EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Gleeson**

Respondent: **Government Legal Department**

Heard at: **London Central Employment Tribunal (via CVP)**
On: **2nd, 3rd and 4th October 2024**

Before: Employment Judge Singh
Mr S Hearn
Mr D Kendall

Representation
Claimant: In-person
Respondent: Ms N Ling (Counsel)

JUDGMENT

1. The Claimant's claim for Unlawful Deduction from Wages is well-founded and succeeds.

2. The Claimant's claim for Indirect Sex Discrimination is well-founded and succeeds.

3. The Claimant's claim for Indirect Associative Disability Discrimination is not well-founded and is dismissed.

There will be a remedy hearing to determine the compensation to be awarded to the Claimant.

WRITTEN REASONS

4. The Claimant requested written reasons for the decision following the hearing. They are set out as follows;

Introduction

5. The Claimant is employed by the Respondent as a Senior Lawyer.

6. She remains employed as of today.

7. Her claim is regarding a payment made by Respondent to its staff in July 2023The Claimant was not paid this payment.

8. The Respondent says that the Claimant was not eligible. The eligibility criteria were that you needed to be “in post” (the Respondent’s words) between 31st March and 31st July 2023.

9. The Claimant was on a career break during that period. She began in March 2023 and it was due to last until September 2023.

10. The Claimant argued that she should be paid the payment. She says that although she was on a career break, she was still “in post”.

11. The Respondent does not agree. The Respondent says that being on a career break means that you are not “in post”.

12. The Claimant also argues that the decision to not pay her discriminates against her because she is a woman and because the reason for the career break is because she was caring for individuals who have disabilities.

Claims and issues

13. The Claimant pursued 3 claims that this tribunal had to make a decision on. Unlawful deduction from wages, indirect sex discrimination and indirect associative disability discrimination.

14. In relation to the unlawful deduction from wages claim, the test for the tribunal to consider was

    a. Was the £1,500 payment properly payable to the Claimant?
    b. If it was, was it paid?
    c. If not, was that deduction authorised beforehand either by statutory provision, a term in the contract of employment or via some other signed written agreement between the Claimant and Respondent?

15. In this case, the Respondent was not seeking to advance a defence on the last 2 points and, as such, all we would need to consider was whether the £1,500 was properly payable to the Claimant.

16. In relation to the indirect sex discrimination claim, the test was

    a. Was the Respondent not paying staff who were on a career break a provision criterion or practice (a ‘PCP’)?
    b. If so, did the Respondent apply that PCP to all staff?
    c. Did they apply the PCP to the Claimant?

d. Did that PCP put a greater proportion of women than men at a particular disadvantage?
e. Did it put the Claimant at a disadvantage because she is a woman?
f. If so, was the PCP a proportionate means of achieving a legitimate aim?

17. In this case, the Respondent accepted that the decision not to pay staff was a PCP and that it was applied to its staff, including the Claimant.

18. In relation to the disadvantage, that was "not receiving the payment".

19. The Claimant argued that more women than men were likely to be carers and therefore the disadvantage was disproportionately suffered by women. The Respondent did not agree with this.

20. The Respondent also sought to justify their actions as a proportionate means of achieving a legitimate aim. The aims were set out in a letter to the Claimant sent as part of these proceedings, on the 26th September 2024. They were as follows

    a. To apply the pay remit within the guidelines set by the Cabinet Office
    b. To maintain consistency with the principle applying to career breaks that an employee is not entitled to pay for the duration of a career break
    c. To maintain a sufficient connection between pay and being at work, as opposed to being voluntarily away from work.

21. The Claimant did not challenge the late submission of these legitimate aims proposed by the Respondent but did highlight that the Respondent's position has changed throughout the life of her case and wished for the tribunal to draw inferences from that.

22. In respect of the indirect associative disability discrimination claim, the tribunal would need to go through a similar test to the indirect sex discrimination claim, however, the Claimant was not claiming that she herself was disabled and was thus put at a particular disadvantage, but instead was claiming that she suffered the disadvantage because of her association with disabled people.

23. In this case, the Claimant argued that the reason for her career break was partly to care for her children who have neurological conditions and her parents who had dementia. The Respondent did not challenge that these individuals were likely to be found to meet the definition of disability in the Equality Act 2010.

