Case Numbers: 3331221/2018
2205965/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mrs S Abdul		**Santander UK Plc**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 25-30 September; 9 October 2019 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr M Reuby, Mrs C Ihnatowicz**

On hearing the Claimant in person and Mr Z Sammour, counsel, on behalf of the Respondents, the Tribunal unanimously adjudges that:

(1) The Claimant's complaints of pregnancy/maternity discrimination based on allegations (a) and (d) identified in the accompanying reasons are well-founded.
(2) The Claimant's other claims are not well-founded.

REASONS

Introduction

1 The Respondents, who employ about 26,000 people in the UK, operate a retail banking business. They form part of a global group with a worldwide workforce of over 180,000.

2 The Claimant, Mrs Sultana Abdul, who was born on 2 July 1986 and is the mother of three children, joined the Respondents as a Customer Service Adviser ('CSA') on 15 November 2004 and remains in their employment. At the outset she worked full-time but latterly she has worked part-time 20 hours per week in a regular 10.00 a.m. to 2.00 p.m. Monday to Friday pattern. Between 17 July 2017 and 10 August 2018 she was away from work, on ordinary and then additional maternity leave and, after 16 July 2018, unpaid parental leave. Her third child was

born on the first day of her period of absence. The older two are of primary school age.

3 The Claimant has for many years been affected by anxiety and depression and, more recently, has been diagnosed with functional neurological disorder, a condition which, among other things, results in back pain, impairs mobility and may affect bowel function.

4 On 15 January 2018 the Claimant presented to her employers a flexible working application by which she sought to work her established weekly pattern, but only during school term-times. The application was refused and her appeal was unsuccessful. A subsequent grievance and grievance appeal also failed.

5 By a claim form presented on 9 July 2018 (case no. 3331221/2018) the Claimant, acting in person, brought a complaint of pregnancy/maternity discrimination based on the refusal of the flexible working application. She included comments about the effect of the refusal on her mental health and complained of a requirement to relocate to a different branch despite her anxiety and depression, but did not explicitly allege disability discrimination.[1] In their response form the Respondents resisted her case in its entirety.

6 In a second claim form, presented on 6 September 2018 (case no. 2205965/2018) the Claimant made further complaints of pregnancy/maternity discrimination and a fresh complaint of sex discrimination, relating to the handling of the flexible working request and her resulting grievance. She also included a further reference to the branch relocation matter. The Respondents presented a response form defending their actions and denying discrimination in any form.

7 The proceedings were consolidated and came before Employment Judge Glennie on 18 January this year in the form of a preliminary hearing for case management. The Claimant was unrepresented and the Respondents appeared by counsel. The judge gave directions for the Claimant to respond by 1 February to the Respondents' request for further information dated 17 January and made provision for them to respond by 22 February to that information.

8 The Respondents' request of 17 January had asked (among other things) whether the Claimant was seeking to put forward a complaint of disability discrimination and, if so, to specify the disability relied upon, the legal character of the complaint (whether direct or indirect discrimination) and the key details of the claim.

9 In his note of the hearing (accompanying the Order) Judge Glennie placed on record the agreement of the parties that the Claimant's complaints rested on five factual foundations:

> **(a) Unduly delaying in considering her flexible working application … ;**
> **(b) Rejecting the Application;**
> **(c) Offering to place her on a Lifestyle 260 CSA Contract;**
> **(d) Requiring her to return to work … at the Cheapside branch;**

[1] At box 12 of the claim form, she answered 'no' to the question whether she was disabled.

> **(e) Failing to resolve the grievance … in accordance with the Respondents' procedures …**

We will call these 'allegations' (a) to (e). The judge also stated that the Claimant had difficulty with the "legal terminology" to be attached to her claims. She was, however, clear that she wished to raise a complaint of disability discrimination, relying on both the depression and the functional neurological disorder. He noted that the "essence" of her proposed disability discrimination complaint was that she was moved to a branch which was further away from her home, and remarked that it had the appearance of a claim for failure to make reasonable adjustments rather than one for direct discrimination. He also recorded what he understood to be a proposed complaint of indirect disability discrimination based on the alleged practice of offering the Lifestyle 260 agreement, which she described as being akin to an 'on-call' contract, the contention being that disabled people experience greater difficulty than non-disabled people in working in that way. The judge was careful to say that he was not ruling such complaints to be within the scope of the claim form and that arguments might arise as to whether any formal amendment of the Claimant's case was required. Any such question must await the further information ordered. He encouraged the Claimant to obtain independent legal assistance.

