EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs J Jennings **v** **London Heathrow Airports Limited**

Heard at: Reading Employment Tribunal by CVP **On**: 27 and 28 June 2022

Before: Employment Judge Milner-Moore
Members: Ms R Watts-Davies
Ms F Tankard

Appearances

For the Claimant: In person
For the Respondent: Ms Ahmad, Counsel

JUDGMENT

1. The claimant was subject to unfavourable treatment on grounds of pregnancy or maternity leave contrary to section 18 of the Equality Act 2010 in the following respects:

   1.1. John Tonner did not respond to the claimant's email of 7 December 2020 in which she raised concerns about the process being followed and said that she would not be able to attend a formal meeting at short notice due to childcare difficulties;

   1.2. On 8 December 2020, Richard White made an assumption as to the decision that the claimant would make regarding the buyout payment.

2. The claims that the claimant was subject to unfavourable treatment on grounds of pregnancy or maternity leave contrary to section 18 of the Equality Act 2010 in the following respects are not upheld and are dismissed:
   2.1. The respondent failed to communicate with the claimant in the period 10 May 2020 and 7 December 2020;
   2.2. The respondent did not inform the claimant until 7 December 2020 that consultation regarding proposed contractual changes had begun;
   2.3. The respondent did not check that the claimant was able to access her work email address during her maternity leave;

2.4. The respondent did not invite the claimant to an informal consultation meeting;
2.5. The respondent did not give the claimant the same amount of time to consider the proposed contractual changes as it gave to those currently at work;
2.6. The respondent did not invite the claimant to attend a formal meeting arranged for 7 December 2020;
2.7. On 7 December 2020, Lianne Summerly informed the claimant that she was at risk of having her contract terminated due to her failure to attend a formal meeting and advised the claimant to sign her contract;
2.8. On 7 December 2020, John Tonner invited the claimant to a formal meeting to take place on 9 December 2020.
2.9. On 23 December 2020, the claimant resigned due to feeling that she could not return to the workplace due to lack of communication throughout her maternity leave;
2.10. The respondent did not offer the claimant an exit interview and the claimant had no opportunity to discuss her reasons for leaving the organisation.

3. The claimant is awarded £3,936 made up of:

3.1. £3,500 compensation for injury to feelings; and
3.2. £436 in interest.

REASONS

1. This case was listed for a two-day hearing to consider issues of liability and remedy in relation to a complaint under s.18 of the Equality Act of direct discrimination on grounds of pregnancy and/or maternity.

The issues

2. The issues for determination were as follows:

Time limits

3. Were the discrimination complaints made within the time limit in s.123 of the Equality Act 2010?

3.1 Was the claim made to the tribunal within three months, plus early conciliation extension of the act which the complaint relates?

3.2 If not, was there conduct extending over a period?

3.3 If so, was the claim made to the tribunal within three months, plus early conciliation extension at the end of that period.

3.4 If not, were the claims made within such further period as the tribunal considers to be just and equitable. The tribunal will decide why the

complaints were not made to the tribunal in time and whether, in any event, it is just and equitable in all the circumstances to extend time.

Pregnancy and maternity discrimination Equality Act 2010 s.18

4. Did the respondent treat the claimant unfavourably by doing the following things?

    4.1 The respondent did not communicate with the claimant during her maternity leave between 10 May 2020 (when Haifa Ali contacted her) and 7 December 2020 (when Lianne Summerly contacted her) except by sending a letter in August. The respondent did not update the claimant that her point of contact in the business, Haifa Ali, was on furlough or had left the business.

    4.2 The respondent did not inform the claimant until 7 December 2020 that consultation had begun regarding contractual changes that would directly affect her.

    4.3 The respondent did not contact the claimant to see if she had access to her work email which was where the majority of the communications were sent. (The claimant was unable to access any documentation sent to her via her work email address whilst on maternity leave from late August 20202 when her personal phone changed.)

    4.4 The respondent did not invite the claimant to an informal conversation about the proposed changes to her contract as provided for in the respondent's process.

    4.5 The respondent did not give the claimant the same amount of time to consider the changes to her contract which would have been given to those currently at work in the organisation.

    4.6 The respondent did not invite the claimant to attend a formal meeting which had been arranged for 7 December 2020 and required the claimant's attendance.

    4.7 On 7 December 2020 in a telephone call, Lianne Summerly informed the claimant that she was at risk of her contract being terminated due to not showing up for the formal meeting and advised her to sign the new contract to avoid this happening.

    4.8 On 7 December 2020 at 11.38am, John Tonner sent the claimant a new invitation to a formal meeting by PDF. The formal meeting was to be attended on 9 December 2020. The claimant replied to John Tonner and expressed her concerns and explained challenges around attending the formal meeting with such short notice to arrange childcare. There was no response from John Tonner.

4.9 On 8 December in an email to the claimant forwarding her old contract and her new contract, Richard White made an assumption of the decision the claimant would make regarding the buy out payment.

4.10 On 23 December 2020 the claimant resigned with effect from 24 January 2021 due to feeling that she could not return to the workplace due to lack of communication throughout her maternity leave.

