Appeal No. UKEAT/0032/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 May 2019
Judgment handed down on 29 November 2019

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

THE COMMISSIONER OF THE CITY OF LONDON POLICE APPELLANT

MRS C GELDART RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS LOUISE CHUDLEIGH (of Counsel) Instructed by: The Corporation of London Comptroller and City Solicitor City of London PO Box 270 Guildhall London EC2P 2EJ
For the Respondent	MR DOUGLAS LEACH (of Counsel) Instructed by: Penningtons Manches Cooper LLP 125 Wood Street London EC2V 7AW

SUMMARY

SEX DISCRIMINATION - Jurisdiction

MATERNITY RIGHTS AND PARENTAL LEAVE - Sex Discrimination

1. The Employment Tribunal was right to conclude that, on their correct construction, the Police Regulations and the determinations made thereunder entitled the Claimant to receive the London Allowance in full throughout her maternity leave.

2. However, the Respondent did not pay the London Allowance (in part or in whole) to the Claimant for much of her maternity leave, because she was on maternity leave.

3. The Claimant brought a claim for sex discrimination. This claim:

   (1) was not excluded by section 76 of, or paragraph 17 of Schedule 9 to, the **Equality Act 2010**; and

   (2) (following the judgment of the European Court of Justice in **Webb v EMO Air Cargo (UK.) Ltd** [1994] QB 718) did not require the Claimant to prove that the Respondent would have treated a man differently.

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THE HONOURABLE MR JUSTICE LAVENDER

(1) Introduction

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1. This is an appeal by the Commissioner of the City of London Police ("the Respondent") against the judgment of an Employment Tribunal sitting at London Central which was sent to the parties on 6 November 2018, by which the Employment Tribunal: (a) upheld the claim made by Mrs Claire Geldart ("the Claimant") for direct sex discrimination in respect of the non-payment or partial payment of what is known as the London Allowance during her absence from duty on maternity leave; and (b) awarded her compensation for injury to feelings in the amount of £4,000.

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2. There is also a cross-appeal by the Claimant. If the appeal succeeds on a particular ground (ground 4), then the Claimant contends that the Employment Tribunal ought to have upheld her claim for indirect sex discrimination.

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(2) The Facts

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3. The following facts are not in dispute. The Claimant, Mrs Geldart, is, and has since 3 June 2015 been, a serving Police Officer in the City of London Police. She became pregnant in 2016. She gave birth on 17 December 2016. She took maternity leave from 18 December 2016 to 3 October 2017. Thereafter she took holiday. She returned to work on 9 January 2018.

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4. The period when she was off work can be divided into four stages:

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(1) In the 13 weeks from 18 December 2016 to 17 March 2017 she received full pay.

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(2) In the 10 weeks from 18 March 2017 to 26 May 2017 she received half pay.

(3) In the 18 weeks or so from 27 May to 3 October 2017 she received no pay.

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(4) In the 13 weeks or so from 4 October 2017 to 8 January 2018 she received holiday pay.

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5. This dispute concerns a part of the Claimant's remuneration known as the London Allowance. During the period of her maternity leave, this was paid to the Claimant in full when she received full pay and at half the usual rate when she received half pay, but not at all when she received no pay. The Claimant contends that she should have received the London Allowance in full throughout the period of her maternity leave. The amount in dispute is £1,941.60.

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6. It is worth noting at the outset that the maternity pay received by the Claimant was more than the minimum to which she was entitled under EU law, so this is not a case where the Claimant is seeking to enforce a right to maternity pay under EU law.

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7. The undisputed evidence before the Employment Tribunal was that it is the Respondents' practice when male and female officers are on sick leave to pay a reduced, or no, London Allowance, when they pay the officers reduced, or no, pay.

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(3) The Police Regulations

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8. As a Police Officer, the Claimant was not an employee of the Respondent and did not have a contract of employment. As with her other conditions of service, her remuneration was

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the subject of delegated legislation, namely the **Police Regulations 2003** (SI 2003/527) ("the Police Regulations"), made pursuant to section 50 of the **Police Act 1996**. Part 4 of the Police Regulations is entitled "Pay", Part 5 is entitled "Leave" and Part 6 is entitled "Allowances and Expenses".

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(3)(a) The Police Regulations: Part 4: Pay

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9. Part 4 begins with regulation 24, which concerns pay. Regulation 24(1) provides as follows:

> **"Subject to the following provisions of this Part, the pay of members of police forces shall be determined by the Secretary of State, and in making such a determination the Secretary of State may—**
>
> **…**

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> > **(b) …. where the pay of a member of a police force of the rank of chief inspector or below is payable subject to such conditions as may be specified in the determination, confer on a member of that police force senior in rank to that member, or on a person employed by [the Chief Officer or the local policing body], such functions in relation to those conditions,**
> >
> > **as he thinks fit."**

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10. The determination made pursuant to regulation 24 is set out in Annex F to the Police Regulations. This determination does not mention the London Allowance, although it does provide (in Part 10) for London Weighting. Paragraph 1 of Part 10 provides as follows:

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> **"The annual pay of a member of the City of London or metropolitan police force shall be increased to £1,827 with effect from 1 July 2002, but any allowance under the Regulations calculated by reference to a member's pay, shall be calculated as if this part of this determination had not been made."**

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11. Mr Leach submitted that London Weighting is, but the London Allowance is not, part of the Claimant's pay as that expression is used in the Police Regulations and in the determinations made thereunder. The Tribunal said as follows in relation to London Weighting in paragraph 3 of its Judgment:

