Bailey said that in her new role it would be up to her whether she was operational during pregnancy. This concerned the Claimant because operational duties could involve physical confrontations and she felt some pressure to do operational duties. She had the impression that this is what Mr Bailey wanted. She also told Mr Bailey that she had been referred for an OH appointment in view of her pregnancy. At the meeting the Claimant raised the possibility that she might want to reduce her hours after her maternity leave to 2 days per week. Mr Bailey told her it was a full-time post but that he would look at the flexible working policy and revert.

21. On 21 November 2019, the Claimant and Mr Bailey had an email exchange:

    21.1. Mr Bailey's email indicated that he was awaiting the outcome of an OH report in relation to the Claimant and that the Claimant had mentioned working part-time, flexibly and home working. He said "*all of this*" needed to be considered prior to arranging a start date;
    21.2. The Claimant responded that her OH appointment had been pushed back to 12 December. She forwarded her existing flexible working arrangement and asked if she could continue with it until she went on maternity leave. She also asked for some home working to help accommodate ante-natal appointments. She agreed there had been a discussion of part time working on return from maternity leave but said she thought it would be best to defer it to closer to the time.

22. On 27 November Mr Bailey said he was debating waiting for the outcome of the OH report prior to having a further discussion. The Claimant said she was happy with this.

23. On 12 December 2019, OH reported. The report referred to complications in the Claimant's pregnancy but that the Claimant was fit to continue in her work in a non-operational capacity. She was fit to work compressed hours. It also noted that lone working had been identified as a risk in the Claimant's pregnancy risk assessment (that document is not itself in evidence).

24. On 13 December 2019, Tajinder Sagoo, HMI from the CFI team, asked Mr Bailey for a start date for the Claimant. Mr Bailey said he was wating for the OH report,

would review the report and then consider the start date as well as any adjustments needed. On 18 December the OH report was sent to Mr Bailey.

25. On 19 December 2019, Mr Bailey emailed the Claimant:

    25.1. He agreed to the Claimant working compressed hours over 4 days;
    25.2. He said that shifts would need to be completed by 5pm for health and safety reasons (save when allocated the late shift);
    25.3. However, flexibility would be needed when necessary for operational, training, judicial and departmental purposes;
    25.4. The Claimant would need to take a rostered lunch break within the day for her welfare;
    25.5. It was unlikely that a reduction of days would be agreed after the Claimant's maternity leave because it would be "unworkable and unsustainable to the business needs of the unit";
    25.6. There would need to be a trial period in respect of the compressed hours;
    25.7. The Claimant could work from home to help accommodate ante-natal appointments subject to certain conditions;
    25.8. In relation to home working to facilitate ante natal appointments, the claimant would need to supply the dates and times of the same and with her manager ensure she had suitable work to do at home.

26. There was a general policy in this part of the business that employees should not work in the office alone. This policy arose because the team worked in a highly secure area of the building to which access was very restricted. An employee had suffered a heart attack when lone working and this had led to a strict line being taken on lone working. Although the general office hours of the building were 7am to 7pm, in practice (subject to what is said below about the late shift) after 5pm it could not be guaranteed that anyone else would be in the office unless the team were on the late shift.

27. Mr Bailey's evidence, which we accept, is that his team and the equivalent team in Manchester alternated on a weekly basis to cover the late shift (the late shift finished at 7pm). When Mr Bailey's team was covering the late shift, two employees from the team per day would work until 7pm. It was a matter for him to decide which particular employees did that and he could take account of their preferences.

28. On 9 January 2020 at 11.01 am, the Claimant responded agreeing to what Mr Bailey had proposed in his email of 19 December 2019 - but with one caveat. Finishing at 5pm could be problematic for childcare reasons. Sometimes she needed to drop her daughter at nursery in the morning and if she did so she could not start work early enough to get her hours done in time for a 5pm finish. She asked to take a couple of hours of annual leave on the days where she needed to leave the office by 5pm having dropped her daughter at nursery in the morning. She also said with regards to the possible reduction in days after maternity leave *"I appreciate your comments, and I personally have no idea what my circumstances will be after maternity. I would like to defer this conversation until then."*

29. Mr Bailey responded as follows:

> Thank you for the email, unfortunately I don't believe that we will be able to agree a start date at this time. The reason for this is that you have said that you are unable to commit to the compressed hrs flexible working arrangement below due to personal circumstances. As detailed in my previous email the appointment would be conditional on your agreement to this flexible arrangement.
>
> The option is still open to join the unit on the basis of this agreement, full time mon-Friday or a further consideration for flexible working on reduced hours. Please let me know if you wish to proceed with any of these options.
>
> I will be contacting HR in the meantime to see how they advise me to progress if you are unable to commit to the offered arrangements.

30. The Claimant responded expressing confusion. She said she had agreed to the flexible working arrangement save that there would be times she would not be able to start early enough to finish at 5pm, hence her suggestion of using annual leave on those occasions. Mr Bailey responded:

> The agreement on starting the unit is that you are able to work the flexible working arrangement detailed below, unfortunately I cannot currently agree to an arrangement whereby you make up hrs through using annual leave.
>
> You have requested a 42hr week covering 4 days, in your response and inline with the details I sent below you have stated you cannot commit to this flexible 42hr week unless you are able to use annual leave.

31. Mr Bailey's evidence, which we accept, was that at some point that he cannot recall he was in a meeting with his superiors in which it was said that annual leave could not be used to make up contractual hours. He had no meaningful recollection of the detail of that meeting beyond what we have recorded.

32. There is nothing express in the Respondent's annual leave policy that prohibits an employee from using annual leave in the way the claimant suggested. There is a general provision that states annual leave is for rest and recuperation.

33. Ms Magbagbeola's evidence was that *"Depending on the circumstances… a very short term agreement [where an employee uses annual leave to make up contractual hours] of two or three weeks may be possible".* It is unclear where she got these rules from and it is not suggested that they are reflected in any policy/guidance document.

34. At 11.36 am, on 9 January 2020, Mr Bailey emailed Ms Magbagbeola:

> Good morning Kemi
>
> Is it possible to have some advice relating to the ongoing discussions regarding the CIO Investigator grading that are currently underway?
>
> In the last recruitment campaign I ran last year we had 3 posts, 2 of which have already started within the unit as CIO Investigator.
>
> The third employee though offered the role via recruitment has not yet had an agreed start date as her current line manager had put her forward for a OHS report due to pregnancy and the restrictions on her role. Taking into account the current discussions should this employee continue through the final stages of recruitment to be within position in our unit as CIO Investigator?

35. The reference to CIO Investigator grading needs some explanation. In essence there were internal tensions between ACCIU and CFI. CFI were concerned because they were losing employees to ACCIU. In the recruitment round described above, all of the successful candidates for the CIO roles in ACCIU were from CFI. Two of them, both men, had already by this point started in ACCIU. The first started in around October and the second in early January 2020.