10 The Claimant did not provide the further information ordered by Judge Glennie. In an email of 21 February 2019 she simply stated that she wished to pursue claims for direct disability discrimination and "failure to make reasonable adjustment". Further correspondence followed and, on 9 April 2019, on the instructions of Judge Glennie, the Tribunal wrote to her explaining that it was necessary to comply with the order and reminding her of information already provided to her about sources of free legal advice.

11 On 10 April 2019 the Claimant wrote to the Tribunal seeking to explain her complaints afresh. She appeared to say that the branch move complaint (allegation (d)) was an instance of direct disability discrimination. As noted above, this may be seen as confirming a case already contained in her claim form. Her message might perhaps also be read as implying a complaint, again based on allegation (d), of discrimination arising from disability[2] (there is a reference to her sickness absence record). In addition, she seemed to allege, for the first time, direct disability discrimination and/or, perhaps, discrimination arising from disability, in the delay in dealing with the flexible working application and/or the outcome of that application (allegations (a) and (b) respectively). More generally, she made the assertion several times that, had she not been on maternity leave, the events of which she complains would not have happened as they did. The 10 April document did not appear to propose any complaint of failure to make reasonable adjustments.

12 In correspondence the solicitors for the Respondents raised further concerns about what they regarded as an impermissible attempt to expand the case beyond the limits of the claim form but, understandably, Judge Glennie did not elect to engage the parties further on the subject of the scope of the dispute.

[2] See the Equality Act 2010, s15.

13 Prior to the hearing (see below), the Claimant made no application to amend the claim form.

14 The parties themselves narrowed the case in one further respect, however, in that the Respondents conceded that the Claimant had at all material times been disabled by depression. They did not make that concession in respect of the functional neurological disorder.

15 The dispute came before us on 25 September this year for final hearing with five days allocated. The Claimant, who has no legal training or experience, appeared in person although she had the support of her husband for some time in the early stages of the hearing. She presented her case ably, despite some understandable difficulty in grasping the applicable legal concepts and the procedural stages through which the hearing needed to be taken. We offered her what guidance we could, consistent with our duty to remain neutral. The Respondents had the considerable advantage of being represented by Mr Zac Sammour, counsel, who presented his case lucidly, economically and with scrupulous fairness to the Claimant.

16 At the outset, we were asked to rule on three procedural matters. First, the Claimant sought permission to amend the claim form to add complaints of direct disability discrimination based on allegations (a) and (e). (It can be seen that her application corresponded with her email of 10 April in relation to allegation (a) but not allegation (e).) Her application proceeded on the understanding that allegation (d) already stood as a complaint of direct disability discrimination. Mr Sammour was content to treat the case as including a complaint of direct disability discrimination under allegation (d) but opposed the application to add fresh complaints of direct disability discrimination under allegations (a) and (e). Having taken time for reflection, we ruled in the Claimant's favour. She relied on pleaded facts and merely sought to attach a fresh label to them. Although the points were not all one way, the balance of prejudice came down comfortably in favour of granting the application.

17 Next, we considered the Claimant's application for permission to rely on a late witness statement produced in the name of her husband. Once it became clear that the intention was only that we should read the statement for what it was worth, Mr Sammour's opposition softened. Again, we were satisfied that the discretionary balance favoured granting the application.

18 Finally, we decided that it was appropriate to split the hearing and to consider first the question of liability. That was the course proposed by Mr Sammour, to which the Claimant took no strong exception.

19 We heard evidence and submissions on liability over days one to four. It was then necessary to reserve judgment because the lay members were required to sit on another case commencing the following morning. Fortunately, however, it was possible to fix a mutually convenient date for our private deliberations in the following week, while the case was still fresh in the memory.

The Legal Framework

Protected characteristics

20 The Equality Act 2010 ('the 2010 Act') seeks to protect certain classes of person against discriminatory treatment based on or related to specified 'protected characteristics', which include sex and disability. It is not necessary to say anything here about the former. By s6(1) the protected characteristic of disability is defined as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. An impairment is 'long-term' if it has lasted for at least 12 months or is likely to last for at least 12 months or for the rest of the life of the person affected (schedule 1, para 2).