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> **"3. The Claimant's basic pay was, and is, supplemented by London Weighting ('LW') and a 'London Allowance' ('LA'). LW, which has formed part of London police officers' pay since**

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> **1949, is designed to compensate for the higher cost of living in London relative to other parts of the United Kingdom. Part-time officers receive a *pro rata* proportion. LW is pensionable and the rate increases in line with basic pay."**

12. Part 4 of the Police Regulations also contains regulation 29, which deals with maternity

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pay, and which provides as follows:

> **"The Secretary of State shall determine the entitlement of female members of police forces to pay during periods of maternity leave."**

13. The determination made under regulation 29 is set out in Annex L to the Regulations.

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Paragraph 1 of this determination provides as follows:

> **"Subject to the following provisions of this determination, a female member of a police force who satisfies the conditions in paragraph (2) is entitled to be paid as respects the first eighteen weeks of any period or periods of maternity leave in any one maternity period (as defined in the determination on maternity leave made under regulation 33) taken in accordance with the determination on maternity leave made under regulation 33, but is not entitled to be paid thereafter."**

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14. Paragraphs 5, 7 and 8 of Annex L also refer to maternity pay as "pay".

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15. Mr Leach submitted that the provision in paragraph 1 of Annex L that a police officer "is not entitled to be paid thereafter" only applies to pay, and therefore, while it applies to London Weighting, it does not apply to the London Allowance.

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16. The Respondent had a policy statement entitled Family Friendly Leave (Adoption, IVF, Maternity, Paternity & Surrogacy) Standard Operating Procedure, published in November 2016 which, inter alia, gave officers on maternity leave who, like the Claimant, had at least 63

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weeks' continuous service, the choice between:

(1) either:

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(a) 18 weeks at full pay (including statutory maternity pay: "SMP");

(b) 21 weeks of SMP; and

(c) the remainder of their leave unpaid;

(2) or:

(a) 13 weeks at full pay (including SMP);

(b) 10 weeks at half pay;

(c) 16 weeks of SMP; and

(d) the remainder of their leave unpaid.

17. The Claimant chose the latter option and was paid accordingly.

(3)(b) The Police Regulations: Part 5: Leave

18. Part 5 of the Police Regulations consists of regulation 33. Regulation 33(7) provides as follows:

> **"A female member of a police force qualifies for maternity leave in such circumstances as shall be determined by the Secretary of State."**

19. The determination made under Regulation 33(7) is set out in Annex R to the Police Regulations. In summary, a police officer may take maternity leave for any part, or all, of the period from 6 months before to 9 months after the expected date of birth. However, Annex R says nothing about the pay or allowances which a police officer is to receive while on maternity leave.

(3)(c) The Police Regulations: Part 6: Allowances and Expenses

20. Part 6 of the Police Regulations begins with regulation 34, which concerns allowances. Regulation 34(1) provides as follows:

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"Subject to regulation 38, the Secretary of State shall determine the entitlement of members of a police force to any allowance, and in making such a determination the Secretary of State may confer on—

(a). the police authority;

(b). the chief officer,

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such functions—

(i). in relation to the calculation of an allowance,

(ii). where the payment of an allowance is subject to such conditions as may be specified in the determination, in relation to those conditions,

as he thinks fit."

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21. The determination made under this regulation is set out in Annex U to the Police Regulations. Annex U provides for a number of different allowances, and also for various expenses. The nature of some of the allowances provided for in Annex U is such that it is

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necessarily the case they will only be paid to a police officer who is working. This is the case, for example, in relation to the Unsocial Hours Allowance (provided for in paragraph 10 of Annex U), which is paid at an hourly rate in respect of every full hour worked between 8 pm and 6 am. This is not the case, however, in respect of the London Allowance.

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22. Paragraph 3 of Annex U concerns the London Allowance. Paragraph 3(a) provides as follows:

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"A member of the City of London or metropolitan police force shall be paid a London allowance at a rate determined by the Commissioner of the relevant force with regard to location and retention needs, following consultation with the joint branch board or Joint Executive Committee, and not exceeding the maximum rates set out in sub-paragraph (b) below."

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23. Paragraph 3(c) deals with the circumstances in which a suspended officer shall, and shall not, be entitled to receive the London Allowance. I will come back to that issue. However, paragraph 3 says nothing about the position of officers on maternity leave.

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24. The Employment Tribunal said as follows about the London Allowance in paragraph 4 of its Judgment:

> **"LA was introduced following a recommendation in 1978 by the Committee of Enquiry on the Police chaired by Lord Edmund-Davies. Its stated purpose was to tackle problems of recruitment of police officers in London. The standard rate of LA, to which the Claimant is entitled, is £4,338 per annum. Again, part-time officers receive a *pro rata* share. LA is not pensionable and the rate has not increased since 2000."**

25. Part 6 of the Police Regulations also contains regulation 36, entitled "Continuance of allowances when member ill". It provides as follows:

> **"If a member of a police force who is regularly in receipt of an allowance to meet an expense which ceases during his or her absence from duty is placed upon the sick list or is on maternity leave, the allowance shall be payable during his or her absence from duty up to a period of a month, but thereafter, during the remainder of his or her absence from duty, payment may be suspended at the discretion of the chief officer."**

26. Mr Leach submitted that this regulation does not apply to the London Allowance, because it is not "an allowance to meet an expense which ceases during his or her absence from duty". The Respondent originally challenged this contention by ground 2 in the grounds of appeal, but that ground was withdrawn before the hearing.