36. The ACCIU role had been evaluated prior to being advertised and the evaluation supported the grading of CIO. However, at some stage, in around December 2019, there was a challenge to this grading by CFI. CFI considered that the ACCIU role was more properly at IO level.

37. Ms Magbagbeola's initial response to Mr Bailey's email did not answer the question posed and simply repeated that a grading exercise was going on. Mr Bailey pressed her for advice and she said on 10 January 2020:

> However, my advice would be for you to pause this process to allow for the grading outcome to be known and (if necessary) further discussions to be had before proceeding.
>
> As an interim measure, you could inform the candidate that *"due to unforeseen circumstances, there is a need to pause the recruitment process for approximately 2 weeks..."* and that you *"will update them as soon as you are able. Apologies for any inconvenience that may have been caused."*

38. On 10 January 2020, Mr Bailey sought further HR advice as follows:

> Sorry to bother you again but in the interim of awaiting Steve's guidance on whether to inform the candidate that we are delaying the recruitment they have responded to a discussion regarding flexible working. I had contacted HR casework but they have said they cannot assist and I need to speak to my HRBP.
>
> She had requested an informal flexible working arrangement to compress her hrs to Tue-Fri. After consideration and following the Flexible working guide, I agreed to the arrangement to fall within safe working hrs.
>
> Unfortunately the applicant has said they cannot agree to my flexible working unless they incorporate annual leave in to their 42hr week, this is due to personal circumstances (childcare arrangements and husband on flexible working). I have informed the candidate that at this time I cannot proceed with a start date unless they agree to the arrangement, work full time hrs or submit a different flexible request taking into account partners working.
>
> She has said that this will only be a short term arrangement as is due to go onto maternity leave. During a previous meeting she had informed me that upon return she will be looking to reduce her working week to 2 days but does not wish to discuss this formally at the current time, therefore I expect that this is the reason for only needing a short term solution. In relation to 2 day working I have informed her that upon return we would not be able to accommodate this request as after reviewing business needs and flexible working policy we could only look at a reduction in hours but not days.
>
> Do you have any advice or guidance if the applicant cannot agree to this?

39. On 10 January 2020, at 12.50, Mr Bailey wrote to the Claimant as follows:

> Thank you for the email, unfortunately I don't believe that we will be able to agree a start date at this time. The reason for this is that you have said that you are unable to commit to the compressed hrs flexible working arrangement below due to personal circumstances. As detailed in my previous email the appointment would be conditional on your agreement to this flexible arrangement.
>
> The option is still open to join the unit on the basis of this agreement, full time mon-Friday or a further consideration for flexible working on reduced hours. Please let me know if you wish to proceed with any of these options.

40. On 10 January 2020, the Claimant responded:

> I'm slightly confused by your email, you state that I haven't agreed to the flexible working arrangement. Just to be clear, I have agreed. My only comments were on the days that you want me to finish work at 5pm, it would mean I would need to start work by 7.00am (including meal break). This won't always be possible due to my caring responsibilities (having to drop my daughter off to nursery at 8am). Therefore, the solution I have offered is that on the days where I drop my daughter off, I will take 2-3 hours annual.

41. Mr Bailey wrote back saying, 151:

> The agreement on starting the unit is that you are able to work the flexible working arrangement detailed below, unfortunately I cannot currently agree to an arrangement whereby you make up hrs through using annual leave.
>
> You have requested a 42hr week covering 4 days, in your response and inline with the details I sent below you have stated you cannot commit to this flexible 42hr week unless you are able to use annual leave.

42. On 15 January 2020, Steve Blackwell, Assistant Director CFI emailed Mr Bailey. 163:

> I am really concerned that you are treading into equality act issues here. She has been successful in an open campaign, other successful candidates from CFI have been promoted and started. The delay seems to be based on her pregnancy and whether her request for adjustments can be met. I don't think you have any options here, she is successful and you have to give her the job. You will have to accept the work adjustments and welcome her into your unit, if you don't you face a real risk of an equality act claim, especially as your delay is affecting her salary and pension. Furthermore, I understand you wanted some assurances to what her future attendance would be, once her maternity leave has concluded. I am not sure if you can do this at this juncture, and again I have concerns that this may be taking you into equality act issues.
>
> Compounding this issue, is that we have effectively closed the Becket CFI office and so Fayza realistically needs to work from another location to comply with her OH recommendations regarding lone working. We can arrange this, but as her post is now with you, I would ask that you start her in your unit.
>
> I am sorry to email you, on this matter. However, now that the full facts have been brought to my attention I feel compelled to insist that you give her a start date immediately. If this is not done, now that her circumstances have been advised to me I will have to raise this as a potential equality act issue. I do not want to do this, but I can not see how you can delay this any longer.

43. At 11.57 on 15 January 2020, Mr Tucker, Head of Investigations, wrote to Mr Bailey as follows:

> I have spoken to Kemi and the decision is that the remaining CIO post be withdrawn.
>
> I would be grateful if you could inform the candidate.

44. Mr Bailey reported this email to Mr Tucker. He said "*senior CFI managers are threatening me with the equality act".*

45. Mr Tucker, then wrote to Ms Magbagbeola:

> Following our discussion I have asked Scott to withdraw the remaining CIO post. However, please see the attached emails regarding this and the threat of equality act action from IE.

46. There is no written record of the discussion, whatever it may have been, that Mr Tucker is referring to.

47. Mr Bailey responded to Mr Blackwell stating that his email contained factual errors and that policy and procedure had been followed.

48. On 15 January Mr Tucker wrote to Ms Magbagbeola:

1. We have accepted the assessment already given by Ian Manning that our posts are banded as EO (IO) level. We will not be providing any further evidence.
2. This leaves us with differing issues for groups of our staff as follows –
   A. Staff already recruited under fluid grading as CIO's (5)
   B. Staff who are existing CIO's who are receiving supervisory allowance (4)
   C. Staff at IO and working towards the PIP2 qualification who will not now progress to the fluid CIO grade (5) but 2 are close to it and 3 are not
   D. One member of internal staff who has already achieved PIP2 and been boarded and is now a fluid CIO
   E. One IE member of staff who has been selected but not started where you advised to withdraw the post, but I have written to you separately about this.

The actions that need to be taken were agreed as –
Group of staff 2A – write to them to inform them of the result of the JEGS but offer them permanent contracts as full non supervised CIO's.
Group of staff 2B – write to them to withdraw the supervisory allowance as a result of the JEGS.
Group of staff 2C – write to them to inform them that we will be making a business case for a Recruitment and Retention allowance that they will qualify for
Staff member 2D – same as 2A
Staff member 2E – we await your advice.

49. The staff member 2E was the Claimant. Ms Magbagbeola provided her guidance in relation to the Claimant on 20 January 2020. Her guidance was:

> I would suggest that you have an informal discussion with the IE person to inform her that
>
> …*"due to changes in business needs, a decision has been made to discontinue the recruitment of the post. Although this will probably come as a disappointment, I do want to thank you for your interest in the post and wish you all the best going forward…*a formal letter will then be sent in due course.
>
> She may want to know what the *business need* is, - I would suggest that you do not go into detail but just advise that the post is no longer required and are sorry that this realisation came so late in the process…

50. It is self-evident that the actual reason or reasons for withdrawing the job offer were to be deliberately obscured by this opaque wording.

