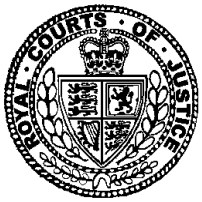

Neutral Citation Number: [2021] EWCA Civ 611

Case No: A2/2019/3118

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM:
THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Lavender

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LORD JUSTICE NEWEY

- -

Between :

COMMISSIONER OF THE CITY OF LONDON POLICE	**Appellant**
- and -	
CLAIRE GELDART	**Respondent**

- -
- -

Ms Louise Chudleigh (instructed by **the Comptroller and City Solicitor**) for the **Appellant**
Mr Douglas Leach (instructed by **Penningtons Manches Cooper LLP**) for the **Respondent**

Hearing dates: Thursday 14th and Friday 15th January 2021

- -

Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Claimant in these proceedings, who is the Respondent to this appeal, is a constable serving in the City of London police. The Respondent in the proceedings, the Appellant before us, is the Commissioner. I will refer to them as "the Claimant" and "the Commissioner" respectively. As a constable the Claimant is an office-holder, and she has no contract of employment with the Commissioner (or anyone else). Her remuneration and other terms of service are prescribed by the Police Regulations 2003 and by "determinations" made by the Home Secretary under powers conferred by those regulations: such determinations are published as Annexes to a Home Office Circular.

2. The Claimant was absent from duty on maternity leave from 18 December 2016 to 4 October 2017, a total of 41 weeks. During that period she received, in accordance with her terms of service, "Police Occupational Maternity Pay" ("OMP") equivalent to eighteen weeks' pay.[1] Thereafter she received a further sixteen weeks' statutory maternity pay.

3. The claim concerns an element in the Claimant's remuneration called "London Allowance" (not to be confused with "London Weighting"). It is her case that she was entitled to receive London Allowance in full during her absence on maternity leave. The Commissioner believed that she was only entitled to receive it to the same extent that she was entitled to OMP, and she was accordingly paid it in respect only of eighteen weeks. The total amount of her claim is £1,941.60, representing 23 weeks' unpaid allowance.

4. It would have been open to the Claimant to bring proceedings for the shortfall as an ordinary debt claim in the County Court. (She could not have brought an "unlawful deductions" claim in the Employment Tribunal under Part II of the Employment Rights Act 1996 because she is not a "worker" within the meaning of the Act.) Instead, however, she chose to bring proceedings in the Employment Tribunal under the Equality Act 2010, claiming that the underpayment in question constituted unlawful discrimination. She originally relied only on direct discrimination (under either section 13 or section 18 of the Act), but she subsequently sought permission to amend to rely in the alternative on indirect discrimination. We were not told why she chose to proceed under the 2010 Act rather than by a claim in debt; but one of the consequences of her doing so was that she could claim not only the unpaid sum but also compensation for injury to feelings caused by it having been withheld.

5. The claim was heard at London Central by a Tribunal comprising Employment Judge Snelson, Mrs M Pitfold and Mr J Carroll on 8 and 9 October 2018. By para. (1) of a Judgment with Reasons sent to the parties on 6 November the Tribunal held:

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[1] In fact she took advantage of an option (under paragraph 7 of "Annex L") to have the payment spread over 23 weeks – thirteen weeks at full pay and ten weeks at half pay – but that is an immaterial complication and for convenience I will in this judgment refer to her as having been paid only for the first eighteen weeks.

> "The Claimant's complaint of direct sex discrimination in respect of the non-payment or partial payment of London Allowance during her absence from duty on maternity leave is well-founded."

Para. (2) recorded that "all other claims" were dismissed: this is evidently a reference to the alternative indirect discrimination claim. She was awarded compensation for injury to feelings in the sum of £4,000.

6. The Commissioner appealed to the Employment Appeal Tribunal. The appeal was heard before Lavender J on 16 May 2019, together with a precautionary cross-appeal by the Claimant as regards the claim of indirect discrimination. By a judgment handed down on 29 November 2019 he dismissed the appeal: he did not find it necessary to consider the cross-appeal and made no explicit order in relation to it. The reason for the delay between the hearing and the eventual decision is that, as will appear below, Lavender J felt it necessary to invite further written submissions on one of the issues.

7. On 4 March 2020 Simler LJ granted the Commissioner permission to appeal against the decision of the EAT. On 23 June she granted the Claimant permission to raise the indirect discrimination claim by way of cross appeal.

8. The Commissioner has been represented before us by Ms Louise Chudleigh and the Claimant by Mr Douglas Leach, both of counsel. Both appeared in both tribunals below.

THE RELEVANT TERMS OF SERVICE

9. The Police Regulations 2003 comprise ten Parts. We are directly concerned only with Part 4, which is headed "Pay", and Part 6, which is headed "Allowances and Expenses", but I will have occasion to refer also to Part 5, "Leave" (which comprises only regulation 33).

PART 4: PAY

10. Part 4 comprises regulations 24-32. Regulation 24 (1) provides that, subject to the following regulations, "the pay of members of police forces shall be determined by the Secretary of State". The following regulations deal with various particular matters relating to pay. For our purposes the only relevant provisions are regulation 28, which gives the Secretary of State power to determine "pay during periods of sick leave taken in accordance with a determination made under regulation 33 (5)", and regulation 29, which provides that "[the] Secretary of State shall determine the entitlement of female members of police force to pay during periods of maternity leave". I need to summarise parts of the determinations made under each of those regulations.

11. The determination under regulation 24 is at Annex F to the Circular (headed "Pay"). It is divided into various Parts. Parts 2-8 prescribe basic pay for the various ranks of officer (that for constables being prescribed by Part 2). The other Parts deal with other aspects of pay, including (at Part 10) London Weighting.

12. The determination under regulation 28 is at Annex K. It provides for a member of a police force "who is absent on sick leave, in accordance with Regulation 33 (5)" to receive full pay for six months in any one-year period and half-pay for a further six months. I need not summarise the provisions of regulation 33 (5) or the determination made under it: they simply set out the regime governing sickness absence.

13. The determination under regulation 29 is at Annex L, which is headed "Maternity Pay". Paragraph 1 reads:

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

The "determination on maternity leave made under regulation 33" is at Annex R: it defines "maternity leave" as a period of fifteen months, the start date of which can be chosen by the officer within prescribed limits. Paragraph 5 provides for the amount of pay under the determination to be reduced by the amount of statutory maternity pay received.

14. Police pensions are calculated by reference to Pay under Part 4 (including London Weighting).

PART 6: ALLOWANCES AND EXPENSES

15. Part 6 comprises regulations 34-39. We are primarily concerned with regulation 34 ("Allowances"), which empowers the Secretary of State to determine "the entitlement of members of a police force to any allowance".