(3)(d) The Police Regulations: Suspension

27. It is instructive to consider the provisions of Schedule 2 to the Police Regulations, which concern the effect of suspension on an officer's entitlement to pay and allowances. What is relevant for present purposes is that separate provisions are made for the effect of suspension on pay and on allowances.

28. Thus, in relation to pay:

(1) Regulation 24(4) (in Part 4) provides as follows:

> **"Nothing in this regulation shall affect the operation of any provisions of the Conduct Regulations and, in relation to a member of a police force suspended or fined thereunder the provisions of paragraphs 1 and 3 of Schedule 2 or of paragraph 4 thereof shall have effect."**

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(2) Paragraph 1(1) of Schedule 2 provides as follows:

> **"Subject to paragraph 3, a member of a police force suspended under the Conduct Regulations who—**
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> > **(a). is detained in pursuance of a sentence of a court in a prison or other institution to which the Prison Act 1952 applies, or is in custody (whether in prison or elsewhere) between conviction by a court and sentence, or**
> >
> > **(b). has absented himself from duty and whose whereabouts are unknown to the chief officer (or an assistant chief officer acting as chief officer),**
>
> **shall not, by virtue of regulation 24, be entitled to pay in respect of his period in detention or custody or, as the case may be, in respect of the period during which his whereabouts are unknown as aforesaid."**

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29. Whereas, in relation to allowances:

(1). Regulation 37 (in Part 6) provides as follows:

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> **"This Part of these Regulations shall have effect in relation to a member of a police force suspended under the Conduct Regulations, subject to the provisions of paragraphs 2 and 3 of Schedule 2."**

(2). Paragraph 2 of Schedule 2 provides as follows:

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> **"Subject to paragraph 3, a member of a police force suspended under the Conduct Regulations shall not, by virtue of Part 6 of these Regulations, be entitled to any allowance, in respect of the period of suspension, other than—**
>
> **(a) an allowance under Schedule 3; or**
>
> **(b) in the case of a member to whom paragraph 1(1) does not apply, such allowance as the Secretary of State may determine."**

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(3). Moreover, paragraph 3(c) of Annex U provides as follows:

> **"A member of the City of London or metropolitan police force suspended under the Conduct Regulations, other than a member to whom paragraph 1(1) of Schedule 2 applies, shall be entitled to receive the London allowance."**

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(3)(e) The Police Regulations: The Tribunal's Conclusion

30. The Employment Tribunal accepted Mr Leach's submissions on the interpretation of the Police Regulations and the determinations made thereunder, saying as follows in paragraph 23 of its Judgment:

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> **"23. In our view the submissions on behalf of the Claimant on sub-issue (a) are clearly right. The structure of the Regulations speaks for itself: if the aim had been for LA to form part of 'pay', rather than stand as a separate allowance, there would have been no difficulty in arranging the legislation accordingly. LA and LW are located in different Parts because they are designed to fulfil different functions, a point consistently made in official reports on police pay to which we were referred. The distinct character of the two payments is also illustrated by the fact that LW is pensionable and subject to regular increases but LA has neither of these characteristics."**

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(4) Ground 1: Was the London Allowance Due?

31. By ground 1 in the grounds of appeal, the Respondent contends that the Employment Tribunal was wrong in its conclusion on this issue. This point is central to this appeal. Mr Leach accepted that, if his construction of the Police Regulations and the determinations was wrong, and the Claimant was not entitled thereunder to be paid the London Allowance during her maternity leave, then the claim in discrimination could not succeed.

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32. On the other hand, if the true construction of the Police Regulations and the determinations is that the Claimant was entitled to the London Allowance throughout her maternity leave, then it is still necessary to consider whether the Employment Tribunal dealt correctly with the sex discrimination claim.

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(4)(a) Submissions

33. For the Respondent, Miss Chudleigh submitted that:

(1) There is a presumption that an employee who is not working is not entitled to be paid.

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(2) As was not disputed, the London Allowance constitutes "pay" as defined in the **Equality Act 2010** and in EU law.

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(3) The London Allowance should be regarded as "pay" for the purposes of the Police Regulations.

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(4) The concluding words of paragraph 1 of Annex L ("but is not entitled to be paid thereafter") are consistent with the London Allowance being part of an officer's pay.

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(4)(b) Decision

34. In my judgment, the meaning and effect of the relevant provisions of the Police Regulations and of the determinations made thereunder is clear. Paragraph 3(a) of Annex U provides that "A member of the City of London … police force shall be paid a London allowance". The Claimant was during her maternity leave a member of the City of London police force. She was entitled to be paid the London Allowance unless a provision of the Police Regulations or the determinations provided otherwise.

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35. Regulation 29 and Annex L concern pay during maternity leave, but the Police Regulations draw a clear distinction between pay (governed by Part 4) and allowances (governed by Part 6), so regulation 29 did not affect the Claimant's entitlement to the London Allowance. As for the continuation of allowances during maternity leave:

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(1) As I have already noted, it is in the nature of an allowance such as the Unsocial Hours Allowance that it was not payable when an officer was not at work, but that was not the case with the London Allowance.

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(2) The premise for regulation 36 was that allowances were not treated in the same way as pay, but would continue to be paid during an officer's maternity leave unless that regulation provided otherwise.

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(3) It is no longer contended that regulation 36 applied to the London Allowance. Paragraph 3(a) of Annex U provides that the London Allowance is paid "with regard to location and retention needs". It follows that the London Allowance is

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not an allowance to which regulation 36 applies, since it is not "an allowance to meet an expense", let alone "an allowance to meet an expense which ceases during his or her absence from duty … on maternity leave".

