EMPLOYMENT TRIBUNALS

Claimant:	**Ms D Lima Morocho**
Respondent:	**Ballymore Asset Management Limited**
Heard at:	**London South Employment Tribunal**
On:	**26 – 28 September 2022**
Before:	**Employment Dyal, Mrs Leonie Brooks and Ms Elaine Thompson**
Representation	
Claimant:	**In person**
Respondent:	**Mr T Fuller (Legal Executive)**

RESERVED JUDGMENT

1. The indirect discrimination claim succeeds in part. The PCP at paragraph 1.1.2 of the list of issues was indirectly discriminatory in relation to the Claimant when it was applied to, and resulted in the refusal of, her request to be furloughed in January 2021. However, it was not indirectly discriminatory nor otherwise unlawful to require the Claimant to attend a disciplinary hearing.

2. The claims otherwise fail and are dismissed.

CASE MANAGEMENT ORDER

1. The parties shall liaise to seek to agree remedy. If they are unable to do so, they must notify the tribunal within 28 days of this document being sent to the parties. A remedy hearing will then be listed.

REASONS

Introduction

1. The matter came before the tribunal for its final hearing.

The issues

2. The issues for adjudication are as follows:

1. **Indirect discrimination (Equality Act 2010 section 19)**

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

1.1.1 Having no (or no adequate) policy and/or rules regarding support with childcare during the pandemic and/or long-term events outside the employees' control

1.1.2 Using the Coronavirus Job Retention Scheme [the furlough scheme] for housekeepers on a limited basis (e.g. only during periods of lockdown and giving priority to housekeepers who have not previously been furloughed). [Added by amendment]

1.2 Did the respondent apply the PCP to the claimant?

1.3 Did the respondent apply the PCP to men or would it have done so?

1.4 Did the PCP put women at a particular disadvantage when compared with men, in that they were more likely to have childcare responsibilities that made it difficult for them to attend work or disciplinary hearings during the lockdowns?

1.5 Did the PCP put the claimant at that disadvantage?

1.6 Was the PCP a proportionate means of achieving a legitimate aim?

1.7 The Tribunal will decide in particular:

1.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

1.7.2 could something less discriminatory have been done instead;

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

2. **Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)**

   2.1 Did the respondent treat the claimant unfavourably by doing the following things:

      2.1.1 Holding the disciplinary hearing in her absence;

      2.1.2 Dismissing the claimant without her attending a disciplinary hearing;

      2.1.3 Failing or refusing to reschedule the disciplinary hearing when informed of the claimant's hospital attendance on 20 January 2021;

      2.1.4 Rejecting her appeal despite being informed that the reason she was unable to attend the disciplinary hearing on 20 January 2021 was due to pregnancy-related illness?

   2.2 Did the unfavourable treatment take place in a protected period?

   2.3 Was the unfavourable treatment at 2.1.4 because of the pregnancy?

   2.4 Was the unfavourable treatment at 2.1.1 to 2.1.4 because of illness suffered as a result of the pregnancy?

The hearing

3. This claim was case managed by Employment Judge Ferguson at a Preliminary Hearing on 17 June 2022. The issues were identified at that hearing and the parties were given 14 days from the date on which the record of the hearing was sent to them to say if either considered the issues to be incorrectly or incompletely stated. Neither did so.

4. At the outset of the hearing, Judge Dyal noted that in the Claimant's witness statement and in the witness statement of Mr Ibhadiyi, there was a lot of focus on race discrimination. He pointed out that there was no complaint of race discrimination in the claim form and that no issue of race discrimination had been identified at the Preliminary Hearing. The Claimant said that her former union had prepared the claim form for her.

5. No application to amend the claim was made to add any complaint of race discrimination. The issues had been carefully identified. The apparent complaints of race discrimination were completely outside of their scope. They were matters that could not possibly have been added to the issues without amendment,

adjournment for a further round of pleading, particularisation of the complaints, disclosure and exchange of witness evidence.

6. However, an amendment was made in respect of another matter. The Respondent's pleaded case was that it admitted the factual content of the PCP the Claimant relied upon (*Having no (or no adequate) policy and/or rules regarding support with childcare during the pandemic and/or long-term events outside the employees' control*) but it denied that this amounted to a PCP. However, Ms Benvenuto's evidence made plain that the Respondent's policy/practice had been to make use of the *Coronavirus Job Retention Scheme* (CJRS). One of the uses to which the Respondent put the CJRS was to furlough some employees who had childcare problems arising out of the pandemic (e.g. because of school closures). It light of this it appeared to the tribunal that the Respondent's pleaded case was plainly wrong. There *was* a policy/practice/set of rules in place precisely to deal with the pandemic and, among other things, childcare problems caused by the pandemic.

7. Ms Benvenuto's evidence was given on day 2. The tribunal considered this problem overnight and raised it with the parties at the outset of day 3. It pointed out that the Respondent's pleaded case appeared to be contradicted by the Respondent's evidence and that this placed the tribunal in an invidious position. It seemed quite wrong to proceed on the basis that there was no relevant policy/practice/set of rules when on the Respondent's (uncontradicted) evidence there was one.

8. Mr Fuller's initial response was that there was no contradiction because the use the Respondent made of the CJRS was not soley related to childcare so the the Respondent's rules/practices around its use were not just about childcare. That may be true, but is immaterial. It matters not whether the rules/practice in question deal only with childcare in the pandemic or whether they deal with childcare but also with other things too. If they deal with childcare in the pandemic then they are plainly relevant. Mr Fuller's considered position was, realistically, to accept this point.

9. There was a discussion as to what to do about this matter and ultimately it was agreed all around that there should be an amendment to add the PCP that now appears at paragraph 1.1.2 of the list of issues. Before taking that course the tribunal specifically checked with the Respondent whether it considered that it would be prejudiced by the PCP being added at a late stage. The tribunal specifically asked whether the Respondent's position was that all the evidence there was sensibly to give on the matter had been given by Ms Benvenuto or whether there was further evidence that the Respondent would wish to give whether now or on another occasion. Mr Fuller responded that it was the former. We were therefore satisfied that there was no prejudice to the Respondent in the PCP being added at a late stage.

10. In short we were content to allow an amendment to add the new PCP:

    10.1. It resolved the invidious position the tribunal had been placed in;
    10.2. It was very closely related to the original PCP;

10.3. The need for amendment arose in significant part out of the Respondent's witness evidence;
10.4. The Respondent was not prejudiced by its late addition;
10.5. The amendment was by consent;
10.6. The amendment could be made consistently with the principles upon amendment in ***Selkent Bus Co Ltd v Moore*** *[1996] ICR 836* and ***Abercrombie and others v Aga Rangemaster Ltd*** *[2014] ICR 209.*

Adjustments to the hearing to accommodate the Claimant

11. The Claimant attended the first day of the hearing with her baby who is now 11 months old. She said that she had tried to get a friend to look after the baby but the arrangement had broken down. She was optimistic of obtaining childcare for the subsequent two days of the hearing.