51. Mr Tucker then emailed Mr Bailey, telling him to action Ms Magbagbeola's email and saying that it had nothing to with pregnancy but rather organisational change in the unit.

52. On 22 January 2020, Mr Bailey wrote to the Claimant as follows:

> I have been advised by Steve Tucker (G6) that due to changes in business needs, a decision has been made to discontinue the recruitment of this post. Although this will probably come as a disappointment, I do want to thank you for your interest in the post and wish you all the best going forward.
>
> This decision is due to departmental business needs and your personal circumstances have not been taken into account to make this decision. The post is no longer required and we are sorry that this realisation came so late in the process.

53. Ms Magbagbeola's oral evidence, under cross examination and in questions from the tribunal, was that her understanding of the reason for the withdrawal of the job offer was that there was no agreement about the Claimant's working pattern. Her evidence was that the job evaluation was not the reason. That contradicted her witness statement. In re-examination her evidence tended to revert to what

was said in her witness statement, but only after the passages in her statement were shown to her and she was, effectively, invited to agree with them.

54. It is plain, not only from Mr Blackwell's email above but also more generally, that there was serious internal concern about the way the Claimant was being treated. On 5 February 2020, Ms Hilary Beeching, HRBP, said this in an email to Ms Magbagbeola:

> As far as I am aware, Fayza only required an OH report because of her pregnancy. Had she not been pregnant, the offer of a role with options around flexible working would have been arranged much earlier.
> The flexible working arrangements are potentially the sticking point but it is up to Fayza to consider whether she can accept them. If she cannot, then as long as Security can justify why they cannot offer anything else, then it is for Fayza to accept or decline the offer of a role. I would suggest that Security could be more flexible as a temporary measure before her maternity leave but that the offered terms would be the ones available on return from mat leave.

55. At some point, through a decision making process that is murky and in respect of which there is no direct evidence, it was decided that the job offer to the Claimant should be reinstated. There are no primary documents (e.g. notes of meetings, memos or the like) evidencing whose decision this was or the basis on which it was taken or exactly when. (We do have the notes of the meeting of 3 March referred to below but evidently a decision had already been taken by then).

56. On 28 February 2020, Ms Magbagbeola drafted a proposed email for Mr Bailey to send to the Claimant. The way in which the proposed email is drafted deliberately obscures the reason or reasons for reinstating the job offer:

> *"After many discussions and advice sought from appropriate colleagues, a decision has been made to honour the CIO Status of those that were appointed as CIO (of which you were a member of that cohort)"*

57. The proposal included wording to the effect that it was accepted that the Claimant had been referred to OH for pregnancy reasons and that had it not been for that she would have probably started in her role as CIO. Mr Bailey responded to this proposed wording, objecting to various aspects of the proposal including that one on the basis that the Claimant would not have been able to start without an agreement as to her working time and there was none. He also commented on Ms Magbagbeola's point 5 (highlighted) as follows:

> 5. *A further possible option is for you and ACCIU Management to agree to pause this until you return from Maternity Leave and revisit the flexible working issue. Fayza has already suggested that she wishes to work 2 days a week on her return, or if not take a career break. I had already considered the flexible working within available policy and this flexible working would not be possible.*

58. On 3 March 2020, there was a virtual meeting between Ms Pradhan, Mr Tucker, Ms Magbagbeola, Ms Sue Keely and Mr Bailey. The notes of the meeting record as follows:.

> Withdrawal of CIO post. Kemi advised that a further letter need to be sent to the applicant withdrawing the offer due to the inability to reach an agreement under the flexible working arrangements making clear this was no pregnancy\maternity related. Scott stated that this has already been done in line with policy. Sue asked what would happen if the applicant said that they no longer wished to apply for the flexible working arrangement. Kemi advised that if this was the case she would be promoted once her maternity leave had finished.
>
> Kemi sated that the complaint about the withdrawal was from the HRBP of CFI and not the individual. But that they would be putting in a grievance.
>
> Sue raised the question that the individual may now make an application to have her post put in place from the date the first individual on that trawl took up their duties. She also raised the point that delaying someone's start date on promotion to after they had completed their maternity leave might be problematic. Kemi said that this was not the case.

59. It is hard to make sense of these minutes, but doing our best (which is informed in part by Mr Bailey's email of 4 March 2020 we refer to below), it appears that the suggestion was that the job offer would be reinstated in principle but re-withdrawn in practice because of a disagreement about working hours.

60. On 3 March 2020, the Claimant lodged an internal grievance about the foregoing events. The Claimant complained in terms of gender and pregnancy discrimination.

61. On 4 March 2020, 222 Mr Bailey wrote to Ms Magbagbeola with a draft email to the Claimant for Ms Magbagbeola's consideration. The content of the message is peculiar in that it starts by indicating that the Respondent is after further consideration (not explained what) willing to honour the post offered to her. But ends by stating:

> Unfortunately as you have not been able to agree to any of the below options the position would again have to be withdrawn from offer.
>
> - Flexible working arrangement dated 19th December 2019.
> - Flexible offer of a reduction in hours over 4 days
> - Full-time mon-fri

62. Thus Mr Bailey's proposed email notionally informs the Claimant the offer is reinstated and concludes by withdrawing it because of a lack of agreement about working pattern without any further discussion of the same.

63. On 4 March 2020, Ms Magbagbeola responded by drafting the outline of an email for Mr Bailey to send to the Claimant notifying her that the job offer was reinstated.

Further to my correspondence to you dated 22 January 2020 notifying you of the withdrawal of the CIO position within the ACCI Unit, there has been further developments which has resulted in the unit now being able to honour the offer which had been previously withdrawn due to changes in business needs.

As you are aware, one of the reasons which prevented you joining the ACCI Unit at around the same time as your colleagues within the same cohort was due to us not being able to agree a mutually suitable working pattern.

64. Again the email was deliberately opaque as to what the 'developments' were. The email went on to set out the structure for Mr Bailey to add some wording to address working patterns. It also included a warning to the effect that if a working pattern could not be agreed the offer would have to be withdrawn.

65. On 6 March 2020, Mr Bailey wrote to Ms Keeley. He complained about the position he had been put in, said that he had been following advice and that he had been put in a vulnerable position because a job offer was being reinstated in light of it being anticipated that the Claimant would raise a grievance. His exact words on this point were "*It has now been decided that this was the wrong advice as a grievance is expected*." He proposed some wording to put to the Claimant about reinstating the offer. This included offering her the following work patterns:

    65.1. That previously offered on 19 December 2019;
    65.2. Full time hours Mon-Fri;
    65.3. 4 day working with reduce hours.