16. The determination made under regulation 34 is at Annex U. This provides for a number of allowances of very different characters including, at Part 3, "London Allowance". Sub-paragraph (c) reads:

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

The maximum rates are then prescribed by sub-paragraph (b). Sub-paragraph (c) provides that a member of either of the two London forces shall be entitled to receive the allowance during a period of disciplinary suspension. It was common ground before us that the purpose of London Allowance is accurately stated in para. 7.6.40 of the Final Report of Sir Thomas Winsor's *Independent Review of Police Officer and Staff Remuneration and Conditions* ("the Winsor Report"), which reads:

> "Officers in the City of London Police and Metropolitan Police are paid a London allowance in addition to London weighting. The London allowance is paid in order to recruit and retain officers in London, and is thus a reflection of labour market conditions (rather than cost of living) in London."

It is clear from that passage that London Allowance has a different purpose from London Weighting, which is reflected in its characterisation as an allowance under Part 6 rather than an element in "Pay" under Part 4. To anticipate, that is a distinction which the Commissioner overlooked when paying officers on maternity leave.

17. I should also note the terms of regulation 36, which reads:

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

THE ISSUES

18. The issues raised by the Commissioner's appeal can most conveniently be summarised as follows:

(A) On the true construction of the Terms of Service, was the Claimant entitled to receive London Allowance for the entirety of her maternity leave rather than only for the first eighteen weeks? This was referred to before us as "the 'contractual' claim" – "contractual" appearing in quotes in recognition of the fact that the Claimant's terms of service do not strictly derive from any contract. This is the subject of ground 1 of the Commissioner's appeal.

(B) If so, and subject to issue (C) below, does the Commissioner's failure to pay the full amount of London Allowance constitute unlawful (direct) discrimination? This is the subject of ground 3. I will refer to it as "the direct discrimination issue".

(C) Is the Commissioner disentitled to defend the claim of direct discrimination by reason of a concession said to have been made by him in the ET? I refer to this as "the concession issue". It is the subject of ground 2.

As a matter of strict logic, issue (C) precedes issue (B); but it is more convenient to take them in this order.

19. If the Commissioner loses on issue (A) but wins on issues (B) and (C), it will be necessary to consider the Claimant's cross-appeal raising her claim that the non-payment of London Allowance for the period in question constituted indirect discrimination. I need not identify at this stage the issues that arise under that claim.

20. In the ET and the EAT the Commissioner argued that the Claimant was not entitled to bring a direct discrimination claim in relation to London Allowance because under the scheme of the 2010 Act such a claim can only be brought under the distinct "equality of terms" provisions: see para. 38 below. Both the ET and the EAT rejected that argument, and it is not pursued before us. However, the equivalent argument is raised in the context of the indirect discrimination claim.

(A) THE "CONTRACTUAL" ISSUE

21. The foundation of the Claimant's case on this issue, as advanced by Mr Leach, is the clear distinction in the Regulations between "Pay", which is the subject of Part 4, and "Allowances and Expenses", which are the subject of Part 6. The regime governing pay during maternity leave which the Commissioner applied to her entitlement to London Allowance derives from regulation 29. Regulation 29 falls within Part 4, which proceeds on the basis that officers are only entitled to receive "pay" during periods of absence from duty to the extent that specific provision is made – as it is for sickness absence under regulation 28 and for maternity absence under regulation 29 itself[2]. But those provisions have no application to London Allowance, which is provided for in a determination made under Part 6 and is treated as an entitlement of a fundamentally different character from "pay" under Part 4. Sub-paragraph (a) under Part 3 of Annex U provides straightforwardly that officers in the two London forces "shall be paid a London allowance". The Claimant was throughout her maternity leave an officer in the City of London Police, and Mr Leach submitted that that was the only condition of entitlement.

22. Mr Leach contended that the fact that the entitlement to London Allowance arises under Part 6 rather than Part 4 is in no way anomalous. It reflects the fact that it has always been seen as a recruitment and retention payment, rather than as an element in remuneration reflecting any peculiar demands of police or the higher cost of living (which is separately recognised by London Weighting – see the passage from the Winsor report quoted at para. 16 above). The difference in character also results in it not being taken into account for pension purposes.

23. That case was accepted by the ET. At para. 20 of its Reasons it says:

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

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[2] I should say for completeness that pay during holiday – strictly, "annual leave" – is provided for by the separate mechanism of a provision that absence on annual leave may be "treated as a period of duty": see regulation 33 (10).

24. In the EAT Lavender J reached the same conclusion. Paras. 34 and 35 of his judgment read:

> "34. In my judgment, the meaning and effect of the relevant provisions of the Police Regulations and of the determinations made thereunder is clear. Paragraph 3(a) of Annex U provides that 'A member of the City of London … police force shall be paid a London allowance'. The Claimant was during her maternity leave a member of the City of London police force. She was entitled to be paid the London Allowance unless a provision of the Police Regulations or the determinations provided otherwise.
>
> 35. Regulation 29 and Annex L concern pay during maternity leave, but the Police Regulations draw a clear distinction between pay (governed by Part 4) and allowances (governed by Part 6), so regulation 29 did not affect the Claimant's entitlement to the London Allowance. As for the continuation of allowances during maternity leave:
>
> (1) As I have already noted, it is in the nature of an allowance such as the Unsocial Hours Allowance that it was not payable when an officer was not at work, but that was not the case with the London Allowance.
>
> (2) The premise for regulation 36 was that allowances were not treated in the same way as pay, but would continue to be paid during an officer's maternity leave unless that regulation provided otherwise.
>
> (3) It is no longer contended that regulation 36 applied to the London Allowance. Paragraph 3(a) of Annex U provides that the London Allowance is paid 'with regard to location and retention needs'. It follows that the London Allowance is not an allowance to which regulation 36 applies, since it is not 'an allowance to meet an expense', let alone 'an allowance to meet an expense which ceases during his or her absence from duty … on maternity leave'.
>
> (4) The Respondents identified no other regulation or determination which provided that the London Allowance would not be paid to an officer during her maternity leave."

25. Ms Chudleigh's argument that the ET and the EAT were wrong started from the proposition that London Allowance would naturally be described as part of the Claimant's pay, or remuneration, and that it was common ground that it would be so regarded for the purpose of domestic and EU equal pay law. From that basis she proceeded to the proposition that, as she put it in her skeleton argument, "it is an established principle of law that women are not entitled to receive full pay during maternity leave". She referred us to the decisions of the CJEU in *Gillespie Northern Health and Social Services Board,* C-342/93, [1996] ICR 498, and *Gassmayr v Bundesminister für Wissenschaft und Forschung,* C-194/08, [2011] 1 CMLR 175,

which are concerned with different aspects of the right to pay during maternity leave under EU law. She also referred us to section 71 of the Employment Rights Act 1996, which confers the statutory right to maternity leave. Subsection (4) preserves the right of a woman on maternity leave to the terms and conditions that would apply if she were not absent, but subsection (5) excludes "terms and conditions about remuneration", because, as she (rightly) submitted, remuneration during statutory maternity leave is provided for by the statutory maternity pay regime.