Pregnancy/maternity discrimination

21 The 2010 Act contains special protection for pregnant women. By s18 it is provided that:

> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –**
>
> **(a) because of the pregnancy …**
>
> **…**
>
> **(3) 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.**

Subsection (6) states that the 'protected period' begins when the pregnancy begins and ends, if the woman has the right to ordinary and additional maternity leave, when the period of ordinary and additional maternity leave ends (or the woman's return to work if earlier) or, if she does not have that right, two weeks after the end of the pregnancy. By subsection (7) protection against direct sex discrimination does not attach to treatment of a woman during the protected period because of her pregnancy or pregnancy-related illness or because she is on, or has taken, statutory maternity leave.

22 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwiwu* [2014] ICR 571 CA, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', etc in the pre-2010 legislation) effected no material change to the law.

Direct discrimination

23 The 2010 Act, s18(7) summarised above is significant: if it were not part of the statutory structure, any complaint of maternity/pregnancy discrimination could be run in the alternative as direct sex discrimination because the condition of pregnancy is one which can only affect females (see *Webb v EMO Air Cargo (UK) Ltd* [1994] ICR 770 ECJ and [1995] ICR 1021 HL). Treatment outside the 'protected period' is not governed s18 and a direct sex discrimination claim can be founded on it.

24 Direct discrimination based on specified characteristics, which include disability and sex, is defined by s13 in (so far as material) these terms:

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

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

Indirect discrimination

25 The concept of indirect discrimination is defined by the 2010 Act, s19 in, so far as relevant, these terms:

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

Protection against discrimination

26 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(b) by subjecting B to any … detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of, a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

27 The 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

28 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions. We take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King-v-Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl-v-Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

The Claims and Issues

29 Following our preliminary rulings, it was agreed that the claims to be decided were of pregnancy/maternity discrimination (allegations (a)-(e)); direct sex discrimination (allegations (a)-(e)); direct disability discrimination (allegations (a), (d) and (e)); and indirect sex discrimination (allegation (c)).

30 The complaints of pregnancy/maternity discrimination raises two key issues: (i) Was the Claimant subjected to any of the alleged 'unfavourable' treatment and did it amount to a 'detriment'? (ii) If so, was that treatment because of her pregnancy/maternity and/or because she was exercising, or had exercised, the right to ordinary or additional maternity leave?

31 The complaints of direct sex discrimination give rise to three key issues: (i) is the claim (or any part of it) excluded by operation of s18(7)? (ii) To the extent

that it is not excluded, was the Claimant subjected to any of the alleged unfavourable treatment and did it amount to a 'detriment'? (iii) If so, was that treatment because of her pregnancy/maternity or any consequence thereof?[3]

32 The complaints of direct disability discrimination turn on the following issues: (i) Was the Claimant disabled by anxiety/depression *and* functional neurological disorder or only by anxiety/depression? (ii) Was the Claimant subjected to detrimental treatment (allegations (a), (d) and/or (e))? (iii) If so, did the Respondents treat her less favourably than they treated, or would have treated a person without a disability and did they treat the Claimant as they did because of her disability or, if applicable, disabilities?

33 The complaint of indirect sex discrimination raises these issues: (i) Did the Respondents apply a 'provision, criterion or practice' ('PCP') of offering Lifestyle 260 Contracts to male and female CSA's?[4] (ii) if so, did the PCP put female CSA's at a substantial disadvantage in comparison with male CSA's? (iii) If so, did it put the Claimant at such a disadvantage? (iv) if so, can the Respondents show that the PCP was nonetheless justified as amounting to a proportionate means of achieving a legitimate aim?

Evidence

34 We heard oral evidence from the Claimant and read the statement of her husband.

35 The Respondents called four witnesses: Mr David Heasman, formerly Regional Manager of the Respondents' Central London East Region, Mr Pritesh Vekaria, formerly Branch Director at the Respondents' Edgware Road Branch, Mr Jason Carpenter, the Respondents' Head of Risk for Retail Credit, and Ms Kathleen Agatiello, formerly Branch Director at the Respondents' Gracechurch Street branch. In addition we read statements in the names of two further decision-makers employed by the Respondents: Mr Craig Baines, a Senior Segment Manager and Mr Chris Fallis, Chief Operating Officer. Both were to have been called as witnesses but, in the end, neither was called because the Claimant said that she did not wish to ask them any questions.

