EMPLOYMENT TRIBUNALS

Claimant: Mrs F Lee

Respondent: R & F Properties QS (UK) Co., Ltd

Heard at: London South Employment Tribunal (by CVP video conference)

On: 22-24 April 2024

Before: Employment Judge Musgrave-Cohen
Mr K Murphy
Mrs J Jerram

Representation:

Claimant: Ms S. Forsyth

Respondent: Mr Z. Wang

JUDGMENT having been sent to the parties on 26 April 2024 following oral judgment being given on 23 and 24 April 2024, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

Claims and issues

1. Having been in early conciliation between 24 December 2022 and 9 January 2023, by a claim form dated 8 February 2023, the Claimant presented a claim of direct discrimination on the grounds of sex. The Respondent replied to deny the claim on 23 February 2023. On 17 May 2023, the claim was set down for final hearing

from 22-24 April 2024. On 17 October 2023 there was a case management hearing at which the directions to trial were modified and claims clarified. The claimant made a further application to amend her claim at the hearing which was granted as described below. The issues for the Tribunal were therefore:

Equality Act 2010, section 13: direct discrimination because of sex

1.1 Did the Respondent do the following things:

1.1.1 Withdrew the Claimant's signed contract of employment on 26 October 2022.
1.1.2 Mrs Zhu of the Respondent asked the Claimant the age of her children during an interview on 20 October 2022.

1.2 If so, was that less favourable treatment?

1.3 If so, was it because of sex?

1.4 The remedy issues remained as specified in the case management order of 17 October 2023 and were:

1.4.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
1.4.2 What financial losses has the discrimination caused the Claimant?
1.4.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
1.4.4 If not, for what period of loss should the Claimant be compensated?
1.4.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
1.4.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
1.4.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
1.4.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
1.4.9 Did the Respondent or the Claimant unreasonably fail to comply with it?
1.4.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?
1.4.11 By what proportion, up to 25%?
1.4.12 Should interest be awarded? How much?

The proceedings

2. The Claimant attended the hearing represented by Ms Forsyth of South West London Law Centres. The Respondent was represented by Mr Wang, Associate Director of HR of the Respondent.

3. We were provided with 2 electronic bundles of documents, the first pdf file was 50 pages long and the second was 117 pages long. We received witness statements from the Claimant and on behalf of the Respondent from Mr Donghui Zhai, Miss Dan Luo, Ms Megngjia Jin and Mrs Wenting Zhu. Ms Luo and Mrs Zhu did not attend to give evidence.

4. On day 3 of the hearing window, having given our judgment on liability, we heard further evidence from the Claimant as to remedy. The Claimant gave oral evidence and was questioned by the Respondent. We had a witness statement from the Claimant, a schedule of loss and mitigation documents.

Application to amend claim

5. On the first day of the hearing, the Claimant applied to amend her claim to add the further complaint of discrimination that Mrs Zhu directly discriminated against her because of sex when she asked her the age of her children during the interview of 20 October 2022. The Respondent objected to the application.

6. The first stage of an application to amend is to understand what claims the Claimant wishes to proceed with and the specific detail of any applications to amend that she makes. In Chaudhry v Cerberus Security and Monitoring Services Limited [2022] EAT 172, His Honour Judge James Tayler reinforced the importance of identifying the specific amendment or amendments sought before considering the application to amend.

7. In this case the Claimant wishes to argue that Ms Zhu treated her less favourably because she is a woman when she asked her how old her children were during the interview on 20 October 2022. She says this was an act of direct discrimination because of sex.

8. The tribunal has a discretion to allow applications to amend. In Selkent Bus Co Ltd v Moore [1996] ICR 836, Mummery J, gave guidance as to the main factors that need to be considered when considering an application to amend. This guidance, which has itself been explained in subsequent case-law identifies the following key-factors that the Tribunal should consider:

    a. Nature of the proposed amendment;
    a. Timing and manner of the application to amend;
    b. Time limits and whether time should be extended pursuant to the applicable statutory test;
    c. The balance of hardship.

9. These factors are not approached as a tick box but rather they are the kinds of factors that we must have in mind when seeking to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it (Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209**,** CA).

10. The Presidential Guidance on Amendments draws a distinction between new claims which are “wholly different” from the claim as pleaded and those which are

"closely connected". In the latter case, often known as a relabelling case, a more lenient approach may be taken to time limits.

11. In Vaughan v Modality Partnership [2021] IRLR 97, HHJ Tayler said that at the heart of the balancing exercise should be a focus on the practical consequences of allowing or refusing an amendment.

12. In our view, this is a new legal claim which is not pleaded in the claim form nor identified as a standalone act of discrimination at the case management hearing on 17 October 2023 in which the Claimant was represented.

13. However, we can see that the fact of the conversation was set out in the claim form and so this is a claim which is "closely connected" to the pleaded claims as opposed to being "wholly different". Paragraph 4 specifically says that the Claimant attended a Microsoft Teams meeting with Mrs Zhu, Head of Oversea Development on 20 October 2022 and was asked how old her children were. It is not identified as a standalone complaint of direct discrimination, but we can see that the factual detail of the complaint is there.