26. I do not see how either point assists the Commissioner. No doubt London Allowance will count as pay for some purposes, but the question in this case is whether it does so for the purpose of the 2003 Regulations, and more specifically so as to be subject to the limits on the right to maternity pay under regulation 28 and Annex L. And to point out that the right to maternity pay under EU law and at domestic law is limited says nothing about the extent of any right conferred by a worker's own (typically contractual) terms and conditions.

27. Apart from that point Ms Chudleigh had no answer to what I consider to be the cogent reasoning advanced by Mr Leach and accepted by both tribunals. I agree with them that on the natural reading of the Regulations and the relevant determinations London Allowance is payable during the entirety of maternity leave and does not fall to be treated in the same way as pay under Part 4; and, having regard to its particular nature and purpose, such a construction cannot be regarded as so contrary to "commercial common sense" as to require a strained construction.

28. In the course of oral submissions we raised with Mr Leach the question whether it was a consequence of his submission that an officer in one of the London forces who took a career break, which is another form of leave provided for under regulation 33 (see paragraph (12)), would be entitled to be paid London Allowance throughout what might be an absence of some years. We were shown the relevant determination, which is Annex OO. Paragraph (10) provides that during a career break the officer remains a member of his or her force for the purpose of the Regulations and determinations made under them "other than … the regulations and determinations … under Part 4 (Pay), Part 5 (Leave) and Part 6 (Allowances and Expenses)". The fact that the Secretary of State in this context makes express provision for the disapplication of provisions relating to allowances as well as pay reinforces my view that an officer who is absent on maternity leave should not lose her entitlement to any applicable allowance without similar express provision.

29. I should also mention for completeness that in the ET the Commissioner argued in the alternative that he was entitled to suspend payment of London Allowance under regulation 36 and should be treated as having done so. That argument was rejected by the ET and not pursued in the EAT (see para. 35 (3) of Lavender J's judgment) or (therefore) before us.

30. I would therefore dismiss ground 1 of the appeal.

(B) THE DIRECT DISCRIMINATION ISSUE

THE STATUTORY PROVISIONS

31. Part 5 of the 2010 Act proscribes discrimination in the field of "Work". Chapter 1 is headed "Employment etc". Section 39 is headed "Employees and applicants". Subsection (2) reads:

> "An employer (A) must not discriminate against an employee of A's (B) –
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment."

By section 42 (read with section 43) a police officer is treated as an employee of the "chief officer" of, in short, the force to which they are appointed.

32. "Discrimination" is defined under Chapter 2 ("Prohibited Conduct") of Part 2 of the Act. For the purpose of this part of the appeal, we are concerned primarily with section 13, but section 18 is also indirectly relevant.

33. Section 13 is headed "Direct Discrimination". I need only set out subsection (1), which reads:

> "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."

The "protected characteristics" are listed in section 4. They include "sex" and, separately, "pregnancy and maternity".

34. It will be observed that the definition in section 13 requires a comparison – B must be less favourably treated than "others". Section 23 (1) provides (so far as material):

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

35. Section 18 is headed "Pregnancy and Maternity Discrimination: work cases". It reads, so far as material:

> "(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 the protected period in relation to a pregnancy of hers, A treats her unfavourably —
>
> (a) because of the pregnancy, or
>
> (b) …

> (3) ….
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5) …
>
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
>
> (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
>
> (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
>
> (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
>
> (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
>
> (b) … ."

The references in subsections (4) and (6) to "ordinary and additional maternity leave" are to the statutory leave entitlement under the Maternity and Parental Leave etc Regulations 1999 (as amended). Those Regulations do not extend to office-holders such as police officers, although the rights under the Police Regulations are substantially similar.

36. It should be noted that section 18 requires only that the treatment complained of be "unfavourable", rather than, as in section 13, that it should be less favourable than that accorded to a comparator.

37. Both section 13 and section 18, and also section 23, substantially reproduce, despite differences of wording, the provisions of the Sex Discrimination Act 1975. The definition of "direct discrimination" in the 1975 Act was in section 1 (1) (a), the equivalent of section 23 (1) being section 5 (3). The predecessor of section 18 was section 3A, which was introduced by amendment with effect from 1 October 2005 (and was itself amended with effect from 6 April 2008). Although the predecessor provisions used the terminology of "on the ground of", rather than "because of", it is well-established that the two phrases connote the same test. Prior to the enactment of section 3A there had been no proscription of pregnancy and maternity discrimination as such, although, as will appear, it was to some extent at least subsumed within direct discrimination on the grounds of sex.

38. Chapter 3 ("Equality of Terms") of Part 5 of the Act contains a separate regime governing equality in terms of employment as between men and women. It substantially reproduces, though with much re-drafting, the provisions of the Equal Pay Act 1970. As noted at para. 20 above, there was an issue in the ET and the EAT about whether the direct discrimination claim should have been brought under those provisions, but that issue is not live before us.

EU LEGISLATION

39. For the purpose of the issue before us there is no need to refer to the underlying EU legislation. But in order to understand the case-law I should mention a few milestones in the history:

(1) Article 119 of the original EEC Treaty provided that member states should "maintain the application of the principle that men and women should receive equal pay for equal work".

(2) In 1975 the Council adopted the Equal Pay Directive (75/117/EEC), which re-stated the principle established by article 119 as "for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration".

(3) In 1976 the Council adopted the Equal Treatment Directive (76/207/EEC) which established the "the principle of equal treatment" – that is, "the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions" – which was directed at discrimination other than as regards pay.

(4) The first Directive concerned specifically with the position of "pregnant workers and workers who have recently given birth", the Pregnant Workers Directive (92/85/EEC), was adopted in 1992. This required member states, among other things, to provide for at least fourteen weeks maternity leave, protection from dismissal during that period, and a payment or allowance during maternity leave at least equivalent to sick pay entitlement.

(5) The Equal Pay and Equal Treatment Directives have since been replaced, but I need not give the details.

SEX DISCRIMINATION AND PREGNANCY/MATERNITY: THE CASE-LAW

40. In the period before the coming into force of the Pregnant Workers Directive the CJEU had to consider the extent to which article 119 and the Equal Pay and Equal Treatment Directives protected the positions of women who were pregnant or on maternity leave. I need not summarise the full case-law but I should mention a few key authorities.

41. In *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, C-177/88, [1992] ICR 325, the Court held that a decision not to recruit a woman because of the cost of funding her maternity absence constituted direct discrimination on the grounds of her sex, contrary to the Equal Treatment Directive. As the Court put it succinctly at para. 12 of its judgment:

> "… [O]nly women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy."