4.11 Amunprit Sangar failed to contact the claimant to conduct an exit interview before 24 January 2021. The claimant was not given the opportunity to discuss reasons for leaving the organisation.

5. Was the unfavourable treatment because of pregnancy

5.1 If so, did the unfavourable treatment take place during the protected period or

5.2 did it implement a decision taking in the protected period?

6. Was the unfavourable treatment because the claimant was on compulsory maternity leave or exercising or seeking to exercise a right to ordinary or additional maternity leave or because she had exercised or sought to exercise the right to ordinary or additional maternity leave?

7. Should the tribunal make a recommendation that the respondent take any steps to reduce any adverse effect on the claimant and, if so, what should it recommend?

8. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that? Should interest be awarded, how much?

9. Did the ACAS Code of Conduct on Disciplinary and Grievance procedures apply. Did the respondent or the claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

10. It is relevant to note that the claimant did not advance a complaint of constructive dismissal.

Evidence and matters arising during the hearing

11. We heard evidence from the claimant and her husband and from Mr Richard White (the Director of the Heathrow Business Support Centre for the respondent) and Mr Austin (the Employee Relations Manager for the respondent). We also received a bundle of approximately 160 pages. The respondent produced some supplementary material and no objection was raised to this.

12. It is necessary to record a matter that arose during the hearing, following the evidence of the respondent's first witness. The respondent's counsel asked

to address the Employment Judge in the presence of the claimant but in the absence of the lay members. She stated that the demeanour displayed by the lay members, in conjunction with the nature of the questions put by them, raised concerns for the respondent as to the neutrality of the lay members. The respondent's counsel made clear, however, that, despite this, she was not making any application that the panel should recuse itself. The panel considered the points raised. We noted that no objection had been taken by the respondent to any of the questions put by the lay members at the time, that the Employment Judge had not observed the issues reported as to the demeanour of the lay members, that the panel well understood its obligation to hear the case fairly and impartially and that there was no application for recusal. On that basis the panel considered it appropriate to proceed with hearing and did so without further incident.

Findings of fact

13. In light of the evidence before us we made the following factual findings.

14. The respondent is the company that operates Heathrow Airport. It is a large employer, employing around 4,500 staff.

15. On 18 November 2013 the claimant began working for the respondent as a Security Officer at Heathrow Airport. The claimant was not issued with a work laptop or phone for the purposes of her work. She was able to access work emails on her personal phone, if necessary, but she was not expected to do so as part of her work.

16. On 17 March 2020, the claimant was placed on covid leave because she was pregnant and so considered to be a particular risk if she contracted covid. The claimant's point of contact after this time was Haifa Ali, an HR officer who had responsibility for maintaining contact with any of the respondent's employees who were absent from the workplace whether on grounds of sickness or maternity leave or for any other reason.

17. In early May 2020, Haifa Ali contacted the claimant by telephone to see whether she would be prepared to go on furlough until her maternity leave began. Placing the claimant on furlough would not have had any adverse consequence for her as her pay would have been preserved but it would have meant that the respondent was able to recover her pay from the furlough scheme. The claimant declined to go on furlough and the respondent raised no issue about this.

18. On 10 May 2020, the claimant's maternity leave began. She rang her line manager Adrian at around that time to let him know that she had given birth. On 13 May 2020, the claimant and Adrian exchanged text messages. He informed her that he was currently on furlough but would be returning at the end of May and stated that he was happy to support her in any way that he could and that she should get in touch if she needed anything. The claimant thanked him for his message and said that she didn't need anything and would see him next year. The claimant did not make any subsequent attempts to contact him.

19. At some point subsequently Haifa Ali herself was placed on furlough but the claimant was not notified of any replacement point of contact. The respondent's evidence, which we regarded as credible, was that this failure occurred because of the impact on its HR capacity due to the reduction in the numbers of staff working at this time. It is also relevant to note that the claimant did not try to initiate contact with the respondent at this time or raise concerns about the failure to provide a substitute point of contact. The claimant also had her line manager as a point of contact if she had any concerns.

20. In the months following March 2020, the respondent was under considerable financial pressure due to the pandemic. Levels of air travel were much reduced and this affected the respondent's financial position. In consequence the respondent began to consider how to reduce its operating costs. Various measures were adopted including the use of furlough and reductions in the number of management staff. The respondent also began to explore the possibility of making changes to employees' terms and conditions of employment. Over that summer, the respondent began discussing with its recognised trade unions proposals for changes to terms and conditions.