14. The Respondent denies discrimination in its ET3 but does not set out a specific response to the detail of the conversation with Mrs Zhu.

15. The bundle contains transcripts of WhatsApp messages which have been translated into English by the Claimant and agreed by the Respondent as being an accurate translation. Without making any findings as to those messages at this stage, we can see that the issue of whether or not Mrs Zhu said this during the meeting has been a live issue in dispute between the parties before today. On 16 February 2023, Mr Zhenhua Wang of the Respondent wrote an internal message to a colleague saying *"the lady Fong Fong who was interviewed by Ms Zhu previously for marketing manager role, is suing the company saying the reason for not hiring her is because Ms Zhu asked her suddenly how old were her children during the interview …"*.

16. We have weighed up the hardship to the Claimant of not allowing the claim to proceed. We do consider that whether or not she was asked this question is central to her case. We are concerned that this allegation was not raised as a standalone complaint in the claim form nor identified at the case management hearing where she was represented. We are concerned that the allegation is being clarified so late in the day. However, we can see the issue included plainly in her claim form and can see that its centrality was understood by the Respondent in the WhatsApp messages. As Ms Forsyth says, we do not think the Respondent is taken by surprise by this allegation.

17. In terms of hardship to the Respondent, Mr Wang raises the general hardship of being called on to answer a case they were not expecting. We appreciate this point but a bare assertion of general hardship is akin to saying amendments should never be granted as any party facing an amended claim will be facing a claim they may not have been expecting. The law is clear that is not the case.

18. More specifically, Mr Wang says that if the Claimant is allowed to put this case forward, the Respondent would need evidence of what has been said to support their case. We consider that the issue of what Mrs Zhu said or didn't say about the Claimant's children is already a central issue in the claim regardless of this amendment and so the Respondent, acting reasonably, must have known it needed to come prepared to address what was said by Mrs Zhu. As long ago as 16 February 2023, they knew that the Claimant said the reason she was not hired was because Mrs Zhu asked her how old her children were.

19. We consider that the balance of hardship leans in favour of granting the amendment. While we appreciate it is a new legal claim, the facts are already a central issue to the claim and the legal claim is closely connected to the complaints within the claim form. The Respondent has known this conversation is a key issue in the complaint since the time the Claimant issued her proceedings. The Respondent has not identified any fresh evidence, either documentary or oral, that it would need to call to respond to the allegation beyond that which relates to matters already in issue in the case.

20. The Claimant made and later withdrew a further application to add a further Respondent to the claim.

Our view as to the credibility of the witnesses

21. We found the Claimant to be a straightforward and honest witness. She took care to give clear evidence about matters that were within her knowledge only. She did not stray into speculation.

22. For the Respondent, we were provided with a statement from Miss Dan Luo but she was not called to give evidence. We do not place any significant weight on her statement given the contents were neutral as to whether or not discrimination occurred.

23. We did hear evidence from Mrs Mengjia Jin (also known as Luna), Senior HR Manager. We considered her evidence to be honest. She was new to the company at the time of the events in the claim and was simply outworking the decisions of others.

24. We heard evidence from Mr Donghu Zhai (also known as Harry), Deputy General Manager for the Respondent. We were concerned about the frequency with which he told us he could not recall important elements of the case. Given that the Claimant had complained of sex discrimination very quickly after her signed contract of employment was withdrawn, we were concerned that the key witness for the Respondent was unable to tell us what had happened in a number of important respects. We found him to be evasive and non-committal. There did not appear to have been any attempt by him, or the Respondent generally, to substantiate his account and the Respondent's case by reference to documentary evidence.

25. The final witness for the Respondent was Mrs Wenting Zhu, General Manager of Overseas Business Department for the Respondent. She is responsible for overseeing the Respondent's sales and marketing matters. She was a Vice President of the Respondent company. Her evidence was very important in the Respondent's case as she held the interview with the Claimant on 20 October 2022 and it is the Claimant's case that she asked her about her children's age and it was her decision to withdraw the signed contract of employment.

26. Despite discussing the need to hear from her, the Respondent was unable to confirm if and when she would attend during day 1 of the hearing. The Respondent's representative appeared to think Mrs Zhu was in China but then confirmed she was in England on a business trip and if she was able to attend she would require a translator. No request for a translator had previously been made.

27. The Tribunal sought to assist by finding a translator at short notice who could attend on day 2 of the proceedings. After 6pm on day 1, after the translator had been booked to attend and Tribunal costs incurred, the Respondent said that Mrs Zhu could not attend due to pressing work commitments. The Respondent asked us to place significant weight on her written witness statement.

28. We reminded ourselves that the hearing was listed on 17 May 2023 and that a Preliminary Hearing had been conducted on 17 October 2023. At no time had the Respondent raised any difficulty with Mrs Zhu attending or needing a translator.

29. The Tribunal were very concerned by Mrs Zhu's absence and lack of sufficient explanation for it in light of the notice given by the Tribunal about the hearing. We did not find her written evidence to be of great assistance. It is brief and does not address in clear detail her perspective on the meeting of 20 October 2022. It continues of the approach of the ET3 and neither admits or denies the contention that Mrs Zhu asked the Claimant the age of her children on 20 October 2022. It does not give us any more information beyond plain assertion of the Respondent's case that HQ HR froze the position the Claimant had been recruited to fill. We placed little weight on it and in any event, were not persuaded by its assertions.