42. In *Handels og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening*, C-179/88, [1992] ICR 332, ("*Hertz*"), which was handed down on the same day as *Dekker*, it was held (see para. 15 of the Court's judgment) that "during the maternity leave accorded to her pursuant to national law, a woman is … protected against dismissal due to absence" – that is, that such dismissal would be contrary to the Equal Treatment Directive. But the Court made clear that that protection did not extend beyond the period of maternity leave fixed by national law, so that dismissal on account of a maternity-related illness would not be regarded as sex discrimination (see paras. 16-17).

43. In *Webb v EMO Air Cargo (UK) Ltd*, C-32/93, [1994] QB 718, the CJEU held that it would be a breach of the Equal Treatment Directive to dismiss a pregnant employee even in circumstances where she had been recruited to cover the maternity leave of a colleague with whom her own maternity absence would overlap. This was no more than the application, in rather stark circumstances, of what it had already decided in *Hertz*. As it said at para. 19 of its judgment, "the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex"; and, as it pointed out, such dismissal will typically be because of the worker's absence from work during maternity leave. The judgment also addresses a suggestion by the House of Lords in its decision making the reference ([1993] ICR 175) that maternity absence was not discriminatory on grounds of sex because the essential element was the employee's absence rather than the reason for it, and that it could be equated with sickness absence. At para. 25 it said:

> "Pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds … ."

When the case returned to the House of Lords ([1995] ICR 1021), Lord Keith, with whom the other members of the Appellate Committee agreed, said, at pp. 1026-7:

> "The reasoning in my speech in the earlier proceedings [1993] I.C.R. 175, 180–182 was to the effect that the relevant circumstance which existed in the present case and which should be taken to be present in the case of the hypothetical man was unavailability for work at the time when the worker was particularly required, and that the reason for the unavailability was not a relevant circumstance. So it was not relevant that the reason for the woman's unavailability was pregnancy, a condition which could not be present in a man. The ruling of the Court of Justice proceeds on an interpretation of the broad principles dealt with in articles 2(1) and 5(1) of Council Directive (76/207/E.E.C.). Sections 1(1)(a) and 5(3) of the Act of 1975 set out a more precise test of unlawful discrimination, and the problem is how to fit the terms of that test into the ruling. It seems to me that the only

> way of doing so is to hold that, in a case where a woman is engaged for an indefinite period, the fact that the reason why she will be temporarily unavailable for work at a time when to her knowledge her services will be particularly required is pregnancy is a circumstance relevant to her case, being a circumstance which could not be present in the case of the hypothetical man."

44. The authorities culminating in *Webb* establish that the dismissal of a worker, or the refusal of employment, because of current or anticipated pregnancy/maternity absence is to be treated as discrimination on the ground of her sex, without the need for the identification of a male comparator in materially the same circumstances. It is no answer to say that she would have been dismissed for the equivalent absence occasioned by something other than pregnancy/maternity, such as ill-health: the two situations are not comparable. I should note that there are several other decisions of the CJEU to the same effect – the only one to which we were specifically referred was *Brown v Rentokil Ltd* C-394/96, [1998] ICR 790 – but they simply reflect the working out of the principle in different situations.

45. Those cases are not, however, concerned with pay. In *Gillespie v Northern Health and Social Services Board*, to which I have already referred, the applicants were female health service employees who had taken maternity leave and received maternity pay in accordance with the applicable collective agreement. Their entitlements under the agreement were related to the amount of their pay at the time that they went on leave but did not take account of any pay increases taking effect after that date. They brought proceedings claiming that that failure constituted a breach of the principle of equal pay under article 119 and the Equal Pay Directive 1975 and/or of the requirements of the Equal Treatment Directive (which was directly applicable because they were employed by an emanation of the state). On a reference by the Northern Ireland Court of Appeal the CJEU held that the effect of article 119 and the Equal Treatment Directive was that it would be unlawful sex discrimination for a woman in receipt of maternity pay not to receive the benefit of any increases accruing during her absence. However, it made clear at para. 20 that:

> "… [A]t the material time neither Article 119 of the EEC Treaty nor Article 1 of Directive 75/117 required that women should continue to receive full pay during maternity leave. Nor did those provisions lay down any specific criteria for determining the amount of benefit to be paid to them during that period."

(The reference to "the material time" is because the Pregnant Workers Directive had not come into force at the time to which the claim referred.)[3] The Court also stated that the Equal Treatment Directive did not apply to pay (para. 24).

46. As will appear, some reliance was placed by the ET in this case on the decision of the EAT (Cox J presiding) in *Fletcher v NHS Pensions Agency* [2005] UKEAT 0424/04, [2005] ICR 1458. I am not sure that this takes matters much further, but I should

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[3] I should for completeness note that the Court went on to say that the amount payable during maternity leave under national legislation payable should not be "so low as to undermine the purpose of maternity leave"; but that point is not relevant to the issues in this case.

summarise its effect. The claimants were student midwives who were undertaking courses combining academic work with clinical placements and were in receipt of NHS-funded bursaries. The bursaries were stopped when they took maternity absence. For the purpose of the 1975 Act they did not constitute "workers" because they were undergoing vocational training, and the bursaries did not constitute pay – a point emphasised by Cox J at para. 54 of her judgment ("this case was not about pay"); but the EAT held that they fell within the scope of the Equal Treatment Directive. The respondent argued that the claimants were not being discriminated against because it applied a general policy of terminating the bursary of any student who was absent (save in the case absences for ill-health lasting no more than sixty days). The EAT rejected that argument. Cox J referred to the EU case-law summarised above (and three more recent cases) and said, at para. 65:

> "These cases establish that no male comparator is required in order to demonstrate sex discrimination. If the reason for the treatment is pregnancy then the detriment resulting, whatever it is, is unlawful sex discrimination even though other employees in the same circumstances are or would be treated in the same way. The same rule is being applied to different situations and is therefore discriminatory."

Applying that principle to the facts of the case, she said, at para. 76:

> "In our judgment, therefore, the law is clear; and the Tribunal erred in concluding that the Applicants were treated in exactly the same way as other vocational trainees, male or female, who were absent from the course and that there was no discrimination contrary to sections 1 and 14 of the [1975 Act]. Treating the Applicants, who were absent because of pregnancy or maternity, in the same way as other trainee midwives who were absent for other reasons (save for short-term sickness) does not constitute a defence to less favourable treatment. The relevant circumstances in section 5(3) of the [1975 Act] were different, because the Applicants were pregnant and other trainees were not. The same rule was being applied to different situations; and the policy imperative of reducing or eliminating disadvantaged pregnant women because of their protected status means therefore that it was discriminatory to withdraw from them the facility of the bursary payment. There is no necessity, on this analysis, for the Applicants to compare their treatment with the more favourable treatment of trainees absent for reasons of sickness in order to succeed in their complaints of sex discrimination."

