

Case number: 2601532/2023  
2601773/2024



## EMPLOYMENT TRIBUNALS

### BETWEEN:

**Claimant**

Ms M McKechnie

And

**Respondent**

Prime Life Limited

## AT A FINAL HEARING

**Held:** At Leicester, in public.

**On:** 10 – 13 February 2025.  
And in chambers 14 & 27 February and 16 May 2025

**Before:** Employment Judge R Clark  
Ms J M Morrish  
Mr C Bhogaita

### **REPRESENTATION**

**For the Claimant:** Ms K Minto of Counsel.

**For the Respondent:** Ms N Chaudhry, Head of HR.

---

## JUDGMENT

1. The claim of unfavourable treatment because of pregnancy or maternity under s.18 of the Equality Act 2010 succeeds.
2. The claim of detriment on the ground of pregnancy or maternity s.47C of the Employment Rights Act 1996 succeeds. No separate financial award of compensation is made as the losses are recovered under other successful claims.
3. The claim for suitable alternative work or normal payment during medical suspension under s.68 of the Employment Rights Act 1996 succeeds. No separate financial award of compensation is made as the losses are recovered under other successful claims.

4. The claim of direct disability discrimination under s.13 of the Equality Act 2010 **fails and is dismissed.**
5. The claim of discrimination arising from disability under s.15 of the Equality Act 2010 **fails and is dismissed.**
6. The claim of failure to make a reasonable adjustment under s.20 of the Equality Act 2010 **succeeds.**
7. The claim of harassment related to disability under s.26 of the Equality Act 2010 **succeeds.**
8. The claim of victimisation under s.27 of the Equality Act 2010 **succeeds in part.**
9. The claim of unfair dismissal under part X of the Employment Rights Act 1996 **succeeds.**
10. The respondent shall pay the claimant compensation assessed in the total sum of **£49,950.24.**
11. The recoupment provisions do not apply.

## **REASONS**

### **1. Introduction**

- 1.1 These claims concern the claimant's existing disability, her first pregnancy and the respondent's handling of the effect they cumulatively had on her ability to perform all aspects of her job.

### **2. Preliminary issues**

- 2.1 We adjusted the hearing room facilities so that the claimant had a more supportive chair. We adjusted the process so she could stand up and walk around the hearing room as and when she needed. We took regular breaks for the benefit of all participants and, when necessary, timed those breaks to allow the claimant to medicate.

### **3. The issues**

- 3.1 The issues in the claim have been identified by the claimant's solicitor and agreed by the respondent in a list of issues. The case has been through three preliminary hearings. We were concerned about aspects of that list of issues. We therefore spent time on the first day to ensure all agreed the actual questions of fact and law arising.

- 3.2 Ms Minto indicated the claim was broader than that particularised, and we can see scope where matters might have been alleged that did not form part of the professionally defined and agreed list. Ms Minto was invited to prepare a revised list of issues so we and the respondent could understand whether the expansions were materially significant or not. As the case had been prepared on the basis of the agreed list, we made clear that it may not be just to the respondent to permit any material variation at this final hearing. That was done overnight. One allegation of pregnancy or maternity discrimination contrary to s.13 was not pursued on the basis it does not exist in law. The respondent objected to the proposed changes and sought a postponement to gather the necessary evidence. Those changes were far more limited than we had understood Ms Minto had intimated the day before. We took the parties through the extent of the proposed variations, claim by claim. The result of that exercise was either that all agreed there was, in fact, no amendment to the list of issues, or where there was it did not amount to any material change that would cause an injustice if the case proceeded. Objection was maintained in just one matter but, we took the view that that too was not a material variation and allowed it on the basis that including it clarified the existing claim. There was no unfairness in proceeding and the list of issues retained its essential formulation.
- 3.3 The list of issues engaged all issue of liability and remedy if appropriate. All agreed to proceed on that basis.

#### **4. Evidence**

- 4.1 For the claimant we heard from Ms McKechnie herself. She also called a friend, Katie Maguire, who had attended as a companion at a later one of the numerous absence meetings held.
- 4.2 A further witness statement was prepared by another person who had also accompanied the claimant at some stage, but she was not called, and that evidence not relied on.
- 4.3 For the respondent we heard only from Mr Mustakim Sayedmiam, one of its HR Advisors. We record how he carried the full weight of the respondent's factual defence. He had played only a secondary part in only some of events in the relevant chronology. We understood that other relevant witnesses to the key events remained employed by the respondent but were not called. In the main, we found Mr Sayedmiam to be a frank and direct witness who did his best to be helpful but there were aspects of the live issues that he had no first-hand knowledge of to be able to speak to them.
- 4.4 We received a bundle running to 492 pages including the additional disclosure.
- 4.5 Both parties made closing submissions, Ms Minto supplementing, in part, a written submission.

#### **5. Facts**

- 5.1 It is not the tribunal's role to resolve each and every last dispute of fact between the parties. Our role is to make such findings of fact as are necessary to determine the issues before us and set the case in its proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.
- 5.2 The respondent is a provider of care home services. It is a large employer employing around 2000 employees across around 60 care homes around the country. The head office is in Leicester. It employs a number of people in an internal HR department. We were told it had both a specialist recruitment team and a specialist maternity team linked to payroll. Both were in addition to a team of operational HR Advisers that included Mr Sayedmiam.
- 5.3 Ms McKechnie has made her career in care. She started in the most junior positions whilst at university and her career has progressed into management. We suspect it may well have done so in any event, but we find at least part of her motivation to take the management route was to be able to manage and reduce the amount of physical care required as part of her working day. That is because she suffers with a number of degenerative conditions. They are fibromyalgia since 2013, hypermobile Ehlers Danlos Syndrome, since May 2022 and generalised degenerative changes in her spine.
- 5.4 She commenced employment with this respondent on 16 May 2022 as Deputy Home Manager at the Charnwood Oaks Nursing Home. Prior to starting, she completed a health questionnaire setting out her long-term musculoskeletal problems which, at the time, were controlled with a cocktail of pain relief medication including pregabalin at a reasonably high dose.
- 5.5 We find the role of Deputy Home Manager is largely a leadership, supervisory and managerial role. Whilst that does still mean engaging in the hands-on care of residents, we find the amount of her work that involves the sort of physical moving and handling tasks that could cause her difficulty is minimal. It is not in dispute that over a typical day, this would not exceed an aggregate of one hour. (at times this was expressed as around 12%).
- 5.6 It is also not in dispute that the claimant participated in a managerial on-call rota that she shared with the Home Manager. This was arranged as one week on and one week off. We find most of the out of hours work was telephone advice, but occasionally she would be called in. Sometimes, the reason for that call in was staff shortages, particularly amongst the two registered nurses employed. In those cases she may then have to work a full night shift. Being on call meant she could not predict what demands would be placed on her if called out.
- 5.7 We find the managerial work involved lots of audit activities, checking care plans, medications and other aspects of the delivery of resident care. We find there was no moving and handling within those tasks of any degree to cause a particular problem to

the claimant. One limited exception was the bed audit. This necessarily required the mattresses to be turned although this could have been done with assistance of others. The managerial role also included office-based HR admin and other general admin such as running the “seniors’ meeting” and to lead and develop the staff generally in the absence of the home manager.

5.8 We find the role afforded the claimant a great deal of autonomy. She was able to decide what work she did, and when, albeit within her overall remit. She had the power to delegate and allocate work to others and reallocate tasks between the workforce. Although junior to the home manager, we find this was not a role where the claimant was told and directed what to do on a day-to-day basis. She was given responsibilities and expectations within the role, but we find she was largely left to manage them herself.

5.9 Upon the claimant starting work, the home manager at the time undertook a general risk assessment. Ms McKechnie says she wasn’t involved in the risk assessment which was conducted alone by the manager, and she only saw it for the first time when it was disclosed in this bundle. We found it peculiar that something like that happened on her first day when she would have surely been involved in a local induction by the manager. Nevertheless, we have not heard from the home manager, we have heard from the claimant and her evidence wasn’t challenged on the point. We therefore accept she was not involved in the process. That aside, the content of the risk assessment seems to go a long way to meet the issues that arise later in this case. We find that as it was not known to the claimant, she could not refer to it and neither were those involved in managing the later absence procedure apparently aware of it. The risks and control measures take account of the autonomy in the role, and it positively contemplates limitations on what would be the full range of duties in the deputy manager role. It notes: -

***Maria to ensure that her workload remains manageable and is not increased to a level where strain can be caused. Any tasks that increase mobilising levels are to be discussed with the management team so support can be given.***

5.10 The significance of that is that before we even get to the problems that would arise in this case a few months later, there were already a range of adjustments in place to deal with the physical handling elements of the role, and particularly those physical aspects of direct care that potentially put the claimant at risk.

5.11 This is the only documented risk assessment we have seen documented. It put in place a comprehensive range of measures that would enable the claimant to perform the vast majority of her deputy manager role, and envisaged adjusting the heavy physical tasks, including delegating to others and managing her workload. Those adjustments would clearly allow her to remain in her post performing her non-physical tasks if, for whatever reason, she could not perform the physical elements.

- 5.12 There is no generic new and expectant worker assessment. We asked what the gender demographic was in the workforce. Mr Sayedmiam did not know but agreed that in this sector, the majority of employees were female and a substantial proportion of them would be of childbearing age. In this context, the relevant regulations, and the thrust of the employer's own policy, require an individual risk assessment where a pregnant employee is at risk from particular hazards in the workplace. In this case, this leads to a curious position. The claimant's case is that the respondent did not undertake an individual new or expectant mothers' risk assessment for her. The respondent agrees that it did not. Its case is that it decided to defer such an assessment until the claimant had returned to work after having the baby. We do not go behind that common ground and find as a fact that there was no individual risk assessment made, at least in the sense that the internal process and documentation were not used and the statutory qualitative requirement to perform a "suitable and sufficient" assessment of the risk was not met.

### Absence

- 5.13 The claimant appeared to settle into her role well over the first 4 months. There are only two matters of note to record during that time. Firstly, in one answer, the claimant suggested there was some tension between her and her manager which left her feeling unable to raise matters. We do not accept that. There is contemporaneous evidence during this time of what seem to be personable and warm messages between the two and their relationship was such that Ms McKechnie was comfortable using choice language at times suggesting their communications were safe and relaxed.
- 5.14 Secondly, we heard evidence of the unsuitability of the office furniture available to the claimant. In short, it seems it was, or at least resembled, garden furniture. This was raised as part of a general approach to criticise the respondent at any opportunity which at times we found risked undermining the claimant's evidence. In any event, it is not disputed that the furniture was inappropriate, but the autonomy the claimant enjoyed in her role meant she could sort alternative working space which she did, working on one of the four "units" to the home where the office facilities were more appropriate.
- 5.15 One aspect of the claimant's physical impairments is that the associated symptoms can occasionally flare up for various reasons or no apparent reason at all, albeit the claimant does not believe her work was the cause of this flare up. Unfortunately, that happened in an acute way on 10 October 2022. The claimant lost sensation in her legs and in bladder control. She spoke to the nurse on duty at the home who, understandably, considered it to be very serious. The claimant was admitted to hospital and, indeed, remained an inpatient for some three weeks. Upon discharge she had lost muscle strength and her ability to walk without crutches. She was gradually rehabilitated over the following four months.

- 5.16 As an obvious consequence, Ms McKechnie commenced a period of absence from work. She initially took annual leave as there was no contractual sick pay, beyond acknowledging the payment of SSP. Sickness absence followed annual leave.
- 5.17 Ms McKechnie was referred to NHS physiotherapy to support her physical recovery. The waiting list for that meant the first appointment would be some way into the future. She was able to fund private physiotherapy sessions which, on balance, seem to have been a major part of what would be her later recovery over the following months.
- 5.18 A “health and welfare” meeting was arranged with Ms McKechnie on 16 February 2023, during which Ms McKechnie’s seemed to be still quite poorly including continuing to experience some limitations in normal activities like showering. We find she did, however, make it clear even at that stage that her focus was on returning to work. She wanted to know what her options were as she was “bored at home and would love to be back at work”. They arranged a further follow up meeting for 13 March 2023.
- 5.19 That meeting became the first “Health and Welfare” meeting we were taken to. The claimant would also at times be invited to “Fit for Work” meetings. We need to briefly explain the nature of the two types of meetings. We find the health and welfare meeting is focused on an ongoing long-term absence and what might be needed to support employee back to work or, no doubt, potentially manage the situation from the respondent’s point of view. We find the “fit for work” meeting focuses on the steps that might be needed to practically get an absent employee who is potentially fit to return to work with adjustments, and to look into the adjustments that might be available. The two are obviously very similar in nature, purpose and effect. There would be many such meetings over the relevant period and whilst the employer labelled them differently in situations consistent with our understanding of their purpose, this was not always the case. Indeed, in some cases the invites mixed both types of meetings. For our purposes, we do not place any particular significance on what the meeting was called and either was, essentially, an absence review.
- 5.20 We should also record the process is quite tightly prescribed with forms and set questions. A number of the meetings appeared to include “standard” questions for employees on long term sick which we found to be either out of place in the context of the claimant’s case, or in some cases, apt to cause insult or offence.
- 5.21 Between her hospital admission in October 2022 and February 2023, her prospects of returning to her full duties seemed some way off. On 9 March 2023 the claimant wrote to her employer. It is an important step in the chronology, and we set it out in full.

***I am writing to see if there is any possibility of an internal transfer to a role which is not as front line as the role I am currently in. As you are both aware, my health has got worse and I am trying to find a solution to get back to work. I have been strongly advised against working in my current role by medical professionals, due to the risk involved. I have also just found out I am pregnant, which makes me higher risk with my conditions to be working as resident facing as I currently do.***

***Would there be any possibility of working in a different role within the company, so I am not putting myself in such a high risk position for my health. I understand that this may involve an OH referral which I am happy to go through. I really enjoy working within the company and I would like to continue to do so.***

***Can you please advise me on the next steps forward with this?***

- 5.22 This makes her own position clear, and we do not accept the claimant's contention that she had never said she cannot do the role of deputy manager. At this stage she clearly did. In the later context, however, it becomes clear that there are other options and, despite how incapacitated she had been since October, there was already the beginnings of what would become a near-full recovery. The private physiotherapy was now being supplemented by NHS physio appointments and all that had helped her to regain her muscle strength. The speed at which the claimant appeared to improve from her quite serious symptoms does appear to be remarkable and it the reason for a change from the pessimistic outlook that she herself had given in this email, to something far more optimistic over the coming weeks.
- 5.23 There is no doubt that the claimant's expectation as at the time of this email of 9 March was that adjustments to the Deputy Manager role would not be made and that her focus should be on temporary redeployment. Whilst this was also the line the occupational health report would appear to take, we accept that it was focused on the risk being in respect of the heavy physical tasks and on-call work.
- 5.24 Perhaps the most significant new fact to emerge around this time was that Ms McKechnie was now pregnant with her first child. That is significant for two reasons. First, it is a major factor in how the claimant assessed her own risk and limitations in the workplace. Had she not been pregnant, we find on balance that the level of physical recovery would have been almost to the pre-October 2022 level of physical ability. Coupled with the autonomy in her role, we suspect had that been the case she would have contemplated returning to her deputy manager role without adjustment. Secondly, a significant part of the various pain relief medication that she constantly took to control her conditions was a drug called pregabalin. We understand that is not compatible with pregnancy, at least not in the early stages. The claimant was unable to take it with the consequential effects that had on her ability to control her pain levels so as to perform any of the significant physical aspects associated with the role. That undoubtedly hindered what we find would otherwise have been a near complete recovery.