21. On 5 August 2020, the claimant received a letter from the respondent. It explained that the respondent was experiencing difficult trading conditions due to covid and that it was engaged in discussions with its trade unions about proposed changes to employee terms and conditions. It contained a schedule showing how the proposals under discussion would affect the claimant personally. However, it also stated that the schedule was for illustrative purposes only and was subject to the outcome of the discussions with the trade unions. The schedule showed that, if the proposed changes were implemented, then the claimant would receive a rise in her basic salary, which would increase from £25,050 to £26,000, she would retain her annual shift allowance of £4,693, but she would lose her annual "early start" allowance of £1,022. Overall, the proposed contractual changes would leave the claimant approximately £71 worse off per year. The letter explained that the claimant's early start allowance would be the subject of a buyout under which she would receive payment equivalent to the value of the allowance for two years. The buy-out payment could either be paid in a single lump sum or paid in monthly increments over the two-year period. The schedule stated that the value of the buy-out payment was £2,045. The letter stated that further information could be found on the respondent's intranet, or that employees could speak to one of the "Change Leads" (whose details were available on the respondent's intranet), or individuals could send a question to a dedicated email inbox, the address of which was provided in the letter. The claimant did not at this stage make any attempt to contact the respondent to raise any queries because she was waiting to see what happened following consultation with the trade union.

22. In September 2020 the respondent produced a "colleague fact sheet" which was made available solely on its intranet. It stated that the trade union was

balloting its members on the terms of the offer during September but that, if agreement was not reached, the respondent would issue its employees with new contracts and may offer to buy out some existing contractual rights. The claimant did not see that information.

23. On 23 September 2020, the claimant changed her mobile phone, although her number was unchanged, she lost any access to work emails on her phone as a result. The claimant could have arranged to get her new phone approved to receive work emails, but she did not do so because she did not think it was necessary. She assumed that, if the respondent needed to contact her it would either telephone her (as Haifa Ali had done in May) or would write to her at her home address (as it had done in September).

24. On 23 October 2020, the Chief Executive Officer of the respondent sent an email to staff advising that the consultation with the trade union side had yet to result in any agreement. The email stated that unless an agreement was reached soon individual letters would to be sent out to employees detailing the changes that the respondent proposed to implement. The claimant did not see this email.

25. During October 2020, the respondent wrote to the claimant again with a confirmation that the negotiations with the trade unions had not resulted in agreement and so the respondent was moving to individual consultation. It attached a further copy of the schedule detailing the impact of the proposed changes for the claimant and the details of the buyout of the shift payment. The figures had not changed since the issue of the August letter. The letter indicated that the claimant would receive an invitation to an informal meeting to discuss the changes or that, if she was content to do so, she could simply email indicating which option she preferred in terms of the buyout. The letter warned that if individuals did not reply they would be invited to a formal meeting and consideration giving to terminating the contract on grounds of "some other substantial reason". The letter was sent by post in a mail shot sent out to a large number of individuals. For that reason, the letter is undated. The claimant's evidence, which we accept, is that she did not receive it by post and that she was still unable to access her work emails. We also accepted the respondent's evidence that, as far as it was aware, the letter was indeed despatched to the claimant at her correct address. We found that the letter simply went astray.

26. The respondent produced a briefing pack for the Change Leads who would be conducting the proposed meetings. The process to be followed varied according to the extent of the impact of the proposed changes. Employees who, like the claimant, would experience a drop in salary of less than 10% could attend a meeting to discuss the options open to them on their accepting the new contractual terms and discuss whether they wished to receive the buyout of any allowances via a lump-sum payments or for the payment to be spread over two years. It is clear from the Change Lead's briefing pack that the changes in contractual terms themselves were not up for discussion and that the respondent's position was that if the changes were not accepted, this could result in an employee's dismissal for "some other substantial reason". The briefing pack did not specifically cover how

the respondent would deal with persons who were absent from the workplace on maternity leave. Mr Austin believed that in oral briefings for the Change Leads reference was made to the importance of ensuring that people on maternity leave had been contacted but he was unable to recall what specific guidance was given or what specific measures were to be taken in order to ensure that such contact had taken place. Although both the letter and the email from the respondent's Chief Executive had indicated that the respondent was going to invite all employees to informal meetings with a Change Lead, this did not, in fact, occur. In the end, only those who specifically requested an informal meeting were given one.

27. On 2 December 2020, the respondent sent a further letter to the claimant by post and by email inviting her to a "final" individual consultation meeting to take place on 4 December 2020.The letter was incorrectly addressed in that the claimant's house number was number 136 but the letter was addressed to number 135. The copy sent by post was not therefore received by the claimant. The respondent's evidence (which we accepted) was that the mistake in the postal address was the result of human error. The version sent by email was also not received by the claimant as she was at that time unable to access her work emails.

28. The 2 December 2020 letter explained that the need to make changes to terms and conditions had been necessitated by the dramatic fall in air travel as a result of the pandemic, that the respondent had attempted to agree the changes through consultation with the trade unions but had been unable to do so and so the respondent wished to secure individual agreement to the changes. It recorded that the claimant had previously been provided with the details of the proposed changes and the buy out options but had not signed the new contract. The letter also suggested that an informal consultation meeting had been arranged and that the claimant had been contacted directly about the proposed changes. (However, that was not correct, and no such meeting had, in fact been arranged, and no direct contact had been made with the claimant). The letter concluded by saying that, if the claimant failed to attend the meeting, or failed to agree to the new terms, her contract of employment might be terminated.