HOW THE CASE WAS PLEADED

47. At para. 1 of her original Grounds of Complaint the Claimant pleaded:

> "The Claimant claims:
>
> a) discrimination contrary to section 18 (4) and section 39 (2) of the Equality Act 2010 ('the EA 2010') and/or
>
> b) direct sex discrimination contrary to section 13 of the EA 2010."

(Strictly, section 39 (2) should be mentioned in both alternatives, since Part 2 simply defines discrimination and other forms of prohibited conduct, and it is the relevant provisions of Parts 3-9 which actually prohibit them; but nothing turns on that.) However, in Further and Better Particulars served on 15 February 2018 she withdrew the claim based on section 18. That was because section 18 (4) only refers to employees exercising "ordinary and additional maternity leave" under the 1999 Regulations, which do not extend to police officers (see para. 35 above).[4] Thereafter the Claimant proceeded only under section 13.

48. The Claimant's case is that the non-payment of London Allowance in respect of the last 23 weeks of her maternity leave constituted less favourable treatment because of her sex within the meaning of section 13 (1) of a kind falling within section 39 (2). She says that the effect of the authorities discussed at paras. 41-44 above, and in particular *Webb v EMO*, is that she does not need to identify a male comparator.

49. I should note how the Commissioner pleaded his response to the direct discrimination claim at paras. 26-27 of the Grounds of Resistance attached to his ET3. These read:

> "26. It is not agreed that no comparator is required. For claims under s.13 a comparator is always required – see s. 23 EqA.
>
> 27. Accordingly, it is relevant that a man absent from work would also receive the same treatment. There was no less favourable treatment than any actual or hypothetical comparator would receive. Further, the causative factor in the reduction and suspension[5] of London Allowance was absence from work, not any protected characteristic."

It is apparent that two points are being pleaded there – first, that the Claimant had to identify a male comparator who would be treated differently; and secondly (see the final sentence of para. 27) that London Allowance was withheld because she was absent, not because of her sex.

THE DECISION OF THE ET

50. The ET dealt with the issues before it under six headings. The first addressed the "contractual" claim. The second considered whether the Claimant should have brought her claim under Chapter 3. That is not an issue before us, and I say no more about it. The substance of the direct discrimination claim is succinctly addressed under issues (3), which the ET identified as "Is a comparator required?", and (4) – "Was the treatment complained of 'because of' sex?". I take them in turn.

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[4] The problem would have been the same even if she had sought to rely on subsection (2) (which arguably might have been more apt), because by virtue of subsection (6) the protected period in the Claimant's case only lasted two weeks from when she gave birth, and her claim only arose later.

[5] The reference to "reduction" of London Allowance is to the fact that the Claimant elected to have her maternity pay for weeks 14-18 paid at half-rate over ten weeks: see n. 1.

51. As to issue (3), it was Ms Chudleigh's submission that the introduction of a separate proscription of pregnancy and maternity discrimination, initially by section 3A of the 1975 Act and now in section 18 of the 2010 Act, meant that it was no longer necessary to give the definition of direct sex discrimination the extended meaning adopted in *Webb v EMO*; and that accordingly the claim must fail for want of a male comparator in the same circumstances. The Tribunal rejected that submission. At para. 26 of the Reasons it said:

> "… To state the obvious, the *Webb* principle applied before the 2010 Act and the logic of Ms Chudleigh's argument, that the 2010 Act abolished it save where the claim falls under s18, is, to our minds, clearly untenable. A Parliamentary intention to *diminish* protection of women against pregnancy and maternity discrimination is nowhere signalled in the Act, which was designed largely to consolidate and simplify the anti-discrimination code which had built up over more than three decades. The consolidation involved adopting principles derived from domestic and Community jurisprudence, such as the *Webb* line of authority. No comparator is required."

52. As to issue (4), all that the Tribunal found it necessary to say, at para. 27, was:

> "Here again, the case is, we think, clear. It is common ground that the Claimant was treated as she was because she was on maternity leave. Following *Webb* and *Fletcher* it is inescapable that the treatment was 'because of' sex. Ms Chudleigh did not contend that, if she lost on issue (3), the Respondent had any answer to the direct discrimination claim."

Ms Chudleigh says that that paragraph does not fairly reflect her submissions. I return to this as part of issue (C).

53. Since the Tribunal refers in para. 27 to *Webb v EMO* and *Fletcher*, I should note what it had said about them at para. 19 of the Reasons, as part of its exposition of the legal framework:

> "It is trite law that discrimination based on pregnancy or maternity is inherently sex discrimination (see *Webb-v-EMO Air Cargo (UK) Ltd* … and the long line of authority which followed it). In *Fletcher-v-Blackpool Fylde & Wyre Hospitals NHS Trust* … it was held that a complaint of sex discrimination by a pregnant woman cannot be defended on the ground that all employees are treated in the same way. Treating pregnant women or women on maternity leave during the 'protected period' in the same way as other employees, in circumstances in which they are disadvantaged because of their pregnancy or maternity, is applying the same treatment to different situations and is therefore discrimination."

54. For completeness, I should record that the fifth issue concerned a limitation point which is no longer live and that the sixth concerned the quantum of the award for injury to feelings.

THE DECISION OF THE EAT

55. The Commissioner appealed to the EAT on four grounds. Grounds 1 and 2 concerned the "contractual claim", with which I have already dealt. Ground 3 raised the issue about whether the claim should have been brought under Chapter 3 of Part 5. Ground 4 was headed "Failing to find that a comparator is required for claims under s. 13 EqA". That corresponds to issue (3) in the ET. Lavender J addressed it at paras. 92-93 of his judgment and upheld the reasoning of the ET. For reasons which will appear I need not give the whole passage, but I should quote para. 93, which reads:

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

56. It will be seen that none of the Commissioner's grounds of appeal to the EAT explicitly challenged the ET's conclusion on issue (4) – "Was the treatment complained of 'because of' sex?". However Ms Chudleigh's skeleton argument did appear to contain such a challenge. Lavender J was evidently troubled by this question. Following the hearing he wrote to the parties asking for further submissions on this aspect, mentioning in particular the decision of the EAT in *Interserve FM Ltd v Tuleikyte*, to which I refer below. In the end, however, having considered both parties' submissions, he did not consider the question because he decided that in order to challenge the ET's reasons on issue (4) the Commissioner needed permission to amend the grounds of appeal, which he was not prepared to grant. I deal under issue (C) with whether he was right to take that course.

DISCUSSION AND CONCLUSION

57. Conventionally the definition of "direct discrimination" in section 13 (1) of the 2010 Act is analysed as comprising two elements – (1) whether the claimant received less favourable treatment than the appropriate comparator (the "less favourable treatment" issue) and (2) whether the less favourable treatment was because of the relevant protected characteristic (the "reason why" issue). However, it has long been recognised that these are two aspects of what is essentially a single question. The *locus classicus* is paras. 7-11 of the speech of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337. At para. 8, having identified those two questions, he says:

> "No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

Lord Nicholls goes on at para. 11 to point out that "tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was". I propose to take that course here.