66. On 6 March 2020, Ms Pradhan, Head of Home Office and Cluster Two Security, sent the Claimant an email as follows:

    'I learnt that you underwent a recruitment exercise some months ago which resulted in you being offered a CIO post with the ACCI Unit. This, as a result of some business considerations was subsequently withdrawn. Since then, as a result of further considerations, a decision has been made to honour the original offer.

    However, I also understand that you and your prospective line manager have not agreed a start date as you have not been able to agree a working pattern that meets both your needs as well as that of the business.'

67. Once again, the reasons for withdrawing the offer and the reasons for reinstating it were deliberately couched in an opaque way. The email also referred to the need to agree a working pattern and that that matter was under consideration. It indicated that a failure to agree a working pattern could lead to the offer being withdrawn.

68. On 13 March 2020, Mr Bailey wrote to the Claimant referring to the reinstatement of the job offer. He resumed discussion of the Claimant's working pattern and proposed the following:

- Compressed hours pattern as offered to you 19th December 2019 (attached)
- Full time AHW working pattern. (normally Monday – Friday)
- 4 day working on shorter hours
- Further options suggested by you that would fit in with our Business needs and your personal circumstances.

69. The Claimant did not respond. She says because she had raised a formal grievance and wanted that process to take its course. We accept that was her reason.

70. Mr Nicholas Jupp was appointed to decide the Claimant's grievance. He wrote to her acknowledging receipt on 16 March 2020. On 20 March 2020, the Claimant had a grievance investigation meeting chaired by Mr Mark Silver.

71. On 24 March 2020 the Claimant commenced a period of maternity leave. She gave birth on 1 April 2020.

72. On 17 April 2020, Mr Bailey was interview by Mr Silver. It is evident that he took the grievance very personally.

73. On 20 July 2020, Mr Silver completed the grievance investigation report. On 28 August 2020, Mr Jupp issued a decision. It is worth setting out the material parts in full. It is refreshing in its candour:

> The Investigating Manager found no direct evidence that the actions undertaken by HMI Bailey constituted intentional discriminatory behaviour. HMI Bailey clearly felt that he had followed policy and procedure and there is evidence to support this view. He attempted to deal with Fayza Ali's requests informally as he clearly understood that the request had been raised in this manner, and wanted to alert her to the possibility that her Flexible Working Request could be refused.
>
> That is not to say, however, that the actions taken in respect of Fayza Ali were not perceived to be discriminatory and did not constitute and result in indirect discrimination. It is clear that they were viewed this way. I consider that HMI Bailey could have explored the options more throughly and that greater clarity around the need for submission of a formal application would have triggered a more thorugh consideration of the options. HMI Bailey clearly thought that he had agreed to the request for a Flexible Working Agreement but I consider that in setting a condition to this FWA that he was aware Fayza Ali would be unable to meet, this had the effect of causing indirect discrimination. I am satisfied that there was a correlation between this condition and Fayza Ali's need for a FWA whilst pregnant.
>
> The investigation did not find evidence to support a finding of discrimination on the grounds of sex or that the job offer had been withdrawn following discussions relating to Fayza Ali's pregnancy. It is unclear on what grounds the job offer was rescinded.
>
> The investigation though did find grounds to believe on the balance of probabilities that Fayza Ali had been subject to indirect discrimination in relation to the discussions relating to her Flexible Working Request which was directly related to her pregnancy. I consider these discussions and the delay in resolving this matter directly led to the applicant being unable to take up the post prior to

the post being withdrawn on the 20/1/2020. As such having reviewed all the documents I conclude that the grievance is partially upheld.

I considered that the terms and conditions which were discussed and set as a precondition in respect of the Flexible Working Agreement would have resulted in indirect discrimination, resulting in the applicant being obliged to reduce her hours/days and as such experience a loss of income. I also considered that they were unnecessary, unduly inflexible and supported by no sustainable business rationale. The applicant already had in place a Flexible Working Agreement which I considered could have been readily transposed to the new role, or adjusted with a greater degree of consideration to the benefit of both the applicant and the business. I also considered that the indication that any future Flexible Working Request was unlikely to be agreed, on her return from maternity, supported the applicants perception that she was being subjected to discrimination, and that this belief rendered constructive discussions on agreeing a start date difficult for the applicant to take part in. Whilst the email setting out this position was indicative and referred to a possible future application, I consider that it was unreasonable and contradicted the position set out within the advert for the post which stated that it was on the basis of full time, part time or flexible working. I also considered that had HMI Bailey responded more constructively to the concerns raised by Assistant Director Steve Blackwell, in an attempt to resolve this matter informally, the matter could have been resolved before the post was withdrawn.

The applicant sought resolution to this grievance in three respects:

1. The restitution of the job offer as a CIO.
2. The completion of an investigation.
3. The arrangement of backpay in the higher role to an agreed date

74. Mr Jupp made the following recommendations:.

1. Write to ACU requesting that senior managers engage directly with Fayza Ali to attempt informal resolution, supported by HR, and offer sufficient reassurances to allow Fayza Ali to take up the post.

2. Write to ACU requesting that any Flexible Working Request is considered in line with Flexible Working policy in a timely and flexible manner.

3. Write to ACU to request that they confirm with Fayza Ali the nature and role of the re-instated post.

4. Write to ACU and recommend that those managers involved in discussions or decisions relating to Fayza Ali's appointment within the ACU refresh their awareness and understanding of Equality legislation via formal training.

5. Write to the relevant HRBP to facilitate the identification of an equivalent role in the event that Informal Resolution is deemed to be unsuccessful.

6. Write to HR with the recommendation that a review is undertaken in line with pay policy to ensure that on starting a new role Ms Ali is placed on the correct salary with a view of potentially backdating this to December 2019 if applicable.

7. Write to HR requesting that a HRBP review the advice provided to ACU regarding the withdraw and re-instatement of the post: to confirm the reasons for the withdrawal of the post, that it was provided in an auditable form, and confirm whether the use of A/L as a short-term reasonable adjustment was inappropriate.

75. On 4 September 2020, Mr Jupp wrote to Mr Bailey:

> I considered that the terms and conditions which were discussed and set as a precondition in respect of the Flexible Working Agreement would have resulted in indirect discrimination, resulting in the applicant being obliged to reduce her hours/days and as such experience a loss of income. I also considered that they were unnecessary, unduly inflexible and supported by no sustainable business rationale. The applicant already had in place a Flexible Working Agreement which I considered could have been readily transposed to the new role, or adjusted with a greater degree of consideration to the benefit of both the applicant and the business. I also considered that the indication that any future Flexible Working Request was unlikely to be agreed, on her return from maternity, supported the applicants perception that she was being subjected to discrimination, and that this belief rendered constructive discussions on agreeing a start date difficult for the applicant to take part in. Whilst the email setting out this position was indicative and referred to a possible future application, I consider that it was unreasonable and contradicted the position set out within the advert for the post which stated that it was on the basis of full time, part time or flexible working.

76. In the course of the evidence, Judge Dyal asked Mr Duffy whether the Respondent sought to go behind the conclusions of the internal grievance investigation in this litigation. He indicated that it did not (though he made clear that the Respondent's position was that it did not need to do so in order to answer the complaints that are actually before the tribunal).