29. On 4 December 2020, one of the respondent's employees, Lianne Summerly, rang the claimant. Lianne Summerly explained that she was calling because the claimant had not attended the meeting that had been due to take place on 4 December, that the purpose of the meeting was to discuss the proposed changes to the claimant's contract and the options open to the claimant in relation to the buyout of her allowance. She informed the claimant that they could try to reschedule the meeting but that, if the claimant did not sign the new contract, she was at risk of having her employment terminated. She asked the claimant to select an option as to the buyout of her shift payment as it was becoming urgent. This telephone call was the first occasion on which the claimant became aware that a formal individual consultation process was now underway in relation to the proposed contractual changes and that the respondent considered that she had failed to take the steps required of her under that process. The

claimant explained to Lianne Summerly that she could not access her work email and so was provided with instructions on how to do this.

30. On 7 December 2020, the claimant accessed her work email and discovered the letter of 2 December 2020. She emailed the respondent explaining that she did not know exactly what was being proposed or what options she needed to select. Lianne Summerly replied and explained that her options were either to have a buy out payment in one lump sum or to have the payment paid over 24 monthly instalments.

31. On 7 December 2020, an HR officer called John Tonner sent a revised version of the 2 December letter inviting her to a meeting on 9 December 2020. The accompanying email said that the copy of the revised contract and buy out form would be reissued ahead of the meeting. At that point, the claimant still did not have access to any final statement of the changes that were to be made to her contract. In fact, the position had not changed from that detailed in the schedule sent to her for illustrative purposes in August 2020. However, the claimant did not know this.

32. On 7 December 2020, the claimant emailed John Tonner. She explained that she had been sent an invitation to a final meeting but there had been no offer of any previous informal meeting. She said that she had received no substantive information since the August letter. She stated that she felt she was not being given the same information and opportunity to consider matters as other employees. She said that it was difficult for her to attend a meeting on 9 December 2020 as she was on maternity leave and it gave her only a day's notice to arrange childcare for her baby and toddler. The claimant concluded her email by saying:

> "I would like to be able to have the same information provide to me as those in the business as I am not sure I completely understand what's happening, that the information I have is the most current information and what this means for me."

33. John Tonner did not reply to the Claimant's email; he simply forwarded it to another individual with a comment that he was not sure the claimant would be attending the meeting on 9 December 2020.

34. On 8 December 2020, Mr White sent an email which enclosed a contract containing the revised terms, a letter attaching a schedule detailing the effect of the contractual changes for the claimant and a letter recording an assumption that the claimant would opt for a lump sum payment in respect of the buyout of her shift allowance. He provided an email address for the claimant to use if she had any questions. Mr White assumed that the claimant would want to receive a lump sum because it was his experience that 85% of individuals affected by the contractual changes had opted for the lump sum. In evidence, the claimant accepted that this was indeed the option that she would have chosen. However, the fact remains that Mr White made an assumption as to the option that the claimant would choose without making any attempt to contact her to discuss matters with her beforehand or indeed waiting to see whether she attended the consultation

meeting on 9 December 2020 so that she could confirm her decision one way or the other.

35. The claimant did not attend the formal consultation meeting on 9 December 2020 because of her childcare difficulties. The respondent's witnesses suggested that the claimant's childcare difficulties were not an obstacle to her attending a meeting by video because the respondent would have been content for her children to be present. However, no one had contacted the claimant to tell her this. It was understandable for the claimant to be concerned about the idea of conducting what was described as a formal meeting, one possible outcome of which was that her employment might be terminated, with two small children present and for her to wish to reschedule the meeting for a time when she would have childcare available. On 10 December 2020, in order to protect her position, the claimant signed her new contract.

36. The respondent maintained that it had to proceed in the way that it did due to external factors. At this time, the respondent was in the process of seeking to raise new funds from the market. It was important for respondent to be able to demonstrate to investors that it had completed the process of making changes to employee terms and conditions in order to assist in securing that further investment. Although we accepted the respondent's evidence on this general point, there was no cogent evidence from the respondent as to the precise timing of this process or exactly when it had to be completed by. Nor was there evidence to suggest that rescheduling the claimant's consultation meeting for a short period so that she could be properly informed as to the changes and make her own election as to the buy-out process would have endangered the respondent's obtaining the investment in question. The claimant would undoubtedly have signed her new contract following such a meeting given that she had done so on 10 December in any event. Mr White, very fairly, accepted that the respondent could have rescheduled the meeting by a few days.

37. Shortly after signing her new contract the claimant began to seek new employment. She decided to leave the respondent's employment because she had been distressed by the respondent's approach to consultation over the contractual changes and because she was anxious about returning to the workplace after a period of absence during what had been a significant period of change. We found that the claimant's husband also had concerns about her returning to work as a Security Officer, a role which was going to require her to engage with the large numbers of passengers travelling through the airport, and so would involve a greater potential exposure to the risk of contracting covid than she had faced before.