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(4) The Respondents identified no other regulation or determination which provided that the London Allowance would not be paid to an officer during her maternity leave.

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(5) Relevant Provisions of the Equality Act 2010

36. The two remaining grounds of appeal concern some of the more complex provisions of

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the **Equality Act 2010**. However, before looking in detail at the interpretation of those provisions, it is appropriate to recall the context in which the questions of interpretation arise on the facts of this case. As the Employment Tribunal rightly held, the Claimant was entitled to be

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paid the London Allowance. She was not paid this allowance. The Employment Tribunal found that the reason why she was not paid the allowance to which she was entitled was because she was on maternity leave. Against that background, it is understandable that Mr Leach should have submitted that this was a clear case of discrimination and that, in effect, any

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proposed construction of the **Act** which led to a different conclusion should be examined carefully before it was accepted.

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37. However, as the Employment Tribunal rightly pointed out, the provisions of the **Equality Act 2010** at issue on this case are demarcation provisions, since they concern the dividing line between what was previously the subject matter of the **Equal Pay Act 1970** and what was the subject matter of the **Sex Discrimination Act 1975**: see **<u>Peninsula Business</u>**

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<u>Services Ltd v Donaldson</u> [2016] ICR 565, at 573f. The Respondent's case, in broad terms, is that this is an equal pay case rather than a sex discrimination case.

(5)(a) The Relevant Discrimination Provision

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38. Part 5 (i.e. sections 39 to 83) of the **Equality Act 2010** is entitled "Work". The Claimant relied on section 39(2), which provides as follows:

> **"An employer (A) must not discriminate against an employee of A's (B)—**
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>
> **(a) as to B's terms of employment;**
>
> …
>
> **(d) by subjecting B to any other detriment."**

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39. Given my finding that the Claimant was entitled to receive the London Allowance during her maternity leave, it is difficult to see how it could be said that the Respondent discriminated against her as to the terms of her employment. However, by failing to pay the Claimant what she was entitled to, the Respondent subjected her to a detriment.

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(5)(b) The Claimant's Deemed Employment

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40. The Respondent was not the Claimant's employer, but was deemed to be her employer by section 42(1) of the **Equality Act 2010**, which provides as follows:

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> **"For the purposes of this Part, holding the office of constable is to be treated as employment—**
>
> > **(a) by the chief officer, in respect of any act done by the chief officer in relation to a constable or appointment to the office of constable;**
> >
> > **(b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable."**

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41. There was an issue between the parties whether the Claimant was deemed to have a contract of employment. Miss Chudleigh submitted that there can be employment without a contract. She relied in support of this submission on the definition of "employment" in section

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83(2) of the **Equality Act 2010**, which provides as follows:

> **""Employment" means—**
>
> > **(a). employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;**
> >
> > **(b). Crown employment;**
> >
> > **(c). employment as a relevant member of the House of Commons staff;**
> >
> > **(d). employment as a relevant member of the House of Lords staff."**

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42. Crown employees and Parliamentary staff are exceptional categories of employees.

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Harvey on Industrial Relations and Employment Law states as follows in paragraphs 101 and 102:

> **"101. For historical reasons, servants of the Crown are treated as a separate category of employee; the principal difference between a servant of the Crown and other employees being that a Crown servant is, in theory, dismissible at any time at the will of the Crown.**

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> **102. The precise status of staff employed in the House of Commons and the House of Lords is obscure since, in constitutional theory, the writ of the common law does not run in the precincts of the Palace of Westminster. Therefore, it seems that a servant of either House cannot, technically, be an employee at common law. That explains the fact that they are normally covered separately in the employment legislation."**

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43. "Crown employment" is defined in section 83(9) of the **Equality Act 2010** as follows:

> **""Crown employment" has the meaning given in section 191 of the Employment Rights Act 1996."**

44. Although they are not applicable to the **Equality Act 2010**, it is instructive to note the

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provisions of section 191(1) and (4) of the **Employment Rights Act 1996**:

"(1). Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers."

….

"(4). For the purposes of the application of provisions of this Act in relation to Crown employment in accordance with subsection (1)—

> **(a). references to an employee or a worker shall be construed as references to a person in Crown employment,**
>
> **(b). references to a contract of employment, or a worker's contract, shall be construed as references to the terms of employment of a person in Crown employment**
>
> **….."**

45. Section 195(3)(b) contains, for House of Commons staff, an equivalent provision to section 191(4)(b). Section 194, which deals with House of Lords staff, assumes that they have (or may have) contracts of employment.

46. It is also relevant to note section 83(3) of the **Equality Act 2010**, which provides as follows:

"(3). This Part applies to service in the armed forces as it applies to employment by a private person; and for that purpose—

> **(a). references to terms of employment, or to a contract of employment, are to be read as including references to terms of service;**
>
> **(b). references to associated employers are to be ignored."**

(5)(c) Discrimination

47. Section 13(1) of the **Equality Act 2010** provides as follows:

"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."

48. Both sex and pregnancy and maternity are among the protected characteristics listed in section 4 of the **Equality Act 2010**.