12. The Claimant instructed a solicitor on 20 September 2022 having borrowed money in order to do so. She had been expecting him to represent her at this hearing. However on 23 September 2022 the solicitor told her (and the tribunal) that he was no longer representing.

13. In light of these matters we had a lengthy discussion at the outset of whether, and if so how, to proceed. The Claimant did not directly apply to adjourn. However, Judge Dyal explained what a tribunal hearing involved and asked if she was ready to represent herself. She said she was not. Judge Dyal asked her directly if she wanted to adjourn and she indicated that she thought this may be best.

14. However, the discussion continued and Judge Dyal outlined an alternative possibility of starting the evidence on day 2. That would give the Claimant the remainder of day 1 to prepare questions for the Respondent's witnesses. The Claimant indicated that a friend of hers, who was also her witness, Mr Ibhadiyi, was assisting her with preparing questions and that he may be able to attend the hearing on day 2. We took a short break so that the Claimant could speak to Mr Ibhadiyi and see whether he would be able to attend on day 2 and assist with questioning.

15. When the hearing resumed, the Claimant indicated that Mr Ibhadiyi was able to attend on day 2 and would assist her with questioning the Respondent's witnesses. Judge Dyal asked the Claimant what her considered position was, did she prefer to postpone the hearing to another listing or did she want the hearing to proceed on day 2? The Claimant's answer was that she preferred the hearing to proceed on day 2. She did not know whether she would be able to secure representation nor secure Mr Ibhadiyi's assistance with questioning witness on a subsequent occasion so she preferred to proceed. We also considered it right to proceed for those reasons and others. The hearing had long since been listed. The tribunal was ready to hear the case and otherwise has huge listing pressures. The Respondent's witnesses no longer worked for the Respondent and had taken annual leave from their new jobs to give evidence. Overall, it was clearly correct to proceed.

16. The Respondent's witnesses gave evidence on Day 2. They were cross-examined at length by both the Claimant and Mr Ibhadiyi. The tribunal gave a great deal of leeway in the questions it allowed and assisted both of the questioners to formulate questions from what were, often, lengthy statements to witnesses. The Claimant's evidence began at the end of Day 2 and completed at lunch time on Day 3. Both sides made oral closing submissions. Mr Fuller also relied upon a detailed skeleton argument. We considered the submissions with care.

Interpreter

17. The Claimant was assisted throughout the hearing by a Spanish language interpreter, Ms Andrea Hurtado. We identify her by name because we wish to pay tribute to the simply first class job that she did throughout, what was, a challenging hearing.

Documents before the tribunal:

17.1. Bundle running to 287 page;
17.2. Witness statements for:
  17.2.1. The Claimant;
  17.2.2. Mr Edmund Ibhadiyi, formerly employed as a security guard by the Respondent;
  17.2.3. Ms Maki Benvenuto, former Resort Director of the Respondent;
  17.2.4. Ms Julie-Ann Palmer, former Resort Director of the Respondent.
17.3. Respondent's chronology;
17.4. Respondent's skeleton argument.

Findings of fact

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

19. The Respondent provides building services, including the cleaning of communal areas, in a number properties around London.

20. The Claimant commenced employment with the respondent on 12 January 2019. She was employed as a housekeeper at Embassy Gardens, a large, multi-storey, residential property divided into flats. Her working hours were 7am – 4pm, five days per week. The days she and the other Housekeepers worked varied according to a rota.

Claimant's personal circumstances

21. Some of the Claimant's personal circumstances are relevant background in the case. She is from Ecuador and speaks English as an additional language. Her primary language is Spanish. The Claimant has children: an 8 year old son and an 11 month old daughter.

22. The Claimant's son was 5 to 6 at the time of the events to which this claim relates. As set out further below the Claimant became pregnant with her daughter towards the end of the chronology of this case.

23. At the outset of her employment the Claimant's son was in Ecuador. However, he joined her in England in around December 2019. He commenced school. We surmise that in the 2019 – 2020 academic year he was either in Reception or Year 1.

24. The Claimant's working hours in part fitted around school hours. Outside of school hours her primary assistance with childcare was from her father. He tended to take the Claimant's son to school and pick him up when she was not able to and otherwise look after him when she was at work. The Claimant was sometimes also assisted by a friend.

The Claimant's employment

25. The Respondent had a suite of workplace policies which were collated together in its employee handbook. The Claimant was emailed a copy of the handbook at the outset of her employment and was later given an updated version of it. In her evidence she appeared to be unfamiliar with its content and we infer that she never read it nor attempted to read it.

26. Among other policies, the handbook included an Employee Standards policy which provided as follows:

> - You must not take a financial interest, other than your remuneration, in any matter in which you act in your capacity as an individual employed by the company.
>
> - You must devote the whole of your time, attention and abilities, during your hours of work for the company. You may not, under any circumstances, whether directly or indirectly, undertake any other duties, of whatever kind, during the hours of work for the company.
>
> - You may not without prior written consent of a senior manager or director (which will not be unreasonably withheld) engage, whether directly or indirectly, in any business or employment which is similar or in any way connected to or competitive with the business of the company in which the employee works or which could or might reasonably considered by others to impair his / her ability to act at all times in the best interest of the company outside the normal hours of work for the company.
>
> - You must inform the Directors of all the relevant facts and gain their permission before agreeing to take part directly or indirectly in the activities of any other business, individuals involved in construction before otherwise accepting any income or other benefit from such an organisation. Permission will not be unreasonably withheld where there is no impact on the normal performance of the individual's work.
>
> - You must not accept any gift, favour or hospitality which is intended to influence the independent and objective performance of your duties as an employee of the company or which could reasonably be thought to have such an intention.

27. The handbook also contained a variety of policies relevant to the interface between work and family including a family leave policy.

28. The Claimant was part of a team of around 14 housekeepers at Embassy Gardens. Most of the housekeepers were women. The Claimant thought there were two men in the team though she was uncertain. Ms Benvenuto said there were five. We prefer Ms Benvenuto's evidence on this. Ms Benvenuto was in a better position generally to know who was on the team since she was a manager with an overview. The Claimant on the other hand worked shifts so did not have full exposure to the rest of the team. She was also off sick for a large portion of the chronology.

29. At the relevant times:

    29.1. The Claimant's immediate line manager was Ms Nona Smadu;
    29.2. Above Ms Smadu was an operations manager;
    29.3. Above the operations manager was the resort director, Ms Benvenuto.

30. The Respondent employed a range of other people at Embassy Gardens, including security staff. Mr Ibhadiyi was one such security guard.