38. On 23 December 2020, the claimant emailed HR and her manager to give notice, having by this time obtained another job offer. The claimant did not make any request for an exit interview at this time. The claimant's maternity leave came to an end on 2 January 2021.The claimant's last day of service was 24 January 2021. She began a new job on 25 January 2021. The claimant's evidence was that she had a discussion with Amunprit Sangar regarding the return of her uniform and pass, and that he had said that he

would be in touch to arrange an exit interview but that did not happen and so the claimant made arrangements for a friend to return her uniform and pass. In fact, the exchange of text messages which took place between the claimant and her friend on 25 January 2021 show that the respondent was ready to conduct an exit interview. The claimant sent a message as follows "*he [Mr Sangur] called saying sorry your leaving. I have to arrange an exit interview with you,,, I said leaving?? You mean left!*" The remainder of the text messages record the claimant saying that she felt that the only reason Mr Sangur wished to offer an exit interview was to secure the return of her ID. Subsequently, she arranged for her friend to return the ID and the respondent's property on her behalf. The exchange of text messages indicates that, had the claimant wished to have an exit interview and to discuss her reasons for leaving, the respondent was ready to provide one. Instead, the claimant arranged for her friend to return the respondent's property and did not pursue the offer of an exit interview.

39. ACAS conciliation began on 1 February 2021 and ended on 2 March 2021 and the ET1 was filed on 18 March 2021. Matters occurring before 2 November 2020 are therefore out of time subject to consideration of whether they form part of a continuing act ending with an in-time event.

Legal principles

40. Section 18 of the Equality Act 2010 provides

18 (1)…….
(2)A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —
(a)because of the pregnancy, or
(b)because of illness suffered by her as a result of it.
(3)A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
(4)A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
(5)For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
(6)The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
(a)if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b)if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

…….
(3)But subsection (2) does not apply if A shows that A did not contravene the provision.

41. In **Onu v Akwiwu** LJ Underhill provided a concise summary of the approach that a Tribunal is required to adopt when considering whether a protected characteristic was the cause of an allegedly discriminatory act.

> *"42. What constitutes the 'grounds' for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in Nagarajan called his 'mental processes' (p. 884 D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had 'a significant influence'. Nor need it be conscious: a subconscious motivation, if proved, will suffice."*

42. This approach applies also to Tribunals considering allegations of unfavourable treatment because of pregnancy or the exercise of maternity leave, see for example the cases of **Johal v Commission for Equality and Human Rights** and **Indigo Design Build and Management v Martinez**. It is clear from the authorities that it is not sufficient that maternity leave is the factual context against which the treatment occurred or, to put it another way, that "but for" an individual's absence on maternity leave the treatment complained of would not have occurred. As Simler J states in **Interserve FM Limited v Ms A Tuleikyte**

> *"21……..It follows that it is necessary to show that the reason or grounds for the treatment — whether conscious or subconscious — must be absence on maternity leave and the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish unlawful direct discrimination under section 18 .*
>
> *22. In cases that do not involve the application of any inherently discriminatory criterion and where the discriminatory reason or grounds exist because of a protected characteristic that has operated on the discriminator's mind or thought processes to some extent (whether consciously or subconsciously) the discriminatory reason for the conduct need not be the sole or even the principal reason for the impugned treatment. It is enough that it is a contributing cause in the sense of a significant influence."*

43. Section 136 of the Equality Act deals with the approach to be adopted by Tribunals in relation to the burden of proof

> *136 (1)This section applies to any proceedings relating to a contravention of this Act.*
> *(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

44. The approach to be adopted by a Tribunal to the application of the burden of proof is detailed in the judgment of the Court of Appeal in **Igen v Wong**

"(1) Pursuant to section 63A of the SDA , it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word "could" in s. 63A(2) . At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA .
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA . This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive .
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but

further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

45. It is not sufficient to establish a primary case for a claimant to show less favourable or unfavourable treatment, there must be "something more" which could enable a Tribunal to find that the protected characteristic could be the cause of the treatment, **Madarassy v Nomura**. That "something more" may be found in matters such as the making of discriminatory comments, in a breach of a code of practice, in evasiveness or failure to provide information that the respondent could reasonably be expected to provide etc.

46. Section 123 of the Equality Act 2010 deals with the application of time limits as follows:

123(1) Subject to section140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.
(2)Proceedings may not be brought in reliance on section 121(1) after the end of—
(a)the period of 6 months starting with the date of the act to which the proceedings relate, or
(b)such other period as the employment tribunal thinks just and equitable.
(3)For the purposes of this section—
(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.
(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a)when P does an act inconsistent with doing it, or
(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

47. An act, or acts, may be treated as "conduct extending over a period" where there is a discriminatory policy or rule or where there was a "continuing state of affairs" in which a claimant was subject to discrimination as opposed to a " succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed" **Hendricks v Met Police Commissioner**. A "relevant but not conclusive factor" in determining whether acts are connected will be whether the same individuals were involved in the acts in question **Aziz v FDA**. Only acts

which are found to be discriminatory can form part of a course of conduct extending over a period **Lyfar v Bright and Sussex University Hospitals**.

48. In considering whether, in the exercise of the Tribunal's broad discretion, it is just and equitable to extend that statutory time limit it is relevant to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the effect of delay on the cogency of the evidence; whether the respondent has cooperated in relation to any information requests, whether the claimant acted promptly once aware of the facts which gave rise to the claim; and the steps taken by the claimant to obtain appropriate advice once aware of the potential claim.