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49. In relation to section 13(1), the Respondent drew attention to section 23(1), which provides as follows:

> **"On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."**

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50. Section 18 of the **Equality Act 2010** contains specific provisions for the purposes of the application of Part 5 of the **Act** to the protected characteristic of pregnancy and maternity. However, the Claimant did not rely on section 18 and it was common ground that section 18 did

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not apply to the particular facts of this case. Nevertheless, it is appropriate to note the wording of section 18(2), since Miss Chudleigh relied on the difference between section 13(1) and section 18(2):

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> **"A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—**
>
> **(a). because of the pregnancy, or**
>
> **(b). because of illness suffered by her as a result of it."**

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51. The other types of discrimination covered by section 18 are those identified in sections 18(3) and (4), which provide as follows:

> **"(3). A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4). A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave."**

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52. It is also relevant to note section 18(7), which provides, in effect, that section 13 does not apply where section 18 applies:

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> **"Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—**
>
> **(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or**
>
> **(b) it is for a reason mentioned in subsection (3) or (4)."**

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53. It will be noted that section 18(7) does not provide that section 13, so far as relating to sex discrimination, does not apply to any case of discrimination because of pregnancy or maternity, but only that section 13 does not apply to treatment covered by section 18.

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54. The Claimant also did not seek to rely on the provisions of sections 73 or 75 of the **Equality Act 2010**, which concern the maternity equality clause and the maternity equality rule. Those provisions were not relevant to the present case, since the Claimant was entitled to be paid the London Allowance during her maternity leave by virtue of the Police Regulations, without invoking the maternity equality clause.

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55. Section 19 of the **Equality Act 2010** concerns indirect discrimination. That is only relevant to the cross-appeal.

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(5)(d) Exclusions: Sections 70 and 71

56. Section 70 of the **Equality Act 2010** provides as follows:

> **"The relevant sex discrimination provision [*i.e. section 39(2)*] has no effect in relation to a term of A's that—**
>
> **(a). is modified by, or included by virtue of, a sex equality clause or rule, or**
>
> **(b). would be so modified or included but for section 69 or Part 2 of Schedule 7.**
>
> **(2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision—**
>
> **(a). the inclusion in A's terms of a term that is less favourable as referred to in section 66(2)(a);**
>
> **(b). the failure to include in A's terms a corresponding term as referred to in section 66(2)(b)."**

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57. Section 71 of the **Equality Act 2010** provides as follows:

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> **"(1). This section applies in relation to a term of a person's work—**
>
> **(a) that relates to pay, but**

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(b) in relation to which a sex equality clause or rule has no effect.

(2). The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14."

(5)(e) Exclusions: Section 76

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58. Section 76 of the **Equality Act 2010** (entitled "Exclusion of pregnancy and maternity discrimination provisions") provides as follows:

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"(1). The relevant pregnancy and maternity discrimination provision [*i.e. section 39(2)*] has no effect in relation to a term of the woman's work that is modified by a maternity equality clause or rule.

[(1A). The relevant pregnancy and maternity discrimination provision has no effect in relation to a term of the woman's work—

(a). that relates to pay, but

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(b). in relation to which a maternity equality clause or rule has no effect.]

(2). The inclusion in the woman's terms of a term that requires modification by virtue of section 73(2) or (3) is not pregnancy and maternity discrimination for the purposes of the relevant pregnancy and maternity discrimination provision.

….."

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59. Section 76(1) is obviously inapplicable to the present case. As for section 76(1A), I note that:

(1) It was a term of the Claimant's work that she was to be paid the London Allowance during her maternity leave, and the maternity equality clause and rule had no effect in relation to that term. However, the Claimant was not alleging that that term was discriminatory.

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(2) The Claimant's complaint was about the Respondent's not paying her the allowance to which she was entitled. That was not a term of her work.

(5)(f) Exclusions: Paragraph 17 of Schedule 9

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60. Schedule 9 to the **Equality At 2010** has effect by virtue of section 82(11). Paragraph 17 of Schedule 9 provides as follows:

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> **"(1). A person does not contravene section 39(1)(b) or (2), so far as relating to pregnancy and maternity, by depriving a woman who is on maternity leave of any benefit from the terms of her employment relating to pay.**
>
> **(2). The reference in sub-paragraph (1) to benefit from the terms of a woman's employment relating to pay does not include a reference to—**
>
> > **(a). maternity-related pay (including maternity-related pay that is increase-related),**
> >
> > **(b). pay (including increase-related pay) in respect of times when she is not on maternity leave, or**
> >
> > **(c). pay by way of bonus in respect of times when she is on compulsory maternity leave.**
>
> **(3) For the purposes of sub-paragraph (2), pay is increase-related in so far as it is to be calculated by reference to increases in pay that the woman would have received had she not been on maternity leave.**
>
> **(4) A reference to terms of her employment is a reference to terms of her employment that are not in her contract of employment, her contract of apprenticeship or her contract to do work personally.**
>
> **(5). "Pay" means benefits—**
>
> > **(a) that consist of the payment of money to an employee by way of wages or salary, and**
> >
> > **(b) that are not benefits whose provision is regulated by the contract referred to in sub-paragraph (4).**
>
> **(6). "Maternity-related pay" means pay to which a woman is entitled—**
>
> > **(a). as a result of being pregnant, or**
> >
> > **(b). in respect of times when she is on maternity leave."**

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(6) Discrimination: The Tribunal's Decision

61. The Tribunal noted in paragraph 25 of its decision that if there was a "contractual" entitlement to the London Allowance, then it was conceded by the Respondent that a claim could be maintained under section 39 of the **Equality Act 2010**. The Tribunal also held in that paragraph that there was nothing in the provisions of the **Equality Act 2010** demarcating the provinces of discrimination and equal pay (in particular, sections 70 and 71 and paragraph 17 of Schedule 9) which excluded the Claimant's discrimination claim.

