RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Ms S Vaughan
Respondent:	Usdaw
Heard at:	Leeds Employment Tribunal (hybrid)
Before:	Employment Judge Deeley, Mr D Crowe and Mr J Howarth
On:	18 February 2024 (attended) and 19 February 2024 (in chambers)
Representation	
Claimant:	representing herself
Respondent:	Mr Todd (Counsel)

RESERVED JUDGMENT

1. The claimant's complaint of direct sex discrimination under s13 of the Equality Act 2010 fails and is dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

1. This claim was case managed during two preliminary hearings:
    1.1 Employment Judge Wilkinson – 29 August 2023; and
    1.2 Employment Judge Rostant – 13 October 2023.
2. We considered the following evidence during the hearing:

2.1 a joint file of documents and the additional documents referred to below;

2.2 witness statements and oral evidence from:

2.2.1 the claimant;

2.2.2 the respondent's witnesses:

Name	Role at the relevant time
1) Mr Paddy Lillis	General Secretary
2) Mr Nick Walker	Central Treasurer

3. The claimant provided additional disclosure documents at the start of the hearing, which included reference to ACAS settlement discussions. Both parties agreed to waive privilege regarding these documents. Neither party objected to the inclusion of these documents in the hearing file.

4. We also considered the helpful oral submissions made by both parties.

Adjustments

5. We asked both parties if they wished us to consider any adjustments to these proceedings and they confirmed that no such adjustments were required. We reminded both parties that they could request additional breaks at any time if needed.

CLAIMS AND ISSUES

6. Employment Judge Rostant recorded the issues arising from the claimant's claim as follows:

6.1 **Complaint:** *The claimant is making the following complaint: Direct sex* [discrimination] *about the financial arrangements for her (with particular reference to car purchase) made by the respondent upon her retirement.*

6.2 **Issues – direct sex discrimination (s13 Equality Act 2010)**

6.2.1 It is accepted that the respondent made additional payments (either in relation to car purchase or otherwise) to the claimant's two male comparators upon their retirement as compared to the arrangements made for the claimant.

6.2.2 The claimant's case is that there is no material difference between herself and her two comparators except for the difference of sex.

6.2.3 It follows that the claimant was treated less favourably than her two comparators.

6.2.4 The issues for the Tribunal will be whether that difference of treatment was because of sex.

7. Neither party wrote to the Tribunal regarding the list of issues. However, the respondent stated at the start of this hearing that the respondent did not accept that the claimant was treated less favourably than her two comparators. They also stated that no additional payments were made to the two comparators – rather, the comparators received a higher payment due to a change in calculation of that payment (i.e. based on the notional value of an electric vehicle, rather than their current car). In any event, the Tribunal has considered the less favourable treatment issue as part of this judgment.

FINDINGS OF FACT

Context

8. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

9. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

> *"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

10. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

11. The respondent is a well known trade union, whose full name is the Union of Shop, Distributive and Allied Workers (commonly known as "**USDAW**"). The respondent represents members working in a range of occupations and industries, including retail.

12. The claimant acted as a volunteer representative for the respondent from around 1999, whilst working for the Co-op. The claimant was later employed as an Area

Organiser based by the respondent on 1 August 2005. The claimant was based at the respondent's Leeds office from that time, until her retirement on 3 March 2023.

13. The respondent's staff at the relevant times for this claim included:

Name	Role at the relevant time
1) Mr Paddy Lillis	General Secretary
2) Mr Nick Walker	Central Treasurer
3) Mr John Gorle	National Officer
4) Mr Nick Ireland	Regional Secretary
5) Ms Sarah Hughes	Area Organiser
6) Mr Jim O'Neill	Area Organiser
7) Ms Jayne Allport	Area Organiser
8) Ms Paula O'Dowd	Executive and Administration Officer (Mr Walker's secretary)
9) Ms Joanne Thomas	Regional Secretary

Provision of cars to the respondent's officers

14. The respondent's officers were supplied with cars for their use during employment. The type of car provided depended on their seniority within the respondent's organisation. In summary, there were two "bands" of seniority:

Level of seniority	**Type of Ford car** ***(purchased by the respondent from a Fleet Provider)***	**Type of Volkswagen car** ***(proposed to be leased by the respondent from a Fleet Provider from around 2022/2023)***
Band 1 (including Area Organisers)	Ford Focus	VW ID3
Band 2 (including National Officers and Regional Secretaries)	Ford Mondeo	VW ID4 (estate)

15. The respondent operated unwritten arrangements regarding its officers' cars on retirement (the "**Car Policy**"). We accept Mr Lillis' evidence that the terms of the car arrangements were not written down for political reasons. Mr Lillis stated that:

"The policy has not been written down since the 1970s for political reasons – it is authorised by the executive of retail workers (who are a lay executive)…".