31. The Claimant had a difficult relationship Ms Smadu whom she believes favoured Romanian Housekeepers and treated housekeepers of all other races badly. The treatment the Claimant refers to took a variety of forms including undue criticism of her work and the manner in which she was spoken to.

32. In December 2019, the Claimant was signed off work with neck pain. She remained signed off with neck pain until 30 March 2020, although along the way there was also an isolation note.

33. In March 2020, the Covid-19 pandemic hit the United Kingdom. There was a national lockdown and, among other things, schools were closed to most children including the Claimant's son. Schools remained open to keyworkers' children but (as Mr Fuller ultimately accepted) the Claimant was not a keyworker for this purpose.

34. The Claimant was furloughed pursuant to the *CJRS* from around the end of March to the beginning of June 2020 when the lockdown was eased and schools reopened, at least to Reception and year 1, at the beginning of June 2020.

35. She then took two weeks annual leave at the beginning of June and returned to work on 17 June 2020. The Claimant's evidence was that she was in content to return to work at this time. The only issue was that she had problems with Ms Smadu. [Our initial understanding had been that part of the Claimant's complaint was that she was not furloughed for longer than she was in the first lockdown. However, her evidence and the case she pursued was to the contrary].

36. On 19 June 2020, Ms Smadu wrote a file note complaining that the Claimant had failed to adequately clean some ventilation grills. The Claimant considered the criticism of her to be unfair.

37. On 25 June 2020, the Claimant raised a lengthy written grievance. The Claimant complained about the criticism of her in relation to cleaning the ventilation grills. She also complained that she felt she had been targeted and treated differently to others. She said that she was not the only person who had been upset by Ms Smadu and that other colleagues had cried as a result of how they had been treated. She further said that Ms Smadu complained about most of the workers save for those from Romania.

38. On 26 June 2020 the Claimant commenced a new period of sick leave. She was signed off with 'stress at work'. She continued to be signed off with 'stress at work' until 11 December 2020.

39. The Claimant was invited to a grievance hearing but indicated that she was not well enough to attend.

40. On 4 September 2020 the Claimant was invited to a stage one capability absence meeting. The meeting took place on 14 September 2020.

41. By a letter dated 22 September 2020 an outcome was given to the Claimant's grievance. This followed a grievance investigation in which a number of colleagues were interviewed. The grievance succeeded in some respects. It held that there had been inadequate investigation of the Claimant's performance in respect of cleaning the ventilation grills. It held that Ms Smadu needed to work on her communication style. It did not uphold the more serious allegations in the way of bullying/discrimination. On 24 September 2020 Mr Chow wrote to Ms Smadu issuing her with a *'cause for concern'* letter. In essence it gave her words of advice.

42. On 24 September 2020, Mr Cross wrote to the Claimant notifying her that the outcome of the stage one absence capability meeting, which was a referral to OH. The Claimant was invited a stage 2 capability meeting on 5 October 2020.

Disciplinary Investigation

43. At some stage, the date of which is opaque but must have been between around the beginning of September and mid-November 2020, an investigation was commenced into the Claimant's attendance at Embassy Garden on certain dates during her sick-leave.

44. The evidence as to how the investigation arose is also opaque. Ms Benvenuto's evidence is that two housekeepers reported to Ms Smadu that they had seen the Claimant in the workplace whilst on sick-leave although it is not in evidence when these reports were made. These sightings prompted a request for CCTV footage to be reviewed and in turn an investigation commenced. Ms Benvenuto knew the name of one of those colleagues (like the Claimant she was called 'Diana') but not the other.

45. In any event this culminated in an investigation report, authored by Mr Ali, Night Manager, dated 14 November 2020:

45.1. Upon review of CCTV footage, the Claimant had come to Embassy Gardens on 16 August 2020 and 1 September 2020;
45.2. On one occasion (we now know this was 16 August 2020), she had met with the residents of a particular apartment (the two adults and their child). She was given the keys to the apartment, the residents went out and the Claimant went up to the property.
45.3. On the other occasion (1 September) she was wearing sunglasses and a mask and was said to be avoiding eye contact with other staff;
45.4. The investigator believed that she was onsite working for a resident privately and in terms recommended a gross misconduct charge and a disciplinary hearing.

46. On 30 November 2020, the Respondent wrote to the Claimant inviting her to a welfare meeting on 3 December 2020. The meeting did not proceed on that date, and on 9 December 2020 Mr Jama wrote to the Claimant again inviting her to a welfare meeting on 10 December 2020.

47. The meeting went ahead on 10 December 2020. It was chaired by Mr Jama, with Ms Haran taking notes. After the welfare meeting was completed the meeting moved on to another topic altogether. It was described to the Claimant as a fact-finding meeting and the Claimant was told that although it was not a disciplinary meeting if she did not give a satisfactory explanation then there may be formal disciplinary action. She was told that the purpose of the meeting was to consider her explanation for "allegedly coming in to work on 16 August 2020 and 1 September 2020 when signed off sick". This was the first the Claimant knew that there were any concerns about her conduct.

48. The notes of the meeting record the following matters:

48.1. The Claimant was asked if she had attended the site on the said occasions. She answered 'no'. She was asked if she had attended the site at all when signed off sick and she answered 'no'.
48.2. The Claimant was then confronted with images from CCTV footage. In the footage, she identified a resident of the building and said that this resident had given her the opportunity to work as a nanny although she did not at this point say when the work had been done. The Claimant was asked what the purpose of the visit to Embassy Gardens was. She essentially said it had been to collect some gifts from this resident namely some earrings and chocolates. She said "*I been working with her one year since I started work. I said I cannot come at this time".*
48.3. The Claimant was asked if she was aware of the Respondent's procedure for receiving gifts. She responded that she was not working for the Respondent after 4 pm or on her days off and that she could receive gifts at those time. She said she had been told by 'Moss' [Mr Chettibi, Security Manager] she could work after 4pm as a nanny. It was put to her that the employee handbook required her to tell the Respondent if she was working for another company or had another job. In response, the Claimant essentially asked what was permitted.

48.4. The Claimant said she only worked for the resident at night and not during working time. She said she had been asked if she wanted to clean but she declined because she had a bad neck.
48.5. The Claimant said she had come in on 1 September 2020 simply to chat with the resident who was a friend.
48.6. The Claimant accepted that she had received and signed for the staff handbook.
48.7. The Claimant said she had been told by Susan and Caita (they are cleaners) and Moss that she could work for a resident out of hours.
48.8. The Claimant was asked how long she had been working for the resident. She responded "*Just one apartment, she saw me as a friend I did not do it every night I do it one or times a month unless she called. I never got extra money just at night like 8 – 12 sometime 2 or 3 hours at night".* The Claimant said she had sometimes been paid in cash and sometimes was paid in kind with help with her English.