124 Remedies: general

(1)This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2)The tribunal may—

(a)make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b)order the respondent to pay compensation to the complainant;

(c)make an appropriate recommendation.

(3)An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate

49. The **Vento** case provides guidance as to the approach to be adopted in considering awards to injury to feelings. Such awards are likely to fall in to one of three bands (lower, middle or higher) depending on the seriousness of the discriminatory conduct and its impact on the claimant. Relevant factors may include whether the claimant was vulnerable and the degree of distress caused.

50. The Presidential Guidance on the **Vento** bands was updated on 27 March 2020 to apply to claims lodged after that date

In respect of claims presented on or after 6 April 2020, the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000. NB these bands take account of the 10 per cent Simmons v Castle uplift.

51. **Prison Service v Johnson** [1997] IRLR 162, para 27 set out the principles that should guide Tribunals in making awards for injury to feelings

- *Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;*

- *Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;*
- *Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;*
- *Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;*
- *Tribunals should bear in mind the need for public respect for the level of awards made.*

Employment Tribunals (Interest on awards in Discrimination cases) Regulations 1996

"6.—
(1) Subject to the following paragraphs of this regulation—
(a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation"

The rate of interest is at 8% and interest is calculated as simple interest that accrues from day to day.

Submissions

52. We heard oral closing submissions from the parties. We do not set these out in any detail here but have addressed the points raised in the conclusions reached. We should record that the respondent provided the Tribunal with four authorities. The first is **Stone v Ramsay Healthcare Limited** (a first instance decision of the Employment Tribunal) in which a claim of pregnancy discrimination succeeded in relation to a multiplicity of allegations of adverse treatment. The second is **Visa International Service v Paul** (a decision of the EAT in which a Tribunal decision that an employer's failure to notify an employee absent on maternity leave of a job opportunity had been an act of direct discrimination on grounds of pregnancy). The third is **Commissioner of Police v Keohane** (which deals with the approach to be adopted when determining whether treatment was "because of" pregnancy, and confirms that it is not sufficient for pregnancy or maternity to be merely the context against which adverse treatment occurs). The final authority is **Indigo Design Build and Management v Martinez** (a decision of the Employment Appeal Tribunal which confirms that when considering whether treatment has taken place because of pregnancy and maternity a Tribunal should follow the guidance in **Onu** and must not adopt a "but for" approach to causation).

Conclusions

53. We have set out below the conclusions reached as to whether there was unfavourable treatment and, if so, whether any such unfavourable treatment

was either because of the claimant's pregnancy (and occurring during the protected period or implementing a decision taken in the protected period) or because of her exercise of the right to maternity leave. We have done so by making cross reference to the allegations of unfavourable treatment as they appear at paragraphs 4.1 to 4.11 above.

53.1 **Allegation 4.1**: We did not consider that the respondent had treated the claimant unfavourably by not communicating with the claimant during her maternity leave in the period 10 May 2020 and 7 December 2020 (with the exception of the letter sent on 5 August 2020). The claimant's line manager had been in contact with the claimant on 13 May 2020 and had provided his contact details and invited the claimant to contact him if she needed to do so. The respondent had *attempted* to contact the claimant by writing to her on three occasions to inform her of the process that was being followed in relation to the proposed contractual changes. It was unfortunate that the claimant only received the August letter and that the other two letters went astray. It is not clear why the first letter was not received. The error as to the address on the second letter may explain why that was not delivered to the claimant. However, the point remains that the respondent's intention had been to communicate with the claimant about the changes. Any failure of communication in this respect did not occur because of the claimant's pregnancy or exercise of maternity leave (in the sense that the approach adopted by the respondent or its failure to be effective was motivated by these factors) it was simply the unfortunate result of post going astray as a result of administrative errors.

53.2 The respondent did not inform the claimant that Haifa Ali had been placed on furlough. However, we considered that this failure occurred as a result of oversight because the respondent's HR department was operating at reduced capacity and under pressure as a result of the pandemic and the numbers of staff on furlough. We did not consider that the oversight occurred because of the claimant's pregnancy or exercise of the right to maternity leave.

53.3 **Allegation 4.2**: It was not correct to say that the respondent did not inform the claimant until 7 December 2020 that consultation had begun regarding contractual changes that would directly affect her. The respondent informed the claimant by letter on 5 August 2020 that it had begun a process of consultation with its trade unions regarding proposed contractual changes. Its letter provided the claimant with a detailed account of how those proposed changes would impact the claimant. The respondent subsequently *attempted* to write to the claimant on two further occasions about the proposed changes and the process that would be followed. Whilst the postal copies of the letters went astray and were not received by the claimant, we have found that they were indeed sent, that the respondent was attempting to communicate with the claimant. As we have recorded above, any failure of communication in this respect did not occur because of the

claimant's pregnancy or exercise of maternity leave. Lianne Summerly then followed up with a telephone call on 4 December 2020 and emailed the claimant to confirm how she could access her work emails.