16. We accept Mr Walker and Mr Lillis' evidence that if an individual officer was driving a car that was owned by the respondent, they would then choose on retirement whether or not to purchase the car.

17. The process in either case was then as follows:

    17.1 the officer would confirm to the respondent whether or not they wished to purchase the car that the union had provided to them;

    17.2 the respondent would obtain a valuation of the car a few weeks prior to the individual's retirement date from its Fleet Provider;

    17.3 the respondent would then calculate the following sum (the "**Retirement Award**"):

    3% per year of service, up to a maximum of 25 years

    (i.e. a maximum discount of 75% of the value of the car)

18. If the retiring officer did want to purchase the car:

    18.1 a discount equal to the Retirement Award would be applied to the value of the car;

    18.2 the officer would then pay to the union the discounted valuation of the car in exchange for purchasing the car; and

    18.3 the officer would then be paid the amount was equal to the Retirement Award as part of his or her pension.

19. If the retiring officer did not want to purchase the car, they would receive a payment equal to the Retirement Award as part of his or her pension.

20. We accept Mr Walker's evidence that the method of valuing cars, then purchasing or receiving an 'award', had been in operation for around 50 years. Mr Walker joined the respondent in 2012 and stated that until 2022, he had always applied this method. Mr Walker said that his predecessor (who had worked for the respondent for around 30 years) had applied the same method.

Change in supplier – 2022/2023

21. The respondent decided in 2022 to change the cars it provided from petrol or diesel Fords to electric Volkswagen vehicles. Electric cars were significantly more expensive to purchase than non-electric cars and the respondent decided that going forwards, they would lease cars from their Fleet Provider (Holmans), rather than purchase them outright.

22. Around the same time, the car industry as a whole experienced significant issues in manufacturing and delivering new cars. This was in part due to the impact on the car industry of the Covid-19 pandemic and lockdowns, as well as the Ukraine war.

23. We accept Mr Walker's evidence that until a couple of years ago, officials could order a new car at around the time that they gave their notice to retire (normally 6 months'

notice or more). The Fleet Provider would usually be able to supply the new car within a few weeks, which meant that the individual's car would be around 6 months old by the time of their retirement. However, as at August 2022 (and during 2023), there was a delay of around 6-12 months due to supply issues in the car industry.

Claimant's notice of retirement

24. The claimant informed the respondent that she intended to retire with effect from 3 March 2023. The respondent's National Executive Council Minutes of a meeting attended by Mr Lillis and Mr Walker (amongst others) recorded on 18 July 2022:

    "152(c) That ex gratia arrangements as now agreed by made for Ms Vaughan to purchase the Union car on her retirement".

25. The claimant contacted Mr Walker on 26 August 2022 to apply for her workplace pension. Mr Walker acknowledged receipt of her pension forms on the same date and stated that the respondent's pension provider would be in touch nearer the date of her retirement.

26. Ms O'Dowd (Mr Walker's secretary) spoke with the claimant in or around October 2022 and told the claimant that if she were to order a new vehicle at that time, it would not be delivered before her planned retirement on 3 March 2023.

27. The claimant then emailed Ms O'Dowd on 31 October 2022 and asked if she could instead take over Ms Allport's car. Ms Allport had been promoted from Area Organiser to a National Officer role, which meant that Ms Allport would be entitled to a 'band 2' car. The claimant wished to have Ms Allport's car because it was: *"half the mileage of mine and 2 years younger"*.

28. The claimant's request was granted and she was provided with Ms Allport's Ford Focus from 7 November 2022. The respondent incurred additional costs when granting the claimant's request because the Retirement Award was higher for Ms Allport's car, than it was for the claimant's existing car.

John Gorle (National Officer)

29. Mr Gorle notified the respondent during 2022 that he intended to retire with effect from late January 2023. Mr Walker provided Mr Gorle with a car valuation in late November 2022. Mr Gorle was unhappy with that valuation because it was based on his existing Ford Mondeo, rather than on the Volkswagen ID4 Estate that he would have been eligible for if such car was available earlier in the year.