24. Although there is currently new legislation governing associative discrimination, this was not in force at the time the incident complained of occurred and, as such, the tribunal must look at the law at that time.

25. The relevant case is that of ***CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia [2016] 1 CMLR 14***. In summary, in that case, the principle was established that an indirect discrimination claim could be pursued by someone who did not share the protected characteristic of those who were disadvantaged by the PCP.

26. In that case, the idea of "ricochet discrimination" was proposed, in that someone could suffer discrimination by their close proximity to those being disadvantaged. However, it was not the association with the people that the Claimant needed to show, but that they shared the same disadvantage that they did.

27. In CHEZ, Roma people who lived in a particular area suffered a disadvantage. Those who also lived in that area and suffered the disadvantage but who were not Roma were able to pursue a claim.

28. In this case, the Claimant would therefore need to show that a disadvantage was suffered by disabled persons by the PCP, and she suffered the same disadvantage because of her close proximity or relationship with disabled persons.

The Law

Unlawful deduction from wages

29. Section 13 of the Employment Rights Act 1996 sets out the right not to suffer an unlawful deduction from wages. Section 13(3) is particularly relevant to this case.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

30. Wages is defined in s.27 of the Act.

27. Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

31. That section also confirms bonuses can amount to wages

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

32. The question of what "properly payable" means under s.13(3) is the key issue in this case.

33. The issue was also at the heart of the case of *New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA*. In Morritt LJ's view in that case, the phrase 'properly payable' suggested that some legal — but not necessarily contractual — entitlement to the sum in question was required.

34. *Delaney v Staples (t/a De Montfort Recruitment) 1991 ICR 331, CA*, is binding authority that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under S.13 ERA is properly payable, including an issue as to the meaning of the contract of employment.

35. *Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT* set out that the approach ETs should take is the same followed by Civil Courts in Contract claims. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

36. *Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714, CA* sets out that in order to determine what is properly payable, a tribunal should consider all the relevant terms of the contract, including any implied terms. This also entitles us to consider other relevant documents such as policy documents.

37. The date on which a payment is due under the contract — and therefore 'properly payable' — may be pivotal in some cases, as it was in *Hellewell and anor v Axa Services Ltd and anor 2011 ICR D29, EAT*. The tribunal may need to work out when the legal entitlement arose.

38. *Farrell Matthews and Weir v Hansen 2005 ICR 509, EAT* stated that once the employer has exercised its discretion in favour of granting a bonus on certain terms, it comes under a legal obligation to pay it.

39. In *Tradition Securities and Futures SA v Mouradian 2009 EWCA Civ 60, CA*, the Court of Appeal upheld an employment tribunal's decision that, once the bonus had been declared, there was a quantifiable sum which the Claimant was legally entitled to receive.

40. When interpreting an express term, the court or tribunal's aim is to give effect to what the parties intended. The 'golden rule' in ascertaining that

intention is that the words of the contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary to avoid absurdity, inconsistency or 'repugnancy'

41. The primary source for determining what the parties meant when they entered into their agreement are the words actually used in the contract, interpreted in accordance with conventional usage. This preference for the ordinary and popular meaning of words means that any alternative technical or specialist meaning is eschewed unless there is evidence that that alternative meaning was intended. With regard to employment contracts, Mr Justice McCombe remarked in *Harlow v Artemis International Corporation Ltd 2008 IRLR 629, QBD*, that these 'are designed to be read in an informal and common sense manner in the context of a relationship affecting ordinary people in their everyday lives'.

Indirect discrimination

42. The law relating to indirect discrimination is found in the Equality Act 2010.

19. Indirect discrimination

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

43. Sex/gender is a relevant protected characteristic for this claim.

44. As set out above, in this case the Respondent was not challenging that the policy not to pay those on career break was a PCP that was applied to all staff.

45. The first issue therefore was whether or not

> *"it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,…"*

46. This section clearly requires a comparison exercise and although there is no specific reference to pools or proportions, that would be the most logical way to determine comparative disadvantages. The EHRC Employment Code endorses a pool approach.

47. *McCausland v Dungannon District Council 1993 IRLR 583, NICA* set out the test for comparing groups within pools and stated that a tribunal should compare those within each relevant group that can and can't comply. That is comparing the proportion of women in the female workforce who are affected by the disadvantage compared to the proportion of men in the male workforce who are affected.