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62. This finding is challenged by ground 3 of the grounds of appeal. The Respondent contends that the Tribunal ought to have concluded that the Claimant's claim was precluded by: (a) paragraph 17 of Schedule 9 to; or (b) section 76 of, the **Equality Act 2010**. Before the Employment Tribunal, the Respondent also contended that the Claimant's claim was precluded by sections 70 and 71 of the **Equality Act 2010**, but the Respondent did not renew that submission in its grounds of appeal.

63. This ground of appeal also indirectly challenges the Employment Tribunal's finding in paragraph 11 of its Judgment that the Claimant was deemed by virtue of section 42 of the **Equality Act 2010** to be working pursuant to a contract.

64. In paragraph 26 of its Judgment the Employment Tribunal rejected the Respondent's submission that a comparator was required if the Claimant was to assert a claim under section 13 of the **Equality Act 2010**, holding that the **Act** had not abolished what it called "the **Webb** principle", i.e. the principle derived from the judgment of the European Court of Justice in **Webb v EMO Air Cargo (U.K.) Ltd** [1994] QB 718. This finding is challenged by ground 4 in the grounds of appeal.

65. In paragraph 27 of its Judgment the Tribunal said as follows:

> **"(4)** ***if the answer to (3)*** *[i.e. "is a comparator required?"]* ***is no, was the treatment complained of 'because of sex'?***
>
> **27. Here again, the case is, we think, clear. It is common ground that the Claimant was treated as she was because she was on maternity leave. Following *Webb* and *Fletcher* [i.e. *Fletcher v NHS Pensions Agency* [2005] ICR 1458] it is inescapable that the treatment was 'because of' sex. Ms Chudleigh did not contend that, if she lost on issue (3), the Respondent had any answer to the direct discrimination claim."**

66. The findings in paragraph 27 are not challenged by any of the grounds of appeal. After the hearing, when I was preparing this judgment, I drew attention to and invited submissions on the following matters:

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(1) The fundamental question in a direct discrimination case is what were the reasons or grounds for the impugned treatment: see **Interserve FM Ltd v Tuleikyte** [2017] IRLR 615, at paragraph 15. (Although not cited at the appeal hearing, paragraphs 15 to 22 of that Judgment appeared to be potentially relevant to the facts of this case.)

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(2) It was asserted in paragraph 21 of the Grounds of Resistance that the causative factor in the reduction and suspension of London Allowance was absence from work, not any protected characteristic.

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(3) The Tribunal stated in paragraph 25 of its Judgment that the Claimant did not challenge the Respondent's contention that a male officer on long-term sick leave would have been denied London Allowance as she was.

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(4) Yet the Tribunal stated in paragraph 27 of its Judgment that it was common ground that the Claimant was treated as she was because she was on maternity leave.

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(5) Miss Chudleigh submitted in paragraph 64 of her skeleton argument that there was no such common ground, and that London Allowance was reduced because the entitlement to pay reduced.

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(6) Yet none of the grounds of appeal expressly challenges paragraph 27 of the Judgment.

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67. In her written submissions, Miss Chudleigh submitted, inter alia, that the Claimant was treated as she was because she was absent from work, not because she was on maternity leave,

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and that, following **Interserve FM Ltd v Tuleikyte**, this was not treatment because of her sex or her maternity. She acknowledged that there was no direct challenge in the grounds of appeal to paragraph 27 of the Judgment. She contended that paragraph 27 could not stand if paragraph 26 was impugned. In the alternative, she applied for permission to amend the Notice of Appeal, by adding the following ground:

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> **"In addition, the Tribunal erred in failing to adopt the right approach to the question of what was the reason for the impugned treatment. In particular, it erred in concluding in §27 of the Reasons, that London Allowance was denied because the Claimant was on maternity leave which was sex discrimination per se, without having considered the reason why the London Allowance was denied and having proper regard to the fact male officers on long-term sick leave would also have been denied London Allowance as the Claimant was (see §25 of the Reasons)."**

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68. In his written submissions, Mr Leach opposed this proposed amendment. He referred to **Khudados v Leggate & Ors** [2005] ICR 1013 (EAT) and he submitted that it was for the Respondent to demonstrate that the concession recorded in paragraph 27 of the Judgment was not made, and that no application had been made: (a) for permission to rely on notes of the hearing; (b) for copies of the Employment Tribunal's notes; or (c) for questions to be asked of the Employment Tribunal under the **Burns/Barke** procedure. He further contended, in effect, that the concession was rightly made, that the Claimant was treated as she was because she was on maternity leave and that the principles in **Interserve FM Ltd v Tuleikyte** did not avail the Claimant.

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69. The proposed amendment does not address the question whether the Employment Tribunal was right to state that there was common ground between the parties, nor is it supported by any evidence as to what happened in the hearing before the Employment Tribunal. I recognise that paragraph 27 dealt very briefly with what is the fundamental question in a direct discrimination case, namely what were the reasons or grounds for the impugned treatment. However, it seems that this may reflect the fact that that question was dealt with

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relatively briefly in the hearing before the Employment Tribunal. The second and last sentences of paragraph 27 indicate that the Employment Tribunal did not consider that there was a contested issue about this fundamental question. Moreover, in her submissions to me on the cross-appeal, Miss Chudleigh contended that the evidence had not gone so far as to identify the actual policy under which the Respondent was acting when he/she reduced and then stopped paying the London Allowance to the Claimant. This in itself suggests that there was not the sort of thorough examination of the evidence before the Employment Tribunal which one would have expected if there had been a contested issue.