**Fit for work meeting.**

- 5.25 The claimant's email of 9 March 2023 led to a fit for work meeting on 17 March 2023. The meeting was carried out by Melissa Stroud, Regional Support Manager and Sophie Hawkes, HR Officer.



- 5.26 Before turning to the matters discussed in that meeting, we need to deal with the issue of note taking. These notes, and the notes of just about all the meetings, require us to exercise caution in the accuracy. The exception is the meeting that would later be conducted by Rupinder. The claimant takes issue with many aspects. The notes are not signed by anyone despite the respondent's insistence in all other respects that its internal policies and the associated prescribed forms are used. (So much so that a form was required to be reproduced to commence the claimant's later grievance that simply cut and pasted the written grievance). Despite that level of insistence, the quality of completion is not policed. The notes of these meetings were not shared with the claimant who saw most of them for the first time in the bundle for these proceedings. The mechanism and timing of them being written up is not fully explained. Mr Sayedmiam says they were typed up contemporaneously but not verbatim. The structure and formatting do not give us confidence to be able to accept that as a fact. They have a structure that does not always make clear who the comments are attributable to. They have a format in which certain questions are posed in advance of the meeting and, in some cases, it is clear answers were not recorded which leaves us doubting that all the content actually represents matters discussed in the meeting. There are also parts where there appears to be skewed comments which make the claimant's explanation of what was actually said appear that the notes have taken a particular angle on the discussion. Fundamentally, the claimant pointed out a number of inaccuracies she had not had opportunity to correct.
- 5.27 At the meeting, Ms McKechnie advised that she would not be fit enough to return to all aspects of her role as a deputy manager, but we find she did not say she could not do the role entirely. She referred specifically to having no problem doing the role, except the things like personal care because she can't be that physical. We find Ms Stroud's position was that the claimant was unable perform any aspect of her job safely.
- 5.28 We understand why the respondent started the process in this way based on the claimant's email of 9 March 2023. However, the respondent appears then to be locked into that state of affairs and ignored the changing situation and the points raised by the claimant. During the meeting the claimant was asked what roles she felt she would be able to do on her return. Ms McKechnie advised that she would not be able to do the *physical elements* of her role, for example personal care. This has been interpreted as her not being able to do *any* aspects of the role at all. The claimant also repeated her notice given in writing in her email of 9 March that advised that she was pregnant. She asked that her hours of work could be limited to 9-5, and that she came off the on-call rota.
- 5.29 We find there was a remarkable lack of appreciation of what the manager was being told. The manager's response to the claimant saying, "I have no problem doing it, only the personal care", which is not disputed to amount to about 1 hour a day, was to then ask her whether she would consider an alternative position of care worker or support work. We do not understand the logic of this as everyone in that meeting would have

been fully aware that those roles involved substantially more of the hazardous tasks throughout the working day that she had literally just made clear that she could not do. The claimant replied, with obvious disbelief about what had just been offered “no, for the reasons I’ve just given”. Within a period of what must have been minutes, she is again asked to consider those roles. The most benevolent explanation would be that those roles were all that were available, but we do not accept that was the case.

5.30 That type of approach would continue throughout the very many meetings that followed. It leads us to accept the claimant’s evidence that, early on in this process, she became concerned that her situation was not going to be supported, and that the respondent was not engaging with the real issues.

5.31 We find she concluded the meeting with her desired outcome of: -

***“Return to work as soon as possible.***

***I am in a position where I need to get back as I am suffering financially.”***

5.32 The claimant was also questioned on her financial motivation. She seemed to seek to distance herself from that suggesting in the course of her evidence. We did not understand why. It was perfectly proper for her to say she needed to get paid when she was able to do productive work as a disabled and pregnant employee. What this did do was explicitly raise the disadvantage that being forced to remain absent on sick leave placed her at a disadvantage.

5.33 Pausing there, we have already referred to the absence of any generic risk assessment and the curious position that the respondent took of deferring any new and expectant mothers risk assessment until after the claimant had had her baby. There was no risk assessment undertaken by Ms Stroud but there was the risk assessment on file conducted by the home manager the previous year which would have answered just about all of the issues now arising and would have facilitated the claimant being able to continue performing the vast majority of the deputy home manager role. Ms Stroud either did not review that document or ignored it. She did, however, reach her own conclusion that there was no work that was safe for the claimant to do. As a result, she directed that the claimant should remain absent on sick leave. We do not accept Ms Stroud’s process to arrive at that conclusion can be said to meet the requirement of a suitable and sufficient risk assessment as it was done outside the expected process and failed to take into account the actual and limited areas of risk and whatever happened was not documented as a risk assessment. There are only two material differences between the situation in March 2023 before Ms Stroud, and that in May 2022 when the favourable and supportive risk assessment was conducted by the home manager.

a) One is that the claimant had had the serious flare up and her own outlook as recently as a few weeks earlier was pessimistic. That outlook was continuing to

improve dramatically over the intervening weeks, and we find she was repeatedly asking for a return to work, just excluding the physical tasks.

- b) The other significant event was that she was pregnant.
- 5.34 We have to infer that the pregnancy was a material factor in Ms Stroud ignoring the dramatic improvement in the claimant's health and her reluctance to listen to what the claimant was then saying about being able to perform work that was not physically demanding. We also infer the decision not to perform a risk assessment until after claimant returned to work brought her pregnancy into the decision making. The risk assessment would have been an important step in reaching a reasoned conclusion on her abilities and the risks she might face. Choosing not to do it leads us to conclude the decisions were informed by other factors.
- 5.35 This meeting resulted in a plan to obtain an occupational health referral. Ms McKechnie was advised that she would be sent further information, and a referral would be completed. Job vacancies would be shared along with EAP information and the claimant agreed to take a few days to take a look at them. The plan was for the parties to review things the following week. In the meantime, the claimant was advised to speak to her GP to gain a recurrent fit note.
- 5.36 We find one obvious piece of information that did not get shared after this meeting was the maternity information that the respondent's policy says would be sent to a pregnant employee. The trigger to provide this was stated as when the employee notified the employer in writing of their pregnancy, as the claimant had done. This did not get provided for another 6 months or so.

#### List of alternative vacancies

- 5.37 We accept Mr Sayedmiam's evidence that the respondent has a pay protection policy to cover situations where employees temporarily perform alternative duties, as appeared potentially available to the claimant. We were told there were no limitations other than it applied only to temporary redeployment unless a permanent job change was agreed, the employee would then be paid the rate for the job. In the context of this case, we find all the vacancy options would have been undertaken on a temporary basis and would, therefore, have triggered the salary protection in full, not only where the rate of pay differed but, unusually perhaps, also where the hours of work differed from full to part time.
- 5.38 The vacancy list was sent to the claimant on 17 March 2023. We find almost immediately, the claimant identified two vacancies that she felt were suitable. She emailed HR to state that she was interested in a vacancy at Peaker Park, which she believed to be a part time role which, at that time, suited. On Monday 20 March the claimant was sent the job description for the vacancy. She responded that same afternoon clarifying pay and hours as although she was keen on the part time nature,

the job description said it was full time. An HR adviser called Sophie replied, confirming the hours were indeed only 20 hours, and that she was happy to answer any further questions. On Thursday that week, 23 March, Mr Sayedmiam took over the case. He accepted that he was told verbally about the claimant's interest in the job around this time.

- 5.39 We find appointment to this role on a temporary did not require a competitive process. We find it was possible that the role could have been ringfenced by Sophie or others in HR but soon after becoming involved in the case, Mr Sayedmiam was told not only that she had not done that, but that the role was no longer available. Mr Sayedmiam agreed in evidence that role would have been a suitable temporary alternative role for the claimant in these circumstances. No explanation has been provided why a suitable vacancy that would have safely maintained the claimant's employment and income until her maternity leave started suddenly became unavailable a matter of days after she had expressed an interest in it.
- 5.40 We find the claimant did not chase Sophie for progress on this vacancy because she reasonably believed it would be part of the discussion at the next meeting and remained unaware the opportunity had disappeared for some time. There was, however, a second vacancy that the claimant was also interested in within the HR admin team. We find she telephoned Sophie in HR around this time and expressed an interest in that vacancy. She was told she was not qualified. The Respondent has not evidenced the need for qualification, and we find she was sufficiently qualified. We find this vacancy too would have been a suitable alternative.

### Occupational Health

- 5.41 Ms McKechnie gave her consent for an occupational health referral which was then made on 23 March 2025.
- 5.42 Part of the referral says: -
- A further meeting was held on 17/03/23, Maria explained that she now feels fit enough to get back to work but unable to do a physical job. Maria has also recently found out that she is pregnant. She feels that with her spinal issues, the further along in her pregnancy she gets the more strain this will have.***
- 5.43 The next day the referral was shared with the claimant who amended it. We therefore find consent was given for the referral. A telephone consultation took place on 27 March 2023. The report was completed and sent to Prime Life on 28 March 2023. The key points in that report are, in summary: -
- a) That the claimant had been well controlled on medication for a number of years and has managed her pain, stiffness and fatigue well.
  - b) Set out what it was that was preventing Ms McKechnie returning to her normal role which was: -

Case number: 2601532/2023  
2601773/2024

***any personal care tasks with residents or be involved in any lifting, carrying or prolonged standing and walking tasks.  
On call duties and additional hours would be unfeasible.***

- c) Suggested administrative work could be undertaken for the next 6 months.
  - d) Confirmed the claimant was keen to return to work in some way now.
  - e) Gives advice of the measures to facilitate an early return to work including undertaking a DSE assessment, a new and expectant mothers risk assessment and that they could expect a phased return to work from the following week, increasing steadily over four weeks.
  - f) Linked the deterioration to the pregabalin and pregnancy, characterised the pregnancy as high risk but confirmed after the pregnancy that she could be expected to return to work as before.
- 5.44 The overall thrust of the OH report was about getting back to work and sustaining her at work. Significantly, it confirmed that the employer could expect her to return to work now in some capacity and limited the physical aspects and the on-call duty as the only obstacles. We find the issue with on call was in part the time of the work but was mainly that it exposed the claimant to the likelihood of having to perform the very physical tasks that were trying to be avoided. It confirmed all of these restrictions were temporary until after the pregnancy, at which time she would return to normal duties.
- 5.45 Around the same time, Ms McKechnie's GP recorded in a fit note how she was fit to return to work with adjustments.
- 5.46 We need to deal briefly with the withdrawal from pregabalin. The claimant says it was stopped abruptly upon her discovering she was pregnant. We understand it is a drug that should not be withdrawn immediately, especially at the dose level the claimant was receiving it. We understand there are other physiological risks of doing so. Indeed, the claimant supports her oral evidence by reference to an attendance at hospital in late March directly linked to her withdrawal from that medication. The issue, however, is whether that was the account she gave at the time to her employer and occupational health. The counter proposition is that the claimant was gradually reducing her dose of pregabalin as part of her family planning so that, if she did fall pregnant, a complete withdrawal from the medication could then happen safely. What it does do, of course, is add a further connection between her disability and the pregnancy.
- 5.47 On 21 March an email was sent on behalf of the claimant chasing an update, querying a potential return to work, and requesting an immediate decision. It concluded with a request to: -

**...contact Maria via email by Friday 24 March as to your decision to suspend on full pay until Occupational Health have reviewed her case or whether she is able to return to work on Monday 27 March in an interim role at her current rate of pay’.**

- 5.48 Mr Sayedmiam was sent this on 30 March. The claimant was invited to a further fit for work meeting. Before then, on 28 March the claimant emailed the respondent saying: -

***I was wondering what is happening with me getting back to work as I gave permission for the occupational health report to be released on Tuesday. Please can you give me an update asap. Also, I am very concerned by my payslip. I note that I do not have a full month. My sick note ran out on the 16th march, and I am not legally required to provide another sick note as I declared I am fit for work. My understanding from government and acas information is that I should be being paid in full from the 17th as I am fit for work, regardless whether the company has made a decision on where to place me. I hope you can understand that this is putting me in severe financial detriment now and I would ask you to sort my pay slip out for the remainder of my pay for march as an urgent payment for this month.***

- 5.49 We find that that the rehabilitation and medical support explains why, by then, there was quite an improvement in the claimant’s position in the short time between the February and the March meetings. So much so, that we can conclude that, but for the pregnancy and the implications that had on her medication regime, she was likely to have been close to getting back to her pre-October level of abilities in the workplace.

- 5.50 On 30 March 2023, Ms McKechnie emailed her HR contact to ask: -

***I was wondering what is happening with me getting back to work as I gave permission for the occupational health report to be released on Tuesday. Please can you give me an update asap.***

### Second Fit for Work meeting

- 5.51 The next meeting took place on 31 March 2023. It was again conducted by Melissa Stroud with Mr Sayedmiam this time advising. We have seen the notes. They were not seen or signed off by the claimant. We accept she would have corrected a number of material aspects of these notes had she had opportunity.
- 5.52 During this meeting they discussed Ms McKechnie’s current health and wellbeing. She advised that due to her pregnancy she was not able to have the same treatment for her pain management, which meant it was worse. She again advised she would not be able to carry out her role as deputy manager but would be able to do a desk based administrative role. We find this was consistent with the added implications of the pregnancy and she explicitly referred to after the pregnancy, she would be back to normal. There was no mention of the alternative jobs.
- 5.53 We accept that even on the strength of the notes as written, the tone has changed. We could not follow the purpose of the apparent enquiry about clinical diagnoses when the employer at this time already had the OH report.
- 5.54 We find the claimant was shocked in this meeting when Ms Stroud expressed the current situation as “having a negative impact on the company”. That situation might be summarised as an employee seeking to return to work, identifying alternatives

which quickly disappear, and of an employer holding a rigid conclusion of her unfitness for any work but disregarding the Occupational Health recommendations to perform various risk assessments.