48. A similar test was adopted by the High Court in *R v Secretary of State for Education and Science ex parte Schaffter 1987 IRLR 53, QBD* (a sex discrimination case), but was expressed slightly differently: tribunals were enjoined to, first, assess the number of persons of the claimant's sex within the defined pool for comparison and ask what percentage of those could comply (X per cent); secondly, find out what percentage of the rest of the pool could comply (Y per cent); and, thirdly, compare X and Y and determine whether one was considerably smaller than the other

49. The Court was keen to point out that it did not matter whether X and Y were very small or very large in terms of the pool as a whole. What was important was how they compared in terms of each other. This principle later found favour with Lord Nicholls in the House of Lords' decision in *Barry v Midland Bank plc 1999 ICR 859, HL*

Associative discrimination

50. The law set out in the Chez case is set out above.

51. The first instance decision of *Follows v Nationwide Building Society ET Case No.2201937/18* applied the case of Chez in the UK Employment Tribunal.

52. In that case, it was determined that someone who suffered indirect discrimination from a policy because of their association with someone who had a disability (in that case, the Claimant was a carer), they could pursue a claim.

Findings of fact

53. This was not a fact heavy case and many of the key facts were agreed.

54. The Claimant started her employment in January 2004.

55. She applied for a career break in December 2022, and this was granted by way of a letter of the 3rd January 2023 [page 91].

56. The terms of the career break were set out in the letter and made it clear that the Claimant would not be paid during it or expected to work but would still be under some obligations to the Respondent during the period.

57. The announcement about the £1,500 was made by way of a briefing email that was circulated on the 2nd June 2023 [page 102-103]

58. The tribunal notes that the wording of this was that "Ministers have agreed to allow departments to make a fixed payment of £1,500 to civil servants in delegated grades in recognition of your public service and the challenges of the cost of living."

59. The Respondent explained that "delegated grades" means anyone who is not a senior civil servant and this included the Claimant.

60. A further email from Susanna McGibbon on the same day also confirmed the following

    "the Government is allowing departments covered by the Civil Service Pay Remit to make a fixed non-consolidated payment of £1,500 per member of staff, in recognition of the pressures felt during the 2022/23 pay year"

    And

    "*Our intention is for this payment to benefit as many delegated employees as possible."*

61. An email from Ms McGibbon on the 6th June 2023 says [page 228]

    "I am pleased to confirm that the non-consolidated payment of £1,500 announced last week will be payable to all colleagues in delegated grades"

    And

    "As I said in my message on Friday [2nd June], I wanted to ensure as many colleagues were covered as possible and I'm delighted we are able to do this."

    And

    "This is very welcome news in recognition of the challenges of cost-of-living increases and the consistent contribution and hard work of civil servants."

62. The next relevant email is a document called "Top Brief" on 23rd June 2023 [page 230].

63. In this, Ms McGibbon said *"I am pleased to confirm that the non-consolidated £1,500 to all civil servants in delegated grades in recognition of the pressures during the 2022-23 pay year will be paid in July".*

64. The document set out the eligibility criteria. This was

    "To be eligible for this payment civil servants in grades below the SCS will need (1) to have been post on the 31st March 2023 and (2) still be in post on the date of the payment- 31st July 2023."

65. It is the definition of the phrase "in-post" which has been a central issue in this case.

66. The above paragraph from Ms McGibbon also made it clear "Agency workers are not eligible for this payment".

67. The next 2 paragraphs were about the date of the payment and payments for part time workers. There was then an FAQs section.

68. The FAQ gave the following relevant information.

    a. Those on maternity leave who have either been in post or on paid/unpaid mat leave on both 31st March 2023 and 31st July 2023 will be eligible for the payment.
    b. Those on sick leave who have either been in post or on paid/unpaid sick leave on both 31st March and 31st July 23 will be receive the payment.

69. In relation to career breaks the FAQs gave the following information

    "*You will need to meet both eligibility criteria described above [you will receive the payment]. If you were on career break on 31st March 2023 or are due to be on career break on 31st July 2023 you will not be eligible for the payment".*

70. We note that unlike with sick leave and maternity leave, this section did not mention about being "in post". It simply stated that those on career break on 31st March or 31st July 2023 were not eligible.