49. The Claimant was sent a copy of these notes following the meeting and asked to sign for their accuracy. She did not respond at all. At times she has suggested that she disagrees with the notes but has not explained in what way. On balance, our view is that the likelihood is that the notes capture broadly accurately what was said at the meeting.

50. However, the meeting had a significant shortcoming in that the Claimant had no one to assist her with English. Her English has real limitations to the point that we think she inevitably must have had some difficulty in fully understanding the nuances of what she was being asked and in responding entirely accurately in English.

51. On 10 December 2020 the Claimant was invited to a disciplinary hearing to answer the following charges:

- Alleged breach of employee standards in the conduct in work policy. Specifically, it is alleged that you have.

  1. Taken a financial interest, other than your remuneration, in any matter in which you act in your capacity as an individual employed by the company.
  2. Not obtained prior written consent of a senior manager or director (which will not be unreasonably withheld) to engage, whether directly or indirectly, in any business or employment which is similar or in any way connected to or competitive with the business of the company in which the employee works or which could or might reasonably considered by others to impair his / her ability to act at all times in the best interest of the company outside the normal hours of work for the company.
  3. You have accepted a gift, favour or hospitality which is intended to influence the independent and objective performance of your duties as an employee of the company or which could reasonably be thought to have such an intention.
     Further particulars being that you have admitted to working for one of the company's residents by babysitting their child and you have admitted to coming to work to accept a gift from them, specifically earnings.

52. The hearing was scheduled for 13 December 2020, a Sunday, by Teams. The meeting did not proceed on 13 December 2020, it is unclear why not.

53. The final fit-note in the bundle, expired on 11 December 2020. It is not apparent from the evidence before us whether or not the Claimant returned to work at this time or whether she remained off of work. The Claimant was asked about this in her evidence but she was uncertain.

54. On 14 December 2020, Mr Jama interviewed Mr Chettibi. He denied any awareness of Susan or Catia working for residents in their own time and denied any conversation with the Claimant about her working for a resident in her own time.

55. At around this time, the pandemic returned to crisis levels with the arrival of the Omicron variant. There was a lot of uncertainty about school opening, Christmas and lockdowns.

56. On 22 December 2020 the Claimant was invited to a disciplinary hearing, to take place by Teams on Saturday 2 January 2021. In this letter, the disciplinary charges were expressed differently, as follows:

- Alleged breach of employee standards in the conduct in work policy. Specifically, it is alleged that you have.

  1. Admitted coming into work whilst being signed off sick to work for a resident in Phase 2 Legacy building as a nanny.

  2. Taken a financial interest, other than your remuneration, in any matter in which you act in your capacity as an individual employed by the company.

  3. Not obtained prior written consent of a senior manager or director (which will not be unreasonably withheld) to engage, whether directly or indirectly, in any business or employment which is similar or in any way connected to or competitive with the business of the company in which the employee works or which could or might reasonably considered by others to impair his / her ability to act at all times in the best interest of the company outside the normal hours of work for the company.

57. The minutes of the investigation meeting were enclosed, along with screenshots of the CCTV footage from 16 August 2020 and 1 Sept 2020, the notes of the meeting with Mr Chettibi and a statement from Vimen Sengah-Udayen.

58. At some point in late December or very early January 2021, it was announced that schools would not immediately reopen after the Christmas break. This created obvious childcare problems.

59. The disciplinary hearing was rescheduled because the Claimant had requested annual leave for 2 January 2021. On 23 December 2020, the Claimant was invited to a disciplinary hearing on 6 January 2021 at 1.30pm via Teams. On 5 January 2021, Ms Benvenuto emailed the Claimant to fix up the arrangements for the following day and offered the Claimant the use of a laptop at the Respondent's premises to join the meeting.

60. On around 4 January 2020, the Claimant had emailed Ms Smadu and Ms Benvenuto attaching a letter from her son's school stating that it would be closed because of the new lockdown. We have not seen this email but it was referred to

in witness and other documentary evidence. The Claimant was certainly asking for assistance in light of her son being unable to go to school. We infer from the evidence that we do have (including paragraph 11 of Ms Benvenuto's statement) that she requested to be furloughed.

61. This request was refused. Ms Benevento's evidence, which we accept, was that the Respondent had some internal rules about the use of the CJRS. During the first lockdown it had furloughed a number of housekeepers including the Claimant. This had led to cleaning standards falling. In the second lockdown, although it had a reduced requirement for housekeepers because parts of the building were close (e.g. the gym), it still needed some housekeepers to clean the general communal areas. Where there were more requests for furlough than the business required, its policy or practice was to give priority to those who had not been furloughed in the first lockdown and those who were highly clinically vulnerable. The Claimant's request to be furloughed was refused (although there was no communication saying this) because she had been furloughed in the first lockdown.

62. The Claimant responded saying that she had never confirmed her attendance, that she had a 5 year old, that schools were closed and she would not be able to attend work. She wanted solution to enable her to attend work and said she may be forced to take annual leave. Ms Benvenuto wrote back, saying that the Claimant had failed to attend work on 2 and 3 January 2021, had not made any request for leave. She granted the Claimant leave between 6 and 10 January 2021. The Claimant further responded. In essence, she said that she had requested leave on 2 and 3 January and said she would need leave for two weeks from 6 January 2021 if the Prime Minister announced schools would be closed until 18 January 2021.

63. The upshot was that the disciplinary hearing was postponed and the Claimant was granted annual leave.

64. On 7 January 2021, the Respondent wrote to the Claimant rescheduling the disciplinary hearing to 9 January 2021, which was a Saturday. Ms Benvenuto's evidence was that she chose a Saturday in order to avoid any clash with home-schooling. She also scheduled the meeting to be by Teams.

65. On 9 January 2021, Ms Plazas of the United Voices of the World Trade Union, wrote to the Respondent on the Claimant's behalf asking for the disciplinary hearing to be postponed to 15 January 2021 in order to facilitate the representative's attendance.

66. On 12 January 2021, the Respondent wrote to the Claimant rescheduling the disciplinary hearing to 20 January 2021 at 13.30. The letter said that if the Claimant failed to attend the meeting would go ahead in her absence.

67. On 20 January 2021, the Claimant went to hospital in the early hours of the morning. She had pain and bleeding. She contacted Ms Smadu and told her that she was unwell but did not give any details. The Claimant does not recall the exact time of this.

68. The disciplinary meeting was scheduled for 13.30. Ms Benvenuto adjourned the meeting in light of the Claimant's absence. Ms Benvenuto was then told by Ms Smadu that the Claimant was unwell. Ms Benveuto emailed the Claimant on 20 January at 16.07 noting that she had not attended and asking her to attend at 17.00, 20 January 2021.