- 5.55 We reject the respondent's contention in the notes of this meeting that there was not enough work to fill 20 hours. Based on the agreed evidence before us, we find Ms Stroud unreasonably overruled the claimant on the elements of the job that she felt clearly could do, and we accept the claimant's evidence that the notes are wrong insofar as they record that the claimant was herself saying she couldn't do any elements of her job. We find she was repeatedly expressing an ability to work and whilst she could not do any of the significant physical tasks, they amounted to only a very small part of the duties. We find the notes do not reflect what the claimant was actually saying and must, therefore, be explained by the way the notes were prepared, leading to a particular desired outcome of rejecting any alternatives.
- 5.56 In part the notes are dismissive and suggesting she should not prioritise income. One passage states: -

***My advice not to push yourself on the basis of financial implication as you are clearly not fit to work. Assess your health condition with your GP in line with your role and evaluate if it is safe to return.***

***I have already done this, I just want to come back. I need to earn money.***

The nearest the notes come to dealing with any of the two possible alternatives is a reference to the fact that there were no other roles in Prime Life. We find it significant that the claimant was correcting the assertions and assumptions as they were made, in particular that it was not the whole role of deputy manager that she could not do, but only limited aspects of it.

- 5.57 We find the respondent's intentions were demonstrated in the final conclusions and "next steps" when it says (as written): -

***I suggest you must consider staying off sick for now as by your own admittance you are not fit to carry out your contractual role.***

***Employers can make reasonable adjustments but not wholesale changes to the role.***

***We have gone through your entire JD and by your admittance there wasn't much that you were able to do.***

***Employer cannot make a new role for an employee.***

***Employer cannot redeploy if there are no suitable alternatives.***

- 5.58 Ms McKechnie was advised to go back to her GP to discuss her return to work and following this, the respondent received a fit note advising Ms McKechnie was fit to return to work on altered hours and amended duties. However, instead of it supporting the deployment to what, we find, were available suitable alternative options, this fit note was used by the respondent to certify Ms McKechnie as absent from work.
- 5.59 On 11 April 2023 Ms McKechnie sent a chasing email asking for an update. This simply prompted a further meeting. We find these meetings then became many and

frequent and largely repeated Ms Stroud's position and did little to advance the situation. So much so, that we find they become particularly distressing to the claimant. We find she reasonably formed the view that her situation was being ignored, despite the meetings still being labelled as fit to work meetings.

5.60 Conversely, we reject the criticism the respondent advanced of the claimant during her evidence, suggesting she was not engaging in a two-way conversation during these meetings. We are satisfied that the respondent had more than enough to know what was needed and it was for them to make the changes that were, frankly, available to them.

5.61 A further fit for work meeting took place on 17 April 2023. This took place by teams. The exchanges were at times insensitive. The invite letter appears to be a template for other purpose and the notes reflect template questions for long term sick having no apparent sense that this situation was involving a disabled employee who was pregnant. The same people were involved. When asked for an update on her health Ms McKechnie advised this was no different from the last meeting. Alternative roles were discussed with Ms McKechnie and a list provided of available roles, however there were now no administrative roles available.

5.62 Ms McKechnie's exasperation at the lack of alternative role or duties is captured in the notes stating: -

***Its not up to me to say whether I am fit to return or not, that is up to you  
And if you think I am not fit to return then you need to look at the alternative option***

5.63 She noted how it had been two weeks since the last meeting she still didn't know what was happening. She made clear she had been saying she was fit to return since 17 March 2023. She referred to her understanding of pregnancy laws as meaning she should be paid, even if the employer would not let her come back to work.

5.64 The respondent maintained its position, we find erroneously, that the claimant did not want to return to her role. It suggested that the level of adjustments requested required a thorough review but said nothing about undertaking such a review which, in the context of ignoring the recommendation to perform the various risk assessments, only reinforces a settled mindset. Instead, it asserted that it would not pay her for hours not worked and therefore deemed her not fit to be at work.

5.65 We find this meeting confirmed to the claimant that the respondent was not going to do anything to help her get back to work or pay her during her pregnancy. The outcome of the meeting was, incorrectly, stated as: -

***As a responsible employer we have a duty of care towards our employee to ensure that they are fit to work and when at work they are safe. By your own admission, you are not fit to carry the duties that you are contracted to. You submitted a fit note, which stated that you may be fit for work taking account of the following advice, amended duties and/or work place adaptations.***



***Within your case such option is not feasible, therefore we will be turning your fit note into a sick note.***

- 5.66 We have already found that both the adjustments to her role and the alternative roles were feasible. Ms McKechnie was told she could still take her holidays to assist her financially if she wished. The notes record the claimant “requested to terminate the meeting at this stage and just closed the meeting window”. We are not surprised and accept she was extremely upset about the way her situation was being handled.
- 5.67 The occupational health referral advised that a pregnancy risk assessment and assessment should be carried out and these would have been put into place if a return to work was facilitated. We find the respondent did not do either. In fact, it is common ground that the respondent stated that it would defer the pregnancy risk assessment until after the claimant had had the baby.

#### Sick Pay and Fit Notes

- 5.68 During Ms McKechnie’s absence she has been paid statutory sick pay, in line with her contract of employment which does not provide for any company sick pay.
- 5.69 We have not seen all the fit notes but there is no issue that the absences were appropriately covered. Those issued from March 2023 described the claimant as fit to return to work with adjustments, but not that she was not fit to perform her work. In particular: -

***patient is currently pregnant and deemed high risk pregnancy by antenatal clinic, as pregnancy proceeds I would anticipate she will struggle more and more to do physical aspects of her job and needs support or redeployment.***

- 5.70 There was yet another fit to work meeting on 6 June 2023. The invite letter is again confused as to the type of meeting. The claimant sought this time to be accompanied. This was permitted. The meeting lasted about 10 minutes. The respondent is critical of the claimant not engaging. We reject that for the reason already given. It continued to offer her wholly unsuitable laundry or care assistant roles which involved a greater degree of heavy physical tasks. Despite the obvious distress and frustration caused to the claimant at the lack of engagement by the respondent, the only action as a next step is to put her through yet another welfare meeting in July.
- 5.71 We agree with the claimant’s perception this felt like a “tick box” process. The only positive aspect of this meeting was a pleasant enquiry about the unborn baby and that this meeting did not repeat the previous meetings which put pressure on her to acknowledge the adverse effect her absence was having on the business as they did at the previous two meetings.

#### Grievance

- 5.72 In an email dated 4 July 2023, the claimant raised a grievance. The content complains of the treatment of her situation, the available alternatives that have not been taken up or adjustments made and the fact that the employer was saying she was not fit for work but was not medically suspending her. She asserted the pregnancy response was unlawful. Within her complaints, she specifically referred to Mr Sayedmiam and Ms Stroud's conduct of the welfare meetings feeling like they were disciplinary hearings.
- 5.73 It is significant that this grievance was sent directly to the Head of HR, Ms Choudry who represented the respondent before us. She did not respond to the claimant but did delegate the handling of the grievance to another HR manager, Rachel Pinto. It seems the claimant's grievance could not be accepted by the employer in the written form that it had been presented. Ms Pinto sent forms for the claimant to fill in instead. That exercise amounted to no more than the claimant cutting and pasting the original grievance onto the proforma so that the employer could then accept it. It had exactly the same information, only now it was another week later.
- 5.74 The employer's procedure says that a grievance hearing: -
- will normally be arranged within 10 working days of the formal grievance being raised. Following this meeting the Hearing Manager will decide on what action, if any, to take. Decisions will be communicated to the employee, in writing, without unreasonable delay, and where possible within 5 working days.***
- In some circumstances, it may be necessary to investigate the complaint further. If the investigation is likely to take longer than five days, this should be confirmed to the employee. If the Hearing Manager cannot make the hearing, the company must offer the employee a reasonable alternative date and time.***
- 5.75 Correspondence was exchanged to accommodate the availability of the claimant and her representative and to set up the grievance meeting which was delayed for some time by annual leave. Despite the fact one specific complaint in her grievance was Mr Sayedmiam's and Ms Stroud's conduct of those absence meetings, on 13 July they invited the claimant to attend yet another meeting for the very next day. The claimant declined saying she was not available but they then renewed the invite, this time to attend on 4 August, just four days before the grievance hearing was to be held. The claimant attended that meeting. We do not need to record any particular content beyond stating that it served no purpose to progress any matters and only served to cause additional distress, amplified by the fact these were two people she had raised a grievance about. The list of available vacancies was again presented listing cooks and kitchen assistants.
- 5.76 Mr Sayedmiam says he was not aware of the grievance at the time of the meeting which we accept. However, the respondent was and yet took no action to recognise the obvious implications of continuing those meetings with the same personnel, in the face of the grievance. At some point after, both individuals were taken off the claimant's case.

### Grievance Meeting

5.77 Connor Greaves, Associate Director of Adult Services conducted the grievance meeting on 8 August 2023. We accept that, to an extent, part of the purpose of a grievance meeting is to clarify the grievance but, just as the respondent had previously required the claimant to restate her original written grievance on a particular form, we find that the grievance meeting did little more than restate for a second time the information put on that form. The claimant made clear in that meeting: -

***I want acknowledgement that the treatment I received was unfair. I want some acknowledgement this is wrong. I am in my third trimester, the stress upset financial detriment is disgusting, no one should go through this the risk associated was even more high risk.***

5.78 We interpret “even more high risk” meaning that the risk of financial loss, not being in work and not knowing what is going to happen is itself exposing her to a greater risk than that posed by doing her job. Her financial difficulties were not insignificant. We find she was forced to take out a loan to finance her mortgage payments as she was receiving no income.

5.79 She referred to the conduct of the welfare meeting saying: -

***Welfare meetings. Probably prefer someone else to be dealing with it. I don't feel comfortable talking to them, they treat it as a tick box exercise.***

5.80 Had this not been raised by Rachel Pinto's enquiries about finding different people to do the welfare meetings, we suspect Mr Sayedmiam and Ms Stroud would have continued to conduct the meetings.

### First Claim

5.81 At this stage in the chronology, on 5 July 2023, the first ET1 claim was lodged. Although that would not be served by the ET on the respondent until 21 September 2023, we find the respondent was on actual notice of the claim as the claimant had raised it within her grievance meeting on 8 August 2023.

5.82 The claimant was asked to agree the notes of the grievance meeting in mid-August and agreed them promptly. She had a phone call about a week later to state that Mr Greaves would get back to her. She heard nothing more and chased progress again in an email dated 6 September sent to both Connor Greaves and Rachel Pinto. Against that background, we reject the respondent's pleaded case that it did not have a chance to resolve the grievance as the claimant presented a claim and then started her maternity leave. It was seized of the matter and there is no evidence adduced as to what, if anything, happened with her grievance after 8 August. We find as a fact the claimant never received a response and her grievance was not, and would never be, concluded.

- 5.83 From late August 2023, a new manager, Claire Hopkins, took over conduct of the absence meetings supported by a new HR Adviser, Rupinder Kaur. From the first invite letter, the tone appeared to improve and became focused on the claimant.
- 5.84 A meeting on 1 September 2023 left the claimant feeling more positive than had been the case in the sense the notes that followed were prepared in narrative form and shared with her for comment. A significant number of her comments were accepted and the notes changed without challenge. One of those exchanges was significant. That was that Rupinder confirmed from her own knowledge that she was aware that there had been another suitable vacancy in Lutterworth around the time in the chronology that the claimant was seeking redeployment options. That had not been identified, and the claimant had not been made aware of it.
- 5.85 The claimant raised an important practical question about maternity leave and wanted to know whether she would get SMP or not. Rupinder agreed to ask payroll. Around the same time as this meeting, the claimant submitted her MATB1 form. It identified the birth in the week of 30 October 2023. We were told that the respondent has a specialist maternity team. They then sent out the respondent's maternity policy and guidance approximately 5 months after the claimant had originally notified her employer in writing of her pregnancy.
- 5.86 On 22 September 2023 the claimant was required to attend yet another absence meeting. The only point of substance was that it was confirmed she would not qualify for SMP during her maternity leave. The respondent's specialist maternity team sent the claimant the notification of her entitlement, or lack of it, about a week after she gave birth to a daughter on 11 October 2023. The employer's declaration on SMP eligibility identifies the reason she was not eligible to be paid SMP was because her average weekly earnings were not high enough. There is no dispute that the claimant's length of service and earnings in her role would have meant she would have qualified for SMP. The single reason the claimant's fell below the qualifying threshold at the qualifying week was because of the forced sickness absence. There is no dispute that paid normally, she would have qualified. Whilst she would then nonetheless qualify for SMA, the significance is that she has lost the 90% of normal pay that she would have been entitled to during the first 6 weeks of her maternity leave.
- 5.87 The respondent agreed the claimant could take annual leave to get some pay around the time she commenced her maternity leave. The months then go by with no contact from the respondent. She continued to be in receipt only of SMA. The respondent's positive case is that it deliberately left her alone without making any contact about her potential KIT days or to advise her of any progress on her grievance or health and wellbeing. We find that only added further to the claimant's distress.

5.88 Some reasonable time must be given by an employee to allow for delay in getting an outcome to her grievance but even by the time she started maternity, it had stood unanswered for around 3 months. We do not accept there was any reasonable basis for the respondent considering her maternity leave meant it could not progress her grievance. That is especially as the claimant had chased progress in September. We find the silence and the lack of any meaningful response at any time meant it became clear to her it was never going to be answered. The claimant was increasingly drawn to the conclusion that she was not wanted back at this workplace.

### Resignation

5.89 She continued through to the spring of 2024 still without any contact from the respondent. We find the upset she felt about how she had been treated and ignored through 2023 was now manifesting in thoughts of what would happen in the future. She concluded the reason for the grievance being left unanswered was because she had asserted her rights in her first claim. On 21 April 2024 she submitted her resignation stating her last day of employment would be 19 May 2024. The resignation was sent to the Head of HR, Ms Choudry. The reasons stated were entirely consistent with the treatment we found she was exposed to.

5.90 She did not receive a response or an acknowledgment. On 24 April 2024 she chased Ms Choudry for an acknowledgement. This was eventually sent on 29 April. On 13 May the claimant sought clarification of her final payments and received holiday payments on 31 July 2024.

5.91 On 1 October 2024, the claimant commenced new employment. In the time, between her resignation and then, we find she had been making reasonable efforts to find comparable employment. She explained she had deliberately not just taken anything and wanted to ensure the next employment was right for her. Against her recent background, that is an entirely reasonable approach and, in the event, did not add particularly to the delay in finding new employment. There is nothing put before us to suggest the claimant had in any way failed to mitigate the losses following her resignation.