71. There was also a copy of the "Civil Service Pay Remit Guidance: Addendum Guidance 2023/24" [page 427] which was a document specific for this payment and is dated 2nd June 2023. This was the document that gave the instructions to the government departments to make the payment.

72. This confirmed the eligibility requirement of having to be "in post" on the 31st March and 31st July. There is nothing in this document about those on career breaks being excluded.

73. The tribunal heard evidence from Mr Chris Chapman, Head of Pay, Policy and Employee Relations. The tribunal wanted to try and understand how GLD made the decision to exclude those on Career Break. There was no documentary evidence of emails or notes of any meeting confirming how this decision had been reached.

74. Mr Chapman confirmed that the Pay Remit Guidance was the document that gave authorization to departments to make the payment. He said that he was not sure who had determined that Career Breaks should be excluded.

75. He said that once that had been decided, all other staff were going to receive the payment, he was satisfied the Respondent had complied with the PSED by having consideration on the impact of the decision on protected characteristics- that is that no protected characteristics were going to be disadvantaged as everyone, barring agency workers and those on career breaks, were going to receive the payment.

76. However, the tribunal finds that no consideration has been done. There is no evidence about how the decision to exclude career breaks has been reached. Particularly the Respondent has not thought about what the makeup of that exclude class could be and, if they have protected characteristics, what impact the decision to exclude them has.

77. The Respondent has also argued that the date of when the payment becomes "anticipated" was a factual point that was relevant to the claim.

78. The case of *New Century Cleaning* stated that the worker would have to show an actual legal (although not contractual) entitlement to the payment in question in order for it to fall within the definition of "properly payable"

79. The Respondent's case was that the correspondence of the 2nd June 2023 doesn't create this legal entitlement. All they do is set out what departments have the power to do, rather than say that depts will be making the payment.

80. They say that the email of the 23rd June also doesn't create that entitlement as although that document confirms to staff that they will be getting the payment, is clear in the FAQs that those on career break are excluded.

81. The case of *Farrell Matthews* said that once a bonus had been "declared" there was a quantifiable sum that the Claimant was legally entitled to receive.

82. It was the tribunal's finding in this case that the bonus was declared in the correspondence on the 2nd June 2023 and those emails did create a legal entitlement.

83. The wording of the Simon Case email [page 102] says *"ministers have agreed to allow departments to make a fixed payment of £1500*". The Respondent suggested that this only conveyed a power on departments, and they still had discretion not to make that payment.

84. We do not agree with that at all. We found that the Respondent was adding words or meaning to the Simon Case email. It was our finding of fact that the Simon Case email confirmed that departments are now being authorised to make the payment to all staff.

85. The McGibbon email of the same day supports this as it uses similar words *"Government is allowing departments".* But this email goes further to say that *"…to make a fixed non-consolidated payment of £1,500 per member of staff".*

86. It is our finding that any member of staff reading this would be under the impression that they would be paid this payment.

87. The wording "*in recognition of the pressures felt during the 2022/23 pay year"* also give an explanation for the payment and we found that anyone who had worked during that period would believe the payment was being paid for services carried out during that financial year and that if they had worked in that period, they would receive it.

88. We accept that the email of the 23rd June does exclude staff on career breaks but as stated, we consider that the payment becomes properly payable before that date.

89. Further, we find that the Respondent's decision to exclude those on a career break has no lawful basis. There was no evidence provided by the Respondent which showed how they had come to the conclusion that those on a career break should be excluded. The Respondent's witnesses accepted that there was nothing in the guidance document, or in the correspondence from Simon Case which stated that those on career break should be excluded. Someone at a later stage has made an arbitrary decision to exclude a group of people without any reasoning. This would be particularly jarring to someone who had worked in the 2022/23 year and felt the pressures referred to, but was now on a career break and missing out on the reward and recognition their colleagues had been given.

90.. It is also our finding that the eligibility criteria of having to be "in post" should take its ordinary meaning. No specialised meaning was put forward by the Respondent. They had no policy document that defined what "in post" meant to the GLD. In the absence of any document from the Respondent that defines "in post", we must take the ordinary meaning of the word as per the case law.

91. Our ordinary reading of "in post" is "employed by the employer". This is what, in our finding, an ordinary person would take "in post" to mean.