30. Mr Gorle and Mr Walker discussed this issue on 1 December 2022. Mr Walker stated at that meeting that the Retirement Award should be calculated on the basis of the value of Mr Gorle's existing Ford Mondeo, not on a 'notional valuation'. Mr Gorle was unhappy with Mr Walker's decision and raised the matter with Mr Lillis.

31. Mr Lillis instructed Mr Walker to discuss the matter again with Mr Gorle. Mr Walker and Mr Gorle had a further discussion on 20 December 2022. Mr Walker offered to use a notional valuation based on a 6 month old Ford Mondeo, in order to calculate

the Retirement Award. Mr Gorle was still unhappy with this proposal and said that he would go back to Mr Lillis and raise the matter with the respondent's officials' association.

32. Mr Gorle's complaint was discussed at the respondent's senior management team meeting on 5 January 2023. The meeting was attended by Mr Lillis, Mr Walker, the respondent's Deputy General Secretary and the respondent's Executive Officer. The respondent stated that no notes of this meeting were taken. The senior management team agreed to calculate the Retirement Award for Mr Gorle based on a notional value of a six month old Volkswagen ID4. This was because Mr Gorle was eligible for a 'band 2' car, ie an ID4.

33. Mr Walker stated in his witness statement:

"40. This decision was made to avoid John's complaint being made formal and becoming widely known amongst the officials. However, it was not a change in policy and we agreed that, notwithstanding whether the retiring official purchased their car or not, retirement payments would be strictly calculated on the value of the car in their possession at the point of retirement.

34. Mr Lillis stated during his evidence at this hearing:

"John was a National Officer, he would have retired with an ID4. The price would have been the price less 6 months' discount applied. There's no additional payment authorised to anyone – this is consistent with how the scheme is run.

The policy has not been written down since 1970s for political reasons – all of it is authorised by the executive of retail workers (lay executive) – the association would be quite clear it looks like we're giving ourselves cars."

35. In relation to Nick Ireland's situation, Mr Walker stated that Mr Ireland had not raised a complaint with him directly. Mr Ireland was not due to retire until the Summer of 2023. However, Mr Walker stated that the respondent treated Mr Ireland in the same way as Mr Gorle as a matter of "consistency":

"Nick was aware of the situation with John – he was acting with a view to his own retirement. We had a complaint from John and were told to anticipate a similar complaint from Nick."

3rd February 2023 – claimant's discussions with Ms Hughes

36. Ms Hughes contacted the claimant on or around 3 February 2023 and informed her that the respondent had agreed to calculate Mr Gorle's Retirement Award, based on the notional value of a 6 month old electric car. The claimant was upset by this. She stated that she wanted to verify this information with Mr Gorle, but had no means of contacting him because he had just retired from the respondent. (The claimant did not in fact speak to Mr Gorle until the respondent's annual delegates conference in April 2023, as stated later in this judgment).

37. Ms Hughes also told the claimant that Ms Hughes' own Retirement Award had been based on the value of her existing car.

February correspondence

38. The claimant spoke and exchanged emails with Mr Walker, Mr Lillis and others during February and March 2023. Ms O'Dowd obtained the respondent's Fleet Manager's valuation of the claimant's existing car (which she had taken over from Ms Allport). Mr Walker confirmed by letter to the claimant dated 20 February 2023 that:

    38.1 the claimant's car was valued at £12,750; and

    38.2 the claimant's Retirement Award would be £6,505.

39. Mr Walker informed the claimant that she would have to make a BACS payment to the respondent to purchase the car at a cost of £12,750 by 10 March 2023. She would then receive her Retirement Award of £6,505 on an ex gratia basis after she retired.

40. The claimant tried to contact Mr Walker on 15 February 2023. She was concerned that her retirement date of 3 March 2023 was fast approaching and she needed to consider how she would finance the purchase of her car from the respondent. The claimant emailed Mr Lillis on 20 February 2023 in an email headed 'Grievance' in which she stated:

    "Good Morning Paddy,

    Unfortunately i feel I have no alternative than to raise a formal grievance against Nick Walker (central Treasurer).

    After submitting my request to retire last year i sent my pension paperwork to Nick around August 2022, i didn't hear anything back so i phoned to speak to Nick on 2nd February for an update and to see what was happening with the car, i was told by Paula some more details about how the process of purchasing the car works and later she e-mailed me for the current mileage for the car i have.