Findings of fact on liability

30. The Respondent is a property development company with its head office in China and an office in Vauxhall, London.

31. The Claimant applied to the Respondent for a post as a Real Estate Marketing Manager/Director on 29 July 2022. She was first interviewed by Mr Zhenhua Wang on 25 August 2022.

32. Around the same time, the Respondent also interviewed Miss Dan Luo for a post. She was recruited as the Sales and Marketing Director and began work on 14 November 2022.

33. On 22 September 2022, the Claimant was interviewed by Mr Zhai (who also goes by the name of Harry) on Microsoft Teams. The Claimant was successful in

interview and on 26 September 2022, Mrs Jin of the Respondent confirmed to the recruiter that the company wished to make an offer of employment to the Claimant.

34. At some point the Claimant's need for flexible working was discussed as when Mrs Jin made the offer on 26 September 2022, she said the company were happy to provide some flexibility for her which would be reviewed at the end of her probation period. The Claimant queried the detail of the flexibility on offer which was confirmed by Mrs Jin on 27 September 2022.

35. The Claimant was formally offered the post of Senior Marketing Manager on 27 September 2022 and the contract of employment was signed by both parties on 29 September 2022. The Claimant's start date with the Respondent was agreed as 1 November 2022.

36. On 14 October 2022 or thereabouts, Mrs Jin asked the Claimant if she had resigned from her previous post. The Claimant did resign from that post in reliance on the contract of employment she had signed with the Respondent.

37. The Claimant was asked to attend a Microsoft Teams meeting with Mrs Wenting Zhu on 20 October 2022. At the start of the meeting, Mrs Jin introduced the Claimant and Mrs Zhu to each other and said that the Claimant needed to finish the meeting in time in order to attend to her children. Mrs Jin then left the meeting.

38. There was no notetaker at the meeting and the Respondent has not produced a note of the meeting.

39. On or around 27 October 2022, the Claimant prepared a note of her recollection of the meeting. The accuracy of those notes has not been disputed by the Respondent and we accept them as accurate. The notes record that Mrs Zhu asked the Claimant about her work experience, the size of the projects she had previously worked on and who her clients were. The meeting is detailed and reads as though it was itself a fresh interview. Towards the end of the meeting, but not at the end, Mrs Zhu asked the Claimant out of the blue "How old are your children?". The Claimant answered that her children were 4 years old and that one was approaching 1 year of age. The next entry records Mrs Zhu asking the Claimant if she had any questions for her.

40. Throughout the hearing, we had been under the impression that the Respondent was denying that Mrs Zhu had asked this question and it was a matter for us to determine. We had been taken to a record of an internal WeChat correspondence between Mr Wang and Mrs Zhu's PA on 16 February 2023 in which the PA denied that Mrs Zhu had asked the question about the Claimant's children's ages and said that "probably the candidate mentioned her work experience and brought it up voluntarily." On 21 November 2023 the PA again said that the question was brought up by the candidate, the Claimant, rather than Mrs Zhu. Mrs Zhu's witness statement did not make clear what the conversation had been about the Claimant's children and was silent about whether she had asked the question about their ages.

41. For the first time in closing submissions, the Respondent acknowledged that Mrs Zhu had asked the Claimant about the age of her children as the record of the meeting produced by the Claimant says.

42. The Respondent said in closing submissions that the question was asked in the context of a get to know you meeting, as a courtesy and to build rapport. The Claimant had denied the question was about building rapport. She says the question came out of the blue and had no relevance to the issues in the meeting. We prefer the evidence of the Claimant, that the question was raised out of the blue by Mrs Zhu in order for Mrs Zhu to learn something that she considered was important in order to decide if the Claimant was the right person for the job, rather than in order to build rapport.

43. The Respondent says that this is a question that would be asked of a man or a woman. We do not accept that Mrs Zhu would have asked both a man or a woman this question. We have not heard any evidence about how Mrs Zhu decides which future employees she wishes to speak to, only that she "sometimes" does so. We have not heard any evidence that Mrs Zhu always asks all applicants of both sexes about the age of their children. In our experience it is not common for a man to be asked the age of his children. We think it more likely than not that the Claimant was asked this question by Mrs Zhu because she is a woman and that the same question would not have been asked out of the blue of a man.

44. The Claimant googled the words "employer withdraw signed job contract" at 10:40am on 20 October 2022. We accept that she did so as she was concerned that the job offer would be withdrawn following her meeting with Mrs Zhu.

45. Mr Zhai received feedback from Mrs Zhu about her meeting with the Claimant. We have not been provided with any details about when that happened or what the content of that feedback was. We were not told about any of the substantive answers that the Claimant gave, other than the age of her children, that might have caused concern to the Respondent.

46. Around the same time as the meeting with Mrs Zhu was going on, Mrs Jin wrote to Mr Zhai to enquire about the post. Mr Zhai answered "Yes, I need to talk to headquarters and apply the role as a headcount."