77. On 9 September 2020, the Claimant appealed against the grievance outcome. The essence of the appeal was that the grievance outcome had not established why the job had been withdrawn nor why it was reinstated shortly after the grievance was lodged.

78. The Claimant's maternity leave ended in September 2020 but she immediately then commenced a period of sickness absence with work related stress.

79. The Claimant's grievance appeal hearing was heard by Ms Jackie Armstrong on 28 September 2020. On 6 October 2020, Ms Armstrong gave the grievance outcome. She said that the reason why the offer was withdrawn was because of a job evaluation. She said that the reinstatement of the job offer was unrelated to the grievance. She stated that the post was still available, that the Claimant should receive back pay at the CIO pay grade to 22 October 2019 (the date she accepted the role) if she now took it up. She also recommended that mediation be explored.

80. On 8 October 2020, Mr Mark Hartley-King, Head of Investigations, emailed the Claimant stating that the role was still open to her and that Ms Susan Keeley, the ACU Lead, would contact her to agree a mutually acceptable working pattern and start date. The Claimant asked to work compressed hours over 4 days.

81. The Claimant met with Ms Magbagbeola on 14 December 2020 and asked if she could be managed by someone other than Mr Bailey if she took up the ACCIU role. She was told that was not possible because of the size of the team. There were discussions about the possibility of mediation and the Claimant meeting with Ms Keeley to agree a working pattern. Ultimately, however, the Claimant remained unwell and these things did not come to fruition.

82. In May 2021, the Claimant withdrew from the ACCIU role. It was agreed with HR she would instead have a managed move to a different new role. There is no further explanation in the evidence before us about what the details of a managed move are and there is no document explaining it.

83. In December 2021, the Claimant became aware of an advertised vacancy *CIO Capability and Compliance team* in CFI (the 'CFI' role). She expressed interest in this role and made a personal statement setting out her suitability.

84. The recruiting manager was Mr Roderick MacDonald. He was asked to assess the Claimant's suitability for the role based on her personal statement. He was aware that the Claimant was a candidate for a managed move, however so far as he was concerned this did not involve treating the Claimant's application any differently to any other. Mr MacDonald was not aware of the background that led to the Claimant being a candidate for a managed move.

85. The Claimant's evidence was that she was a good candidate for this role. However, her evidence was very general and ultimately on this matter we prefer Mr MacDonald's evidence. We found his evidence to be cogent, detailed and well balanced. His evidence was very candid and it gave us confidence that he was doing his best to assist the tribunal. His assessment was that the Claimant was not a suitable candidate for the role for the following main reasons:

    85.1. She did not have recent experience of leading investigations into serious and complex immigration crime. Her most recent experience was Operation Hove which ended in 2017. Mr MacDonald's evidence was that matters had moved on very significantly important ways since then. He gave many, (what we find are) weighty examples of this. For example, wholesale changes to the law and practice on the handling of data in criminal investigations, as reflected in the DPA 2018, new policies/codes of practice from sources such as the ICO, the Attorney General and the Association of Chief Police Officers. He explained that these had led to fundamental changes in the way investigators have to conduct investigations.
    85.2. There was no evidence of experience in "*provide feedback in challenging non-compliant behaviours*";
    85.3. The Claimant had no background in policy or guidance drafting;
    85.4. The Claimant was not trained on CLUE a new case management system. However, in his oral evidence Mr MacDonald said this was not an important matter since the Claimant had clearly used other case management systems.

86. Contemporaneously Mr MacDonald summarised his reasons by saying: *'the lack of any operational investigative experience over what has been a protracted period is perhaps the most compelling reason for our decision.'*

87. There is some important further background within which Mr MacDonald's assessment needs to be understood:

    87.1. He operated a small, understaffed team.
    87.2. The team was geographically dispersed making it harder to accommodate an inexperienced colleague;
    87.3. The Nationality and Borders Bill was of great significance to the Home Office's investigative work. It was proceeding through Parliament and was anticipated to effect very major operational changes. The shape of those

changes was uncertain and as the bill progressed through Parliament were shifting. It was necessary to have internal positions, guidance and policy documents in place ready for the passage of the bill into law which was anticipated to be in April 2022 with a commencement date of July 2022.

87.4. The period of greatest urgency in the team was January 2022 to April 2022, with the subsequent period to July 2022 being almost as urgent.

87.5. Mr MacDonald's evidence was that this was the most difficult operating climate he had known surpassing even Brexit.

87.6. There had also been a significant Crown Court decision that had major implications for the way in which the Home Office carried out investigative work of certain kinds that an urgent response was needed to.

87.7. There was great pressure from the above as well as internal Home Office pressure and pressure from No. 10 to have a response in place to the bill when it passed into law.

87.8. The incumbents of the is CIO role needed to be subject matter experts who investigators within the Home Office considered credible.

87.9. It was essential therefore that whoever was recruited would be capable of doing the job immediately rather than after a period of training.

88. In this recruitment exercise, Mr MacDonald was hoping to recruit three people. Four people including the Claimant responded to the job advert. Two were existing but temporary members of Mr MacDonald's team. The other person passed a paper sift but then failed at interview. Thus only two posts were in fact filled and one remained vacant.

89. At the time that Mr MacDonald was considering the Claimant's application, he was not asking himself what it would take to bring the Claimant up to speed. He was simply assessing her against the essential criteria. However, in his witness evidence before the tribunal, he was asked about this matter and in essence his evidence was that:

89.1. The Claimant would have needed in the order of three to six months work in a criminal investigation team in Home Office to update her investigation knowledge and skills sufficiently that she would have the credibility needed to undertake the role.

89.2. The Clamant would alongside that and after that have needed a period of mentoring and training within the team to become expert in the matters which the team advised other teams about, such as the implications of (what became) the Nationality and Borders Act 2022.

90. We accept Mr MacDonald's evidence. We found him an impressive and credible witness. His answer were straightforward, clear and cogent and it was plain that he gave his considered view whether that was something that assisted the Respondent's case or not.

91. In May 2022, the Claimant returned to work on restricted duties (to her Immigration Enforcement Officer role). In September 2022, the Claimant accepted a managed move in CIO role in training and skills. She worked, and continues to work, a three day week owing to mental health vulnerabilities.

Law

Direct discrimination because of pregnancy/maternity

92. The EqA prohibits employers from treating an employee unfavourably (as opposed to less favourably) because of her pregnancy (s.18(2) EA 2010) or because she is exercising, is seeking to exercise or has exercised the right to maternity leave (s.18(4) EA 2010).

93. S.18 EqA provides:

> *18. Pregnancy and maternity discrimination: work cases*
>
> *(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
>
> *(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
>
> *(a) because of the pregnancy, or*
>
> *(b) because of illness suffered by her as a result of it.*
>
> *(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*
>
> *(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*
>
> *(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).*
>
> *(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—*
>
> *(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;*
>
> *(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.*

94. There is no comparative exercise. However, in order for a discrimination claim to succeed under s.18 EqA, the unfavourable treatment must be 'because of' the employee's pregnancy, pregnancy related illness or maternity leave.