53.4 **Allegation 4.3**: Whilst it is correct that the respondent did not check that the claimant was able to access her work email so that she could receive the communications that the respondent was sending, we did not consider that this was unfavourable treatment given that the respondent was not aware that the claimant had lost access to her work email and, more importantly, given that the respondent had also arranged for the letters in question to be sent to the claimant by post and had no reason to believe that such letters would not be received.

53.5 **Allegation 4.4**: It is correct that the respondent did not invite the claimant to an informal meeting to discuss the proposed changes to her contract. However, we have found that the respondent departed from the process that it had originally announced and that it had not invited all staff to informal consultation meetings, rather it had offered meetings to those who specifically requested it. The claimant was, of course, deprived of the opportunity to request an informal meeting but that occurred because the October 2020 letter had gone astray and not because of the claimant's pregnancy or exercise of the right to maternity leave.

53.6 **Allegation 4.5**: It is correct that the claimant did not have the same amount of time to consider the changes to her contract as those who were still attending work would have had. However, we considered that the reason why this occurred was that the respondent's letters of October 2020 and 2 December 2020 had gone astray and not because of the claimant's pregnancy or the exercise of the right to maternity leave.

53.7 **Allegation 4.6**: It is not entirely correct to say that the respondent did not invite the claimant to attend a formal meeting which had been arranged for 7 December 2020 and required the claimant's attendance. The respondent did attempt to invite the claimant to a meeting on 4 December 2020 but that attempt failed because the 2 December letter went astray as a result of an error as to the address. Any failure therefore occurred as a result of administrative error and not because of the claimant's pregnancy or exercise of the right to maternity leave.

53.8 **Allegation 4.7**: We have found that, on 4 December 2020, in a telephone call, Lianne Summerly informed the claimant that she was at risk of her contract being terminated due to not showing up for the formal meeting and advised her to sign the new contract to avoid this happening. Whilst that was unfavourable treatment and came as a shock to the claimant, Lianne Summerly was not motivated to do these things because of the claimant's pregnancy or the exercise of maternity leave. She did them because the claimant had not attended

the consultation meeting or signed the new contract and so she was aware that if the respondent's processes were followed to their conclusion the claimant might be liable to be dismissed for some other substantial reason. When she made the telephone call Ms Summerly would not have been aware that the claimant had not received the respondent's earlier letters.

53.9 **Allegation 4.8**: This allegation consists of two parts. As to the first, it is correct that on 7 December 2020 John Tonner invited the claimant to a further consultation meeting on 9 December 2020. We did not consider that he was motivated to do this because of the claimant's pregnancy or exercise of the right to maternity leave, he was simply trying to reschedule a consultation meeting that had not taken place.

53.10 The second part of the allegation relates to John Tonner's failure to engage with the concerns raised in the claimant's subsequent email or even to reply to it. We considered that the claimant has shown facts from which we could conclude that John Tonner's failure to address the concerns raised in her email, was because of the exercise of maternity leave. We considered that the "something more" which **Madarassy** requires is to be found in the fact that the claimant was making clear in her email to him that she was at a disadvantage in the consultation process as a result of being on maternity leave in two key respects (1) that she had not received all the relevant information and so didn't understand what she was being asked to agree to (2) that due to being on maternity leave and having the care of a young child she could not attend a meeting at short notice. Once the respondent knew that the claimant was at a disadvantage as a result of being on maternity leave, it was incumbent on it to do something to put matters right and to enable the claimant to participate in the consultation process and to take an informed decision on the proposed changes to her terms and conditions. Its failure to do so requires explanation. The respondent has not put forward cogent evidence sufficient to show that its failure was in no sense whatsoever connected to the claimant's exercise of the right to maternity leave. The respondent's explanation for these matters is that it needed to conclude the process of reforming terms and conditions in order to secure further investment. However, as we have found, there is no cogent evidence to show that the respondent could not have allowed a further short period to schedule a consultation meeting at a time that the claimant could accommodate, to ensure that the claimant was clear as to the changes that she was being asked to agree to and to allow her to make a decision to sign the new terms and make her own election as to the buy-out payment. The respondent also relies on the fact that its HR function was under pressure due to the upheaval within the business and the impact of having staff on furlough. However, two members of the respondent's HR team were in contact with the claimant over the relevant period and arrangements were being made by them for consultation meetings to take place. There was therefore sufficient HR capacity to

engage with the claimant's concerns and to give her a further interval in which to review the detail of what she was being asked to agree to and to schedule a consultation meeting at a time that the claimant could accommodate.