47. The Respondent's position is that Mr Zhai was informed by HQ HR in China that there was a freeze on headcount and he could not employ the Claimant. He says Mrs Zhu had no control over this decision and was surprised by it. He explained that it was highly unusual for HQ HR to freeze headcount in this way.

48. We do not accept the Respondent's evidence that the instruction came from HR HQ independently of Mrs Zhu. Mr Zhai has not explained why he felt he needed to talk to HQ about headcount on this occasion and why he had not checked that the required headcount was permitted prior to the Claimant's recruitment.

49. The Respondent has not explained what was unusual about the situation that led to HR HQ freezing the post. It is not appropriate for us to Google the property

situation in China as Mr Wang suggests to try to understand what happened in the wider property market on or around 20 October 2022 that led to the Claimant's position being withdrawn. It is for the Respondent to evidence their case. They have not done so. We have not been provided with any documentary evidence to support their contention that there was a need for a headcount reduction.

50. We take notice of the fact that Mrs Zhu was a Vice President of the company working from China. We find it is more likely than not that she gave the instruction to withdraw the contract of employment from the Claimant following her conversation with the Claimant in which she asked about the age of the Claimant's children.

51. The Claimant was told that the job offer was withdrawn on 26 October 2022 and the decision was confirmed in writing on 9 November 2022. She was paid 1 week notice.

52. We did not hear evidence as to why the recruitment of Miss Luo proceeded but not that of the Claimant although we appreciate that they were recruited for two different roles.

53. Documents in the bundle suggest that the Respondent relaunched a recruitment exercise for the post of Real Estate Marketing Manager/Director, the Claimant's role, on 15 February 2023.

Findings of fact on remedy

54. We made our findings of fact on remedy after having delivered judgment on liability. We received further oral and written evidence from the Claimant, a schedule of loss and mitigation documents. Our findings were as follows.

55. Shortly after the contract of employment was withdrawn the Claimant started a fresh job search. She was successful at securing a new post commencing on 1 May 2023 albeit at a lower salary. She stopped looking for further employment on this date. She would require time to rebuild her confidence to pursue higher paying positions and in the meantime she had found a post she liked and was committed to.

56. The Respondent's submission was that the Claimant would have been made redundant had she remained in employment with the Respondent. We did not accept noting that we had not heard evidence about this possibility and that the documents relied on at the remedy stage revealed some inconsistencies, namely:

    a. The redundancy letter saying redundancies were being considered at the Respondent was dated September 2022 which was the same time as two new positions were being recruited into the sales team.
    b. The advert we have been shown that the sales team were recruiting a new position in February 2023 which suggests there were not redundancies at that time.

57. Had the signed contract of employment not been withdrawn, the Claimant would have earned a salary of £62,400 gross per year. She would also have been entitled to receive £450 per month travel allowance and £60 per month phone allowance. Reading the contract, in particular clauses 8.1-8.3, we consider that had she not suffered direct discrimination she would have been entitled to receive these expenses. This takes her to a total package of £68,520 per year or £5,710 per calendar month. Additionally she would have received 6% pension contributions.

58. As a result of the contract of employment being withdrawn, the claimant incurred loss of nursery deposit fees for her son in the sum of £245.76.

59. Turning to injury to feelings, the Claimant left the interview on 20 October 2022 feeling deflated, confused and frightened. She was stressed and worried that the job would be taken away because of the things Mrs Zhu had said to her. We accepted she had used Google to search for advice as she was afraid that the Respondent was going to withdraw her signed contract of employment.

60. When the Respondent did withdraw the contract of employment, the Claimant was stressed and upset at becoming unemployed and facing financial strain. She had resigned from a previously stable job in order to take up this new employment. She was the primary breadwinner in the family and had young children, including one under 1 years of age. Losing her job threw her into a state of panic, humiliation and upset due to the instability the unexpected news caused and made her worry about whether she should hide the fact she has young children from prospective employers. We accepted that it would have been more difficult and upsetting to try to find employment from a position of being unemployed and that she felt compelled to take a lower paid, more family friendly, position. We were encouraged that she has now found a position that she is happy in.

The law

Direct Discrimination

61. Section 13 EqA 2010 defines direct discrimination in the following terms:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

62. Direct discrimination in employment is rendered unlawful by s.39 EqA, which states as follows:

> "(2) An employer (A) must not discriminate against an employee of A's (B)—
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment."

63. Direct discrimination (except on the grounds of age, which is irrelevant in this case) cannot be justified.

64. An actual or hypothetical comparator will be required in discrimination claims. The comparator must not share the protected characteristic, but the circumstances of the comparator must be the same as or not materially different from the Claimant.

65. The test to determine whether less favourable treatment is "because of" the protected characteristic is not a simple "but for" test. The House of Lords said, in Nagarajan v London Regional Transport [1999] ICR 877 that the protected characteristic must only have a "significant influence on the outcome", that is it must influence the decision more than trivially, for discrimination to be made out. Similarly, in O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1997] ICR 33, the EAT held that the protected characteristic need not be the main reason for treatment, provided it is an "effective cause".