95. In ***Interserve FM Ltd v Tuleikyte*** (2017) UKEAT 0267/16, [2017] IRLR 615 Simler P held that the correct approach to the question whether the treatment complained of was 'because of' the proscribed factor was essentially the same in the context of s 18 as in that of s 13. This was broadly endorsed by Underhill LJ in ***Commissioner of the City of London Police v Geldart*** [2021] IRLR 74.

96. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case

is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

Discrimination arising from disability

97. Section 15 EQA 2010 provides as follows:

(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

98. In ***Pnaiser v NHS England*** [2016] IRLR 170 the EAT gave the following guidance:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The

warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

99. The test for justification is whether the unfavourable treatment of the claimant is a proportionate means of a legitimate aim ***Buchanan v Commissioner of Police of the Metropoli****s [2016] IRLR 918).* The justification test is described further below under indirect discrimination.

Indirect discrimination

100. Section 19 EqA provides as follows:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

101. In ***MacCulloch v ICI*** [2008] IRLR 846, Elias J (as he then was) set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in ***Lockwood v DWP*** [2014] ICR 1257:

(1) The burden of proof is on the Respondent to establish justification….
*(2) The classic test was set out in **Bilka-Kaufhaus GmbH v Weber Von Hartz** (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*
(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].
(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

102. When assessing proportionality, the tribunal must reach its own judgment, but it must be based on a fair and detailed analysis of the working practices and business considerations involved, having regard to the business needs of the employer (***Hensman v Ministry of Defence*** *UKEAT/0067/14/DM*, *[2014] EqLR 670;* ***City of York Council v Grosset*** (*[2018] EWCA Civ 1105*, *[2018] IRLR 746*).

The burden of proof and inferences

103. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

104. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire

procedure and/or code of practice.

105. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

106. The position was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
>
> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.*
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"*
>
> *(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'*

107. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory*

questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'

108. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

109. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

110. It is not permissible to infer discrimination simply from unreasonable treatment. However, it can be permissible to infer discrimination from the failure to explain unreasonable treatment (***Bahl v The Law Society*** [2004] IRLR 799).

111. In ***Birmingham City Council v Millwood*** [2012] UKEAT/0564/11/DM, [2012] EqLR 910 (Langstaff J, President) the EAT said this:

'… We have to ask whether the Tribunal by asking for "something more" identified that which Mr Swanson submits they did: that there had here been a number of rejected explanations put forward for consideration. We approach this question by remembering that the purpose of the provisions is to identify a proper claim of discrimination, recognising that it is highly unlikely in the real world that there will be any clear evidence that that has occurred. The inference will have to be drawn if a claim for discrimination is to succeed at all. Though a difference in race and a difference in treatment to the disadvantage of the complainant is insufficient and something more is required, Mr Beever was prepared to accept that where as part of the history that the Tribunal was examining an employer had at the time of the alleged discriminatory treatment given an explanation for it which a Tribunal was later to conclude was a lie, that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof. We agree.

What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof.'

112. **In *Raj v Capita Business Services Ltd*** [2019] IRLR 1057, Heather Williams QC (Deputy Judge of the High Court) said this:

> *I then turn to what I will call as a shorthand, Mr Robison's* Millwood *point. Whether the evidence in any particular claim establishes a* prima facie *case that, absent an adequate explanation from the Respondent, the treatment in question was because of / related to a protected characteristic, will always be fact-sensitive and context-sensitive. In my judgement, in paras 25 and 26 of* Millwood*, the EAT was not seeking to lay down a rigid rule of law that the Claimant will always satisfy the stage one test and shift the burden of proof if the Tribunal finds the Respondent has given untruthful or wrong evidence about an aspect of whether the conduct happened or why it happened.*

113. In ***Gallop v Newport City Council* [2016] IRLR 395**, HHJ Hand QC said this at [62]:

> *As to the reversal of the burden of proof, I accept Ms Grennan's submission that this point fails both evidentially and in principle. The appellant relied upon* Birmingham City Council v Millwood *[2012] EqLR 910 and* Solicitors Regulation Authority v Mitchell *[2014] All ER (D) 44 (May) both of which make a valuable contribution to consideration of what more might be required than simply a difference in status and a difference in treatment before the burden of proof can be regarded as having shifted. But ultimately all such cases are exemplary; if there is a principle it is that explanations exposed as lies are likely to shift the burden of proof. But cases depend upon their own facts. That there has been a dishonest explanation will not necessarily shift the burden of proof in any particular case. The instant case is an example of that. Lies may be told to cover up a perfectly innocent explanation. In effect, this is what the Cadney Tribunal has found in this case and in my judgment that conclusion involves no issue of law let alone any error of law*

114. In ***Wisniewski (a minor) v Central Manchester Health Authority*** [1998] EWCA 596 Brooke LJ said this:

> *(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.*

115. In ***Efobi v Royal Mail Group Ltd*** [2021] UKSC 33, Lord Leggatt said:

> *The question of whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in [Wisniewski] is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."*

Discussion and conclusions

Pregnancy discrimination

116. The Respondent helpfully and realistically accepts that the answer to each of the questions at paragraphs 1.1 – 1.4 of the List of Issues is 'yes'. We agree.

117. The sole issue for us to determine is whether the withdrawal of the job offer was because of pregnancy.

118. In our view this is a case in which the statutory burden of proof is important. There is no direct evidence that the job offer was withdrawn because of pregnancy, but there is a large body of evidence from which we infer and find on the balance of probabilities that, absent an explanation, the treatment was because of pregnancy. We turn to that body of evidence.

119. Mr Bailey's response to the Claimant's email of 9 January 2020 (i.e. her response to his email of 19 December 2019 setting out a working pattern and associated matters) is very suspicious. In her email, the Claimant agreed in almost all respects to what Mr Bailey proposed. She identified just one problem which was that on some occasions she would not be able to start work early enough to finish her shift by 5pm (which was necessary to avoid lone working). She proposed one possible solution - namely to use annual leave.

120. Mr Bailey's response was very peculiar. We would expect a manager in his position to address the Claimant's concern about finishing at 5pm. That is all the

more so where (1) everything else was agreed and (2) it was only certain that the Claimant would have this issue for a short period (i.e., until commencing maternity leave). Thereafter it was unclear what her needs would be. What Mr Bailey actually did was unreasonable and obstructive.

121. The basis upon which Mr Bailey decided that the Claimant could not use her annual leave in the way she suggested was incredibly thin. He had a vague recollection that at some meeting in the past he had been told annual leave could not be used to make up contractual hours. However, given that he was making this issue a deal breaker in respect of giving the Claimant a start date, it is most surprising that he did not look into the matter properly. If he had, he would have seen that there was nothing in the annual leave policy forbidding it. The policy expresses the general principle that annual leave is for rest and recuperation, but there was nothing to indicate that the Claimant would be using it otherwise. After all on these days she would be working a shift that was 2 hours shorter than it would otherwise have been. Presumably that would have been more restful and relaxing than working a full shift.