    I heard nothing back from Nick so i spoke to Joanne Thomas on 14th February about my concerns, i tried phoning Nick on 15th February but on MiCollab his calls were diverted to Paula so i sent Nick an e-mail that afternoon asking him to let me know When i could speak to him. I again phoned Nick on 17th February but nobody answered his desk phone, (i don't have Nick's mobile number) To say i feel rejected and disappointed is an understatement, i sit here 2 weeks away from leaving and I haven't got a price for the car, I'm also being advised that there are questions around the allowance I receive from usdaw as I've currently got a 21 plate diesel which is not the new specification of car for area organisers, when i received the e-mail to order one i was specifically told not to as i would be retired by the time it arrives however this is alt speculation. I am also led to believe i have to find the cash value to buy the car before I receive the allowance from usdaw which 2 weeks away I haven't got a clue how much that could be.

I feel that Nick has let me down as he was aware on 14th February there were concerns being raised and he has not acted to get things resolved for me.

I would like my association rep to. accompany me at any meeting arranged."

41. The claimant included Mr Maundrill (her association representative) in the email and Ms Thomas (the Regional Secretary for the claimant's region).

42. Mr Lillis responded later that day by email, stating that he had asked Mr Walker to contact the claimant to discuss her concerns. Mr Lillis stated in his evidence that it was the respondent's normal practice to try and resolve grievances informally where possible.

1st March – claimant's email

43. The claimant had difficulty in getting hold of Mr Walker, following Mr Lillis' email. She spoke to Mr Walker on 24 March 2023 and followed up by email to Mr Walker and Mr Lillis on 1 March 2023. The claimant's email was headed "Follow up conversation" and stated:

"Good afternoon Nick,

Following our conversation on Friday morning [I] *expressed my concerns about the way your department and yourself had not explained and supported me in a timely manner regarding me leaving and the allowance i was to get for the purchase of my car compared to other employees who have recently retired, you said you would do some revised pension figures for me to take a £6k or a £12k lump sum to buy the car, i still haven't received these figures and i go in 2 days:*

I feel really [let] *down at this point will you please send the information through at your earliest convenience."*

44. Mr Walker responded later that day and his email set out the options for the claimant and the impact on her pension if she were to choose to take a lump sum or not. The claimant did not respond initially. Mr Walker sent a further email to the claimant's personal email account on 9 March 2023 (a few days after the claimant retired). Mr Walker asked if the claimant had reached a decision. The claimant replied stating:

"Hello Nick, I'd rather not take the lump sum and stick with my original plan to take all my pension as monthly payments, I've paid for the car this morning and I'm trying to activate my insurance quote but LV have had some system issues today."

45. The transfer of ownership of the car to the claimant from the respondent was actioned with effect from 10 March 2023. Mr Walker then wrote to the claimant on 17 March 2023, setting out the final details of her pension entitlement. His letter stated that:

"Your first pension instalment will be made on 14 April 2023 and will also include an amount of £6,505 (net of tax) which is the payment made to you by the National Executive Council in recognition of your years of service with the Union."

46. We concluded from the claimant's correspondence that her key concerns as at February and early March 2023 related to:

    46.1 the lack of information and support from NW's department;

    46.2 her difficulties in obtaining the funds for the £12,750 that she needed to purchase the car from the respondent at short notice.

47. The claimant did not mention her concerns regarding the difference in treatment between herself and Mr Gorle in that email. The claimant accepted that the wording of her emails was 'vague' and that an individual with no knowledge of the situation would not be aware that she was referring to the way in which Mr Gorle's Retirement Award had been calculated.

48. We accept the claimant's evidence that this was because she wished to verify Mr Gorle's circumstances by speaking with him first. However, we also note that the claimant did not seek to pursue matters via Mr Maundrill who, as the association secretary, would have been aware of Mr Gorle's situation. We also note that the claimant did not seek to raise matters further with Mr Lillis in late February or March 2023.

49. Mr Lillis stated that during cross examination in relation to the claimant's emails in late February and 2023:

    "I spoke to your association rep (Steve Maundrill) – I told Steve [in his role] *as national secretary of association that I'd referred the matter to Nick* [Walker] *and it would be resolved.*

    All full time officials are member of officials' association (including me) – the association negotiates staff terms and conditions on the officials' behalf.