66. Discrimination may be sub-conscious. The case of Nagarajan concerned race discrimination but the principles established there are applicable to sex discrimination:

"All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. ……. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination."

67. In cases of direct discrimination, it is important to identify the decision maker who is alleged to have acted with discriminatory motivation (Reynolds v CLFIS (UK) Ltd [2015] ICR 1010). It is not sufficient to add together the mindset of one employee with another to establish liability. Paragraph 36 records:

"In my view the composite approach is unacceptable in principle. I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow."

68. The word "detriment" has been construed broadly by Courts and Tribunals. In the leading case of Shamoon v Chief Constable of the Royal Ulster Constabulary

[2003] ICR 337, the House of Lords held that it is only necessary for the Claimant to show some disadvantage. He or she need not show any material physical or economic consequence that was materially to his or her detriment.

69. It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". While the Claimant's perception is, strictly speaking, irrelevant, the Claimant's subjective perception of their treatment is likely to inform the Tribunal's conclusion as to whether, objectively, the impugned treatment was less favourable.

Burden of Proof in Discrimination Claims

70. Burden of proof provisions in EqA Claims are set out 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."

71. In Igen v Wong [2005] ICR 931 the Court of Appeal provided the following guidance which, although it refers to the Sex Discrimination Act 1975, applies equally to the EqA:

"(1) Pursuant to section 63A of the 1975 Act, 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 employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, 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 section 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 section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(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 section 56A(10) of the 1975 Act. 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 employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer 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 employer 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 employer 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."

72. In Madarassy v Nomura International plc [2007] IRLR 246 Mummery LJ held at para 57 that "could conclude" meant that "a reasonable tribunal could properly conclude" from all the evidence before it.

73. Mummery LJ went on to say:

"This would include evidence adduced by the complainant in support of the allegations of [in that case] sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."

74. A mere difference of treatment is not enough to shift the burden of proof, something more is required: Madarassy per Mummery LJ at para 56:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

75. However, as Sedley LJ observed in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279 at para 19, *"the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

76. The Claimant is not required to adduce positive evidence that a difference in treatment was on the ground of the protected characteristic in order to establish a prima facie case of discrimination and shift the burden of proof. See Network Rail Infrastructure Limited v Griffiths-Henry [2006] IRLR 865 at para 18 per Elias P:

"Ms Cunningham says that in order to establish a prima facie case there must always be some positive evidence that the difference in treatment is race or sex, as the case may be. That seems to us to put the hurdle too high. … Provided tribunals adopt a realistic and fair analysis of the employer's explanation at the second stage, we see no justification for requiring positive evidence of discrimination at the first stage."

77. In Anya v University of Oxford [2001] ICR 847, the Court of Appeal held that 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 (see paragraphs 2, 9 and 11).

78. Those primary facts may include not only the alleged acts at the heart of the complaint but also other acts which may constitute evidence pointing to a prohibited ground for the alleged discriminatory act or decision. The function of the tribunal is twofold: to establish what the facts were on the various incidents

alleged; and, secondly, to decide whether the tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a prohibited ground for the acts of discrimination complained of. The Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

Remedy for discrimination

79. Where a Tribunal finds that an employer has discriminated against an employee, there are three types of remedy available (see section 124 of the Equality Act 2010). The tribunal may:

    a. make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
    b. order the respondent to pay compensation to the complainant;
    c. make a recommendation that the respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant.

80. It is for a Claimant to prove her loss and, generally speaking, this will include proof of the causal link between the unlawful treatment and the loss. In many cases this will be obvious or relatively easy for a claimant to achieve.

81. The Claimant is under an obligation to take *reasonable* steps to mitigate her loss, but it is for the respondent to prove with evidence that she has failed to do so.

82. The aim of compensation is to put the Claimant in the position, so far as is reasonable, that she would have been in had the discrimination not occurred (Ministry of Defence v Wheeler [1998] IRLR 23 and Chagger v Abbey National plc [2010] IRLR 47). The types of financial loss that are recoverable are, in general, the same as for an unfair dismissal compensatory award and include the value of lost earnings and benefits. The same principles of mitigation apply. However, there are a number of key differences as follows:

    a. There is no statutory cap on the amount of compensation;
    b. The tribunal does not award simply what is considers ‘just and equitable’ but must assess loss under the same principles as apply to torts (see s124(6) and s119(2) Equality Act 2010), though the two approaches will often lead to the same result.
    c. The tribunal can award compensation for non-financial losses such as injury to feelings, aggravated damages and general damages for personal injury.
    d. The Recoupment Regulations do not apply (recoupment does not arise in this case in any event).
    e. The tribunal has power to, and generally should award interest on past losses.

Compensation for injury to feelings

83. An award for injury to feelings is intended to compensate the Claimant for the anger, distress and upset caused by the unlawful treatment she has received. It is compensatory and not punitive, but the focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (see Komeng v Creative Support Ltd [2019] UKEAT/0275/18).

84. Tribunals have a broad discretion about what level of award to make. The matters compensated for encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102). The general principles that apply to assessing an appropriate injury to feelings award were set out by the EAT in Prison Service v Johnson [1997] IRLR 162, as follows:

    a. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;
    b. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;
    c. Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;
    d. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;
    e. Tribunals should bear in mind the need for public respect for the level of awards made.