70. In all the circumstances, and having regard to the principles set out in **Khudados**, I dismiss the application for permission to amend the grounds of appeal and I proceed on the basis that the unchallenged position before the Employment Tribunal was that the Claimant was treated as she was because she was on maternity leave.

71. In paragraph 28 of its Judgment the Employment Tribunal noted that a limitation defence had not been pursued and held that the Claimant's claim was in time. This aspect of the Employment Tribunal's decision is not challenged. Nor is there any challenge to the Employment Tribunal's assessment of the appropriate amount of the award for injury to feelings.

(7) Ground 3: Was the Claimant's Claim Excluded?

72. As I have said, the Respondent contended by ground 3 in the grounds of appeal that the Claimant's claim was excluded by two provisions of the **Equality Act 2010**: section 76 and paragraph 17 of Schedule 9. In her written submissions, Miss Chudleigh relied on paragraph 17

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of Schedule 9, but made no reference to section 76. She also referred to sections 70 and 71 of the **Equality Act 2010**, but she did not contend that they precluded the Claimant's claim in direct discrimination. She contended that they precluded the Claimant's claim in indirect discrimination, but that means that they are only relevant, if at all, as a response to the cross-appeal. At the hearing, Miss Chudleigh relied on all of these provisions of the **Equality Act 2010**, but it remains the case that sections 70 and 71 were not included in ground 3 and therefore can only be relevant, if at all, to the cross-appeal.

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(7)(a) Section 76

73. Miss Chudleigh submitted that the Claimant's claim was precluded by section 76(1A) of the **Equality Act 2010**. That subsection provides that section 39(2), at least insofar as it concerns the protected characteristic of pregnancy and maternity, has no effect in relation to a term of a woman's work that relates to pay, but in relation to which a maternity equality clause or rule has no effect. Miss Chudleigh contended that **BMC Software Ltd v Shaikh** [2017] IRLR 1074 provided assistance on the interpretation of section 76(1A), although it was a case concerning sections 70 and 71.

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74. However, this is not a case in which the Claimant is complaining that a term of her work is discriminatory. She does not contend that any of the terms of her work are less favourable because of her pregnancy and maternity. The terms of her work, as the Employment Tribunal held, provided that she was entitled to receive the London Allowance during her maternity leave. Her complaint is that, because she was on maternity leave, the Respondent did not give effect to the terms of her work. As I said when considering section 39(2), this is not a case in which the Claimant was discriminated against "as to" the terms of her employment.

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75. Accordingly, I do not consider that this is a case to which section 76(1A) applies.

(7)(b) Paragraph 17 of Schedule 9

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76. Miss Chudleigh submitted that the Claimant's claim was precluded by paragraph 17 of Schedule 9 to the **Equality Act 2010**. She submitted that paragraph 17(1) applied to the present case, because the Respondents deprived a woman who was on maternity leave of a benefit from the terms of her employment relating to pay.

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77. Despite my inviting him to address the issue, Mr Leach did not submit that the London Allowance constituted "maternity-related pay" as defined in paragraph 17(6)(b) (i.e. "pay to which a woman is entitled … in respect of times when she is on maternity leave"), and so was exempt from the operation of paragraph 17(1) by virtue of paragraph 17(2)(a). Nevertheless, I do not see why the London Allowance did not constitute "maternity-related pay" as so defined. This point was not taken before the Employment Tribunal, and I do not base my decision on it, although I would have been prepared to do so if necessary.

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78. Both parties approached paragraph 17 on the basis that its applicability turned on the question whether there was deemed to be a contract between the Claimant and the Respondent, in which case the Respondent's obligation to pay the London Allowance was exempt from the operation of paragraph 17(1) by virtue of paragraph 17(4).

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79. The Respondent referred to the Employment Appeal Tribunal's decision in **<u>Commissioner of Police of the Metropolis v Lowrey-Nesbitt</u>** [1999] ICR 401, but I do not find that decision to be of assistance on the question which I have to decide. The issue in that

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case was whether a police officer was a worker within the meaning of the **Employment Rights Act 1996** because he or she worked under a contract. The decision was that a police officer is an office holder whose terms of service are governed by statute and statutory instrument, and not by contract. That is not in dispute, but the present case is one in which a police officer is deemed by statute to be in an employment relationship.

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80. The question is one of construction. The context is that the paradigm case of employment is that of employment pursuant to a contract of employment, but that there are other relationships which are, for various purposes, treated as, or deemed to be, employment. This includes Crown employment and membership of Parliamentary staff (referred to in section 83(2) of the **Equality Act 2010**) and also, in the present case, the relationship between the Claimant and the Respondent, which is deemed to be employment by section 42 of the **Equality Act 2010**.

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81. When construing the provisions of the **Act** which concern the rights of employees, it is appropriate to consider whether or not Parliament intended to provide for different treatment for actual and deemed employees. I can think of no reason why Parliament would have intended, by paragraph 17 of Schedule 9 to the **Equality Act 2010**, to enact that conduct which, if carried out by an actual employer, would have constituted discrimination, should not constitute discrimination if carried out by a deemed employer such as the Respondent in relation to someone who was deemed to be in an employment relationship with them.

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82. As for Miss Chudleigh's submission that section 83(2) demonstrates that employment as defined in the **Equality Act 2010** does not necessarily connote a contract of employment, so that section 42 should not be read as deeming the Claimant to have a contract of employment, I

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do not find this compelling. Crown employment and membership of Parliamentary staff are exceptional cases of employment. Moreover, in the case of Crown employees and members of House of Commons staff, references in the **Employment Rights Act 1996** to contracts of employment are to be construed as refences to their terms of employment.