122. Mr Bailey did not ask Ms Magbagbeola (or anyone) for advice on whether or not he was right to take this hard line on the use of annual leave and that is again very surprising. Ms Magbagbeola's evidence is that for short periods it was acceptable to use annual leave to cover contractual hours. There was only a short period between the discussions with Mr Bailey and the commencement of the Claimant's maternity leave, so in one sense the period in question was short.

123. In any event, using annual leave was just one possible solution to the problem and no doubt there were many others that merited consideration. The internal grievance outcome as communicated in the letter to Mr Bailey said this:

> *I also considered that they were unnecessary, unduly inflexible and supported by no sustainable business rationale. The applicant already had in place a Flexible Working Agreement which I considered could have been readily transposed to the new role, or adjusted with a greater degree of consideration to the benefit of both the applicant and the business*

124. The Respondent does not seek to go behind this analysis and we in any event agree with it.

125. Taking all that into account, serious doubts immediately arise as to whether the Claimant's difficulty in finishing at 5pm was the real reason for refusing to give the Claimant a start date (which in turn had the effect of withholding her promotion).

126. The next matter is that it is clear to us that after 6 November 2019, despite his oral evidence to the contrary, Mr Bailey was preoccupied about the post maternity leave period and what the Claimant's working hours would be at that point. We think the contemporaneous documents make this very clear. In his email of 21 November 2019, he essentially said in terms that part-time working (which is something that only relates to the post-maternity leave period) had to be considered prior to arranging a start date. This arose out of the meeting of 6

November 2019 when the Claimant indicated that she might want to work 2 days per week on return from maternity leave.

127. The documents show that Mr Bailey maintained this preoccupation despite the Claimant saying on at least two occasions after 6 November 2019 that she in fact was uncertain what hours she would want to work after maternity leave and asking to defer that matter. Nonetheless, a repeated feature of Mr Bailey's internal correspondence, in which he was considering or discussing whether/when the Claimant could start, was about precisely that matter.

128. Of course we appreciate that working hours and pregnancy/maternity leave are distinct grounds. However, we find it very unlikely that Mr Bailey would have been thus preoccupied with the possibility of the Claimant wanting to work 2 days per week starting in approximately 12 months time, if in the meantime the Claimant had not been pregnant and due to go on maternity leave. It seems to us that, absent pregnancy and maternity leave, the overwhelming likelihood is that Mr Bailey would simply have crossed the bridge of a potential request to work part-time 2 days a week if and when the issue actually arose. Pregnancy/maternity leave was/were the factor(s) that made him want to address that future possibility immediately.

129. A further link with pregnancy is that one of the reasons for the delay in agreeing a start date was that Mr Bailey took the view that he needed to await the outcome of an OH report before the Claimant could commence employment. He says this was based on Government Recruitment Service Guidance. That guidance has not been put before us and therefore any nuances to it have not either. In this case, awaiting an OH report did not make any real sense. The Claimant was a current employee who was currently in work in an adjacent team. She had been placed on non-operational duties pursuant to a risk assessment and there was no apparent reason why she could not commence in her new role without an OH assessment. No doubt an updated pregnancy risk assessment would have been prudent. Mr Bailey's email, described in our findings of fact, says that he was "debating" awaiting the outcome of an OH report. This reflects the reality that in our view there was no strict requirement to do so in the circumstances of the Claimant's case.

130. The Respondent's case is that Mr Tucker was the ultimate decision maker when it came to the withdrawal of the job offer. The contemporaneous documents make clear and in any event we are satisfied, that Mr Tucker was well aware that the Claimant was pregnant, that she was due to take maternity leave and of the details of Mr Bailey's negotiations/correspondence with her.

131. We acknowledge that the issue of Mr Bailey not giving the Claimant a start date and Mr Tucker withdrawing the job offer are distinct. However, we are sure that they are factually closely linked matters and that our analysis of Mr Bailey's approach sheds light on Mr Tucker's. Mr Bailey had day to day management of this issue and was clearly in communication with Mr Tucker about it. We think it likely that Mr Bailey's approach influenced Mr Tucker's.

132. Mr Tucker did not give evidence. In closing submissions, Judge Dyal asked Mr Duffy if he would like to say anything about this and whether he accepted that in the right case the failure to call a decision maker could lead to an adverse inference being drawn. Mr Duffy accepted that in principle adverse inferences could be drawn but submitted they did not fall to be drawn in this case. As to the reason for Mr Tucker not giving evidence, Mr Duffy took instructions and having done so said that Mr Tucker had "*retired in 2020 and was not willing to get involved*". He did not know why Mr Tucker was not willing to get involved. Ms David submitted that an adverse inference should be drawn.

133. The inference we are, in effect, asked to draw is that the Claimant's pregnancy was a ground of her treatment and that Mr Tucker did not have an account of his decision to withdraw the job offer that would withstand the scrutiny of giving evidence in a tribunal hearing.

134. We do find the absence of evidence from Mr Tucker very troubling for a number of reasons. Firstly, he is the actual decision maker in relation to the withdrawal of the job offer; therefore it is his evidence that matters more than anyone else's. Secondly, his absence is in reality not explained in any meaningful way. The fact he has retired is not of itself an explanation – retired people can give evidence just like anyone else. No reason is given as to why he was "*not willing to get involved*". Thirdly, there is a real paucity of contemporaneous documents that shed light on the decision and decision making process. There is not a single document before us from the job evaluation exercise itself, nor any primary documents, such as notes of meetings, that evidence the thought process once the job evaluation exercise was complete. All there are a few very short emails from Mr Tucker that assert the reason for withdrawing the job offer. Even these are significantly undermined by Ms Magbagbeola's evidence that the reason for withdrawing the job offer is different to the reason stated in those emails.

135. Further, and this is an important point in its own right as well as an additional reason why we are troubled by the absence of Mr Tucker, the Respondent was *deliberately* obscure in its communications with the Claimant about the reason for withdrawing the job offer and indeed the reason for reinstating. It deliberately chose not to explain to her what the reason was at the time but instead to phrase the correspondence in a cryptic way. It has failed to explain why it did this. In the circumstances of this case we find that very suspicious.

136. Taking all these matters into account we are satisfied that there is a strong prima facie case that, at the least a material part of the reason why the job offer was withdrawn, was the Claimant's pregnancy and thus the burden of proof shifts. There is a more than sufficient basis for us to conclude on the balance of probabilities that the Claimant's pregnancy was a significant part of the reason why the ACCIU job offer was withdrawn.