## **6. Pregnancy & Maternity Discrimination – s.18 Equality Act 2010**

### Law

6.1 So far as is relevant, section 18 of the Equality Act 2010 provides: -

***(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.***

***(2) A person (A) discriminates against a woman if, in or after 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 in that protected period as a result of the pregnancy.***

***(3)A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave or on equivalent 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 or a right to equivalent maternity leave.***

- 6.2 Subsection (6) defines the protected period. There is no dispute that all events relevant to the allegations in this case take place during the protected period.

### Discussion

- 6.3 There are two allegations of unfavourable treatment advanced. The first is not offering the claimant any alternative roles while she was pregnant. The second is not allowing her adaptations to her role to accommodate her high-risk pregnancy.
- 6.4 We are satisfied both are made out. We are satisfied the treatment in both is unfavourable. There were three options by way of alternative roles. They were the role at Peaker Park, the HR admin role and the Lutterworth role identified by Rupinder. The evidence we have establishes the suitability of these roles, particularly the Peaker Park vacancy which was positively accepted as being suitable. We are equally satisfied that not making adaptations to her role to accommodate her high-risk pregnancy is made out. Instead, the respondent's managers took the line that the claimant was not fit enough to work at all whilst pregnant, despite medical evidence stating that she could work with adjustments and despite the respondent agreeing in evidence the part of her role that was in issue amounted to no more than about 12% of her workload. We do accept the landscape changed and at the time of the claimant's absence her abilities were substantially impaired. That improved to the point of Ms McKechnie contemplating returning to work but, even then, that was initially to alternative roles and not her normal role. But that too then changed. The medical evidence suggested there was scope for adjustment within the current role, identifying the risk areas which amounted to a small proportion of the role. The respondent's position seems to have been set in stone on the earlier state of affairs. They then stuck to it and remained blinkered in the face of various sources of evidence that the claimant had improved substantially to be able to do all but the small proportion of the physical tasks.
- 6.5 We are satisfied that we can properly reach a finding that the claimant's pregnancy was a material factor influencing the employer's decision not to progress alternative vacancies and in not entertaining any steps to adjust her normal role. Nevertheless, we can analyse that through the prism of the shifting burden drawing inferences from the primary facts. A significant fact is the respondent's decision to postpone the question of any risk assessment of her ability to work safely in the at that time. That stands out as the risk assessment was not only required by law and directed by

occupational health, but it was surely the practical route to properly assess what work the claimant could safely do. The respondent's insistence of simply saying she was unfit for any work without such an assessment means it has not been able to demonstrate to us the rationale basis for its own conclusion. The pregnancy was the significant factor in that motivation. Indeed, the only basis for the respondent's decision to defer the assessment on the information before it is that it would wait until after the claimant had had her baby. The relationship between the disability and the pregnancy is key to this. It puts the pregnancy central in its motivation. We found Ms McKechnie's dramatic improvement between February and late March 2023 would have been all but a full return to her pre-October levels of ability if only she had been able to retain her previous levels of medication. The fact she was not able to take the medication was the single reason why she could not do the physical task. The reason for that was that she was pregnant. The material difference between the supportive and enabling risk assessment conducted in May 2022 and the situation in Spring of 2023 was that the claimant was now pregnant.

- 6.6 The surrounding circumstances further justify the inferences, particularly the manner in which the Peaker Park vacancy vanished when the claimant expressed an interest.
- 6.7 We are satisfied that the claimant has established more than enough facts from which we could conclude her pregnancy was material to the reason why the treatment occurred. The law requires us then to turn to the respondent to show the reason why it happened was in no way whatsoever because of the pregnancy. We are not satisfied it has. As a result, we are required by s.136(2) of the 2010 Act to conclude that the claimant's pregnancy was a material part of why she was not offered suitable alternative roles and why her normal role was not adjusted in any way to accommodate her returning to work. The respondent has not adduced positive evidence to show that the reason she was not redeployed or her role adjusted was in no way whatsoever because of her pregnancy.
- 6.8 Consequently, this allegation succeeds.

## **7. Employment Rights Act 1996 and Maternity and Parental Leave etc Regulations 1999:**

### **Law**

- 7.1 Section 47C of the Employment Rights Act 1996 provides: -

***(1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.***

***(2)A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—***

***(a)pregnancy, childbirth or maternity,***

***...***

Case number: 2601532/2023  
2601773/2024

*(b)ordinary, compulsory or additional maternity leave,  
...*

*(3)A reason prescribed under this section in relation to parental leave may relate to action which an employee takes, agrees to take or refuses to take under or in respect of a collective or workforce agreement.*

*(4)Regulations under this section may make different provision for different cases or circumstances.*

7.2 Section 48 provides, so far as is relevant: -

**48 Complaints to employment tribunals.**

*(1)An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section ....47C(1)...*

*(2)On a complaint under subsection (1), it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

7.3 The prescribed regulations are the Maternity and Parental Leave Regulations 1999. Regulation 19 supplements to the detriment provision in the Employment Rights Act 1996.

### Discussion

7.4 The claim alleges two related detriments. They are:-

- a) Being placed on sick leave and paid SSP notwithstanding the fit note recommendations, and
- b) Failing to carry out a risk assessment.

7.5 There is no issue in fact that both occurred. We are satisfied that both are properly described as detriments. The detriments in fact flow through into every other aspect of the claim and have further consequences. The absence of the risk assessment has a direct connection with the claimant's other rights to maternity protection and suspension. Had a risk assessment been conducted, it would have either supported the claimant that she was able to undertake the alternative roles or the sort of adjusted duties she was contending for, or it would have supported Ms Stroud's conclusion that there was no suitable work that the claimant could safely perform. In this context, either conclusion would have had the result of the claimant continuing to earn her normal pay until she commenced maternity leave as, even if the latter conclusion was evidenced the claimant would have been entitled to maternity suspension. There was no lawful route for the respondent in these circumstances to simply insist the claimant remained absent on sick leave, whatever the contractual terms as to sick pay might have been.

7.6 Section 48 does not operate in quite the same way as s.136 of the Equality Act 2010 but the respondent does have an evidential burden to explain the treatment. The



context in which we assess that, however, draws on the same primary facts and inferences that we took into account when deciding the reason why the maternity discrimination occurred. That does not mean this claim automatically succeeds. It has to be made out on its own terms. However, we consider there is an added issue for the respondent as the two detriments are connected in that the absence of the risk assessment actually creates an evidential gap for the respondent to explain its reason for insisting on the sickness absence.

- 7.7 We have already rejected the respondent's factual case in respect of the claimant agreeing she was unfit to work and having done so, all the evidence supports a conclusion that these two detriments were done on the ground of Ms McKechnie's pregnancy.

## **8. Right to remuneration s.68 Employment Rights Act 1996**

### **Law**

- 8.1 Part VII of the Employment Rights Act 1996 is headed "suspension from work". Section 66 is headed "suspension on maternity grounds" and provides, so far as is relevant: -

***(1) For the purposes of this Part an employee is suspended from work on maternity grounds if, in consequence of any relevant requirement or relevant recommendation, she is suspended from work by her employer on the ground that she is pregnant, has recently given birth or is breastfeeding a child.***

***(2) ..***

***(3) For the purposes of this Part an employee shall be regarded as suspended from work on maternity grounds only if and for so long as she—***

***(a) continues to be employed by her employer, but***

***(b) is not provided with work or (disregarding alternative work for the purposes of section 67) does not perform the work she normally performed before the suspension.***

- 8.2 Section 67 gives the pregnant employee a right to be offered any available suitable alternative work before being suspended from work on maternity grounds and provides definition of what amounts to suitability.
- 8.3 Section 68 requires a pregnant employee who is suspended from work on maternity grounds to be paid remuneration while she is so suspended, subject to certain exceptions. Section 69 defines how that remuneration is to be calculated.
- 8.4 The meaning of relevant requirement or relevant recommendation in section 66(1) is defined and, via the Suspension from Work (on Maternity Grounds) Order 1994, leads us to the Management of Health and Safety at Work regulations 1999 in particular, regulation 16 which provides: -

***Where—***

*(a) the persons working in an undertaking include women of child-bearing age; and*

*(b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, as amended by Directive 2014/27/EU,*

*the assessment required by regulation 3(1) shall also include an assessment of such risk.*

*(2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.*

*(3) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk.*

*(4) ...*

- 8.5 That is a specific obligation to the general obligation under regulation 3 to conduct risk assessments. It is not engaged unless there is some evidence of a potential risk to the pregnant employee **Madarassy v Nomura International PLC [2007] IRLR 246**.
- 8.6 The risk assessment contemplated by the 1999 regulations is a “suitable and sufficient one”. However, for present purposes at least, there is no particular format or formality, and it does not even have to be in writing. It is a concept founded on judgment, evaluation and examination of all the circumstances. It is a thought process. **Stevenson v J M Skinner & Co [2008] EAT/0584/07**.

### Discussion

- 8.7 There is no doubt that the claimant had informed her employer in writing of her pregnancy on 9 March 2023. There equally not dispute that there was a substantial risk in the claimant carrying out the *full* range of duties of her deputy manager role. That risk was in respect of the heavy physical tasks, typically associated with providing hands on care to residents, but also in other physical tasks. Despite the position taken at the time by Ms Stroud, the claimant was not challenged in evidence on her contention that these tasks amounted to about 12% of her total duties and we found as such. Nevertheless, that finding is sufficient to establish that there was a potential risk and the duty to undertake the risk assessment contemplated by regulation 16 was engaged.
- 8.8 We will return to the causation element of section 66 and deal first with the clear conclusions that engage either section 67 or 68.

- 8.9 There is no doubt in our view that the respondent did have suitable alternative work available for the claimant. That was either by way of adjustment to her normal role of deputy home manager or in the alternative vacancies that were available, at least until she expressed interest in them. The claimant might have been entitled to present a claim on that ground, that she should have been offered that work before being suspended but of course, she was not suspended, at least not expressly so.
- 8.10 However, the effect of sections 66(3) is to deem the employee as being suspended for the purpose of this part for as long as she continues to be employed by her employer, but is not provided with work or (disregarding alternative work for the purposes of section 67) does not perform the work she normally performed before the suspension.
- 8.11 We are satisfied that the facts engage this provision. Being told to remain off sick without identifying any work is a suspension for these purposes.
- 8.12 We then return to the more complicated element of section 66. Was that suspension in consequence of any relevant requirement or relevant recommendation. In this case there is a circle to square. Curiously, both parties' cases on risk assessment is that there wasn't one. The respondent's positive case is that it deferred such an assessment until the claimant was able to return to work after her pregnancy. On the other hand, Ms Stroud's decisions were based on some sort of "assessment" conducted by her, or at least the conclusion was held by her as a belief that the claimant was exposed to a health and safety risk if she were to return to work in any capacity due to her pregnancy.
- 8.13 We do not accept that whatever led to that belief was a suitable and sufficient risk assessment to discharge the obligation under regulations 3 or 16 of the 1999 Regulations. However, it was an evaluation of sorts as, whatever had been taken into account when arriving at that conclusion, Melissa Stroud did nevertheless come to the conclusion that the claimant could not safely remain at work. That conclusion is at the heart of what section 67 seeks to protect. Of course, we don't know what she took into account as it was not documented beyond being able to say it clearly ignored relevant factors such as the medical recommendations for the type of work that could be done safely. The fact there was: -

- a) An identification of a potential risk (Madarassy)
- b) And some thought process arriving at a conclusion (Stevenson)

means that the suspension that followed was in consequence of a relevant requirement. To conclude otherwise would lead to the illogical and unjust result that an employer that ignored its duties to undertake a risk assessment and insisted the employee remain on sick leave would be in a better position than the employer that fulfilled its duty to assess the risk, but then failed to engage with the alternative work or suspension.

- 8.14 For completeness, a suitable and sufficient assessment would have arrived at a conclusion that there was safe work available to the claimant either in respect of adjusted duties within her own role or the alternative roles. However, even if the ethereal assessment was correct, the respondent was then bound to suspend the claimant on full pay in accordance with Section 68. It did neither. Instead, it insisted that a fit note saying fit for work with adjustments should be treated as being unfit for work and insisted the claimant then remains off sick and in receipt of SSP only.
- 8.15 This claim succeeds and the claimant is entitled to a declaration. The claimant has suffered financial losses, but these are coterminous with the losses flowing from the discrimination claims (and, indeed, the pregnancy detriment claim). For that reason, we make no separate award under this provision. But for that provision succeeding, we would award the unadjusted losses quantified in the same sum, although the treatment of the different adjustments varies between the heads of loss.

### **9. Direct Disability Discrimination (s.13 Equality Act 2010)**

#### **Law**

- 9.1 So far as **direct** disability discrimination is concerned, Section 13 of the Equality Act 2010 provides: -
- (1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.***
- 9.2 By that provision, we are required to identify the reason why the treatment complained of occurred. That is the crucial question in cases of direct discrimination (**Nagarajan v London Regional Transport [1999] IRLR 572 HL**) and if we are able to, we will seek to make an explicit finding of the reason why it occurred. (**Amnesty International v Ahmed [2009] IRLR 884 EAT**). In this regard, the “because of” and “less favourable” questions are not always apt for separate consideration, particularly where the comparator is hypothetical.
- 9.3 Where the reason why is not readily apparent, we will turn to s.136 of the Equality Act 2010 which provides: -
- (2) if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.***
- 9.4 We considered **Madarassy v Nomura International PLC [2007] IRLR 246** as authority for the proposition that the burden does not shift by proving a difference in treatment and difference in characteristic alone, something more is required.
- 9.5 This connotes two stages of analysis. The first is whether the claimant has shown facts from which the tribunal could conclude there has been discrimination, which will

include such inferences arising from the primary facts as are appropriate to draw. The second, if the first stage is satisfied, is for the employer then to show that the treatment was in no way whatsoever because of the protected characteristic.