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83. In my judgment, the Employment Tribunal was right to conclude that on the correct construction of section 42 and paragraph 17 of Schedule 9, the reference in paragraph 17(4) to "her contract of employment" is to be read as including, in the Claimant's case, her terms of service as set out in the Police Regulations and the determinations made thereunder. It follows that the Claimant's claim is not excluded by paragraph 17 of Schedule 9.

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(8) Did the Claimant need a Comparator?

84. Miss Chudleigh submitted that the Claimant could not pursue a claim for sex discrimination as defined in section 13(1) of the **Equality Act 2010** without proving that the Respondent treated her less favourably than he treated or would treat another person. She drew attention to the contrast between the words of section 13(1) ("… A treats B less favourably than A treats or would treat others") and the words of section 18(1) ("… A treats her unfavourably").

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85. Mr Leach submitted that the Employment Tribunal was right to hold that the **Webb** principle applied. In **Webb** the European Court of Justice held that the dismissal of a female worker on account of pregnancy constituted direct discrimination on grounds of sex and (in paragraph 24) that:

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> **"… there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons."**

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86. The applicable provisions of domestic law in **Webb** were sections 1(1)(a) and 5(3) of the **Sex Discrimination Act 1975**. Section 1(1) (a) provided as follows:

> **"A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if —**
>
> **(a) on the ground of her sex he treats her less favourably than he treats or would treat a man…"**

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87. I note that this section contained similar wording to section 13(1) of the **Equality Act 2010**.

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88. Section 5(3) provided as follows:

> **"A comparison of the cases of persons of different sex or marital status under section 1(1) or 3(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."**

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89. Although differently worded, this provision is substantially the same as section 23(1) of the **Equality Act 2010**.

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90. In giving effect to the decision of the European Court of Justice, Lord Keith said as follows in **Webb v EMO Air Cargo (U.K.) Ltd** *(No. 2)* [1995] 1 WLR 1454, at 1459-1460:

> **"The ruling of the European Court proceeds on an interpretation of the broad principles dealt with in articles 2(1) and 5(1) of Council Directive (76/207/E.E.C.). Sections 1(1)(a) and 5(3) of the Act of 1975 set out a more precise test of unlawful discrimination, and the problem is how to fit the terms of that test into the ruling. It seems to me that the only way of doing so is to hold that, in a case where a woman is engaged for an indefinite period, the fact that the reason why she will be temporarily unavailable for work at a time when to her knowledge her services will be particularly required is pregnancy is a circumstance relevant to her case, being a circumstance which could not be present in the case of the hypothetical man…"**

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91. On its face, **Webb** is authority for the proposition that a claimant who has been treated unfavourably on the ground of her pregnancy or maternity has been the victim of sex discrimination and does not need to, and indeed cannot, prove that a man would have been treated differently.

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92. I am not persuaded by Ms Chudleigh's argument that the law has changed since **Webb** was decided. In particular:

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(1) As a matter of EU law, **Webb** has been followed and developed by the European Court of Justice, including in the cases referred to in paragraphs 63 to 65 of the decision of the Employment Appeal Tribunal in **Fletcher**, which was itself a case in which the **Webb** principle was endorsed and applied: see, in particular, paragraphs 65, 76, 91 and 92.

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(2) As I have already mentioned, there is no relevant difference between the wording of section 13(1) of the **Equality Act 2010** and the wording of section 1(1)(a) of the **Sex Discrimination Act 1975**.

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(3) I do not consider that the fact that section 18(1) of the **Equality Act 2010** uses different wording affects the interpretation of section 13(1).

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(4) Section 18 of the **Equality Act 2010** is not an exclusive statement of the circumstances in which a claimant can complain of discrimination by reason of pregnancy or maternity.

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(5) Miss Chudleigh submitted that section 18 gave effect to the Pregnant Workers' Directive, as did **Webb**, but **Webb** was, as Lord Keith noted, based on the Equal Treatment Directive.

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(6) Miss Chudleigh relied on the decision of the Employment Appeal Tribunal in **Lyons v DWP Jobcentre Plus** [2014] ICR 668, but that decision concerned the particular issue of the extent to which an employee was entitled to protection

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from dismissal as a result of an illness suffered as a result of pregnancy (which is

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the subject of section 18(2)(b)). Accordingly, although **Webb** was cited in argument, the Employment Appeal Tribunal did not find it necessary even to refer to it, and certainly did not state that it was no longer applicable.

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93. In the present case, the unchallenged position before the Employment Tribunal was that the Claimant was treated as she was because she was on maternity leave. Given that, the Employment Tribunal was right to hold that the **Webb** principle meant that the Claimant did not have to prove that a man would have been treated differently.

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(9) The Cross-Appeal

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94. Given my conclusions on the appeal, it is unnecessary for me to address the cross-appeal, and I do not consider that it would be appropriate for me to do so, since the cross-appeal raises a number of potentially complex issues, including issues concerning the applicable time limit, the Respondent's argument that the claim in indirect discrimination is excluded by section 71 of the **Equality Act 2010** and the identification of the relevant provision, criterion or practice for the purposes of section 19.

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(10) Conclusion

95. For the reasons which I have given, this appeal is dismissed. I emphasise that my decision is limited to the particular circumstances of this case, and in that context I draw attention to what I said in paragraphs 66 to 70 above.

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