92. The Career Break letter [page 80] makes clear the terms of the break. In particular the ET paid attention to the fact that on return to work, the Claimant is given any pay rises that her colleagues have been given (that is normal ones not performance related). The break appears to be just

that, a break, rather than the Claimant being removed from the Respondent for a period.

93. There is no suggestion that the Claimant will be removed from her role during the break and would have to apply for a new post when she returns.

94. It was our finding then that anyone on career break is still "in post". Therefore, by the Respondent eligibility criteria, those on career break should still receive the payment.

95. They go on, in our opinion, to give contradictory guidance to say that those on career break will not receive this payment. As this is not based on any logic or reasoning and is contrary to the wording of the Pay Remit guidance, we say that this answer in the FAQ is wrong and that the eligibility criteria should trump it.

96. The Respondent's witnesses tried to argue that those on career break should not receive it as the career break terms confirms they will not receive pay during that period. However, Mr Chapman also went to pains to confirm the bonus was not pay and was a "non-consolidated" payment and how that it was "unprecedented". We therefore found that payment to someone on career break would not be incompatible with the principle that someone on career break would not be paid their salary or any normal bonuses.

97. The Claimant raised the issue of non-payment with HR on the 26th June 2023 [page 114-111]

98. The payment was made on the 31st July 2023 and the Claimant's career break ended on the 11th September 2023.

99. The Claimant submitted an appeal on the 4th October 2023 and received an outcome on the 23rd November 2023. The grievance was not upheld [page 331]

100. She appealed on the 13th February 2024 and received the outcome on the 26th March 2024 [page 372]

101. We also had sight of a number of other relevant documents

i. Carers guidance documents [page 412]
ii. Civil service pay remit guidance [page 427]
iii. Dept of Health and Social care guidance [page 372]

102. Finally, we were provided with some statistics from the Respondent that were relevant to the numbers of staff who were on career break and what their gender was. These were provided by the Respondent to the Claimant after a request from her on 22nd May 2024, as part of these proceedings. [page 397-401]

103. We were provided statistics going back to 2018. These showed that the Respondent employed a greater number of Female employees compared to Male employees generally. In each year the Respondent employs nearly twice as many women than men. In 2023 this was 1856 women to 923 men and 2024 2053 women to 998 men.

104. In relation to staff on career break, we also saw a heavy skew towards women. In 2018 this was 81 women to 11 men. By 2023 this had become closer at 64 women to 23 men and in 2024 54 women to 17 men.

105. The Claimant argued that these numbers showed a significantly larger proportion of women than men were on career break and therefore subjected to the disadvantage of not receiving the payment.

106. The Respondent argued that these figures needed to take into account the overall split of staff. The numbers needed to take into account the fact that they employ twice as many women than men.

107. We did calculations and found that 0.026% of women vs 0.017% men employed by the Respondent in 2024 were on career break of the Respondent's employees.

108. In 2023 it was 0.034% of women and 0.024% of men.

Decision

109. With those findings of fact in mind, the tribunal made the following unanimous decision on the claims and issues.

Unlawful Deduction from Wages

Was the payment properly payable to Claimant?

110. It was our finding that the payment was properly payable to Claimant. As set out above, we found that the payment became anticipated in the 2nd June emails and in those it made clear that the payment would be paid to all staff.

111. The pay remit addendum set out the eligibility criteria- that you must be "in post" on the 31st March and 31st July. As set out above, it is our finding that the Claimant was "in post" and that the ordinary reading of that phrase should be taken, in the absence of any specialist definition used by the Respondent organisation. That is, someone who is employed by the Respondent during those periods.

112. We find that the Claimant was employed and "in post". She was temporarily suspended from having to carry out her work duties and not getting paid, but still subject to various obligations towards the Respondent, just as any other employee is. There was no suggestion that her entire work contract was ceased during that period. The letter even

makes it clear she cannot undertake any other paid work during the period without permission.

113. We find that the Respondent misapplied this criterion when deciding that career break staff were not "in post" and therefore not entitled to the payment and excluded them. We find that they cannot rely upon this misinterpretation to defend that that the payment is not due. This would be a circular argument.

114. As the Respondent accepts that the payment was not made and does not say that the deduction was authorised, we find that the Claimant should be paid the £1,500.