36 In addition to the testimony of witnesses, we read the documents to which we were referred in the two-volume bundle prepared by the Respondents.

The Facts

37 We have had regard to all the evidence but it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

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[3] The language of s13 must in this context be treated as much wider than it is in order to accommodate the effect of the case-law derived from the *Webb* case.

[4] Perhaps the question should be narrower, *eg* Did the Respondents have a practice of offering the Lifestyle 260 Contract to CSAs whose requests to work adjusted hours or patterns under their current contracts could not be granted?

38 As we have said, the flexible working application was made on 15 January 2018, by which time the Claimant had been on maternity leave for approximately six months.

39 The Respondents' Flexible Working Policy summarises their responsibilities in the area of flexible working and acknowledges an obligation (para 6) to "make sure all flexible working requests are fairly and fully considered" and to comply with all relevant legal obligations. In complementary Flexible Working Guidelines, detailed guidance is provided on the flexible working application process. Here (Section 11) it is noted that requests may be dealt with informally. Failing that, the relevant manager should arrange to discuss a request with the employee concerned at a formal meeting as soon as possible and at the latest no more than 28 calendar days after the application is received. A decision on the application should be issued within 14 days of the meeting. The guidelines also cover the employee's right to appeal against any flexible working application decision. Any appeal must be submitted within 14 days of receipt of the first-instance decision. An appeal meeting should be arranged within 14 days of receipt of the notice of appeal.

40 It is common ground that the procedural guidance was not followed in this case. The manager with responsibility for the flexible working application was Ms Agatiello, the Claimant's line manager. She did not hold a formal meeting with her to discuss her application until 23 April 2018. Her decision, rejecting the application, was issued on 3 May 2018. We heard evidence from Ms Agatiello about work pressures to which she was subject and personal and family concerns. We accept that evidence. We have also noted her acknowledgement, during an interview on 1 August 2018 by Mr Carpenter for the purposes of the grievance appeal and in her evidence before us, that one factor explaining the delay in dealing with the request was the Claimant's absence on maternity leave.

41 In the course of exchanges while the first-instance application was under consideration, Ms Agatiello raised with the Claimant the possibility of her moving to a Lifestyle 260 CSA Contract. That is an agreement by which the worker agrees to work on an 'as and when' basis within a specified region and is guaranteed a minimum of 260 hours annually. The Claimant made it clear that she was not interested in working on such terms.

42 Ms Agatiello's reasons for refusing the flexible working request were given in her letter of 3 May 2018. In summary, they were that if the request were granted the organisation would be unable to manage the work which needed to be covered between the existing staff and there would be a risk of a detrimental effect upon the Respondents' customers and the Claimant's colleagues. The Claimant worked at the Gracechurch Street branch which had a budgeted headcount of 2.6 FTE CSA's. The other 'City' branches had similar allocations (between 1.8 and 2.6). The headcount restrictions meant that only one CSA could be permitted to be out of the branch at any given time. Granting the application would severely restrict the Respondents' freedom to permit other CSAs to take annual leave during school holidays. Many were parents or grandparents with child care responsibilities. The option of covering the Claimant's absences through 'on-call'

staff was not practicable. The Claimant, who at all relevant times lived in the Aldgate area, walked to work at the Gracechurch Street branch. Transfer to another branch was no solution not only because of the budgeted headcount problem. The possible options were confined to Bishopsgate, Moorgate and Cheapside. None offered any greater scope for accommodating her application than Gracechurch Street.

43 The Claimant appealed on 6 May 2018. An appeal hearing was convened before Mr Vekaria (a witness before us). He held a meeting with the Claimant on 4 June 2018. At the conclusion of the meeting he dismissed her appeal but put forward two possible solutions: first, a proposal, to permit her to take off one third of the total period of school holidays, and secondly, a switch to a Lifestyle 260 Contract. Neither idea was acceptable to the Claimant. A letter from Mr Vekaria, confirming the outcome, followed on 18 June 2018.