69. At 17.00 the disciplinary meeting proceeded in the Claimant's absence. Ms Benvenuto had a list of prepared questions that she would have asked the Claimant had she attended. In the Claimant's absence Ms Benvenuto extrapolated the answers to those questions from the existing materials, that is the CCTV footage, investigation report and investigation interview. She wrote the answers next to the questions in her notes.

70. The materials before Ms Benvenuto from which she extrapolated answers to the questions she would have posed to the Claimant, were in parts less than clear. Some of the answers the Claimant gave, as recorded in the notes of the investigation hearing, are uncertain as to their intended meaning. In our view, the interpretation that Ms Benvenuto gave to the materials was not at all generous to the Claimant. The notes did need to be interpreted because their meaning was unclear; Ms Benvenuto interpreted the notes in a way that tended to inculpate rather than exculpate the Claimant.

71. We accept Ms Benvenuto's evidence that she made the decision to dismiss the Claimant at the disciplinary hearing itself, which concluded at 17.31. We did pause for thought on this because there is an obvious convenience for the Respondent in the dismissal decision being made prior to there being any knowledge or hint of knowledge of pregnancy. Further we paused because the notes of the disciplinary meeting themselves do not record that the decision was made at this time and the dismissal letter was not promulgated until 26 January 2021. However, Ms Benvenuto's evidence on this point was not challenged, is not implausible of itself, we considered here generally to be a reliable witness and on balance we accept her evidence.

72. On 20 January 2021, the Claimant emailed Ms Benvenuto at 17.34. The subject line was "*resignation letter"* and the message said simply *"I hope you are ok and safe, please find the attached document*". However, nothing was attached. The Claimant emailed Ms Benvenuto at 17.38 and said *"Sorry… I was in the hospital emergency area for 7 hours from 12am until 6am and today I was all day with pains in the belly and a lot of bleeding and pain in the body".* At 17.47 she emailed again and said *"oh my God, I'm very bad, I'm sorry, I've been in the hospital in an emergency for 7 hours and I haven't been able to rest very well".* The email attached a letter of resignation. The resignation letter referred to the Claimant not being in good health but did not elaborate.

73. On 25 January 2021, the Claimant emailed Ms Benvenuto and said that she had been asked whether her resignation was immediate or not but she had retracted it and explained her reasons for doing so. She complained that other colleagues had been assisted by being furloughed and queried why she had not. She asked for her disciplinary hearing to be scheduled when her representative would

accompany her on 27 January. She said "*I have the medical report from the hospital and the new explanations about my health and my abdominal pain and the rest for 2 weeks".* No report was attached and no further health information was given.

74. The Claimant was summarily dismissed by letter of 26 January 2021. In essence the letter said as follows:

    74.1. Ms Benvenuto found that the Claimant had been working for a resident for a year. She inferred that the year in question was January 2020 to December 2020. That coincided with a period of sick-leave. She concluded that, notwithstanding the Claimant's explanations to the contrary, the Claimant had been working for the resident on 16 August and 1 September 2020.
    74.2. She concluded that the Claimant had received payments for her work.
    74.3. She questioned whether the work was limited to nannying given what was seen on the footage on 16 August 2020 and implied that the Claimant may in fact have been cleaning.
    74.4. She said that the Claimant did not have consent to do this work and that it breached her contract and the Employee Standards in the employee handbook in a number of ways.
    74.5. She concluded that this was gross misconduct.

75. On 27 January 2021, the Claimant appealed against her dismissal by email. She said in that email *"it's clear that my health has not been taken into consideration (and other topics as well). Yesterday I felt bad again and I went to hospital, the clinical assessment gave me a result that I am pregnant and I must attend an appointment with the gynaecologist today afternoon urgently. I have attached the clinic assessment report by the way."* The report confirmed the Claimant was pregnant however there were serious concerns about the pregnancy.

76. On 1 February 2021, the Claimant was invited to an appeal hearing on 9 February 2021 to be heard by Ms Julie-Ann Palmer. Ms Palmer was the Resort Director of a different property and she did not know the Claimant.

77. On 3 February 2021, the Claimant was assessed by her GP and was signed off sick with gynaecological issues from 20 January 2021 to 5 February 2021.

78. On 8 February 2021, the Claimant asked the appeal hearing to be postponed so her representative could attend.

79. On 9 February 2021, the resident whom the Claimant had met in the CCTV footage wrote to the Respondent. She said that the Clamant had worked doing some babysitting for her in 2019 on an ad hoc basis, but had not done so in the period August - September 2020. She said that the Claimant had been invited to her flat to give her some clothes and other items they no longer needed.

80. On 9 February 2021, the Respondent wrote to the Claimant rescheduling the appeal meeting to 15 February 2021.

81. The appeal hearing was chaired by Ms Palmer. The claimant was accompanied by Ms Kelly a union representative from the Allied Independent Working Union. Ms Palmer went through each ground of appeal and invited representations to be made, which they were at some length. Among other things, the Claimant said that she had not admitted that she had been working on the occasions for which there was CCTV footage. She said that she had only worked for the resident three or four times, which was as a nanny, in the early part of 2019.

82. The Claimant's appeal was dismissed by letter dated 12 March 2021. It dismissed all of the grounds of appeal which it engaged with in some detail. Among other things Ms Palmer concluded that even if the Claimant had not been working for the resident on 16 August or 1 September 2020 she had done so on other occasions without permission. She considered that, and the taking of gifts, to be gross misconduct.

Other background evidence

83. We accept both the Claimant's and Mr Ibhadiyi's evidence that there were other occasions when employees were given gifts by residents. This included, clothes, chocolates and on one occasion an £800 cake. There is no evidence to suggest that these gifts were managed in any way, for instance by being reported and registered. Nor is there any evidence of any disciplinary issue arising. We also accept Mr Ibhadiyi's evidence that gifts of this kind were so widely known about that management at Embassy Gardens must have been aware of them.

84. Mr Ibhadiyi gave evidence that there were other employees besides the Claimant who had done work for residents. He was also of the view that the management must have known about this. It does seems probable to us that there were other occasions on which employees carried out work for residents. The employees had significant exposure to the residents and inevitably had skills that the residents may find useful. However, there is no cogent evidence that the management were aware of any cases of this. There is also direct evidence (their oral evidence), which we accept, that neither Ms Benvenuto nor Ms Palmer were aware of any other cases of this.

85. Our overall impression of the evidence is that management did regard working for residents as a serious matter and this is reflected in the Employment Standards. It also makes inherent sense because the residents are in effect the Respondent's clients - its relationship with whom it was naturally protective over.