58. The correct approach to the reason why issue is also well-established. The most authoritative statement is in para. 64 of the judgment of Lady Hale in *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728, ("the *Jewish Free School* case"). The ultimate question is "what caused the treatment in question?". But, as Lord Nicholls observed at para. 29 of his speech in *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065, "causation is a slippery word". Answering the causation question in this context may involve two different kinds of inquiry. In a straightforward case the putative discriminator will have overtly applied a criterion based on the protected characteristic. But in other cases, although the ostensible criterion is something else, the putative discriminator may still have been influenced in his or her decision by the proscribed factor, consciously or unconsciously: in such a case it is necessary to examine their mental processes to establish what caused them to act as they did. In the jargon of discrimination lawyers the former are sometimes described as "criterion cases" and the latter as "motivation" cases[6]. The distinction is not black-and-white, but it is a useful working tool.

59. As a matter of simple fact, the reason why the Claimant did not receive London Allowance in respect of the 23 weeks in question is straightforward and not in dispute. It was because the Commissioner wrongly understood it to be, for the purpose of the Regulations[7], a form of pay governed by the principles applicable to "Pay" under Part 4, and thus not payable in respect of any period of absence from duty save as expressly provided for (which it was for the first eighteen weeks but not thereafter): see para. 21 above. In fact it appears from the witness statement of the Assistant HR Director for the City of London Police, Kelly Harris, that she assumed that London Allowance was to be treated in the same way as London Weighting; but that is simply a more specific way of saying that she treated it as a form of pay.

60. The real issue, however, is how that reason is to be characterised in law. Mr Leach submits that it should be characterised as "maternity absence", and thus, on the basis of *Webb v EMO*, as being because of the Claimant's sex. Ms Chudleigh (consistently with para. 27 of the Grounds of Resistance) submits that it should be characterised simply as "absence", the particular reason for the absence being immaterial.

61. In my view Ms Chudleigh's characterisation is correct. On the Commissioner's understanding that London Allowance was a form of pay, the basic rule under the Regulations (as in most employment situations) is that pay is only due if the employee is ready and willing to work, subject to special provision for certain kinds of absence/unavailability: see para. 59 above. Thus the reason why she was not paid except for the first eighteen weeks was, simply, that she was unavailable for work:

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6 The terminology is not ideal because of the risk of confusion between "motivation" and "motive": see paras. 69-70 of my judgment in *Page v Lord Chancellor* [2021] EWCA Civ 254, [2021] IRLR 377. But no-one has yet come up with a better label.

7 I say "for the purpose of the Regulations" because for other purposes the London Allowance may constitute "pay": see paras. 25-26 above and para. 89 (3) below.

that was the "criterion" which produced the non-payment.[8] The absence in question happened to be because of maternity, and to that extent the Claimant's sex was part of the cause of the non-payment, but "but for" causation of that kind is not determinative: see para. 37 of my judgment in *Amnesty International v Ahmed* [2009] UKEAT 0447/08, [2009] ICR 1450. The only difference that the Claimant's maternity made was that the Commissioner did, consistently with his misunderstanding that London Allowance fell to be treated as pay, pay it as part of OMP for the first eighteen weeks. Another way of putting it is that her maternity was the reason why London Allowance was paid for that period, but it was not – which is what matters – the reason why it ceased to be paid thereafter.

62. That approach, identifying "absence" rather than "maternity absence" as the relevant reason, echoes Lord Keith's initial analysis in *Webb v EMO*, which of course he had to abandon as a result of the decision of the CJEU: see para. 43 above. But *Webb v EMO*, together with *Dekker* and *Hertz*, which it followed, are cases of a different kind. They were not concerned with pay but with dismissal. That is a fundamental distinction. It is one thing to proscribe the dismissal, or other adverse treatment, of a woman for being absent as a result of pregnancy/maternity; but it is quite another to require that she be paid during a period of pregnancy/maternity absence. The scheme of both the domestic and the EU legislation is that a woman should receive "maternity pay" on a prescribed basis for a prescribed period; but the whole premise of the scheme is that that is required because she would not otherwise be entitled to be paid since she is not available for work. That is stated explicitly by the CJEU in *Gillespie*: see para. 45 above. It is plainly not sex discrimination not to pay a female employee who is absent on maternity leave more than the amount of maternity pay to which she is entitled during the prescribed period, nor, if she remains absent beyond that period, not to pay her at all.

63. Although we are not bound by *Fletcher* my analysis is not inconsistent with the reasoning of the EAT in that case. As noted at para. 46 above, Cox J went out of her way to emphasise that that case was about unequal treatment and not about pay.

64. It is true that the Commissioner's belief that the London Allowance fell to be treated as "pay" under the Regulations was mistaken. But that does not affect the analysis of the reason why he did not pay it after the first eighteen weeks. The focus must be on the criterion that he applied, rightly or wrongly.

65. On the basis of that conclusion, the direct discrimination claim fails whether or not the Claimant was obliged to identify a comparator: she loses straightforwardly on the basis that the treatment complained of was not because of her sex (or, applying *Webb v EMO*, because of her maternity absence). But in fact, as Lord Nicholls says in *Shamoon*, that finding also necessarily answers the less favourable treatment question: on the Commissioner's (mis)understanding that London Allowance fell to be treated as a form of pay, it would not have been paid to a man who was unavailable for work for 23 weeks in circumstances not covered by any express provision.

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[8] I should say that it was not suggested that this is a case of Lady Hale's second kind, where the Commissioner was "motivated" by some conscious or unconscious prejudice against women or against officers who took maternity leave.

66. One way that Ms Chudleigh put her case was to submit that the Commissioner would not have paid London Allowance to a man who remained absent because of illness following the expiry of his sick pay entitlement. That is correct as a matter of fact, and it illustrates the fundamental point that officers who are not available for work are not entitled to be paid without special provision. But it is not itself the point: long-term maternity leave and long-term sickness cannot be equated and indeed attract different entitlements.

67. I should say something more about the relationship between the ET's issues (3) and (4), because it is relevant to issue (C) on this appeal. Although I can understand why the ET took them separately, they are in fact intertwined in a similar way to the two issues defined in *Shamoon*. If it were correct to characterise the reason for the non-payment of London Allowance as "maternity" or "maternity absence" then it would indeed appear to follow from *Webb v EMO*, as the ET held on issue (3), that it was unnecessary to identify a male comparator in the same circumstances. If, however, as I would hold, the reason is simply "absence", then *Webb v EMO* does not apply and the ET's finding on issue (3) was wrong. As Mr Leach accepted, the ET made life difficult for itself by addressing issue (3) before issue (4).