44 By a letter of 25 June 2018 Lorraine Stokes, Regional HR Coordinator, notified the Claimant that following her period of maternity leave she would be returning to work at the Cheapside branch. From her home, that branch was 0.2 miles further than the Gracechurch Street branch, an estimated increase in walking time (each way) of five minutes. The accommodation at the Cheapside branch was all on one floor, whereas at Gracechurch Street it was on two floors making it necessary for staff to use stairs to move between the customer-facing area and the staff facilities, including toilets. The branch manager at Cheapside was known to the Claimant and the two had worked harmoniously together in the past. We accept Mr Heasman's evidence that he was responsible for the proposal to move the Claimant and that he had judged that it would be beneficial for her. The other consideration in his mind was that there was a vacancy at Cheapside and it was desirable (as he saw it) to avoid a second move in a short space of time for the member of staff who had replaced the Claimant at Gracechurch Street when she left on maternity leave. Mr Heasman made enquiries indirectly of Ms Agatiello as to where (apart from Gracechurch Street) the Claimant would be willing to work and received the reply that she would only work in the City area, in particular at the Moorgate, Bishopsgate or Cheapside branches. He did not discuss his plans with the Claimant before causing Ms Stokes to write the letter of 25 June.

45 On receipt of that letter the Claimant immediately protested and complained that the requirement to move had been imposed upon her because she had taken maternity leave. On 10 July she was notified that she would, after all, be able to return to Gracechurch Street. That decision was made or authorised by Mr Heasman.

46 The parties agreed that, as a matter of contract, it was open to the Respondents to require the Claimant, on notice, to transfer to the Cheapside branch. In addition, she accepted that it was not inherently a breach of her rights under the maternity provisions to require her on returning from maternity leave to work at Cheapside.

47 In the meantime, on 29 June 2018, the Claimant issued a grievance alleging discrimination based on pregnancy/maternity and disability in the handling of her flexible working application.

48 Under the Respondents' Grievance Policy, the company's responsibilities include investigating formal grievances fully and managing them as sensitively and quickly as possible. The accompanying guidelines provide that a letter should go to an aggrieved employee within 14 days of delivery of his or her grievance containing an invitation to a formal grievance meeting. Outcomes should be issued either at the meeting or within 14 days of it. There is also provision for appeals against grievance decisions.

49 The grievance was referred to Mr Carpenter (a witness before us) who, on 24 July 2018, proposed a date for a grievance meeting two days later. The date was not convenient to the Claimant and she explained that she was not available until 9 August. In the event, the meeting was set up for 13 August. On that occasion, the Claimant was given a full opportunity to ventilate her concerns about the handling of her working request and about the requirement (as we have noted, swiftly reversed) to transfer to the Cheapside branch. There was a delay which is explained in part by an IT problem which prevented the Claimant from studying the notes of the meeting and in part by Mr Carpenter's absence on annual leave.

50 On 14 September, the date on which she was due to return to work following her parental leave, the Claimant commenced a period of sick leave.

51 On 18 September the Claimant approved the notes and made certain further points.

52 On 2 October 2018 Mr Carpenter rejected the Claimant's grievance. He found that there was no discrimination in the handling of the flexible working request or in the requirement to move the Cheapside branch. He did note that there had been a regrettable delay in the handling of the flexible working request. He also proposed that the application should be reviewed again by the new Regional Manager.

53 On 4 October 2018 the Claimant appealed against Mr Carpenter's decision. The appeal was assigned to Mr Fallis, whose statement we read. An appeal meeting was scheduled for 30 October and the Claimant invited. She replied that she was not well enough to attend but wished the appeal to proceed in her absence. Mr Fallis carried out some investigation, including interviewing Mr Carpenter. He then adjourned the appeal, pending the completion of the review which Mr Carpenter had directed.

54 The review was assigned to Mr Baines (the Respondents' other 'paper witness'), apparently in February 2019, who produced a draft decision the following month. The outcome was published on 3 April 2019. Mr Baines concluded that the flexible working request been considered fairly and objectively and expressed his agreement with the outcome. His reasons did not differ significantly from those which had been given by the decision-makers already involved. He went on to re-state the two possible solutions already documented by

Mr Vekaria and added a third, namely the idea of a job-share, although the feasibility of that solution was not explored.

55 The Claimant returned to work at the Gracechurch branch on 19 March 2019. Just over a month later that branch closed and she transferred to the Moorgate branch.

56 On 9 July 2019, Mr Fallis issued his decision on the Claimant's appeal against Mr Carpenter's rejection of her grievance. He upheld that rejection, judging the substance of the decision on the flexible working application to be sound and non-discriminatory. He added that in view of the fact that she had moved to another branch on the closure of Gracechurch Street, it was open to her to make a fresh application if so inclined. He explained in his witness statement that he did not attend to completing his work on the appeal until some three months after the result of Mr Baines's review was published because his time was taken up with the task of leading a major restructuring exercise involving 600 staff.