- 9.6 To understand how that works, and what evidence should and should not be considered at each stage, regard must be had to **Efobi v Royal Mail 2021 UKSC33**, which confirmed the subsequent decision on the same point in **Ayodele v Citylink Ltd [2017] EWCA Civ 1913**. It confirmed the long-standing approach in **Igen v Wong [2005] EWCA Civ 142**, **[2005] ICR 931**, and **Laing v Manchester City Council & Anor [2006] ICR 1519** and the further explanation provided by Elias J, as he then was. Drawing on other high authority in this area including **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** and **Madarassy v Nomura International [2007] EWCA Civ 33**, the ultimate question remains whether or not the respondent has committed an act of discrimination and section 136 simply overcomes the obstacle that there are real evidential problems for an employee in evidencing the motivating factors found only in someone else's mind.
- 9.7 We also remind ourselves that whilst we should not ignore evidence which suggests discrimination, we should equally not ignore evidence that suggests there has not been discrimination. (**Field v Steve Pye & Co (KL) Ltd and Others [2022] EAT 68**)
- 9.8 We have regard to how the comparison process applies to comparators of different types under the Act. **Martin v The Board of Governors of St Francis Xavier 6<sup>th</sup> Form College [2004] EAT 22**.

### Discussion

- 9.9 There is no dispute the claimant was disabled by virtue of her degenerative conditions.
- 9.10 There are four discrete detriments alleged to amount to less favourable treatment done because of that condition. They are: -
- a) Telling the Claimant on 17th April 2023 that she would have no option but to be classed as being on sick leave and without any pay because the Claimant could not work.
  - b) Failing to carry out a DSE Risk Assessment as recommended by the Claimant's occupational health report.
  - c) Failing to investigate the Claimant's grievance dated 4 July 2023.
  - d) Failing to provide the Claimant with any assurance that the investigation into her grievance would be completed.
- 9.11 We are satisfied on our findings of fact that the claimant was indeed subject to these four acts or omissions and that they are properly characterised as detriments. As is

often the case, the crux of deciding this type of prohibited conduct is to answer the reason why she was subject to them.

- 9.12 A comparator under section 23 of the 2010 Act is a forensic tool to help answer the question of whether the treatment was less favourable. It also begins to address whether that was because of the protected characteristic, albeit **Madarassy** makes clear a difference in treatment and characteristic is not in itself enough. In all four alleged detriments, the claimant's list of issues relies on a hypothetical non-disabled Deputy Manager who had been off sick for 3 months.
- 9.13 We do not consider the comparator advanced to be a proper comparator for these four allegations, albeit the reasons differ slightly between them. For the first allegation, the hypothetical deputy manager must also be unable to perform aspects of their job role due to some physical restriction that is not a disability.
- 9.14 There is also no further evidential basis advanced to help us construct that proper hypothetical comparator in order to reach a reasoned conclusion as to what would have happened in that hypothetical case, even on the balance of probabilities. The evidence we have of the home manager's initial risk assessment, done with full knowledge of the claimant's disability and restrictions, did not prevent her in her role. There are other factors potentially engaged including the claimant's other protected characteristic of pregnancy which we have found elsewhere was a material part of the motivation of Ms Stroud. Whilst we are satisfied that did include consideration of Ms McKechnie's limitations, those are things arising from the disability, not the disability itself. We are not satisfied, therefore that the claimant has established a prima facie case that the disability was an operative reason for the treatment. The burden does not therefore shift to the respondent and this part of the claim fails.
- 9.15 As to the remaining three detriments, in each we are also not satisfied that the claimant has shown facts from which we could conclude that her disability played any motivating part. The first of these is in respect of the decision not to carry out a DSE risk assessment as recommended by the Claimant's occupational health report. There is next to no evidence of how DSE assessments are ordinarily done in other circumstances and nothing from which we can begin to construct the circumstances of the hypothetical comparator to conclude they would have been treated more favourably. Moreover, the DSE assessment is conceptually so closely linked to the failure to perform the new and expectant mothers risk assessment, which was explicitly deferred until after her pregnancy, that we consider it was more likely than not, rolled together with that forming part of the same thought process to defer until the claimant was back in work. Whatever else we've have concluded about Ms Stroud's approach to this case, at the time the DSE assessment was recommended Ms Stroud would not have contemplated the claimant working in any capacity likely to expose her to risk requiring a DSE assessment. On balance, that is more likely to be the reason why the assessment was not conducted.

9.16 Finally, the two detriments alleged in respect of the failure to progress grievances also do not engage with the hypothetical comparator as advanced by the claimant. The comparator must have lodged a grievance about materially similar complaints, but the comparator must not have the claimant's disability. That the hypothetical comparator does not work to assist analysis of this claim perhaps explains why the evidence adduced has not tackled this comparison. There is something fundamentally wrong with a senior member of staff not concluding a grievance, and the organisation itself then not addressing that with any assurances that it would be completed. The facts of this case are an extreme example of such failures and do beg the question why that happened. The respondent has not answered it. If the burden shifted, the claim would succeed. However, we are not satisfied it is proper to conclude on the evidence that the burden has shifted.

9.17 For those reasons, the four claims of direct disability discrimination fail.

## **10. Discrimination arising from disability - s.15 Equality Act 2010**

### **Law**

10.1 The claim of discrimination arising from disability is found in section 15 which provides:  
-

*(1) A person (A) discriminates against a disabled person (B) if—*

*(a) treats B unfavourably because of something arising in consequence of B's disability, and*

*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

10.2 The constituent elements of this statutory tort to be addressed start, therefore, with unfavourable treatment.

10.3 Next is whether the reason for the treatment was something that arose in consequence of the disability. We have regard to **Pnaiser v NHS England [2016] IRLR 170** for the propositions, in summary, that the something arising may be part of mixed reasons as long as has some significant influence to amount to an effective cause, that motives are irrelevant and that the something arising may be found in more than one step between the disability and the treatment.

10.4 Next is the causal connection. As with all forms of prohibited conduct where the causal link is based on a test of "because of", the question is to identify what it was that consciously or subconsciously caused the alleged discriminator to act. The burden of making out those essential elements rests with the claimant. He may discharge that burden by satisfying us outright that the "because of" test is made out on the on the evidence on the balance of probabilities in the ordinary way. Alternatively, he may rely on s.136 of the 2010 Act as set out above.

- 10.5 In short, the claimant need only prove a prima facie case. If he does prove facts from which we could conclude, in the absence of any other explanation for the treatment, that the reason for the dismissal was something arising in consequence of his disability, we then turn to the respondent to prove that the treatment was not for that reason.
- 10.6 If the claim is made out thus far, it is not discrimination unless the respondent fails to justify the treatment as being a proportionate means of achieving a legitimate aim. The approach to whether an aim is proportionate was considered, albeit in the context of indirect discrimination, in **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15**. For present purposes, PCP is substituted with the unfavourable treatment in the section 15 claim.
- 10.7 In **Hardy's & Hansons plc v Lax [2005] EWCA Civ 846 [2005] ICR 1565**, it was held it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

### Discussion

- 10.8 This claim has to fail because the way it has been advanced does not fit the structure of section 15. There may have been a number of alternative bases for advancing a section 15 claim, but they are not before us and it is not for us to recast the claim of any party, still less a legally represented party. Our reasoning is as follows.
- 10.9 We accept that the treatment advanced is made out. There was an expectation that the claimant would complete heavy physical tasks as part of her job role. That physical work may have been a small part of her role, accounting for about an hour a day or 12% of the role, but it was an expectation of the role viewed in totality.
- 10.10 We then have to unpick the relevance of the second limb of the unfavourable treatment alleged in the list of issues, which is an added explanation *why* Ms McKechnie could not perform that 12% of the role due to not being able to take the requisite medication during her pregnancy. We accept that prior to her flare up in October 2022 she had managed well under a regime of relatively high pain relief medication. However, this starts to complicate the section 15 analysis. The explanation is, itself, the beginnings of what could potentially be a reason why she experiences something she considered unfavourable to her, but not necessarily an explanation for why she was subjected to the treatment that she considers to be unfavourable. Even the question of whether the treatment was unfavourable is potentially in issue. Lots of jobs have physical requirements which employees perform. In this case it was not unfavourable when she first applied to perform the tasks as part of the job. It only becomes unfavourable when a point is reached when the employee can no longer do it but even then, it doesn't really fit the section as an employee would not then rely on that as the "treatment" in a s.15 claim, it would be whatever steps the employer then took to address their inability to



perform the duties. Putting that complication to one side, and assuming we do accept the requirement to perform this part of the job description was unfavourable treatment, we must then identify the reason why she was subjected to that and whether that was because of something arising from her disability.

- 10.11 That may be made out on the primary findings of fact, or it might be established as a prima facie case, drawing on inferences from those facts which shift the burden. The starting point is to consider what the claimant's pleaded case alleges was the "something arising" that motivated the respondent, in some material way, to subject her to the treatment in question.
- 10.12 The pleaded case is that her disability creates an inability to complete heavy physical tasks. We accept that. That is why she was previously taking the painkiller medication. We are satisfied that such an inability can properly be said to be "something that arises in consequence of the disability", namely Fibromyalgia and/or Hypermobility Ehlers Danos Syndrome and/or generalised degenerative changes in her lumbar spine or the combination of all three.
- 10.13 However, the section 15 analysis collapses at the analysis of causation. In order for the pleaded claim to work, we have to be satisfied that a material part of the reason why the respondent expected her to do heavy physical tasks (even at only 12% of the job) was because she was unable to do so. It amounts to a conclusion that "I am asking you to do X because I know you cannot do X". This claim has not been thought through. That is clearly not the reason why. The reason why the claimant was required to undertake heavy physical tasks is because this was part of the role of the deputy home manager she had applied for and performed well, albeit with the painkiller medication, until her flare up.
- 10.14 If these facts point to any of the forms of prohibited conduct under Chapter 2 of Part 2 of the Equality Act 2010, it is a failure to adjust that requirement, not the reason why the requirement was imposed.

## **11. Reasonable adjustments (ss.20 and 21 Equality Act 2010)**

### **Law**

- 11.1 So far as is relevant to the circumstances of this case, the duty to make adjustments in a first requirement case arises under section 20(3) of the 2010 Act where: –
- a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.***
- 11.2 In determining whether the duty has arisen, the Tribunal must identify each element of the section in turn, that is to identify the provision, criterion or practice ("PCP"); the identity of a non-disabled comparator (where appropriate) and the nature and extent of the substantial disadvantage suffered. Only by breaking down those elements can a

proper assessment be made of whether the adjustment contended for was reasonable or not. (**Environment Agency v Rowan [2008] IRLR 20 EAT**)

- 11.3 Whether a disadvantage is substantial or not is to be measured against the statutory definition of more than minor or trivial. It is a low threshold, but a threshold nonetheless, which we have to be satisfied is surpassed.
- 11.4 Paragraph 20 of part 3 of schedule 8 of the 2010 Act imports a requirement of knowledge on the employer in respect of both the employee's disability and that he is likely to be placed at the disadvantage created by the PCP. Unless there is or ought to have been the required level of knowledge of both elements, the duty to make a reasonable adjustment does not arise. (**Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283**)
- 11.5 Whether an adjustment is reasonable or not is a question of fact for the Tribunal taking into account all the relevant circumstances and applying the test of reasonableness in its widest sense. Guidance similar to that which used to exist under s.18B of the repealed Disability Discrimination Act is now found in the code of practice.

### Discussion

- 11.6 The analysis of the reasonable adjustment claim picks up where the s.15 claim fell down. We are satisfied that there was a requirement that the claimant lift and hold residents and assist in personal care duties as needed. This was a relatively small part of the duties of a deputy manager that might involve heavy physical tasks and is put at about 12% but, nonetheless, remains part of what was expected of her. The specific formulation of how this PCP is pleaded is on a slightly narrower basis than elsewhere which refers generally to the heavy physical tasks within the deputy manager role, such as mattress turning during a bed audit, but we do not consider the distinction to be significant or undermine the validity of this PCP. We are satisfied that these requirements in a job role or job description are properly a PCP of the respondents.
- 11.7 The next consideration is whether that PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability. There are two articulated. The first is that she suffers pain, stiffness and fatigue and needed medication to manage her conditions to be able to carry out her role. However, due to her pregnancy, she was not able to take the medication, thus being exposed to the pain and stiffness she might otherwise be able to control.
- 11.8 We are satisfied that disadvantage is made out. It arises from the convergence of the PCP and the disability. Someone without her disability would not suffer the levels of pain and fatigue and need the levels of pain control. Someone without her disability would not have been in recovery from the extreme flare up of symptoms she experienced the previous October. Moreover, her disability meant she was only ever

able to carry out those tasks with the benefit of a relatively high regime of painkillers. Without the pain control being available to her from around March 2023, she was unable to manage those physical tasks.

- 11.9 The second disadvantage is that her inability to meet the PCP meant she was unable to complete her full role she was put on SSP and would be at risk of sanctions and dismissal.
- 11.10 We are satisfied that that disadvantage is also made out. Despite the heavy physical tasks of her job amounting to about 12%, she was prevented from doing any of her role and required to remain on sick leave. For reasons we have set out elsewhere, that should not have happened and was itself unlawful and discriminatory, but it happened as a fact. Not only is that a disadvantage in itself, but in the terms of this contractual relationship it would only qualify for SSP payments. The claimant was financially disadvantaged and, for as long as the absence continued would have been at increasing risk of employment sanctions being imposed.
- 11.11 Even then, the duty to make an adjustment only arises if the respondent knew of the disability and the disadvantage. To defend this knowledge element of the claim, a respondent must satisfy the tribunal not only that it did not know in fact, but that it could not reasonably be expected to know. By Paragraph 20 of Schedule 8 of the Equality Act 2010, the necessary knowledge is both the knowledge of the disability and the knowledge of the disadvantage.
- 11.12 In this case we have no doubt that the respondent did in fact have the necessary knowledge of both. At all material times that the question of the potential adjustments to the claimant's work was being explored in the various absent meetings, the decision makers contemplating it were aware of both the underlying disability and the disadvantage that physical work presented to her. The very substance of the claimant's requests at that time was either to find alternative work without the heavy physical tasks or remove those physical tasks from the deputy manager role. Even if that were not the case, the original risk assessment identified both and flowed from the disclosures made by the claimant prior to taking up the role. Although that manager was not involved in the events in early 2023, and the claimant herself was not aware of that risk assessment, it would have meant any argument that the respondent ought not reasonably be expected to know would have failed. The second disadvantage was actually known at the material time as the claimant made clear her desire to work for its own intrinsic value, but also her need to earn. That formed part of the retort that she should not focus on finances but concentrate on her health.
- 11.13 We are therefore satisfied that the duty to make an adjustment was engaged in March 2023. The two adjustments contended for are, in summary, adjust the deputy manager role to remove the parts she could not perform or redeploy her to alternative work that did not require it. We are satisfied on the evidence that either or both were reasonably

available within a very short time of the duty arising. Either or both were reasonable adjustments to make for the following reasons.