85. The Court of Appeal in Vento identified three broad bands of compensation for injury to feelings. There is within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. Compensation must relate to the level of injury to feelings experienced by the particular Claimant.

86. Presidential Guidance states that in respect of claims presented on or after 6 April 2022, and taking account of Simmons v Castle [2012] EWCA Civ 1039, the Vento bands shall be as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases), with the most exceptional cases capable of exceeding £49,300. This claim was presented on 8 February 2023.

Interest

87. A Tribunal can, and usually will award interest on awards of compensation made in discrimination claims under s124(2)(b) EqA and the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Regulations"). Interest is limited to past loss, that is loss to the date of the Remedy Hearing. The current rate of interest is 8%.

88. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (see reg 6(1)(a) of the Regulations). Interest is awarded on all sums other than compensation for injury to feelings from the midpoint date (reg 6(1)(b)). The mid-point date is the date halfway through the period between the date of the discrimination complained of and the date when the tribunal calculates the award (reg 4).

89. The Tribunal has a discretion to award interest on a different basis if it considers that serious injustice would otherwise be caused.

Grossing up

90. Awards will be "grossed up" by a Tribunal where the sum to be received by the claimant will be taxed. The purpose is to place in the Claimant's hands the sum she would have held had she not been treated unlawfully, ie, to compensate for the true net loss.

Conclusion on liability

91. We do not consider that Ms Luo is an actual comparator in this case as her circumstances were materially different from the Claimant. We have compared the Claimant to a hypothetical comparator and have asked ourselves what was the reason for the treatment that we have found occurred.

Withdrawal of Claimant's signed contract of employment

92. We have reminded ourselves of the shifting burden of proof and considered whether we find that there are sufficient facts from which we could conclude that the reason the contract was withdrawn was because of the Claimant's sex. We have found that there were sufficient facts and we do so conclude that the Claimant's sex was the reason the signed contract of employment was withdrawn.

93. We find that the person who decided to withdraw the contract of employment was Mrs Zhu. She is Vice President of the Respondent company and in line with our experience of company structures, we find that she would have had authority to make decisions about headcount and recruitment. We do not think that she would be subservient to HR HQ or that she would expect to be told about their decisions from the UK based Mr Zhai. We consider it more likely than not that she would have control over such decisions herself.

94. The Claimant had been interviewed successfully twice and her competence and ability to carry out the role had been agreed. We have not heard any evidence that Mrs Zhu had any concern about the Claimant's ability to carry out the role. We know that she fed back about her interview with the Claimant to Mr Zhai. Within a few hours of Mrs Zhu speaking to the Claimant, Mr Zhai said he needed to confirm the headcount for the position.

95. The evidence as to how the headcount freeze came about is contradictory. Mr Zhai says that HR HQ contacted him. However the WeChat records suggest that he contacted them. We do not have any evidence at all as to what the alleged instruction from HR HQ actually was.

96. The timing of the intervention by Mr Zhai, so soon after the interview with Mrs Zhu and despite the contract of employment having already been signed, leads us to conclude that Mr Zhai was acting on the instruction of Mrs Zhu in withdrawing the post.

97. It goes without saying that withdrawal of a signed contract of employment is a detriment under the Equality Act 2010.

98. As to whether the withdrawal was because of the Claimant's sex, we remind ourselves that we are considering whether the Claimant's sex had a significant influence on the decision of Mrs Zhu, as in whether it influenced the decision more than trivially.

99. We find that the Claimant's sex did have a significant influence, that is more than a trivial influence, on the decision to withdraw the job offer. We infer this from the following factors:

    a. The Claimant had been successful in her application for the post against another applicant. At no time has the Respondent cast any doubt over her abilities and experience including following the meeting with Mrs Zhu.
    b. The UK based HR team had been willing to arrange a period of flexible working for the Claimant showing that she was a credible and capable of delivering in the role.
    c. At the start of the meeting with Mrs Zhu, Mrs Jin raised the fact that the Claimant had a limited period of time due to her childcare commitments. We understand that this is the first time Mrs Zhu became aware of her childcare commitments.
    d. Mrs Zhu later asked the Claimant about the age of her children out of the blue in a meeting clearly designed for Mrs Zhu to assess the Claimant's suitability for the post. As set out previously, we do not consider she would have asked a man this question. We consider that the Claimant's childcare responsibilities were important to Mrs Zhu's assessment of the Claimant's suitability for the role.
    e. It was not until closing submissions that the Respondent admitted that it was Mrs Zhu who had asked this question and not the Claimant who had raised the issue of her children's age.

f. Almost immediately after this meeting, Mr Zhai referred for the first time to a potential problem with headcount for the post.
g. We have not received any evidence to support the Respondent's case that there was a need for a headcount freeze.
h. Mr Zhai was unable to assist us with a number of important elements to help us better understand what had happened on the Respondent's case. We found his answers evasive and draw an inference from them.
i. Mrs Zhu did not attend the hearing and, for the reasons described above, we draw an inference from that.