    …

    It was an ongoing discussion with Nick [Walker] *– you didn't come back to me directly or go to the association. The only reason for the difficulty at the moment is the worldwide issue with the supply of vehicles. My understanding was that you bought* [Ms Allport's] *car.*

    …

    I told Mr Maundrill that there was no necessity [for a grievance meeting] *because Nick had resolved the matter.*

    The issue is the car scheme – it was always set up for the official to buy their car on retirement…I gave Mr Maundrill an assurance – we have a good relationship with the association – and made it clear we would sort it out. Hence, the payment was offered to you [i.e. the respondent's settlement offer made via ACAS after the start of these proceedings]*, but you told me where to put my money…".*

ACAS settlement offer

50. Both parties agreed to waive privilege in relation to the matters set out in this section regarding ACAS settlement discussions at the start of the final hearing. The claimant produced emails (which included reference to settlement discussions) and the respondent agreed that these would be included in the hearing file.

51. The claimant contacted ACAS to discuss her complaint and engaged in early claim conciliation from 28 April 2023 to 9 June 2023. She then presented her claim form to the Employment Tribunal on 18 June 2023.

52. Mr Lillis authorised the respondent offered to settle the claimant's claim. On 28 July 2023, the respondent offered via ACAS to pay the claimant £5095 (subject to agreeing COT3 terms). The £5095 offer was based on the difference between:

    52.1 the Retirement Award that the claimant received based on her existing car; and

    52.2 the award that she would have received, if it had been calculated on the basis of a 6 month old Volkswagen ID3 with 500 miles.

53. The respondent's calculation was also set out in detail at page 97 of the hearing file (see table below). The claimant refused this offer. She informed the Tribunal during her evidence, that she had estimated that a 6 month old Volkswagen ID3 would be valued at a much higher price than the respondent.

54. Mr Walker stated in his witness statement:

    "41. Following receipt of the Claimant's ET1 form, the General Secretary contacted me around 18 July 2023 to ask me to resolve the issue as if the Claimant had ordered and bought a VW ID3. I therefore obtained a value for a six month old ID3 and calculated the difference between the appropriate ex-gratia payment arid the purchase price and then the difference in the benefit received between the car she bought and the ID3 she would have bought had she been able to."

55. We are not required to decide whether or not the claimant's valuation is correct at this stage of our findings of fact. However, we note that the claimant accepts that she did not have access to the information used by the respondent to calculate the difference between the Retirement Award and the potential award based on the Volkswagen ID3. We also note Mr Walker's evidence that the value of a six month old Volkswagen ID4 was significantly lower in June 2023, than in January 2023.

56. One further issue that the claimant raised during these proceedings was the respondent's reference to 'additional payments' made to Mr Gorle and Mr Ireland in their draft ET3, which was mistakenly submitted to the Tribunal. We accept the respondent's evidence that there were in fact no 'additional payments' made, but rather Mr Gorle and Mr Ireland's Retirement Awards were calculated on a more generous basis (i.e. by reference to a notional electric vehicle).

Comparators

57. The claimant named two comparators in these proceedings, i.e. Mr Gorle and Mr Ireland, to whom we have already referred to in detail in these findings of fact.

58. The respondent also provided information relating to Mr O'Neill, a male Area Organiser who retired in June 2023. The respondent provided a copy of Mr Walker's letter to Mr O'Neill. The letter stated that the respondent had authorised the sale of Mr O'Neill's Ford Focus to him for the sum of £11,000 (i.e. the respondent's Fleet Manager's valuation of Mr O'Neill's existing car).

59. The claimant stated during cross-examination that she believed that the respondent had deliberately calculated Mr O'Neill's Retirement Award on the same basis as her Retirement Award because the respondent was aware that she intended to bring a claim, following her ACAS early claim conciliation discussions from 28 April to 9 June 2023. However, the claimant did not provide any supporting evidence of that contention.

60. We do not accept the claimant's evidence on this point because:

    60.1 it is inconsistent with the fact that the respondent later made an offer through ACAS in July 2023 to settle the claimant's claim, based on the notional valuation of a 6 month old electric car;

    60.2 we previously concluded that the respondent treated Mr Gorle and Mr Ireland differently because Mr Gorle refused to accept another resolution to his complaint (as set out in detail in our earlier findings of fact); and

    60.3 we also note that Mr Ireland did not in fact retire until June 2020, which was several weeks after the claimant had commenced ACAS early claim conciliation. If the respondent was trying to treat male employees in a different way to Mr Gorle as part of a strategy to 'shore up' its defence to the claimant's claim, then Mr Ireland's Retirement Award would have been calculated on his existing car.