- a) There is no dispute that the heavy physical work within the deputy manager role amounted to no more than an hour a day or about 12% of the role. The vast majority of the role could be performed.
- b) The nature of the deputy manager role came with some autonomy and some power of delegation. There was scope for that 12% to be performed by others. To the extent that there may have been issues arising in rostering to provide adequate levels of staffing, that has not been evidenced or advanced by the respondent.
- c) The occupational health report made recommendations for alternative duties in a temporary basis. It linked her ability to control her pain levels to her pregnancy but made clear that this was likely to return to being well managed after she gave birth.
- d) There were three alternative vacancies that were suitable for the claimant to perform. The circumstances as to why they were not offered, disappeared after the claimant expressed an interest, or she was deemed unqualified, have not been evidenced.

11.14 The question of reasonableness arising from the cost of either adjustment does not properly arise. The evidence is that if the claimant had been temporarily assigned to any alternative role, she was entitled to be paid her normal remuneration under the pay protection policy. Alternatively, if there genuinely were grounds for medical suspension due to the implications her pregnancy had on the safety of her continued working, she was entitled to full pay in any event.

11.15 Neither adjustment was made. Either was reasonable to be made. There was, therefore, a failure to make a reasonable adjustment.

11.16 We must then turn to the question of timing for two reasons. The first is to determine when the failure occurred. The second, related, issue is to satisfy us that the claim is in time, and we have jurisdiction.

11.17 The occupational health report suggested a return with adjustments in a week, that would take it, to around 10 April 2023. The nature of the adjustments themselves seem to us to be very easy to achieve. There was no fundamental adjustment to her current deputy manager role other than to remove a small part of her duties. We have not been told in evidence of any particular difficulty in reassigning that element of her role and, it stands to reason, those elements were being covered somehow during her continued absence. Similarly, the alternative roles appear to have been available at the end of March. In short, nothing we have before us suggests there was any reason why either adjustment could not be made straight away. There may be other reasons

why occupational health suggested a further short period of time and the respondent could not have been criticised for relying on that. For those reasons we consider the date of the failure, for the purpose of section 123 is slightly different for the different adjustments. The respondent's HR and or managers had clearly decided in their own mind not to make any of the alternative suitable vacancies available to the claimant by the time then met again on 31 March 2023 when, in accordance with section 123(3)(b) or (4)(a), it made clear there were no other alternative roles. We are satisfied that the adjustment to the claimant's own job role could have been made almost instantly. Factoring in the occupational health advice for it to happen in a week's time, the reasonable period within which the adjustment might have been expected to be made was done for the purpose was 10 April 2023.

11.18 The claim alleging that failure was presented on 5 July 2023 following early conciliation between 25 May and 26 June 2023. It is well within time.

## **12. Harassment contrary to s. 26 Equality Act 2010**

### **Law**

12.1 Section 26 of the Equality Act 2010 provides: -

***(1) A person (A) harasses another (B) if-***

***(a) A engages in unwanted conduct related to a relevant protected characteristic, and***

***(b) The conduct has the purpose or effect of-***

***(i) violating B's dignity, or***

***(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.***

***(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-***

***(a) The perception of B;***

***(b) The other circumstances of the case;***

***(c) Whether it is reasonable for the conduct to have that effect.***

12.2 We are required to consider separately the discrete elements of this provision. Namely, whether any conduct found to have taken place was unwanted, had the proscribed purpose or effect and was related to the relevant protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**). That case is also relevant to the threshold of when conduct amounts to harassment, Underhill P said at para 22: -

***"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."***

12.3 Whilst that passage focused on dignity as a prohibited purpose or effect within s.26(1)(b)(i), we take the view the essence of a threshold applies similarly to the other prohibited purposes or effects in s.26(1)(b)(ii) and that threshold is regulated by the

concept of the reasonableness or not of the conduct having the prohibited effect as set out in s.26(4)(c). Similarly, the meaning of the statutory words is itself a measure of the threshold and, as the Court of Appeal stated in **Grant v HM Land Registry & Another [2011] IRLR 748**, the significance of the words must not be cheapened. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

### Discussion

- 12.4 The conduct said to be unwanted has been described in two broad statements rather than discrete acts. No issue was taken with this formulation and the constituent stages of each in the chronology was covered in the evidence and in the respondent's case. The essence of the allegation that the respondent failed to make any attempt to resolve the source of the Claimant's discriminatory treatment, and so failing to enable the Claimant to return to work following her ordinary maternity leave manifests in the potential alternative vacancies being made not available, in the repeat absence meetings where the same matters were put to the claim time and again, where there appeared to be a lack of appreciation that the amount of physical work involved in the role of a care assistant was substantially greater than that in her role as deputy manager, yet these roles were repeatedly put to her as the only alternatives. Perhaps the greatest part of this was the way the grievance was ignored, in substance, and not responded to, including the fact absence meetings were allowed to continue with the people who had been named as part of the grievance. The lack of contact during maternity leave and failure to respond with a grievance outcome at all led to the conclusion nothing was going to change.
- 12.5 All that conduct happened as a matter of fact. We are satisfied it was unwanted by definition as it was contrary to what the claimant was seeking.
- 12.6 We are equally satisfied that the conduct can properly be said to relate to the claimant's protected characteristic of disability. Related to is a broader concept to because of. It connotes a different test of causation or connection. Context can give that connection. All of the conduct arose, and only arose, in respect of handling the effects of the claimant's disability in the context of making adjustments. All of it was directly connected with her disability, the effects of her disability and the respondent's handling of that. We are satisfied it is all related to it.
- 12.7 The next question is whether that conduct was done with the proscribed purpose, or if not, whether it reasonably had the proscribed effect. We do not characterise these actions as being done with purpose, although aspects of the conduct have caused us to reflect closely on why things happened as they did. Why would an organisation permit continued meetings between an employee and manager, when the grievance was explicitly complaining about that manager's handling of those meetings. Why would a senior manager tasked with hearing a grievance appear start the process,

then do nothing to resolve it or make any further contact with the employee. Of course, the respondent has not called evidence from anyone competent to address those obvious matters. In any event, it seems to us it is better described on the evidence as a dismissive failure that risked causing the proscribed consequences, rather than being done with the purpose and little turns on it as we are, in any event, entirely satisfied that this course of conduct did in fact have the effect of creating a degrading or humiliating environment, where her situation was clearly of little consequence to those managing it. We are satisfied it was objectively reasonable for her to feel that way. She repeatedly chased, challenged, and even explained the law at one point. It is perfectly reasonable that she should feel that way.

12.8 This claim is made out.

### **13. Victimisation contrary to s. 27 Equality Act 2010**

#### **Law**

13.1 Section 27 of the Equality Act 2010 provides, so far as is relevant: -

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
  - (a) B does a protected act, or***
  - (b) A believes that B has done, or may do, a protected act.***
- (2) Each of the following is a protected act—***
  - (a) bringing proceedings under this Act;***
  - (b) giving evidence or information in connection with proceedings under this Act;***
  - (c) doing any other thing for the purposes of or in connection with this Act;***
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.***

13.2 “Because” means no more or less than it does elsewhere in the 2010 Act as a test of causation. The relevant proscribed reason (in this case the protected act) must have some material effect on bringing about the decisions, acts or omissions that make up the detriment. As ever, it is open to us to conclude the actual reason where that is clear on the facts. Otherwise, we apply section 136 of the 2010 Act as explained elsewhere. If the claimant proves facts from which we could conclude the proscribed factors were material, we must so conclude unless the respondent can show it is in no way whatsoever because of that reason. (**Royal Mail Group Limited v Efofi [2021] UKSC 33**)

#### **Discussion**

13.3 There is no dispute that the claimant’s first claim lodged on 5 July 2023 is a protected act within section 27(2)(a). Before then, there may have been a protected act in the process of engaging with ACAS but as for reasons of privilege, we have no evidence to show what was conveyed to the respondent, if anything, there could not be knowledge of it before the actual bringing of proceedings. The respondent has actual knowledge of the protected act on 8 August 2023 when the grievance meeting recorded the

claimant telling the employer, and in any event on 1 September 2023 when the employment tribunal served the claim on it.

- 13.4 We note the claimant's formal grievance was itself submitted to the respondent's head of HR on 4 July and its contents are sufficient to either be a protected act, or to at least raise the evidential basis for there being a belief that a protected act had been or would be done. However, it is important to address only the claims as they are put. The claimant does not rely on either this grievance as a protected act, nor is the victimisation put on the basis of belief.
- 13.5 Turning to the alleged detriments, three are alleged. In respect of some of these, there is again some degree of generic description, rather than specific acts or omissions.
- 13.6 We are satisfied that the first detriment is made out. Taken literally, of course, the respondent did "respond" to the grievance in that it required the claimant to represent the grievance on a form, did appoint a senior manager to hear the grievance and did hold an initial meeting at which the claimant restated her written grievance. That, however, is not the meaning of this detriment. The case was run, and understood by all to be, that there was no outcome to the grievance. That is the detriment we find made out.
- 13.7 We do not accept there is a detriment made out of deliberately putting forward a different version of events in the response to the First Claim. The respondent is entitled to advance its version of the facts and was required and expected to respond to the first ET1 whether or not that ET1 amounted to a protected act for the purpose of section 27. It is all but ubiquitous that responses to claims will advance some significant differences in the facts. There is no basis for concluding that if the ET1 had raised claims that did not include one of victimisation, that the factual account advanced by the respondent would have been the same as the claimant and any detriment would fail on causation. The respondent had a legitimate interest in defending the claim on the basis of its asserted understanding of the facts, however much they varied to the claimants. It is a situation that comes close to the situation in **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48**. We are not satisfied the account that was filed in the response can properly be described as an unfavourable treatment and to the extent it can, we are satisfied the reason was to put the respondent's case as it was understood by the person drafting it. Even though there were elements of that case which did not stand scrutiny, we are not satisfied it was done for the purpose of causing the proscribed consequences or that it was reasonable that it did.
- 13.8 As to the third alleged detriment we are satisfied that the respondent did refuse to make any changes to the workplace to enable the claimant to safely return to work. This goes further than the mere failure needed for the claim of failure to make a reasonable adjustment in two important matters. First, that we find Mellissa Stroud



refused to look at the constituent parts of the claimant's deputy manager role and engage in any form of reasonable analysis of the substantial proportion of the role that she could still perform. Secondly, there were suitable alternative roles available for the claimant, but which became unavailable or out of reach when the claimant expressed an interest in them. The reasoning for that remains unexplained. The evidence before us of their suitability leads us to infer her interest was a factor in why the roles became unavailable and that there was some motivation to positively refuse to engage. That conclusion is reinforced by the insistence that her "fit for work with adjustments" be treated as unfit for work and why there was no appetite to engage in a suitable and sufficient new and expectant mother's risk assessment, until after the claimant had had her baby.

- 13.9 Of the detriments we find made out, we do not accept there is a proper basis for concluding that the refusal to make adjustment was materially caused by the protected act. The fundamental obstacle to that succeeding is, of course, that the die was cast long before the protected act occurred. Although that state of affairs continued after the protected act, it did not meaningfully alter in any way beyond being repeated. That allegation must fail too.
- 13.10 The failure to respond to the grievance is different. There is a close proximity of timing. The employer's first knowledge of the claim appears to arise at the initial grievance meeting and Mr Greaves will have had direct knowledge of it. Despite our criticism of the perfunctory form filling to start the grievance and the repetition that occurs in the initial meeting, which would appear to be how the respondent embarks on handling grievances. We have to conclude, therefore, that up to 8 August 2023, the grievance was set to conclude and produce an outcome at some stage, within the respondent's usual procedures. We have to ask ourselves, what changed that? The only significant event is the lodging of the claim. We note the ET1 explicitly referred to the slow progress on the grievance, yet this did not prompt the respondent to pick up the pace. We also note the respondent's ET3 response says that: -
- "The claimant submitted the ET claim prior to the respondent being able to fully investigate the grievance submitted, therefore not affording us the opportunity to resolve the claims raised in the grievance through these channels."***
- 13.11 We consider there to be enough primary facts to draw an inference that the reason why the grievance was never progressed to a conclusion was because of the protected act. Indeed, one reading of the ET3 response can be interpreted as that being the respondent's positive pleaded position. In any event, there is sufficient from the primary facts to draw an inference that it was a material part of why Mr Greaves didn't ever conclude it. Having satisfied ourselves that there are facts from which we could conclude the protected act was the reason why, the law then requires us to conclude as such, unless the respondent can show it played no part whatsoever in motivation for the detriment.

13.12 Mr Greaves has not been called to explain why he didn't provide an outcome to the grievance or even to keep Ms McKechnie informed to reassure the claimant at any point after 8 August about his plan to respond. Nothing in the contemporaneous documentation explains it that would permit us to properly conclude the protected act was in no way whatsoever a material part of the reason for that. Mr Sayedmiam did not give evidence on the point, even hearsay, and could not as he was not involved. Accordingly, we are bound to conclude the respondent has not discharged the burden that is then placed on it, and we find that the first detriment was because of the protected act.

13.13 This part of this claim succeeds. The second and third alleged detriments fail.

#### **14. Constructive Unfair Dismissal**

##### **Law**

14.1 It is axiomatic that in order to claim unfair dismissal, the claimant must have been dismissed. In this context, section 95(1)(c) of the Employment Rights Act 1996 ("the Act") provides the statutory definition of dismissal: -

***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—***  
***(a)...***  
***(b)...***  
***(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.***

14.2 We remind ourselves of the essential authorities on "constructive" dismissal generally. They start with **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761** on the application of common law principles of repudiatory breach of contract, acceptance and causation as they arise within the context of contracts of employment. The definition of the implied term of trust and confidence set out in **Mahmud v BCCI [1997] UKHL 23** that: -

***"an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence".***

14.3 Assessing whether that term has been breached is an objective test. (**Leeds Dental Team Limited v Rose [2014] ICR 94**).

14.4 The case feels as though it should be a last straw case. In fact, the constructive dismissal is identified in the list of issues as simply the failures in respect of the grievance and lack of assurances thereafter. Whilst the repudiatory conduct occurs over a period of time from late August 2023 to spring of 2024, it is to be treated as a continuing single state of conduct by omission and does not engage the sort of considerations of a "last straw" case.

- 14.5 As to causation, it is not necessary that the contractual breach is the only reason for the resignation or even that it is the principal reason for the employee's resignation. It is sufficient that the repudiatory breach "played a part in the dismissal" (**Nottinghamshire County Council V Meikle [2004] EWCA Civ 859 [IRLR] 703**).
- 14.6 If a resignation amounts in law to a dismissal, that is not the end of the claim. The provisions of section 98 of the Act then engage. It is then potentially open to the respondent to prove the reason, or if more than one the principal reason, for dismissal and that that reason is a potentially fair reason. In this case the respondent does not assert a potentially fair reason. Its defence lies elsewhere in the cause of action and remedy.