86. The Claimant gave specific evidence in the course of the disciplinary investigation that she and two other employees who had been told they could work for residents outside their working hours by Mr Chettibi, Security Manager. The Claimant did not work in security and Mr Chettibi was not her manager. It seems implausible that he told the Claimant that she could work for a resident outside her normal hours. It was simply nothing to do with him. He denied any knowledge of this when interviewed. On balance we think it is unlikely that Mr Chettibi gave anyone permission to work for residents out of their normal working time. The Claimant is mistaken in this regard.

Law

Direct discrimination because of pregnancy/maternity

87. 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).

88. 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.*

89. 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.

90. 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 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.

91. In ***Del Monte Foods Ltd v Mundon*** [1980] ICR 694 the EAT said: "*In a case where it is said that the reason for the dismissal is another reason connected with her pregnancy, not the pregnancy itself, it seems to us that the employers*

have to know the facts alleged by the employee as grounding the reason and also to know or believe that those facts relied upon are connected with the woman's pregnancy."

92. The facts of ***Really Easy Car Credit Limited v Thompson*** **[2018] UKEAT/0197/17** bear some similarity to those in this case in that shortly after the decision to dismiss was taken the employer discovered that the Claimant was pregnant and that this explained some facts that had been known (but not known to be related to pregnancy) at the time of the dismissal. HHJ Eady QC (as she was) said this:

> *What the ET appears to have done instead is to have found the Respondent liable by omission. When it found out about the Claimant's pregnancy, it seems the ET considered the Respondent was in a different position than it had been on 3 August. It appears that the ET considered that the Respondent ought then to have taken positive steps in revisiting its decision. More than that, the ET took the view that, once the Claimant had told the Respondent she was pregnant, "It must have been obvious … that the claimant's attendance at hospital and her emotional state were pregnancy related" (paragraph 4.4). Even if those were reasonable assumptions in the circumstances (although I do not suggest that they were (1) because the ET made no finding of fact that the Claimant had actually told anyone that her hospital visit had been related to her pregnancy and (2) I am not at all certain it would be reasonable to assume that an emotional outburst must be related to pregnancy), that was not the correct question for the ET. This was not a case where the Respondent's liability would be established if it had treated the Claimant unfavourably because of something arising from her pregnancy, i.e. akin to a section 15 EqA claim in a disability discrimination case. Rather, the legal test the ET had to apply was to ask whether the Claimant's pregnancy itself had been the reason or principal reason for her dismissal or whether the decision to dismiss had been because of her pregnancy. That required the Respondent to know of the Claimant's pregnancy when it took the relevant decision; it imposed no positive obligation on the Respondent to then revisit its decision after it learned of her pregnancy; see the case of Del Monte, which, on the facts, is indistinguishable from the present case in terms of chronology (and the Claimant's written submissions are wrong to suggest otherwise).*

Indirect discrimination

93. 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.

94. The best guidance, in relation to the identification of the pool is that of Lady Hale in ***Naeem v Secretary of State for Justice*** [2017] ICR 64:

> *40 … In the equal pay case of Grundy v British Airways plc [2008] IRLR 74, para 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in Allonby v Accrington and Rossendale College [2001] ICR 1189, para 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that "There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition."*
>
> *41 Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that: "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively." In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"—ie the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.*

95. In ***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601, Lady Hale said this at [14]

> *…as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in* Equality: the New Legal Framework*, Hart 2011, pp.64–68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.*

96. In ***Dobson v North Cumbria Integrated Care NHS Foundation Trust*** **[2021] IRLR 729** the EAT said this:

> **46** Two points emerge from these authorities.
>
> (a) First, the fact that women bear the greater burden of child care responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. We refer to this fact as "the child care disparity".
>
> (b) Whilst the child care disparity is not a matter directed by statute to be taken into account, it is one that has been noticed by courts at all levels for many years. As such, it falls into the category of matters that, according to *Phipson*, a tribunal *must* take into account if relevant.
>
> **47** That is not to say that the matter is set in stone: many societal norms and expectations change over time, and what may have been apt for judicial notice some years ago may not be so now. However, that does not apply to the child care disparity. Whilst things might have progressed somewhat in that men do now bear a greater proportion of child caring responsibilities than they did decades ago, the position is still far from equal. The assumptions made and relied upon in the authorities above are still very much supported by the evidence presented to us of current disparities between men and women in relation to the burden of child care.

97. It went on as follows:

> **56** In summary, when considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear in mind that particular disadvantage can be established in one of several ways, including the following.
>
> (a) There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected in limine;
>
> (b) Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;
>
> (c) The disadvantage may be inherent in the PCP in question; and/or
>
> (d) The disadvantage may be established having regard to matters, such as the child care disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken.

98. **In *McNeil and others v Revenue and Customs Commissioners*** [2019] EWCA Civ 1112, the court said this about particular *disadvantage:* "*In CHEZ Razpredelenie Bulgaria v Komisia za zashtita ot diskriminatsia, case C-83/14, [2016] 1 CMLR 14, the CJEU confirmed that the word "particular" in the phrase "particular disadvantage" was not intended to connote a disadvantage which was "serious, obvious and particularly significant" but simply to make clear that it was persons with the relevant protected characteristic who were disadvantaged: see paras. 99-100 of its judgment (p. 546). (That being so, the word would appear to be, strictly speaking, to be redundant, since that would be the effect of the statutory language even without it.)"*

99. 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."*

100. Concrete evidence is not always required to prove justification (***Lumsdon v Legal Services Board*** [2015] UKSC 41).

<u>*The burden of proof and inferences*</u>

101. 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*.

102. 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.

103. The burden of proof also operates in indirect discrimination cases. We agree with Mr Thomas that "*The burden of proof of establishing the provision, criterion or practice ('PCP'), the group disadvantage and the personal disadvantage rests with a Claimant, and only once a Claimant has established all three does the burden of proof shift to a Respondent to demonstrate the PCP was a proportionate means of achieving a legitimate aim (Dziedziak v Future Electronics Ltd EAT 0271/11, reaffirmed by the Supreme Court in Essop and Ors v Home Office (UK Border Agency) and Another [2017] ICR 640, SC).*"

104. 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.

105. 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).

Discussion and conclusions

Pregnancy discrimination

106. It is convenient to start by drawing conclusions about when the Respondent first had knowledge of the Claimant's pregnancy.

107. In our view the earliest possible moment in time is when Ms Benvenuto received the Claimant's email of 20 January 2021 timed at 17.38 in which she referred to bleeding and pains in the belly. We have accepted Ms Benvenuto's evidence that this was not until after the disciplinary hearing and after she made her decision to dismiss.

108. In our view, objectively there is some basis to infer from this email that the Claimant might be pregnant given the symptoms reported - although the symptoms reported are also consistent with any number of other explanations. We take that into account, but we nonetheless accept Ms Benvenuto's evidence that she did not make any link between what the Claimant reported and a possibility of pregnancy at that time. The Claimant's evidence was also that she did not, at that time, think that she might be pregnant.