RELEVANT LAW

61. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' pleadings and the respondent's written submissions.

DIRECT DISCRIMINATION (s13 EQA)

62. Section 13 of the Equality Act 2010 provides that:

    "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

63. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

64. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

    64.1 was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

    64.2 if so, was such less favourable treatment because of the claimant's protected characteristic?

65. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

66. In relation to less favourable treatment, the Tribunal notes that:

    66.1 the test for direct discrimination requires an individual to show more than simply different treatment (*Chief Constable of West Yorkshire Policy v Khan* 2001 ECR 1065 HL);

    66.2 an employee does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that an employee can reasonably say that they would have preferred not to be treated differently from the way an employer treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

    66.3 the motive and/or beliefs of the parties are relevant to the following extent:

        66.3.1 the fact that a claimant believes that he has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, Shamoon);

        66.3.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

        66.3.3 for direct discrimination to be established, the claimant's protected characteristic must have had a 'significant influence' on the conduct of which he complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

67. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA).

Comparators

68. To be treated less favourably implies some element of comparison. The claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (section 23 Equality Act 2010 and see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

69. It is for the claimant to show that any real or hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

70. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground (*Anya v University of Oxford* [2001] IRLR 377).

BURDEN OF PROOF

71. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 Burden of proof

…

(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.

…

(6) A reference to the court includes a reference to -

(a) an employment tribunal;

…

72. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 approved guidance given by the Court of Appeal in *Igen Limited v Wong* [2005] ICR 931, as refined in *Madarassy v Nomura International plc* [2007] ICR 867. In order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

73. Mummery LJ stated in *Madarassy*: *"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"*

74. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

75. The guidance from caselaw authorities is that the Tribunal should take a two stage approach to any issues relating to the burden of proof. The two stages are:

    75.1 the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than those identified or than he hypothetically could have been (but for his disability); there must be "something more".

    75.2 if the claimant satisfies the first stage, out a prima facie case, the burden of proof then shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

76. However, we note that the Supreme Court in also stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

TIME LIMITS

77. The provisions on time limits under the EQA are set out at s123 EQA:

123 Time limits

(1)… proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

APPLICATION OF THE LAW TO THE FACTS

78. We applied the law to our findings of fact and reached the conclusions set out below.

79. We note from our findings of fact that:

    79.1 Mr Walker's initial approach to any officials was to try and push back on any request that the respondent make an exception to the Car Policy;

    79.2 the claimant accepted Ms O'Dowd's statement that any new electric vehicle would not be delivered to her before her retirement, due to the global difficulties with the supply of new vehicles at that time. The claimant therefore asked instead to purchase Ms Allport's vehicle, to which the respondent agreed;

    79.3 Mr Gorle, by way of contrast, did not accept Mr Walker's initial refusal to make an exception to the Car Policy. Mr Walker made an alternative offer to Mr Gorle, including using a calculation based on the notional value of a six month old Ford Mondeo. However, Mr Gorle persisted and the respondent's senior management team agreed to calculate the Retirement Award for Mr Gorle based on a notional value of a six month old Volkswagen ID4 in order to avoid him raising a complaint;

    79.4 the respondent's senior management team wanted to avoid a similar complaint from Mr Ireland, whom they had been told was aware of Mr

Gorle's complaint. They also gave Mr Ireland a Retirement Award for Mr Gorle based on a notional value of a six month old Volkswagen ID4;

79.5 the respondent clearly did not treat everyone 'consistently', contrary to Mr Walker's evidence. The claimant, Ms Hughes and Mr O'Donnell all received Retirement Awards which were calculated on the value of their existing (non-electric) cars;

79.6 when the claimant found out about Mr Gorle's treatment, she did not raise this issue explicitly with the respondent in her email headed 'grievance' or in other correspondence and discussions before her retirement. The claimant stated that this was because she had no means of speaking to Mr Gorle to verify his position, because Mr Gorle had already retired. The claimant eventually spoke to Mr Gorle at the respondent's annual delegates conference in April 2023 (after the claimant had retired);

79.7 Mr Lillis authorised a settlement offer to the claimant via ACAS in July 2023, after these proceedings started, which was based on the respondent's calculation of the notional value of a six month old Volkswagen ID3 (which was the electric vehicle applicable to the claimant's job grade). The claimant at this hearing did not accept that that valuation had been calculated correctly. In any event, she rejected the offer.