### Discussion

- 14.7 There is no dispute that the Respondent did fail to investigate the Claimant's grievance dated 4 July 2023, at least it has not adduced any evidence to support the notion that it did anything with the grievance beyond the meeting that was held on 8 August to, essentially, require the claimant to restate her complaints in person. There is no evidence of a conclusion being reached and there certainly was no communication to the claimant of a conclusion or of any update or plan. We are equally satisfied as a result, that there has been no communication by the respondent to the claimant to provide her with any assurance that the investigation would be completed despite her chasing for an update.
- 14.8 We are satisfied that this failure, conduct by deliberate omission, does amount to a fundamental repudiatory breach of the contract of employment. For many years the law has implied a fundamental term into contracts of employment that an employer will reasonably and promptly afford a means to resolve workplace grievances. (**W A Gould (Pearmak) Ltd v McConnell [1995] IRLR 516**). That is largely now consumed within the implied term of trust and confidence and that is how the claimant puts the breach.
- 14.9 Analysing the elements of that implied term, we are satisfied that the employer's conduct was likely to seriously damage trust and confidence. That is not enough to establish a repudiatory breach because the conduct may occur with reasonable and proper cause. If it does, it does not amount to a breach. In that regard, however, we are in the dark for reasons given elsewhere. We simply do not know what the reason was why the grievance did not progress any further past the meeting on the 8 August. The respondent does not advance a case that we could engage with to assess whether it was done with reasonable and proper cause. Its ET3 does not assist it in this respect and substantially undermines its position. Ultimately, we do not have a basis to conclude there was reasonable and proper cause and as such, the breach of the implied term of trust and confidence is made out.
- 14.10 We have no doubt that the fact the respondent ignored her grievance, after ignoring her earlier on that year when she was seeking the adjustments, was a significant

event. We have no doubt that it was the main reason for her resignation. We say 'main' as it must follow the previous events from earlier 2023 also formed part of her reasoning. Indeed, her letter of resignation says as much. This is a claim that could have been put on the basis of a last straw but wasn't. As it happens, nothing turns on that as the alleged repudiatory conduct was made out. **Meikle** makes clear that breach only has to be a material part of the reason for resignation, not the only reason. Usually, that law applies in the context of other factors outside a potential breach of contract forming part of the reason for the resignation. In this case, the other reasons could have formed part of the breach.

- 14.11 The final element is whether there has been any affirmation of the contract of employment. In other words, has the claimant in the knowledge of the repudiatory breach called for the respondent to perform the contract. We do not accept there was. The grievance was delayed but progressing up to 8 August. The claimant chased progress about a month later which is not at that time such a delay as to establish the repudiatory breach. She then commences maternity leave from late September. Thereafter, until her resignation, she is not in work, not performing any side of the contract and not calling on the respondent to perform its side. The relationship is in temporary suspense whilst in the statutory maternity leave period and at no point does the claimant do anything that could be said to be accepting the breach and working to the contract. We cannot see that there was any basis for suggesting that the contract had been affirmed and, to be fair, no basis was suggested.
- 14.12 We are satisfied that she did not lose the right to accept the repudiatory breach and, accordingly, her resignation was a dismissal in law in accordance with s. 95(1)(c) of the ERA 1996.
- 14.13 There is no positive case going to a potentially fair reason for dismissal. It follows the dismissal in law was an unfair dismissal.

## **15. REMEDY**

### **Financial losses**

- 15.1 We start with additional findings of fact in respect of pecuniary loss.
- 15.2 Ms McKechnie was earning £34,118 per annum gross or £2,843.17 per calendar month. Her net pay was £2,190.50 per calendar month. Her employer was contributing 3% of gross which we find to be £85.30 towards her pension each month.
- 15.3 There is no evidential basis for us concluding those rates of pay would have changed over the period we are concerned with, nor that the basis of her employment would have changed in a way to affect the findings of income.
- 15.4 Between the period when the claimant was seeking a return to work, and commencing maternity leave she earned only SSP and the occasional payment of holiday pay when

Case number: 2601532/2023  
2601773/2024

leave was booked as a means of maintaining some financial income. We find the figure of SSP paid was £2,209.15 as per the unchallenged credit figures in the schedule of loss. We find the annual leave booked and paid in this period was £3,421.66. We find she also received a Tax refund £141.20 = 5772.01

- 15.5 We find Ms McKechnie commenced maternity leave on 24 September 2023. Had she been earning in the qualifying period, we find the 90% enhanced maternity pay would have been £588.92 per week. ( $£34,118 / 52.14 \times 90\%$ ). Although the effective date of termination was 19 May 2024, we find but for that termination Ms McKechnie would have remained on maternity leave until 24 September 2024. We have insufficient evidence to conclude she would have returned to work any sooner than that and a strong presumption on the facts of this case she would have taken the full period.
- 15.6 We are satisfied that the ordinary “SMP” maternity pay she would have received in employment had she been earning in the qualifying period was satisfied by the “SMA” maternity allowance she did in fact receive.
- 15.7 We accept that she commenced looking for alternative work before the period of maternity leave would have expired. However, on the evidence before us, we do not accept that permits us to conclude she would have returned to work before then. We find Ms McKechnie obtained new employment which she commenced on 1 October 2024.
- 15.8 That new employment was on terms which fully mitigate her loss from 1 October. There is no challenge to mitigation advanced by the respondent in the earlier period. However, for completeness we record that we are satisfied that Ms McKechnie has not failed to mitigate her loss. Indeed, we consider it was reasonable for her to think carefully about the roles she might want to take, to consider how that shaped her career and after reflecting on her recent experiences. All that meant it was reasonable not to simply take any paid employment. In any event, the short period of 6 days between the end of the notional maternity leave and her actually starting new employment that mitigates her loss renders this point academic.
- 15.9 Our findings on liability establish that the adjustments that were available to return to the claimant to paid employment on full pay could have been implemented from 10 April 2023.
- 15.10 Equally, a suitable and sufficient risk assessment could have been concluded from that time.
- 15.11 We have found the financial pressure placed on her by the respondent’s refusal to redeploy or suspend her forced her to take out a loan to secure her mortgage repayment obligations. She claims £1,378.83 in interest and this was not challenged.

### Discussion

- 15.12 The first point to record is that there was no challenge to the schedule of loss submitted by the claimant and not counter schedule. The issues going to remedy in all respects were not addressed or challenged by the respondent in the course of evidence.
- 15.13 The claimant's financial losses flowing from the claims that succeed needs to be considered in stages. The first stage is the period between when adjustments could realistically have been made, or a suitable and sufficient risk assessment to evaluate the hazards to the pregnancy could have been concluded. We consider that to be a period starting on 10 April 2023 until 24 September 2023 When we find the maternity leave starts and the next phase of loss begins.
- 15.14 During this first phase there was, either, suitable alternative work available to the claimant which would have been paid at full pay or, alternatively, a medical suspension would have secured her full pay. In the event we are compensating for the discriminatory failures to make adjustments or the unfavourable treatment. Other claims under the Employment Rights Act 1996 would also engage this remedy but it can only be recovered once, and the claimant is entitled to recover under the most advantageous regime for her.
- 15.15 That equates to part of April ( $\pounds 2,192.50 / 30 \times 21$ )  $\pounds 1534.75$  plus 4 months at  $\pounds 2,129.50$  plus the part month of September before maternity leave commenced on 24 September 2023. That is  $\pounds 1534.75 + \pounds 8518 + \pounds 1754.00$  ( $\pounds 2,192.50 / 30 \times 24 = \pounds 1754.00$ ). The total loss of wages is  $\pounds 11,806.75$ . to that we must add the loss of the employer's pension contributions at 3% of that loss of earnings which equates to  $\pounds 354.20$  making the running total  $\pounds 12,160.95$  to which we add the interest on her emergency loan of  $\pounds 1378.83$  top arrive at a total figure for loss of earnings in this phase of  **$\pounds 13,539.78$**
- 15.16 From that we need to make deductions by way of credit for other payments received in the period. First, the claimant was paid  $\pounds 2,209.15$  for SSP and other payments from the respondent;  $\pounds 3,421.66$  in holiday pay and  $\pounds 141.20$  as a tax rebate. The total to credit is  $\pounds 5,772.01$ . The net loss is therefore  **$\pounds 7,767.77$**  ( $\pounds 13,539.78 - \pounds 5,772.01$ )
- 15.17 We then move on the second phase of loss, during maternity leave. The only head of loss here is the difference of the enhanced maternity pay that the claimant would have received but for the discrimination, and the statutory maternity allowance she did in fact receive. The enhanced maternity pay should have been based on gross annual earnings of  $\pounds 34,118$  equating to  $\pounds 654.35$  per week ( $\pounds 34,118 / 52.14$ ) which would have produced a period of 6 weeks of enhanced maternity pay at 90% of that, namely  $\pounds 588.92 \times 6 = \pounds 3,533.52$ . Credit must be given for the SMA that was paid during that same 6-week period at the rate of  $\pounds 172.48$ . That is  $\pounds 1,034.88$ . The net loss for the period during maternity leave is therefore  **$\pounds 2,498.64$**  ( $\pounds 3,522.52 - \pounds 1,034.88$ )

Case number: 2601532/2023  
2601773/2024

- 15.18 The final phase is the brief period between the notional end of the maternity leave period on 24 September 2024 and the commencement of the new employment on 1 October 2024. There is a period of 7 days loss of full pay. We calculate that at **£511.580** net. As we have found there was no failure to mitigate there is no deduction.
- 15.19 We are satisfied the new role earning £40,000 fully mitigated the claimant's financial loss.
- 15.20 The claimant is also entitled to a basic award under the unfair dismissal claim which amounts to £1080.18. She is also entitled to a notional award to recognise the loss of the statutory rights she had accrued with the respondent. We assess that broadly and in the round at £500.
- 15.21 The total financial loss is therefore **£12,358.17** (£7767.77+£2498.64 + £511.58 + £1080.18 + £500)

#### Non-financial loss and damage

- 15.22 We find the claimant has suffered injury to feelings. It is therefore an award that is properly before us to assess the seriousness of that injury.

#### Law

- 15.23 There is no dispute in law that recovering compensation for injury to feelings actually suffered is available to the claimant in respect of the discrimination claims. (sections 119(4) and 124 of the Equality Act 2024)
- 15.24 We have been guided by the significant cases in this area. In particular, **MOD v Cannock [1994] IRLR 509** so far as the award is compensatory not punitive and the tortious principles of compensation apply. To **Prison Service v Johnson [1997] IRLR 162** on the approach to valuing damages. We have of course had regard to **Vento v The Chief Constable of West Yorkshire Police [2003] IRLR 102** and the three bands of seriousness of injury. The valuation of those bands is subject to annual increase which directs us to the relevant presidential guidelines which, in this case, is for the year from April 2023. The appropriate value of the bands in this case is, therefore:
- a) £1,100 to £11,200 for less serious cases.
  - b) £11,200 to £33,700 for serious cases.
  - c) £33,700 to £56,200 for the most serious cases.
- 15.25 We have also had regard to more recent authorities on the assessment of injury to feelings. In particular, **Eddie Stobart Limited v Graham [2025] EAT 14** and **Shakil v Samsons Limited [2024] EAT 192**. Each of which deals with the proper application of

Vento, and the practical considerations in valuing whether the injury to feelings is more, or less, serious.

- 15.26 Again, we should record there was no real challenge to the claimant's schedule of loss nor any challenge in evidence to her assertions of the effect the treatment had on her.
- 15.27 We accept that the claimant has suffered an injury to feelings of some measure. We therefore accept that there is evidence before us of injury to feelings. This is not a case where no award should be made. That then requires us to engage with the assessment of the seriousness of that injury and value it within the relevant guidelines. We are satisfied for the reasons set out below, this injury is more than that envisaged by the lower Vento band of "less serious". The claimant does not claim that her injury fell within the upper band. We therefore agree that the middle band represent the correct Vento band.
- 15.28 In analysing seriousness, we have had regard to the fact that the duration of the claimant's exposure to the discriminatory acts occurs over a number of months, from March 2023 through to September 2023 when the maternity leave commenced. And continuing through then in silence until the following May when she resigned. The discrimination is repeated and clearly had an impact on her. The assessment of seriousness takes this beyond the sort of injury we would expect to see after a one-off event of discrimination.
- 15.29 We have also considered the implications flowing from the fact that pregnancy should be a joyous life event. Discrimination playing out in the context of pregnancy can cause serious injury to feelings. That is not because pregnancy as a protected characteristic is worthy of greater compensation, but because the task of any court or tribunal of assessing quantum of general damages is to assess the extent to which a compensable injury reduces, diminishes or extinguishes the prior state of some aspect of human existence. It is a relative measure of what existed prior to the statutory tort of discrimination, or would have done but for it, and that which exists after and because of it. The focus is, obviously, on the effects after it, but the proper measure of the injury must reflect back to where that state of human existence would have been but for the discrimination. In the case of pregnancy, it is readily apparent that the claimant was expecting to have all aspects of self, self-worth, identity and any other number of references to her identity as an expectant mother affirmed with her pregnancy and birth and a significant measure of the seriousness of the injury is the loss of that inward reflection and negative implications of what she had to deal with.
- 15.30 There is no evidence of prior injury to feelings from any act, event or other cause not recoverable against the respondent.
- 15.31 There are ample references in the unchallenged evidence of the claimant supporting our view of the seriousness of the injury where she refers to: -



Case number: 2601532/2023  
2601773/2024

- a) "Instead of being able to look forward to my newborn, I am still traumatised by the memory of my entire pregnancy.
- b) Her claim "made it clear how I had been discriminated against, and the Respondent had every opportunity to try and resolve matters. It chose not to do so and continued to discriminate against me and treat me as though I was unable to work when I was in fact able to work".
- c) "I do not feel that I have been treated with dignity or respect at any time since I communicated on 9th March 2023, my intention to return to work following a period of absence and following me falling pregnant."
- d) "Instead of being able to look forward to my newborn's arrival, I spent the entire pregnancy fighting with the Respondent and my maternity leave dealing with the litigation, including attending a preliminary hearing not long after having given birth. My whole memory of this period is marked by the Respondent's treatment."
- e) Her references to loving the job she had and being prevented from doing it.
- f) Finding herself having to defend and explain her disability and pregnancy related absences against challenges to "how is this affecting the company" and being made to feel guilty that she was the problem.
- g) Enduring repeated absence meetings that were futile in the context of the respondent ignoring any adjustments or alternative roles.
- h) Enduring further meetings with the same individuals after raising a grievance which included complaints about the way those individuals had conducted the previous meetings.
- i) Being reduced to tears after meetings.
- j) In the later meetings feeling she needed to bring a companion to witness the nature of the meetings.
- k) The respondent's deliberate decision not to contact the claimant in any form during her maternity leave.
- l) That the claimant's repeated concerns about her financial pressures because she was not earning, which in turn were turned against her to concentrate on her health and pregnancy.
- m) Her references to having a "torrid time" and that no one listened to her.
- n) That the exposure to the discrimination was not only extended, between March and September 2023, but repeated during it.