53.11 **Allegation 4.9**: It is not disputed that, on 8 December 2020, Richard White issued a letter which made an assumption as to the decision the claimant would make regarding the buyout payment. Although the claimant accepted that this was the option that she would have chosen, we considered that this was nonetheless unfavourable treatment. It was a decision that was for the claimant to take after proper consideration. The issue of the letter on the basis of an assumption as to the choice that the claimant would make was a further instance of the respondent pressing ahead despite the claimant having made clear that she felt at a disadvantage due to being on maternity leave. Mr White maintained that he made an assumption as to the choice that the claimant would take not because she was on maternity leave but rather because this was the choice that 85% of other employees had opted for. However, this misses the point that what is complained of is not the result but the process. We consider that the claimant has shown facts from which we could conclude that Mr White's decision to press ahead and issue a letter recording an assumption as to the claimant's presumed choice was because of the exercise of maternity leave. By this time the respondent had been made aware that its efforts to engage with the claimant during her maternity leave by sending the October and December letters had not been successful and that the claimant considered herself to be at a disadvantage as a result of being on maternity leave. The respondent failed to act appropriately in response to that information. As indicated above, we do not accept that the respondent has produced cogent evidence to show either that its actions were solely motivated by the need to secure further investment or could be attributed to lack of HR capacity, such that the respondent has shown that the claimant's absence on maternity leave played no part whatsoever in its approach.

53.12 **Allegation 4.10**: The claimant did indeed resign on 23 December 2020. As detailed above, although there were various communication failures which contributed to that decision, we have found that only two of these were acts of unfavourable treatment because of the exercise of maternity leave.

53.13 **Allegation 4.11**: We have found that the respondent was prepared to offer the claimant an exit interview. The claimant has not therefore established that she was unfavourably treated in this respect.

54. We did not consider that this was a case in which it would be appropriate to make an adjustment to compensation because of a failure to comply with the ACAS Code of Conduct on disciplinary and grievance procedures. Although the claimant did not pursue a grievance, we consider that her failure to do so was not unreasonable in the circumstances. She had tried to raise concerns

in her email of 7 December 2020 and had received no response to that email. The claimant decided to leave the respondent's employment shortly after the events in question and so the practical benefit of a grievance would have been limited.

55. The acts that we have found to amount to unfavourable treatment on grounds of the exercise of maternity leave all occurred after 2 November 2020 and so were within time.

Findings of fact as to injury to feelings

56. We made the following factual findings about the impact on the claimant of matters in respect of which her complaints have succeeded. The claimant was upset and anxious after receiving the phone call from Lianne Summerly on 4 December 2020 suggesting that she had failed to attend a meeting and so might be liable to dismissal. Those feelings were exacerbated by the respondent's subsequent failure to respond to her email of 7 December 2020, by the scheduling of meetings at short notice that she was unable to attend and by the respondent's issue of a letter which assumed that she would consent to the contractual changes and agree to receive the buy out as a lump sum. As a result of these failures to communicate with her properly, the claimant was upset and felt anxious about returning to the workplace. This contributed to her decision to leave the respondent and find other employment, although we considered that anxiety about returning to a role involving exposure to the public and to a potentially increased to risk of contracting covid also played a part in that decision. The claimant was upset by the loss of her career at London Heathrow which was a role that she had enjoyed. The claimant did not require any medical treatment for the feelings of low mood or anxiety that she experienced.

57. The claimant also gave evidence that she felt guilty about having returned to work earlier than she had planned. Although her maternity leave with the respondent came to an end on 2 January 2021 she had not planned to return until March. She felt that her early return to work may have affected her baby's son's development as she considered that he had reached some milestones later than might be expected. We did not consider that these were matters that could be said to have been caused by the acts of the respondent which we have found to be a breach of the Equality Act 2010.

Conclusions: Remedy

58. The claimant considered that the injury to feelings that she experienced should attract compensation in the middle Vento Band and sought compensation in the amount of £25,000. However, we considered that the appropriate level of compensation for injury to feelings in this case fell within the lower of the Vento bands. We noted that this not a case where the claimant was being singled out and having changes made to her contract because she was on maternity leave. This was a programme of contractual reform which affected the entire workforce. Furthermore, the immediate impacts of the proposed contractual changes on the claimant were limited, in that the drop in her basic pay was relatively small and she was to receive

a two year buy out of her allowances that would see her £2,000 better off in the short term. The respondent failed to respond appropriately when it became clear that communication failures had occurred with the result that the claimant had been placed at a disadvantage because of being on maternity leave. However, this is not a case where the respondent deliberately set out to exclude the claimant from receiving such communications (e.g., this is not one of those cases where a respondent has deliberately, for example, failed to make a claimant absent on maternity leave aware of internal vacancies or promotion opportunities). It is also relevant to note that the breaches of the Equality Act that we have found to have occurred, happened during a fairly short period from 7 December 2020 to the claimant's resignation on 23 December 2020. The breaches made the claimant feel upset and anxious and contributed to her decision to seek new employment. The claimant was distressed by these matters during December 2020 and January 2021, in particular. However, the claimant did not need to seek any medical treatment for her feelings of distress and anxiety, she found new employment during this period, and she started a new job on 25 January 2021. In the circumstances, we considered that an award of £3,500 represented an appropriate amount to reflect the degree of injury to feelings by reference to the matters found to be a breach of the Equality Act 2010.

59. The first discriminatory act occurred on 7 December 2020 and 569 days had passed between that date and the date of the hearing. We calculated the interest due to the claimant on the sum awarded as follows £3,500 x 569 (days) x 8/100 x 1/365 = £436.

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Employment Judge Milner-Moore

Date: …7 October 2022

Sent to the parties on:

10 October 2022

For the Tribunal Office