100. It follows that we conclude that there are facts from which we could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant.

101. The burden of proof therefore shifts to the Respondent. For the reasons described, we do not consider that they have proven that the reason the contract of employment was withdrawn was for a reason other than sex. On the balance of probabilities, we do not accept the Respondent's explanation for why the contract of employment was removed. We do not consider they have shown that they did not discriminate against the Claimant. We do not accept that the reason the job offer with was withdrawn was because of a headcount freeze from HR decided on independently of Mrs Zhu's interview.

102. We find that the Claimant's sex was the reason for the job being withdrawn.

Mrs Zhu asking the question about the children's age

103. The Claimant's case is that it is direct discrimination to ask a question about the age of the Claimant's children in the interview. We begin by recognising that in our experience it is unlikely that this question would have been asked of a man. But we consider it highly important to assess the context in which the question was asked in order to decide whether, in this case, it was less favourable treatment because of sex to ask the question during the interview rather than an innocent and inquisitive question from an interviewer seeking to build rapport.

104. In the context of this case we consider it was less favourable treatment because of sex for the following reasons:

a. In our view, the meeting of 20 October 2022 was not an informal get to know you meeting, rather it was a formal meeting in which Mrs Zhu wanted to assess the suitability of the Claimant for the role.
b. The question from Mrs Zhu was asked after the Claimant had raised concerns about childcare and we consider it was asked by Mrs Zhu because she thought it was important in her assessment of the Claimant's suitability for the role.
c. The question was asked out of context, in that it was not part of a general conversation but came directly after questions about the Claimant's experience.

d. Following the question being asked, as we have described above, the signed contract of employment was withdrawn.
e. It was not until closing submissions that the Respondent clearly conceded that the question had been asked.
f. We have also drawn an inference from the absence of Mrs Zhu. Despite knowing about the hearing for 11 months, she has not attended to explain her reasons for asking this question of the Claimant despite it being a central component of the Claimant's case.

105. We find that the Claimant was treated less favourably because of her sex in respect of both complaints. Both complaints of direct sex discrimination are well founded and succeed.

Conclusion on remedy

Recommendation

106. The Claimant has not asked us to make a recommendation and we decline to do so.

Loss of earnings

107. The Tribunal felt that the Claimant had conducted a reasonable and thorough search for alternative employment starting shortly after the contract of employment with the Respondent was withdrawn. The Respondent accepts that she reasonably mitigated her loss during this time. We award her her full loss of earnings until 1 May 2023 when she secured alternative employment.

108. The Respondent asks us to stop her losses of earnings from 30 June 2023 on the basis that had she remained in employment there is a chance that she would have been made redundant. We rejected that possibility. The evidence provided was inconsistent and not persuasive.

109. We consider it just and equitable to award the Claimant all past loss to the date of trial. We recognise that the Claimant stopped looking for further employment once she commenced her current position and we appreciate that it would have taken her some time to rebuild her confidence recommence her search. However, we consider that acting reasonably, she could have restarted her search for a comparably paying position towards the end of 2023 and that she could have potentially found alternative employment at the rate of pay the Respondent was offering by the present day. Accordingly, we calculate her loss of earnings to flow from 1 November 2022 to 30 April 2024 and no further.

110. Had the Claimant taken up her employment with the Respondent, she would have earned a total package of £68,520 per year of £5,710 per calendar month. We reject the Respondent's argument that she was not entitled to the travel allowance and phone allowance as she did not start work. Reading the contract, in particular clauses 8.1-8.3, we consider that had she not suffered direct discrimination she would have been entitled to receive these sums.

111. We gave careful thought to the calculation of the net sum the Claimant would have taken home and have broken this down into the 2022/23 tax year until 30 March 2023 and beyond.

Loss from 1 November 2022 to 30 March 2023

112. From April 2022 until October 2023, the Claimant was in receipt of £8,060.31 taxable pay from her previous employer. She had been on maternity leave during this time.

113. Had she taken up her position from the Respondent, between 1 November 2022 and 30 March 2023, she would have earned 5*£5,710 = £28,550. She also received £8,060.31 from her previous employment giving £36,610.31 in the tax year.

114. Of that, £12,270 would have been tax free as her personal allowance, leaving £24,340.31 subject to 20% tax. This would have given her take home of £19,472.25 net.

115. The remaining £28,550 less £24,340.31 would have been tax free as part of her personal allowance meaning £4,209.69 tax free.

116. Doing the best we can, we therefore consider that her net earnings from the Respondent between 1 November 2022 and 30 March 2023 would have been £19,472.25 + £4,209.69 = £23,681.94.

Loss from 1 April 2023 to 30 April 2024

117. Going forwards from 1 April 2023 onwards, had she remained in employment with the Respondent, the Claimant would have earned £50,302.60 net per year or £4,191.88 net per month or £967.36 net per week.

118. From 1 May 2023 onwards, the Claimant was in full time employment albeit at a lower rate of pay.

119. We have been through the Claimant's payslips from her present employment and deducted that from the sum she would have earned with the Respondent between 1 April 2023 and 30 April 2024 and conclude that her net loss for this period is £20,959.18.