137. We are not satisfied that the respondent has proven a non-discriminatory explanation.

138. Again, we have not heard from Mr Tucker at all and we repeat the above analysis. The witnesses we have heard from gave different accounts of the reason for the withdrawal of job offer. Mr Bailey says it was because of the outcome of the job evaluation exercise. Ms Magbagbeola said repeatedly in her oral evidence it was inability to agree the Claimant's working pattern. That contradicted her witness statement which identified the job evaluation outcome as at least the primary reason. Her evidence in re-examination left her evidence equivocal. The picture painted by the contemporaneous documents is also both murky and inconsistent. The decision making process around the reinstatement was highly opaque and again there is a paucity of documentation evidencing what happened, when and why.

139. We have no hesitation in finding that the Respondent has failed to prove a non-discriminatory reason for the treatment.

140. The complaint of pregnancy discrimination thus succeeds.

Section 15

141. The Respondent helpfully and realistically accepts that the answer to issues 3.1, 3.2 and 3.5 is 'yes'. We agree. The battle ground is therefore over issues 3.3 and 3.4.

142. As to issue 3.3, the Respondent submits that the unfavourable treatment (the refusal of a managed move to the ACCIU vacancy) was not because of the Claimant's disability related sickness absence. It submits this on the basis that, it says, had the Claimant been at work during this period rather than on sick-leave (i.e., at work between September 2020 when maternity leave ended and January 2022 when she applied for the job) there would have been insufficient time for her to acquire much further experience of immigration crime investigations.

143. We reject that submission. If the Claimant had been at work in that period she would have been an investigator, and given her background and experience, she would have got up to speed with the recent developments in investigation practice and procedure. A period of a year or so was plenty for her to do that. This conclusion is supported by Mr MacDonald's evidence that he would estimate that a period of 3 – 6 months work in investigations was what someone like the Claimant (i.e., someone with a strong background in investigating immigration crime) required to get back up to speed and meet that aspect of the essential criteria of the job role.

144. The Respondent also submits that the lack of recent experience was not the only reason why the Claimant did not get the job. For instance she also did not have a background in drafting policy and guidance. That is true, but there is no need for the Claimant to show that the 'something' which arose in consequence

of disability was the only reason for the unfavourable treatment. It is sufficient that it was one of the material reasons.

145. Issue 3.5 is whether the unfavourable treatment was a proportionate means of achieving a legitimate aim. We return to this below.

Indirect discrimination

146. The Respondent helpfully and realistically concedes that the answer to issues 4.1 – 4.5 is 'yes'. The dispute is limited to justification.

Justification

147. We are alive to the fact that in a s.15 claim the 'thing' that has to be justified is the unfavourable treatment and that in an indirect discrimination claim the 'thing' that has to be justified is the applicable 'PCP'. In this case, however, the factors that bear on justification are the same in both cases are very similar. In argument no distinction was made between the factors bearing on justification in the context of s.15 and in the context of indirect discrimination. In this case, the PCP in this case is defined in a very narrow, role specific way that aligns it very closely with the unfavourable treatment in issue in the s.15 claim. We can therefore conveniently deal with justification for both s.15 and indirect discrimination together.

148. The Respondent relies upon the same putative legitimate aim in respect of both the s.15 and indirect discrimination claims, namely:

> *"to fill vacancies with suitably skilled and experienced employees to maintain operational efficiency and meet business needs."*

149. The Claimant accepts that this was a legitimate aim. We agree, it plainly was. We also accept that, factually, it was the aim.

150. *Real need*: we find that the aim did indeed correspond with a real business need. We set out in our finding of fact, Mr MacDonald's evidence about the importance of the role and the importance of the incumbents of the role being able to immediately fulfil the role requirements. We accepted that evidence and consider that it demonstrates amply that there was a real need.

151. We reject the Claimant's submission that "*it is clear that there was not a real need to immediately have three operatives in the posts advertised, as only two actually began*". That is not a sound argument. The fact that only two posts were filled reflected the fact that there were only two suitable candidates. The reason the third post was not filled was simply that there was not a suitable third candidate to fill it; it was *not* that there was no real need to fill it.

152. *Appropriate to the employer's objectives/necessary in the sense of reasonably necessary:*

153. We find that the unfavourable treatment was reasonably necessary to achieve the employer's objective:

153.1. We agree with the core of Mr MacDonald's analysis that the Claimant lacked some of the essential skills/knowledge for the role. In particular she lacked recent experience of investigating immigration crime. The need for experience to be recent was very important because there had been a lot of very significant changes to investigation law, practice and procedure since the Claimant's investigation experience. Further, in order to have any credibility as a subject matter expert advising experienced investigators in other teams, it was essential to have recent experience. She also did not have a background in drafting policy documents or guidance. That was a core aspect of the job.

153.2. It is true that with a secondment to an investigation team for 3 – 6 months, followed by a subsequent period of training and mentoring within Mr MacDonald's team (of say a further 3 months), the Claimant could eventually have met the essential skills requirements of the role. Given this and the fact that the Respondent was unable to actually find a suitable third candidate, we have given careful thought to whether the unfavourable treatment was appropriate to the employer's objectives/reasonably necessary.

153.3. We conclude that it was. Firstly, during the most critical period of January to July 2022, the Claimant would not have been contributing to the output of the team. Secondly, in reality if she had been give the post, it would have meant that instead of the other team members being able to focus just on their own work, they would have needed to devote a significant amount of time and resource to training and mentoring the Claimant. Thus for a period of perhaps 6 – 9 months (i.e., 3 – 6 months on secondment in another team followed by a period of mentoring and training on return) the Claimant would not have augmented the team's capacity. Rather she would have reduced it at least when she returned to the team following secondment. The team would have needed to invest significant time and effort in training and mentoring her. Thirdly, if the role had been given to the Claimant then it would have been filled and that would have meant that *if* a well qualified candidate came along, the role would have been taken and unavailable. Fourthly, the context really matters. This was a small geographically dispersed, over-stretched team that was operating immense, indeed exceptional, pressure (see findings of fact). It simply did not have the capacity to bring someone who did not have the required skills up to speed.

154. We also take the view that the aim could not have been achieved through less discriminatory means. The only alternative to rejecting the Claimant's application was to offer her the role together with an extended period of training to include a secondment in an investigation team followed by further training in Mr

McDonald's team. This was not a viable option for the reasons we have explained. Again, it would have reduced the capacity of the team even further and would have taken up a vacancy that could not then be filled if a suitable candidate came along.

155. This did have a discriminatory impact on the Claimant because it meant that she could not complete the managed move. That was a significant impact albeit that it was in part mitigated by the fact that she remained in employment and remained a candidate for further managed move opportunities (which later came to fruition). The impact was not as severe, thus, as it would have been if the refusal of this managed move had led to the termination of her employment.

156. In any event, we are satisfied that the business need was sufficiently weighty that it was proportionate to refuse the Claimant (or anyone that lacked the essential skills for the job and who would have required a significant period of training to acquire them) the role.

157. For essentially the same reasons we think that the PCP was reasonably necessary to achieve the aim.

158. We are satisfied that the means the Respondent adopted for achieving its legitimate aim were proportionate.

159. The s.15 and the indirect discrimination claims must therefore fail.

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Employment Judge Dyal

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Date 14.03.2023