68. On this analysis the argument which Ms Chudleigh advanced in the ET to the effect that *Webb v EMO* had been rendered redundant by the enactment of section 3A of the 1975 Act falls away. It is referred to in the grounds of appeal and Ms Chudleigh's skeleton argument, but it did not feature in her oral submissions, and I need not address it, save to say that I am not surprised that the ET and EAT found it unconvincing.

69. Ms Chudleigh referred us to three other authorities in connection with the direct discrimination issue. None of them seems to me to go to the heart of the matter, but I should address them.

70. In *Madarassy v Nomura International Plc* [2007] EWCA Civ 33, [2007] ICR 867, the claimant was made redundant following her return from maternity leave. She claimed, *inter alia*, that she was selected for redundancy for reasons connected with her pregnancy or her absence on maternity leave (exactly how the case was put is not clear from the judgment). The ET dismissed that claim. Part of its reasoning was that a man in the same circumstances would have been treated in the same way. The claimant submitted, relying on *Webb v EMO*, that that was an error of law because in a case of alleged pregnancy/maternity discrimination there was no need for a male comparator. This Court rejected that submission. Mummery LJ, with whom Laws and Maurice Kay LJJ agreed, said, at paras. 118-119 of his judgment:

> "118. The submission that a hypothetical male comparator is always irrelevant in cases of alleged pregnancy discrimination is incorrect. The mere fact that a tribunal compared Ms Madarassy's treatment with that of a hypothetical male comparator does not disclose an error of law in this case. It is necessary to take account of the factual nature of the particular allegation. As is clear, for example, from *Webb v. EMO* there is no place for a hypothetical male comparator in the case of dismissal of a female employee for becoming or being pregnant.

> 119. It does not follow, however, that it is wrong for an employment tribunal to make a comparison with a hypothetical male comparator for the purpose of determining whether pregnancy or some other reason was the ground for the particular treatment of a pregnant female employee. As explained earlier[9], two routes are open to the tribunal and both of them are legitimate. The first route is to identify the attributes of a hypothetical comparator. The second is to go straight to the question why the complainant was treated as she was. There was no error of law on taking the first route of the hypothetical comparator."

Ms Chudleigh submitted that that supported her case. It may do, but the reasoning is rather compressed, and I prefer not to put it at the centre of my own reasoning.

71. In *Lyons v DWP Jobcentre Plus* [2014] UKEAT 0348/13, [2014] ICR 668, the claimant suffered severe post-natal depression. She was eventually dismissed some time after the expiry of both her maternity leave and an agreed period of annual leave. The ET dismissed her claim of pregnancy/maternity discrimination under section 18 of the 2010 Act because the dismissal had occurred after the end of the protected period. It also dismissed a claim under section 13. The EAT (Cox J presiding) dismissed her appeal. As regards the section 18 claim it, in effect, followed *Hertz* in holding that outside the protected period dismissal for a maternity-related illness was not to be regarded as discrimination on the ground of the employee's sex. Although Ms Chudleigh sought to draw some support from Cox J's reasoning it is not in my view sufficiently close to any of the issues before us to be useful.

72. Finally, in *Interserve FM Ltd v Tuleikyte* [2017] UKEAT 0267/16, [2017] IRLR 615, the employer had a policy of automatically treating employees who had not received any pay for the last three months as "leavers", which meant that they were sent P45s. The claimant took maternity leave but her earnings were too low to entitle her to statutory maternity pay. The policy was accordingly applied in her case at the conclusion of the three months. It appears that this did not ultimately result in her being dismissed, but it nevertheless had various adverse consequences. The ET found that the "automatic consequence of applying this approach was to treat the Claimant unfavourably because she was absent on maternity leave" (see para. 8 of the judgment of the EAT), and accordingly constituted discrimination under section 18 (3) of the 2010 Act. The EAT allowed the employer's appeal. Simler P held – plainly correctly – that the correct approach to the question whether the treatment complained of was "because of" the proscribed factor was the same in the context of section 18 as in that of section 13, and she referred at para. 15 of her judgment to para. 64 of the judgment of Lady Hale in the *Jewish Free School* case[10]. At paras. 19-20 she observed that "the

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9 This appears to be a reference to the "reason why" and "less favourable treatment" issues: see paras. 80-81 of Mummery LJ's judgment, which refer to *Shamoon*.

10 In passing, I would note that at para. 15 Simler P refers to the two kinds of discrimination identified by Lady Hale as "criterion cases" and "reasons why cases". Terminology in this area is treacherous, and with respect I think that that way of putting it may cause confusion. It is more usual to use the phrase "the reason why" to refer to the overall issue of whether the treatment complained of was "because of" the protected characteristic rather than to what I have called "motivation cases".

mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination", referring both to the general analysis of "but for" causation in *Amnesty v Ahmed* (above) and more particularly to the maternity leave cases of *Hair Division Ltd v Macmillan* [2012] UKEAT 0033/12, [2013] EqLR 18, and *Sefton Borough Council v Wainwright* [2014] UKEAT 0168/14, [2015] IRLR 90. She held that the claimant had plainly not been treated in the way that she was because of any "criterion" applying specifically to women on maternity leave: the policy applied to anyone absent unpaid for three months. The only way that direct discrimination could be established was if it could be shown that the mental processes of the manager in question had been significantly influenced, consciously or unconsciously, by the claimant being on maternity leave, in other words that this was (in my shorthand) a "motivation case": see para. 28. The case was remitted to the ET for consideration of that issue. The decision is not on all fours with the present case. However, I agree with Ms Chudleigh that it has some relevance. It is another case where the correct characterisation of the reason for the treatment complained of was not the claimant's maternity absence but simply her absence (coupled with her non-receipt of any pay).

73. For those reasons, I would hold that the ET was wrong to find at para. 27 of the Reasons that the non-payment of London Allowance for the final 23 weeks of the Claimant's maternity absence was because of her sex. I would accordingly, subject to issue (C), allow ground 3 of the appeal.

(C) THE CONCESSION ISSUE

74. It was the Claimant's case in Mr Leach's skeleton argument that ground 3 of the appeal is not open to the Commissioner because:

(a) the ET proceeded on the basis that the only issue as regards the direct discrimination claim was whether the Claimant was obliged to identify a male comparator, i.e. issue (3), and that, if she did not, it was "common ground that the Claimant was treated as she was because she was on maternity leave" and that "Ms Chudleigh did not contend that … the Respondent had any [other] answer to the direct discrimination claim" – in short that the point had been conceded: see para. 27 of the Reasons (para. 52 above); and

(b) the Commissioner had not challenged that aspect of the ET's reasoning in its grounds of appeal in the EAT and Lavender J made no error of law in refusing to allow such a challenge to be advanced (para. 56 above).