15.32 Against that, there are some factors which properly mitigate the seriousness of the injury.

- a) That she was able to take a considered view of the situation and resign, albeit in the face of a rational conclusion that things were not going to improve.
- b) She was able to find and secure new employment.

15.33 We also have to acknowledge that some of the matters that the claimant say were discriminatory, and which presumably contributed to her injury, have not been made out. As a matter of principle, the respondent should not, therefore, be liable to compensate for matters that were caused by events that we have found were not successful legal claims. However, stripping out the unsuccessful s.13 and s.15 claim has little effect on causation because of the substantial factual overlap, leaving the same course of discriminatory treatment and the same impact on the claimant. Any adjustment is minimal.

15.34 The duration of the ongoing consequences was extended. Before the resignation, she had endured over a year of stress of exposure to the repeated and largely futile absence meetings, made to feel guilty for the effect she was having on the business and then having her grievance complaint ignored. This is not a single event. Ms McKechnie effectively mitigated the continuing damage by her resignation and resolve to find alternative work. We consider the move away from the respondent and putting that behind her was actually a positive process allowing her to focus on a new future. There is also an extent to which concluding the litigation marks the end of the closure process. We therefore treat the injury to feelings as being concluded by October 2024 save for residual effects during the time the case that the respondent has defended has taken to conclude. That is not to say those residual effects are minimal. We accept the process of going through this hearing to pursue her rights has added to the injury by causing the claimant to relive events.

15.35 The discrimination played out in private although it must follow other employees must have been aware that the claimant was pregnant, was away from work and was not at work at times she otherwise would have been expected to be. Nevertheless, this is not a case where any public ridicule or exposure can be said to substantially aggravate the injury so as to support a suggestion of very serious injury. Similarly, the injury to feelings has not had any obvious effect on the claimant's ability to secure future employment or her long-term choices of industry or sector or career generally.

15.36 This is a single injury, made more serious over time by further acts of discrimination or aggravating features of the handling of the case. There are no other causes for that single injury.

15.37 Doing what we can to assess the injury to feelings in all its respects, we accept the claimant's submission that the seriousness of this injury is properly to be assessed in

the middle Vento band. It is therefore appropriate to compensate within the middle band. We then have to consider where in the middle band the assessment should fall. Neither party referred to quantum cases and, in any event, reports of other cases are unlikely to be of assistance unless the injury suffered in that other case was fully articulated, which they tend not to be. We consider this case should be assessed in the upper half of the band because of the particular effect on the claimant at a time which otherwise should have been a joyous life event meaning the measure of diminution in her state was greater. We also take into account it was an injury that was added to, repeated and exacerbated over more than a year that Ms McKechnie was exposed to it.

15.38 The midpoint of the relevant band applicable at the time her claim was presented is £22,450 and the top £33,700. We consider the seriousness of the injury to warrant more than the midpoint. We might have considered it to be close to the top of that band had it not been for the evidence that Ms McKechnie was able to take a rational approach to mitigating the injury, to find suitable alternative work and to do so very quickly. That indicates a process of putting the injury behind her. We can thereafter consider the injury to have something akin to residual effects only. Insofar as injury to feelings can have a “recovery”, this was close to it.

15.39 Our evaluation of those factors means we must balance the seriousness of the injury with the recognition of those mitigating factors. We still consider this to be in the top half of the middle band but closer to the mid-point. Applying the broad-brush valuation that we must, we set the award at £25,000, subject to any additional award for aggravated damages.

15.40 The requirement imposed by the provisions of ITEPA 2003, as confirmed in **Wealmoor Limited v Poniatowski [2005] EAT 48**, means we then have a further assessment to perform to apportion the single injury as between that which we consider arose from pre dismissal conduct, and that related to the dismissal. Appeal cases including **Vento** have recognised assessing the largely subjective injury of injury to feelings so as to translate it into hard currency is bound to be an artificial exercise and that whilst the award must be fair and reasonable gauged by earlier decisions, the award must also of necessity be arbitrary or conventional. We have reasoned our assessments of seriousness and apply a broad-brush approach to the valuation. An arbitrary division of a single injury for the purpose of income tax law, adds a further dimension of both complexity and arbitrariness. We are required to complete that near impossible task within the context of a judicial decision that applies justice and fairness, relevance and reason.

15.41 Had all the discriminatory events been relied upon to found the constructive dismissal, it would have been open to us to conclude all events, and therefore all of the award for injury to feelings, was related to the dismissal. The way this case has been pleaded, however, means that is not the case. The failure to conclude the grievance is the

single act of conduct that is relied on to show breach of the implied term. We have to somehow reach an assessment of how much of the injury arises from that. We have considered the following factors in performing that task: -

- a) The effect of an injury is felt greatest when it is first suffered.
- b) Unless there is an intervening recovery, which there was not here, further acts of discrimination thereafter exacerbate or aggravate that existing injury.
- c) Whilst there may be a number over time, their individual contribution, to the extent they can each be individually assessed, is likely to be small compared to the initial injury.
- d) In this case there were a number of acts of discrimination over a number of months. Each further discriminatory act, and the passage of time itself with no resolution, each adds to build the seriousness of the injury.
- e) We consider that leads to a conclusion that the majority of the injury can be ascribed to the pre-dismissal conduct.
- f) However, the grievance was itself a significant act likely to contribute, aggravate or exacerbate to the injury to more than a minor extent. Dismissal is a significant event, and employees will always wrestle over the consequences of a resignation leaving them unemployed. That is a big decision that the claimant must have spent time ruminating over.

15.42 We consider that against that, the balance to be fairly struck leads to apportioning the injury to feelings between pre-dismissal and dismissal in the ratio 70/30. Of the £25,000 for the total injury, £17,500 is on account of the pre dismissal discriminatory conduct.

**Aggravated damages.**

15.43 Ms McKechnie claims aggravated damages of £2,000.

15.44 Our approach to aggravated damages has been directed by consideration of the key authorities of **Alexander v Home Office [1988] 2 All ER 118; Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT; HM Land Registry v McGlue UKEAT/0435/ 11/RN; HM Prison Service v Salmon [2001] IRLR 425.**

15.45 We take the view that an award of aggravated damages in discrimination cases before the Employment Tribunal will not always be a necessary head of damage. That is because an award of aggravated damages is, itself, in the nature of compensation for injury to feelings and, despite requiring some form of high handed or oppressive conduct by the employer to engage in the first place, the award remains wholly compensatory in nature.

- 15.46 What is required is an assessment of *additional* injury because of that conduct. The reason it is often not needed is because, where the aggravating conduct occurs within an act of discrimination itself, we are able to fully compensate for the injury to feelings caused without having to engage in additional assessments for aggravated damages. That removes the risk of double counting and over-compensating for the same injury.
- 15.47 For those reasons, we consider it is unnecessary to engage with the first and second ‘gateways’ identified in **Shaw** concerning the manner of discrimination or the motive for it. However, there is one aspect which we consider does properly engage the scope for additional injury and an award of aggravated damages and that is in respect of the third typical ‘gateway’ identified in **Shaw** and, indeed, **Salmon**, namely the subsequent conduct of the employer following the discriminatory acts. This is a situation that can arise in employment cases where the subsequent conduct is not, in itself, discriminatory but has added to the employee’s injury.
- 15.48 In this case, the handling of the grievance was likely to be a matter that we may well have found engaged aggravated damages and, had it not itself been found to be an act of discrimination, are likely to have considered an award of aggravating damages to compensate for the injury to feelings caused by it. That is because this carries the sense of that high handed or malicious quality necessary. The fact that we do not make such an award does not mean we do not consider it to have been an aggravating feature of the case, but there is no need to make an award because it was itself discriminatory and we have factored it into the award for injury to feelings that we do make. Doing anything else in this case is likely to either lead to overcompensating, slipping into a punitive mindset or just overcomplicating unnecessarily what is already a complicated and multifaceted remedy exercise.

*Adjustments under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992*

- 15.49 The claimant claims an uplift in her compensation of 25% pointing to failures of the respondents to engage with the relevant code of practice, in this case that is the Code of Practice 1 relating to discipline and grievance.
- 15.50 Section 207A(2) provides that: -
- (2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—***  
***(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,***  
***(b)the employer has failed to comply with that Code in relation to that matter, and***  
***(c)that failure was unreasonable,***  
***the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%***
- 15.51 The applicable proceedings are defined in schedule A2 which includes the claims before us.

- 15.52 There is no real dispute that there was a fundamental failure in the handling of the grievance. It is right to say there was a meeting, but both the meeting, and the earlier requirement to complete the internal grievance form, did little more than restate the basis of the claimant's original grievance. There is then not only no outcome, or progress report or update, but even at the date of resignation, and still at the date of trial, the respondent has simply ignored the claimant's grievance and then sought to defend it. At the heart of the code is encouraging employers to adopt a process to engage with the employee about their concerns in a way that is fair and allows any resulting decision to be based on both side's contentions, evidence and responses. That did not happen. We are satisfied that the failures were unreasonable.
- 15.53 The extent and nature of those failures leads us to conclude that the maximum of 25% is not appropriate because there are more serious examples of failures, just. We consider that should be discounted but only to 20%.
- 15.54 Not all heads of loss are caught by the uplift. The basic award for unfair dismissal is excluded by section 124A of the Employment Rights Act 1996.
- 15.55 The effect is as follows.
- a) The financial losses of £12,358.17 includes the basic award of £1080.18 to which the uplift does not apply. Taking that out gives £11,277.99. Calculating 20% of that is £2,255.60, which gives a total for financial loss of £14,613.77 (£11,277.99 + £2,255.60 + add back £1,080.18)
  - b) The non-financial loss of £25,000 results in an increase of 0% of £5,000.
  - c) The total award is then £44,613.77.

### Interest

- 15.56 We are required to consider the application of interest under the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996**. In short, that requires us to apply 8% interest to the award to the date of the decision. In the case of awards of injury to feelings, that is from the date of the discriminatory act. In the case of other awards, that is from the mid-point. We are not permitted to adjust the rate of interest but are permitted to adjust the period of interest under regulation 6 where it is appropriate to avoid serious injustice.
- 15.57 With that in mind, we have taken the date of 10 April 2023 as the date of the discriminatory act for all losses. We also consider the end date should be the date of our final deliberations to avoid any further delay in promulgating the decision. That limits the period to 27 February 2024. That is a period of 688 days. The mid-point being calculated on 344 days.

15.58 It is only the claims that succeeded under the Equality Act 2010 to which interest is attached. That means we do not apply interest to the compensation for the awards for unfair dismissal or detriment. The detriment claims do attract an award of injury to feelings and such an award does not attract interest under the 1996 regulations. Where there is a clear distinction between injury caused by acts of detriment under the 1996 Act and injury caused by prohibited conduct under the 2010 Act, we would adjust interest accordingly. In this case, we take the view the claims cover the same factual landscape and that the award of injury to feelings are therefore made under the 2010 Act.

15.59 The figure for injury to feelings of is £30,000 (£25,000 + 20% uplift). The Claimant is entitled to £4,523.84 in interest ( $£30,000 \times 8\% / 365 \times 688$ )

15.60 The figure for financial loss is £12,933.59 (£10,777.99 + 20% uplift). The claimant is entitled to £812.63 in interest ( $12,933.59 \times 8\% / 365 \times 344$ ).

### Grossing up

15.61 As the total award exceeds the £30,000 threshold, it would appear to engage the provisions of Chapter 3 of part 6 of the Income Tax (Earnings and Pensions) Act 2003 and we are, at least, required to consider the implications.

15.62 However, in this case there is a substantial part of the award of injury to feelings which we have determined is in respect of the pre-dismissal acts. Taking that out means the elements that are caught within that chapter of the 2003 Act are below the £30,000 level. There is, therefore, no grossing up to perform.

## **16. Summary Remedy Table**

16.1 This table is to assist with understanding which awards engage which adjustment or uplift. The parties are invited to apply for reconsideration if they consider there are errors in the arithmetic or basic principles applies. Any other reconsideration applications will be subject to initial consideration.

| Head of loss                        | Unadjusted award | 207A uplift @ 20% | ITF interest | Other interest | TOTALS     |
|-------------------------------------|------------------|-------------------|--------------|----------------|------------|
| Unfair dismissal Basic Award        | £1080.18         | N/A               | N/A          | N/A            | £1080.18   |
| Unfair dismissal Compensatory Award | £500             | £100              | N/A          | N/A            | £600       |
| Loss of earnings                    | £10,777.99       | £2,155.60         | N/A          | £812.63        | £13,746.22 |
| Injury to feelings                  | £25,000          | £5000             | £4523.84     | N/A            | £34,523.84 |

Case number: 2601532/2023  
2601773/2024

|                                                                                                                       |            |           |           |         |            |
|-----------------------------------------------------------------------------------------------------------------------|------------|-----------|-----------|---------|------------|
| Totals                                                                                                                |            |           |           |         |            |
| Unadjusted                                                                                                            | £37,358.17 |           |           |         |            |
| Uplifted awards                                                                                                       |            | £7,255.60 |           |         |            |
| Interest (ITF)                                                                                                        |            |           | £4,523.84 |         |            |
| Interest (other)                                                                                                      |            |           |           | £812.63 |            |
| Sub Total                                                                                                             |            |           |           |         | £49,950.24 |
| Less £24,166.69 as the non-taxable element of Injury to feelings (70% of £34,523.84)                                  |            |           |           |         | £25,783.55 |
| Addition for Grossing up – as the taxable element of the award does not exceed £30,000, there is nothing to gross up. |            |           |           |         | £0         |
| Add back non-taxable element of injury to feelings award                                                              |            |           |           |         | £24,166.69 |
| Grand Total                                                                                                           |            |           |           |         | £49,950.24 |

EMPLOYMENT JUDGE R Clark

DATE 24 May 2025

JUDGMENT SENT TO THE PARTIES ON

...29 May 2025.....

AND ENTERED IN THE REGISTER

...Farhan Sheikh.....

FOR THE TRIBUNALS