120. We conclude that loss of earnings in total is £44,641.12.

Pension loss

121. Had the Claimant remained in employment from 1 November 2022 until 30 April 2024, she would have been entitled to 6% pension, or £341.60 per month. This equates to a total pension loss of 18 months = £6,148.80.

122. In her current position she receives £86.79 per month. This equates to a gain of £86.79*12 = £1,041.48.

123. Therefore the loss of pension is £5,107.32.

Nursery fees

124. We accept that the Claimant incurred loss of nursery deposit fees for her son in the sum of £245.76.

Deduction from losses

125. The Respondent has already paid the Claimant £1,107.69 which we deduct from the financial loss.

ACAS

126. We had considered whether or not the ACAS Code of Practice, Disciplinary and Grievance Procedures (2015) applied to this dismissal. The Claimant did not make submissions on this and left it to us to consider.

127. The Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace. Disciplinary situations are said to include misconduct and/or poor performance. Redundancy situations are specifically excluded. We conclude that the ACAS Code does not apply to this dismissal which was not a disciplinary matter as defined in the Code of Practice.

State benefits

128. The Claimant told us that she received £1,516.06 in job seeker's allowance. We deduct this sum from the financial loss.

Sub total financial loss

129. We therefore aware financial loss of £47,370.45.

Interest on financial loss

130. We award 8% on those heads of loss arising under the Equality Act 2010.

131. On the award for past financial loss, we have calculated interest from the mid point between the date of discrimination and today, which is a period of 282 days.

282 * 0.08 * 1/365 * £47,370.45 = £2,927.88

Grossing up financial loss

132. The total of the financial loss is £50,298.33.

133. As this award exceeds the tax-free threshold of £30,000 in section 401 of the Income Tax (Earning & Pensions) Act 2003, it is necessary to gross up the excess to take account of the fact that it will be taxed as income in the Claimant's hands.

134. There is no evidence that the Claimant has used any part of the £30,000 allowance previously and we are satisfied, therefore, that she can apply it in full to our award. Accordingly, the amount of our award that is taxable is £20,298.33.

135. The personal allowance will have been used in current employment. So the £20,298.33 will all be taxed at either 20% or 40%.

136. Current income tax bands have the basic rate of 20% payable on sums between the personal allowance and £50,270 and 40% above that.

137. On the basis that the Claimant is earning £45,000 now, we consider that the difference between £50,270 and £45,000 = £5,270 will be taxed at 20% meaning the following grossing up:

£5,270 / 0.8 = £6,587.50.

138. The remaining sum of £20,298.33 less £5,270 = £15,028.33 will be taxed at 40% meaning the following grossing up:

£15,028.33 / 0.6 = £25,047.22

139. The total grossed up financial loss is therefore:

£30,000 + £6,587.50 + £25,047.22 = £61,634.72

Injury to feelings

140. The Claimant's representative contended that this was a lower band case equating to a sum of £5,000. We disagree and think that is too low. We have considered both successful findings of direct discrimination together and we consider this to have had a more serious impact on the Claimant than a lower band case represents. We have also given some consideration to similar cases in which women were dismissed from employment because of their sex. We recognise that in the Claimant's case there is the additional feature that she was just returning to the workplace following her maternity leave and the added vulnerability this brings.

141. We recognise the serious impact this had on the Claimant. She had resigned from stable employment at the end of a period of maternity leave because she had what she believed was a signed and secure contract of employment with the Respondent. Due to the discrimination suffered, she was left with neither

position to return to while facing the financial responsibilities of being the primary earner providing for a young family. The situation caused her panic, humiliation, stress and upset.

142. We consider this to be a middle band case. We consider the appropriate sum to be £16,000.

Interest on injury to feelings award

143. On the award for injury to feelings, we have calculated this from the date of discrimination of 26 October 2022 until today, 24 April 2024, a period of 564 days.

564 * 0.08 * 1/365 * £16,000 = £1,977.86

144. This provides a total sum for injury to feelings of £17,977.86

Grossing up injury to feelings

145. Given that the personal allowance and 20% tax rate have all been used up as described above, the injury to feelings award will all be taxed at 40%. The grossed up sum is therefore:

£17,977.86 / 0.6 = £29,963.10

Summary

Head of loss	**Award**
Financial loss	
Net loss of earnings from 1.11.22-30.4.23	£23,681.94
Net loss of earnings from 1.5.23-30.4.24	£20,959.18
Pension loss	£5,107.32
Nursery fees	£245.76
Less pay received from Respondent	-£1,107.69
Less job seekers allowance received	-£1,516.06
Sub total financial loss	£47,370.45
Interest on financial loss	£2,927.88
Sub total of financial loss	£50,298.33
Grossed up financial loss	**£61,634.72**
Injury to feelings	
Injury to feelings award	£16,000
Interest on injury to feelings award	£1,977.86
Sub total injury to feelings	£17,977.86
Grossed up injury to feelings	**£29,963.10**
Total	**£91,597.82**

146. The Respondent is ordered to pay compensation to the Claimant for financial loss and injury to feelings, inclusive of interest, of **£91,597.82**.

Employment Judge Musgrave-Cohen

6 June 2024