Indirect discrimination

115. The Respondent accepted that the decision not to pay the award to staff on career break was a PCP and was applied to the Claimant and its other staff.

116. The question for the ET was whether a greater proportion of women than men were placed at a particular disadvantage by the payment

117. The ECHR code made it clear that statistics remain a useful took in establishing indirect discrimination. It is an established approach to compare proportions of workers as raw numbers often don't give an accurate picture.

118. The Claimant argued that there was a need to look behind the figures, given the Respondent's employee figures skewed heavily towards women than men.

119. However, we felt we did not need to do that. The case of *R v SoS for Education and Science ex parte Shaffer* said that it did not matter if the statisitcs were very small or very large in comparison to the pool as a whole, what matters was how they compared in terms of each other.

120. The case of *McCausland v Dungannon District Council* was also useful in that case the tribunal also compared very small percentages of the overall staff numbers and were able to make a finding on those.

121. In this case, looking at 2024 as an example, we can see that 0.026% of the total women employed by the Respondent vs 0.017% of the total men employed by the Respondent were on a career break. In comparison with each other, there is a difference of 35%. That is to say therefore that 35% more women than men are on a career break and would be at any disadvantage caused by being on a career break.

122. In 2023, the relevant period, there is a 30% difference between the 0.034% of women in the Respondent's female workforce who are on career break and the 0.024% of male workforce. There are therefore 30%

more women than men placed at that particular disadvantage of not being paid the payment because they are on a career break.

123. We were satisfied that a difference of 30% and 35% was high enough to be considered "significant" and "substantial".

124. When considering the disparate impact, tribunals need to assure themselves that the statistics they are considering are not merely fortuitous or short term. In this case, the stats provided showed a similar/comparable difference each year.

125. Based on the figures provided, the tribunal decided that the difference between men and women was not marginal but was instead significant and substantial.

126. As we have found that there was a disadvantage towards a considerably larger proportion of women than men who were on a career break by the PCP, we have gone on to look at whether the Respondent's actions were a prop means of achieving a legitimate aim.

127. These were set out in the letter on 26th Sep 2024 (supplementary bundle page 205). I will deal with each in turn.

"To apply the pay remit within the guidelines set by the Cabinet office".

128. Mr Chapman made it clear that the payment was separate from ordinary payments and bonuses and the documents relating to those did not give any guidance to the Respondent and were not helpful to the tribunal. There was however a specific addendum drafted by the Respondent setting out the remit for the payment and this was the pay remit we considered.

129. The "legitimate aim" set out in the Respondent's letter of 26th September 2024 is vague in our opinion, so we had to study the addendum to determine what the Respondent's guidelines were in order to adduce what the legitimate aim was.

130. As stated, the guidance said "departments are able to award civil servants a fixed non-consolidated payment of £1,500 per full-time employee subject to eligibility".

131. The eligibility is "to have been in-post both on 31st Mach 2023 and still in post on the date of the payment". There is nothing in this document that gives guidance on excluding those on career breaks.

132. Mr Chapman also explained that the aim of the organisation was that as many people as possible received the payment. He confirmed that there was a separate pot for the payment and if the amount to be paid out exceeded the pot, savings would be made elsewhere to make sure the

payment could be made to all. It was clear that this was a priority and there was no financial limitation on the Respondent.

133. On that basis, we do not accept that there was a legitimate aim set out in the guidance which required Respondent not to pay those on career break. This was not part of the remit of the addendum document that provided guidance on the payment. As such, the Respondent's argument that they excluded those on career breaks in order to apply that remit, fails.

"To maintain consistency with the principle applying to career breaks that an employee is not entitled to pay for the duration of a career break".

134. We accept that this was a legitimate aim, but do not accept that the PCP was a proportionate means of achieving that aim. As stated above, Mr Chapman made clear that this payment was not "pay" and that this was an exceptional payment. We therefore do not accept that payment of this payment to those on career break would break the consistency of the principle that an employee on career break does not receive their normal pay.

135. The Respondent's actions in not paying those on a career break was therefore not a proportionate means of achieving that aim.

"To maintain a sufficient connection between pay and being at work, as opposed to being voluntarily away from work"

136. We did not fully accept that this was a legitimate aim and the reasons for us rejecting this are tied into our reasoning as to why, if it was a legitimate aim, the Respondent's actions were not a proportionate means of achieving that aim.