Less favourable treatment?

80. We concluded that the claimant was treated less favourably than Mr Gorle and Mr Ireland because:

80.1 the respondent previously applied the Car Policy to all employees for around 50 years. The only difference between job grades being the actual value of the car allocated to employees;

80.2 Mr Gorle received an increased Retirement Award based on a notional value of the electric car applicable to his grade, despite the fact that the electric car would not have been delivered in time for his retirement;

80.3 Mr Ireland received an increased Retirement Award on the same basis as Mr Gorle, simply because he was aware of Mr Gorle's discussions with the respondent; and

80.4 the claimant did not receive a similar increased Retirement Award. The respondent offered after she retired to pay the difference between the Retirement Award that she received and an increased award based on a notional value of the electric car applicable to her grade. However, this offer was subject to the claimant entering into an ACAS COT3 agreement. There was no suggestion by the respondent that either Mr Gorle or Mr Ireland was required to enter into a COT3 agreement in order to receive their increased Retirement Award.

Was the less favourable treatment related to the claimant's sex?

81. We understand that the claimant felt very hurt and upset by the disparity in the respondent's calculation of the Retirement Awards and the lack of transparency around the respondent's Car Policy. However, the claimant was unable to articulate clearly why she believed that her treatment was related to her sex. The Tribunal asked the claimant to explain this again and she stated:

"The issue about Jim is the decision was taken in January to give John and Nick the extra payment. There's also a reference in ET3 about PL authorising an extra payment to John and Nick for good working relations. I've been asked for information on that – I've not had an answer."

82. The Tribunal asked her again, having explained the legal tests around the burden of proof in sex discrimination cases and she stated:

"Because there's no other explanation been given. There's no policy in existence that says how this process works, how this payment was given – it's been given to two males, when I raised questions as a female – it was not given to me. I also know that Sarah Hughes was refused it too.

If the policy said if you buy the car, it would be based on the electric vehicle, I would totally accept that. If the policy said if you purchase car, it would be based on value of car driving at the time

The policy and Mr Walker confirmed payment made no matter what grade of job you are, same payment calculation if you buy the car or not. The respondent is trying to say because I bought the car and John and Nick didn't – that's why I've been treated differently because I am a female. There is no other reason being put to me."

83. We note that the cases quoted in the Relevant Law section earlier in this judgment (a copy of which were provided to the parties at the start of their evidence) include the following points on the burden of proof in discrimination cases.

83.1 In order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation;

83.2 Mummery LJ stated in *Madarassy*: *"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"*; and

83.3 unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no

light whatsoever" to the question of whether he has treated the employee "unfavourably".

84. We concluded that the claimant had not provided evidence to shift the burden of proof in this case. She was unable to point to 'something more' than a difference in status and difference in treatment. Her claim therefore fails.

85. However, even if the burden of proof shifted to the respondent, we concluded that the reason for the claimant's treatment was not due to sex. Our key reasons included:

    85.1 a male Area Organiser (Mr O'Neill) received a Retirement Award, calculated on the same basis as the claimant when he retired in June 2023;

    85.2 the reason why the respondent treated Mr Gorle and Mr Ireland differently to the claimant was to avoid them pursuing a formal dispute against the respondent. The respondent believed that by doing so, they could keep the issues raised by Mr Gorle confidential;

    85.3 the claimant did not seek to pursue her complaint in the same manner as Mr Gorle during her employment with the respondent. In particular, she did not specify the basis on which she believed her Retirement Award should be calculated. The claimant's focus in late February and March 2023 was around the lack of information and support provided by Mr Walker, which caused her difficulties in obtaining sufficient funds to purchase her car from the respondent; and

    85.4 when the claimant did set out the basis on which she believed her Retirement Award should be calculated in her ET1 on 18 June 2023, the respondent then offered to pay her the difference between her Retirement Award and an award calculated on the same basis as Mr Gorle, subject to the claimant entering into a COT3 agreement. The claimant refused to accept that offer.

CONCLUSIONS

86. The claimant's complaint of direct sex discrimination under s13 of the EQA fails and is dismissed.

Employment Judge Deeley

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Employment Judge Deeley
26 January 2024

JUDGMENT SENT TO THE PARTIES ON

RESERVED JUDGMENT

26 January 2024

Ben Williams

FOR EMPLOYMENT TRIBUNALS

All judgments (apart from those under rule 52) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.