Secondary Findings and Conclusions

Pregnancy and maternity discrimination

57 In our view, there are clear and insurmountable difficulties with the complaint of pregnancy/maternity discrimination based on allegations (b), (c) and (e). The question for us is whether the matters there complained of happened 'because of' the fact that the Claimant had exercised her right to statutory maternity leave. The exercise of that right was certainly the context in which the relevant events occurred but we see no basis for finding that it was the *reason*, or *a reason*, for any of them.

58 As to (b), Ms Agatiello's decision, arrived at with evident reluctance, was based on commercial realities. It is not for us to assess the reasonableness of the Respondents' decision on the flexible working application: the issue is as to the reason for it. That said, there is an evident logic to support it and no evidence to suggest that the reason offered to us was anything other than true. We are satisfied that there was no conscious motivation against the Claimant on account of her having exercised her right to maternity leave. Might there have been some subconscious motivation? Again, we find there is no evidence to get that notion off the ground. There was no evidence to suggest that applications of the kind made by the Claimant ordinarily fare any better than hers did[5]. Nor did the Claimant put before us any broader case based on wider 'background' material suggestive of an animus against working mothers or those exercising maternity rights.

59 As to (c), the complaint fails first because no detriment is identified. Mooting the possibility of a Lifestyle 260 Contract occasioned no harm to the Claimant. In circumstances where the flexible working application had been

[5] We heard about only one other case. There, in a non-Metropolitan setting, a trial period was offered to test the feasibility of term-time only working. The CSA headcount budget was 5.7 FTE, more than double that of the Gracechurch Street branch. And we do not recall it being said or suggested that the application was made by a mother on, or recently returned from, maternity leave.

refused, it was offered as a way forward and nothing more. There was no question of the contract being foisted upon her. It was open to her to refuse it, as she did. Moreover, even if an arguable detriment had been shown, it was plainly not 'because of' the Claimant's exercise of the right to statutory maternity leave. Again, that exercise was part of the context but manifestly no part of the reason.

60 Turning to (e), again, we see no arguable basis for alleging pregnancy/maternity discrimination in the handling of the grievance process. As to substance, we find that no complaint is made out. As to process, the grievance was the subject of a thoroughly regrettable delay, compounding the most unsatisfactory handling of the initial flexible working request (to which we will shortly come). But again, we focus on the reason for the treatment complained of. We find that the reason for the delay in handling and disposing of the grievance and in particular the grievance appeal has been truthfully explained and that the reason was not that the Claimant had taken maternity leave. The delays in handling the grievance and grievance appeal occurred after the period of statutory maternity leave and we see no reason to attribute the delay to the fact of that leave having been taken. As will shortly be explained, quite separate considerations apply to allegations (a) and (d).

61 For these reasons, we hold that the complaints of pregnancy/maternity discrimination under allegations (b), (c) and (e) are unfounded.

62 Turning to allegation (a), we see this part of the case quite differently. In our judgment, the delay in dealing with the flexible working application certainly amounted to a detriment. And we are satisfied that the fact that the Claimant was away on maternity leave at the time when the application was being considered contributed in a material way to the delay. We would have been likely to infer as much without the evidence of Ms Agatiello. Having heard her frank acknowledgement of the link, the matter is proved to a very high standard. We stress that our finding does not attribute any malign motive to her. But motive is nothing to the point. To repeat, we are concerned with a reason. Here we are clear that at least one reason for the delay was the fact that the Claimant was away on maternity leave. That is sufficient make out this part of the case under the 2010 Act, s18.

63 We turn finally to allegation (d). In the first place, is a detriment established? In our judgment it is. Although the Claimant ultimately remained at the Gracechurch Street branch, she was upset by the letter notifying her of the move, which came out of the blue. In assessing whether a detriment is established, the Tribunal must take account of all the circumstances including any vulnerability on the part of the complainant. Given her mental health condition, the Claimant was certainly a vulnerable person. The law does not set a particularly high standard for demonstrating a detriment. We find that that standard was met. We also find that the way in which the decision to move the Claimant was taken and communicated is attributable in part to the fact that she was away on maternity leave. We have little doubt that, had she not been, the decision would not have been taken and communicated to her as a *fait accompli.* On the contrary, she would have been consulted and her views considered before any decision taken. Again, we do not attach any sinister or ulterior motive to the Respondents.