109. We find that the actual date of knowledge of pregnancy was on 27 January 2021 when the Claimant referred to her pregnancy in an email.

110. Turning to the list of issues, it is plain that all of the treatment at paragraphs 2.1.1 and to 2.1.4 happened. Further, each item of treatment was obviously

unfavourable. All of the treatment occurred during the protected period: the Claimant was pregnant when each occurred. The key issue is the reason for the treatment.

111. This is a discrimination case and we approach it not expecting to see any direct evidence of discrimination. We stood back from the primary findings of fact and asked ourselves whether there was any basis to draw an inference that pregnancy or pregnancy related illness was the reason or part of the reason for the treatment. We do not see any basis for drawing such an inference.

112. As to issue 2.1.1. the disciplinary hearing went ahead in the Claimant's absence. Factually it is true that she was absent because of pregnancy related illness. However, this was unknown to Ms Benvenuto when she decided to go ahead. The reason why she decided to go ahead was because the hearing had been postponed so many times before and she thought the time had come to proceed in order to finally adjudicate upon the disciplinary allegations.

113. As to issue 2.1.2. having heard the evidence we take the view that the reason for the dismissal was that Ms Benvenuto thought the disciplinary allegations were well founded, that they amounted to gross misconduct and merited dismissal. The reason the dismissal happened without the Claimant attending a disciplinary hearing is set out above.

114. Before reaching these conclusions we noted that:

114.1. We ourselves regard the dismissal as quite harsh.
114.2. Ms Benvenuto did not give the Claimant the benefit of the doubt in her interpretation of the investigation meeting notes. Rather, Ms Benvenuto interpreted the disciplinary interview in a way that was unfavourable to the Claimant and not the only possible interpretation.
114.3. The Claimant had a difficult relationship with her line manager and had made a grievance about her including alleging (race) discrimination.
114.4. There was some evidence of other employees accepting gifts but not being disciplined.
114.5. It was probably true, though unknown to Ms Benvenuto, that other employees had worked for residents without penalty.

115. However, we saw no basis to infer from these matters that there was any pregnancy or pregnancy related illness reason for the dismissal. Those factors do not, in the context of this case, point in that direction. Further, our finding of fact is that the decision to dismiss was made on 20 January 2021, that is before Ms Benvenuto knew or suspected the Claimant was pregnant or suffering pregnancy related illness.

116. As to issue 2.1.3: Ms Benvenuto did not know that the Claimant was in hospital until after the disciplinary hearing. She knew that the Claimant had contacted the Respondent to say she was unwell prior to the hearing but the detail about hospital did not come until afterwards. The reason the hearing was

not rescheduled upon learning the Claimant had been in hospital was because by the time Ms Benvenuto found this out she had already conducted the hearing and reached a decision. Further, Ms Benvenuto did not know or suspect that the Claimant was pregnant or that her illness was pregnancy related until after she not only decided but actually promulgated her decision by the letter of 26 January 2021.

117. As to issue 2.1.4: The appeal was rejected but it was rejected because Ms Palmer thought that the grounds of appeal were not well-founded. Although she was aware that the Claimant had not attended the disciplinary hearing because of pregnancy related illness, she simply did not think that had anything to do with whether or not the allegations themselves (which had nothing to do with pregnancy and pre-dated the pregnancy) were well founded. She thought the allegations were well founded and that they were instances of gross misconduct for which dismissal was the correct sanction.

118. We repeat that before making this conclusion we considered the evidence in the round and asked ourselves whether there was any basis for inferring pregnancy discrimination. We considered the same factors as above and noted additionally that Ms Palmer was aware that the Claimant was pregnant and aware that the Claimant had missed the disciplinary hearing because of pregnancy related illness. Ms Palmer also placed more emphasis on the Claimant accepting gifts than Ms Benvenuto had. We noted again that other employees had received gifts that were not managed through a disciplinary process never mind dismissal.

119. Having considered those matters we saw no basis to infer from them that any part of the reason why Ms Palmer dismissed the appeal was pregnancy or pregnancy related illness. She considered those to be entirely irrelevant factors in her decision upon appeal and rejected the appeal on its merits as she saw them.

120. In short, neither pregnancy nor pregnancy related illness were any part of the reason for any of the treatment complained of.

Indirect discrimination

121. The first PCP to consider is: *Having no (or no adequate) policy and/or rules regarding support with childcare during the pandemic and/or long-term events outside the employees' control.*

122. In our view this PCP did not exist. The Respondent did have a policy/rules regarding support with childcare during the pandemic and/or long-term events outside the employees' control. It was not a *standalone* childcare policy/set of rules but it was a policy/set of rules that dealt with the Respondent's pandemic response and related among other things to childcare.

123. It might be argued that the first PCP existed nonetheless because such policy/rules regarding support with childcare was not "*adequate*". However, in an indirect discrimination claim the adequacy of a PCP falls to be determined at the justification stage. There is no metric by which to gauge whether a PCP is adequate in any of the preceding stages which are focussed upon other matters. Even at the justification stage the legal test is not whether the policy is 'adequate' but it could sensibly be said that if a PCP is not a proportionate means to achieving a legitimate aim then it is not adequate and in that sense adequacy arises at the justification stage.

124. In our view the correct approach is to identify what the PCP the Respondent did apply was and then apply the statutory tests to it. The PCP it applied was '*using the CJRS for housekeepers but only on a limited basis (e.g. during periods of lockdown and giving priority to housekeepers who have not previously been furloughed).*'

125. Mr Fuller accepted in his oral closing submissions that this PCP existed and was applied. He also accepted that there was a childcare disparity (in the *Dobson*) sense. What he did not accept was that in this case there was group disadvantage. The essence of his point, which he made very well, was that there was a lack of any direct evidence to show that the PCP did cause a group disadvantage. The only evidence of the personal circumstances of employees in the pool other than the Claimant was the Claimant's evidence. Her evidence was that she knew two of her female colleagues had children. One had a circa-20 year old. The other had a 13 or 14 year old. She knew that one of the men in the pool had a child in another country. That was the extent of it.

126. However, in our view, group disadvantage can and should be inferred in this case:

126.1. The particular disadvantage in issue is "*having childcare responsibilities that made it difficult to attend work or disciplinary hearings during lockdowns".*

126.2. There is no dispute that the relevant pool is the group of people to whom the PCP was applied and that is the housekeepers at Embassy Gardens.

126.3. There is a paucity of direct or statistical evidence about how the PCP affected the pool but that is not the end of the analysis.

126.4. We take judicial notice of the childcare disparity (using that term in the sense it was used in *Dobson*).

126.5. On the evidence we have, the hours employees were required to work was determined in accordance with a rota. The hours were not at the employees' choosing and were not flexible.