137. Firstly, as the Respondent confirmed there were classes of employee who were not "at work" who still received this payment- those on maternity leave and sick leave.

138. Secondly, the Respondent has made it clear that this payment is not "pay" and so, as with the above legitimate aim it the idea that the Respondent wants to maintain the connection between pay and work is not relevant to this payment.

139. Finally, we disagreed with the Respondent's suggestion that someone taking career break is voluntarily away from work. This was, in our opinion, quite dismissive as to the reasons someone goes on career break which can often be because they are forced to due to their personal circumstances. To suggest that this is different for example to someone on maternity leave who has chosen to have a baby was not a correct distinction in our view.

140. As such, we did not find that this was a legitimate aim or that the Respondent's actions in withholding the payment for those on career break was a proportionate means of achieving that aim.

141. The Indirect sex discrimination claim therefore succeeds.

Indirect associative disability discrimination

142. A similar test to the above would need to be applied in an indirect disability discrimination claim, as it would for an indirect disability discrimination. The tribunal would need to consider if a PCP was placing a significantly larger proportion of disabled persons at a substantial disadvantage in comparison to non-disabled persons and, if the Claimant was suffering that disadvantage. If it was, the tribunal would go on to consider whether the Respondent's actions were a proportionate means of achieving a legitimate aim.

143. However, in relation to suffering the disadvantages, the Claimant was claiming that although she did not have a disability, she was subjected to the particular disadvantage because of her close association with those with disabilities- in this case her children and parents.

144. The relevant case is that of "Chez". The law has changed since then but that change only took effect after the relevant date of the incidents in this case. As such, we must look at the principles established in Chez.

145. Chez was a direct discrimination claim. In that case the Claimant argued that people of a particular group were being subjected to less favourable treatment and that she was also subjected to that less favourable treatment because she lived in the same locality as them.

146. The Claimant relied upon the first instance case of *Follows v Nationwide Building Society*. As a first instance decision it is not binding on us but can be persuasive.

147. In that case, the Claimant worked from home full time to care for her disabled mother. She was asked to attend the office for weekly meetings and claimed it was indirect discrimination. Although she was not disabled herself, she argued that she was subjected to the particular detriment because of her close association with her mother. This is commonly referred to as a "friends and family" association.

148. The Respondent argued that we should not follow Follows and that Chez does not apply as it was a direct discrimination case.

149. I looked at the judgement in Follows and the reasoning given by the EJ.

150. In it they quoted the ECJ in Chez who said

"The principle of equal treatment in the Directive is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less fav treatment or a particular disadvantage on one of those grounds".

151. The EJ confirmed that the reference to "less favourable treatment" referred to direct discrimination claims and "particular disadvantage" must refer to indirect discrimination claims. As such, it was their reasoning that Chez extended the protection to those outside the particular protected group in indirect discrimination claims also.

152. However, the EJ then went on to say that

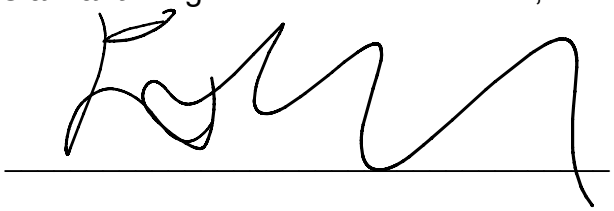
"*whether someone not sharing the protected characteristics but who was associated with someone who was and was thus disproportionately disadvantaged by the PCP, would be within the scope of the indirect discrimination provisions."*

153. This, to us, was key to determining the Claimant's case. In the reasoning above, the protected group must also suffer the disadvantage, as well as the individual who does not have the protected characteristics. There must be an association between the disadvantage as well as between the individuals.

154. In this claim that was not the case. As found in the facts, those on sick leave would still receive the payment. There are no grounds for us finding therefore that disabled persons would not receive it and be placed at the disadvantage.

155. As such, even though the Claimant has a close association with disabled persons, as they are not disadvantaged, the principles of Chez cannot apply to extend the protection from indirect discrimination to her.

156. As such, the Claimant's arguments do not succeed, and this claim fails.



Employment Judge **Singh**

_____15TH November 2024
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....21 November 2024.....

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FOR THE TRIBUNAL OFFICE