We simply find that they did not give proper consideration to the Claimant's interests and feelings and that this omission was because she was away from the branch on maternity leave. On these grounds, we find, again, that the s18 complaint is made out.

Sex discrimination - direct

64 We reject the complaint of direct sex discrimination for two reasons. First, by operation of the 2010 Act, s18(7), the complaint of direct sex discrimination is excluded in any event in relation to allegations (a) to (d) inclusive because they relate to matters occurring during the 'protected period'. Secondly, our findings on the merits of the pregnancy/maternity under allegation (e) necessarily defeat any parallel claim under that allegation for direct sex discrimination.

Sex discrimination – indirect

65 As we have noted, the complaint of indirect discrimination is based on allegation (c) only. In our judgment, that claim is plainly misguided and based on a misunderstanding of how indirect discrimination works. The Claimant fails to demonstrate any relevant 'provision, criterion or practice' or any group disadvantage affecting women or any personal disadvantage affecting her. The offer of the Lifestyle 260 Contract may, as the Claimant believes, be one which women take up in greater numbers than men. We do not know. Whether that is true or not, it does not begin to make out a claim for indirect discrimination.

Direct disability discrimination

66 The complaints of direct disability discrimination rest, as we have noted, on allegations (a), (d) and (e). We are satisfied that there is nothing in these claims. The Respondents did not treat the Claimant adversely because of either of her conditions. Nor is there any basis for supposing that they would have treated another employee in like circumstances but not affected by the medical conditions which she relies upon, any more favourably.

67 We refer to what we have already said about allegation (a). We are satisfied to a high standard that the delay in dealing with the flexible working request was nothing to do with the Claimant's health. It is, we think, a ground of reproach that the Respondents failed to give any thought to the possible impact upon her, given her vulnerability, of failing to deal promptly with the application. But that failure was certainly not 'because of' her state of health. We see no possible reason to think that it was. There is no evidential basis for such a theory.

68 As to (d), similar observations apply. It was inconsiderate of the Respondents to handle the proposed branch move in the way in which they did. Plainly, the better course would have been to canvass her views first. But we are entirely clear that they did not have any thought (conscious or subconscious) to her mental state and the only thought directed to her physical state was the feeling of Mr Heasman that a transfer to the Cheapside branch would place her in accommodation better suited to her physical needs (as he understood them). He may in hindsight reflect that sensitive management of staff requires more than

kindly paternalism. But the claim fails: there was no discrimination against the Claimant because of either of her conditions.

69 Turning to allegation (e), we find again no substance in the complaint of direct disability discrimination. The failure to dispose of the grievance process in a reasonable time was regrettable, but had nothing whatsoever to do with the Claimant's medical condition, mental or physical.

70 Disability discrimination may take a number of different forms. The only claim before us is of direct discrimination. For the reasons stated, it must be rejected because the 'because of' link to her medical conditions is not made out. On the contrary, we are satisfied that those conditions played no part whatsoever in the mental processes behind the acts or omissions on which her claims depend. In these circumstances, we think it unnecessary to decide whether the functional neurological disorder amounted to a disability.

71 For completeness, we should add two final points. First, in our view, the Claimant has not been materially disadvantaged in relation to disability discrimination by the fact that her case has been limited to a s13 claim for direct discrimination. We have mentioned that her email of 10 April could be seen as hinting at a complaint of discrimination arising from disability but had such a case been made, we would have rejected it on the basis that none of the treatment covered by allegations (a) to (e) had any connection with her medical conditions *or any consequence of those conditions*. Second, we have reached our conclusions without applying the burden of proof provisions because we have been able to reach clear findings on the evidence. But had we applied them, they would have led us to the same result.

Outcome

72 For the reasons stated, the claims succeed to the limited extent set out above.

73 The parties are strongly encouraged to resolve the modest remedy claims which result. If the Tribunal does not receive notice within 28 days that the remedy claims have been agreed, arrangements will be made to list a remedies hearing. The Claimant should obtain advice promptly so as to enable her to engage with the Respondents in a realistic dialogue aimed at settling what is left in this case. The Tribunal must not be told anything about such a dialogue, if it happens.

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EMPLOYMENT JUDGE SNELSON
28 Oct. 19

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Reasons entered in the Register and copies sent to the parties on 28 Oct. 19

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