126.6. At the relevant time when this PCP was applied schools were closed. There was a national lockdown. A childcare 'bubble' with another household was permitted but only with one other household. This

meant that it was even more difficult than usual to make childcare arrangements.

126.7. The pool was comprised mainly of women (9:5).

126.8. We think it is likely that others in the pool had childcare responsibilities and problems as result with attending work/meetings at times fixed by the employer. The inherent probability is that more of them were women than men.

126.9. We think on the balance of probabilities more women than men in the pool experienced the particular disadvantage in issue.

126.10. The Claimant plainly suffered the particular disadvantage in issue, and did so because of her childcare responsibilities. She had difficulty in attending work and attending a disciplinary meeting during the second lockdown in January 2021.

126.11. As a result she had to take annual leave in the beginning of January 2021 to cover childcare; this was not a desirable time to take annual leave and she would not otherwise have taken it.

126.12. There was an occasion when she was unable to attend disciplinary hearing because of childcare. Although the hearing was postponed on that occasion, the hearing later went ahead in her absence because it had previously been postponed and thus the lack of childcare and requirement to attend meetings did contribute to the hearing going ahead, ultimately, without her.

Justification

127. The PCP was, it seems to us, applied in two quite different contexts.

127.1. Firstly, it was applied by generally requiring attendance at work in January 2021 (subject to taking annual leave) rather than furloughing the Claimant;

127.2. Secondly, it was applied by requiring the Claimant to attend a disciplinary hearing during a lockdown/school closure period rather than furloughing her and deferring the disciplinary hearing.

There were different aims behind these different applications of the policy.

128. As to the general requirement to come to work, the aim was for the Respondent to provide an adequate cleaning service to its client. This was a legitimate aim – a business that was of itself a non-discriminatory one.

129. However, we do not think that this was a proportionate means of achieving the aim because the aim could have been achieved by less discriminatory means.

129.1. The first point to note is that the Respondent did agree to the Claimant's annual leave request in January 2021. This meant that she was absent from work and not providing the Respondent with cleaning services. It

therefore had to cover some or all of her work by some other means or by reducing the cleaning standard by the amount her work would have increased it. This put it into much the same position as both parties would have been in had the Respondent simply furloughed the Claimant albeit that the Claimant's annual leave would not have been deleted so would have been there to take another time. We note that by this point the CJRS was extremely flexible.

129.2. On the other hand the impact on the Claimant would have been different if she had been furloughed. She preferred furlough pay (at 80%) to using her annual leave at this time (on full pay). The purpose of the leave was simply childcare and it was a very bad time to take annual leave: there was a national lockdown. Her leave was depleted.

129.3. The most obvious way of achieving the aim in a less discriminatory way was to use an agency worker to cover the Claimant's work. This was suggested to Ms Benvenuto in her evidence. She rejected that possibility because, she said, it would have been necessary to pay twice, once the Claimant's wages at 80% (the furlough rate) and once for the agency worker. Asked why that was problematic given that the Claimant's wage would be reimbursed by the CJRS, she said that this would not happen for a year or two and this was not acceptable because wages were ultimately paid by lease-holders' fees. We do not accept this reasoning. No doubt there would have been some lag in payment of the CJRS grant but there is no basis (in evidence at least) for assuming it would be anything like a year or two. That That is not how the CJRS routinely worked. In any event we are only talking here about a small amount of money in comparison to the size of the Respondent's undertaking and it seemed to us highly implausible that it would cause the Respondent any real problem to use the odd agency worker whilst paying the Claimant 80% of her salary and awaiting reimbursement of that from the CJRS.

129.4. We note that the Claimant's evidence, which was not challenged and which we accept, is that the Respondent did make some use of agency workers at other times. So it is not as if this was an alien way of covering labour shortages.

130. We therefore do not think that the means were proportionate and the general requirement to attend work during the second lockdown was indirectly discriminatory against the Claimant.

131. We would add that a further difficulty with the Respondent's position is that while we can accept that it was perfectly cogent to take into account whether or not an employee had previously been furloughed, that was not the only important factor. What was missing was a reasoned process for balancing the needs of the members of the workforce and assessing the weight of the needs. Not all reasons for wanting furlough are the same or equally weighty. The respondent appreciated that in relation to highly clinically vulnerable but did not, so far as we can tell from the evidence, otherwise.

132. We note that the Respondent had a parental leave policy which the Claimant could have availed herself of. We do not think that assists the Respondent materially. The Claimant would not have been paid anything if she had taken parental leave and that would have been a major disadvantage for her, a working mother on a low income. The Respondent would not have had the benefit of her work. So it would simply have been a lose:lose option and it does not materially move the analysis on either way.

133. As to the requirement to attend a disciplinary hearing during lockdown/school closure, rather than furloughing the Claimant and deferring the hearing, there was a different aim. It was to give the Claimant a timely opportunity to answer the serious disciplinary charges that had been laid in order to then reach a timely adjudication upon them. That was plainly a legitimate aim. It was not in any way related to sex and there was a sound business need to bring the disciplinary process to a conclusion.

134. The means adopted – inviting the Claimant to a disciplinary hearing - were plainly apt to achieve this aim.

135. In our view the means were also proportionate, striking an appropriate balance between the Respondent's needs and the Claimant's interests including her childcare needs.

135.1. The disciplinary hearing was rescheduled numerous times going ahead only on the fifth occasion.
135.2. Along the way the hearing was rescheduled when the Claimant identified childcare as the barrier to attendance.
135.3. Along the way the hearing was scheduled at a variety of different times (days of the week/times of day), including at the weekend which was outside of school hours so there was no possibility of interrupting any home-school /on-line learning the school provided.
135.4. It was unclear when the lockdown would end/when schools would reopen and thus unclear how long the disciplinary matter would be delayed for if the Claimant were furloughed and the matter deferred pending the end of furlough.
135.5. The events in question were by then quite historical and were going stale. They were factually sensitive and it was important for them to be discussed as soon as reasonably possible.
135.6. The hearing itself would be relatively short.
135.7. It was generally important to bring the matter to a conclusion as soon as reasonably possible.

136. In our view, then, to the extent that the PCP was applied in the context of requiring the Claimant to attend a disciplinary hearing that application of the PCP was justified and not indirectly discriminatory.

Conclusion

137. The indirect discrimination claim succeeds but only in a limited way. Our preliminary view is that the Claimant's dismissal was not tainted in by the indirect discrimination we have found and it would have occurred when it in fact did occur even absent any discrimination. Our preliminary view, then, is that the Claimant's remedy is likely to be limited in that it is unlikely to include any loss of earnings that flow from the dismissal.

Employment Judge Dyal
Date 10.10.2022