In his oral submissions Mr Leach (who argued the Claimant's case with conspicuous ability) did not formally abandon either point but he acknowledged that there were difficulties about the ET's approach and said that he was not attempting to exclude ground 3 (i.e. issue (B)). But I still need to decide whether the approach of the EAT was wrong.

75. I start with the basis on which the ET proceeded. I do not believe that Ms Chudleigh made the concession which the ET attributes to her at para. 27 of the Reasons. She told us that the ET must either have misunderstood her submissions or expressed itself wrongly. Its statement that it was common ground that the Claimant was treated as she was "because she was on maternity leave" blurred the essential issue. There was

indeed no dispute that London Allowance was withheld because she was absent from work, and as a matter of fact the reason why she was absent from work was because she was on maternity leave. But that did not mean that as a matter of law she was not paid because she was on maternity leave: see paras. 59-64 above. As to that, it had always been part of the Commissioner's case in the ET, as before us, that the correct characterisation of the reason for non-payment was simply that she was absent from work. Ms Chudleigh referred us to the terms of the Grounds of Resistance, quoted at para. 49 above: it is quite clear from the final sentence of para. 27 (starting "Further …") that the Commissioner was not simply taking the point about the need for a comparator – the ET's "issue (3)" – but was contending, separately, that the non-payment of London Allowance was because the Claimant was absent – i.e. "issue (4)". It is extremely unlikely that Ms Chudleigh would have abandoned that aspect of her case, and Mr Leach very fairly accepted that she did not do so explicitly.

76. It is in my view much more likely that the ET misunderstood the Commissioner's case. It looks to me as if it regarded the crucial "reason why" question, issue (4), as depending on the outcome of the comparator issue, issue (3), rather than the other way round. It is impossible to retrieve now exactly how the misunderstanding arose, and it may be that the responsibility is as much that of counsel as of the ET: the fact that the Commissioner did not in his grounds of appeal challenge para. 27 of the ET's Reasons suggests that Ms Chudleigh may herself have believed that her "reason why" ground could be dealt as part of "issue (3)". But, however it came about, I have no doubt that para. 27 of the ET's Reasons does not correctly reflect her position.

77. Turning to Lavender J's refusal to allow the position to be corrected, he was right to hold that the Commissioner required permission to amend the grounds of appeal in order to challenge para. 27 of the ET's Reasons. Ms Chudleigh in her post-hearing submissions in the EAT sought permission to add the following ground:

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

I am not sure that that is the best encapsulation of the point, but it was clearly sufficient to raise the "reason why" question.

78. Lavender J gave his reasons for refusing permission at para. 69 of his judgment, as follows:

> "The proposed amendment does not address the question whether the Employment Tribunal was right to state that there was common ground between the parties, nor is it supported by any evidence as to what happened in the hearing before the Employment Tribunal. I recognise that paragraph 27 dealt very briefly with what is the fundamental question in a direct discrimination case, namely what

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

79. I do not believe that those reasons justified refusing the Commissioner permission to argue what Lavender J himself describes as "the fundamental question in a direct discrimination case", which was clearly in issue on the original pleadings. I do not believe that it was necessary for the Commissioner to adduce evidence about the hearing in the ET in order to establish that there had been a misunderstanding of some kind. It is perhaps unfortunate that the question arose only in post-hearing submissions: I suspect that if it had been explored with both counsel in the course of the hearing, as it was before us, it would have become adequately clear that something had gone wrong. As regards the last two sentences in the passage quoted, I do not believe that the resolution of the direct discrimination issue required findings of fact about why London Allowance was withheld. The factual cause is adequately clear (see para. 59 above): what matters is how it should be characterised in law.

80. I would accordingly allow ground 2.

THE CROSS-APPEAL: INDIRECT DISCRIMINATION

81. I should first consider a preliminary point raised by Ms Chudleigh. The indirect discrimination claim is raised by way of cross-appeal in the Claimant's Respondent's Notice. Ms Chudleigh submitted that we had no jurisdiction to entertain a cross-appeal because neither the ET nor the EAT had made any order from which the Claimant could appeal. I do not accept that submission. The ET did in fact expressly dismiss the indirect discrimination claim, albeit in rather opaque terms (see para. 5 above); and the Claimant cross-appealed against that order in her Respondent's Answer in the EAT. It is true that the formal order of the EAT says nothing about the cross-appeal, but at para. 94 of his judgment Lavender J says in terms that he will not address it, and I have no doubt that as a matter of substance the EAT should be treated as having dismissed it.

82. The issues raised by the indirect discrimination claim fall, broadly, under three heads:

(1) whether the indirect discrimination claim is out of time;

(2) whether it is debarred by section 71 of the 2010 Act; and

(3) whether it is well-founded in substance.

83. In circumstances where neither the ET nor the EAT has considered those issues at all it would not be right for us to decide them unless they turn on a pure point of law or, to the extent that they involve issues of fact or evaluation, there is only one conclusion to which the ET could properly have come: the same principles apply as in *Jafri v Lincoln College* [2014] EWCA Civ 449, [2014] ICR 920. On that basis, I do not believe that we can decide the first and third issues and the only proper course is to remit them to the ET. I should briefly explain why.

84. As to the time point, this arises because the indirect discrimination claim was first raised by way of amendment after the expiry of the primary time limit under section 123 (1) (a) of the 2010 Act (even as extended by section 140B). Permission to amend was granted on the basis that it remained open to the Commissioner to take the time point at the hearing.[11] I think that that means that the ET would be considering the point in the context of an application for permission to amend, applying the principles most recently expounded in paras. 47-50 of my judgment in *Abercrombie v AGA Rangemaster Ltd* [2013] EWCA Civ 1148, [2014] ICR 209. But even if it were to be treated as an application for an extension of the primary time limit under section 123 (1) (b), the nature of the exercise would be much the same. In either case, what would be required would be an exercise of the Tribunal's discretion. I am prepared to say that in my view the Claimant has on the face of it a reasonable case for the grant of permission, but I cannot say that the question is so open-and-shut that the decision ought to be taken by this Court.

85. As to the substantive claim, Mr Leach sought to persuade us that a finding of indirect discrimination was inevitable on the basis of the facts already found, or which were undisputed on the evidence or as to which common-sense inferences could be drawn. I am not persuaded. Cases of indirect discrimination require careful findings of fact. Here the ET made no findings directed to the relevant issues, and even the written evidence and submissions which we have seen touched on the indirect discrimination pretty lightly: it was, as Ms Chudleigh put it, not regarded as the main battleground. This Court should be very cautious about making assumptions that may seem plausible but which have not been considered by the fact-finding tribunal.

86. I turn to the one issue which I believe that we can properly decide, which concerns the effect of section 71 of the Act. As noted above, Chapter 3 of Part 5, which comprises sections 64-80, contains a separate regime governing equality in "terms of work" as between men and women. The central concepts are:

    (a) that the terms of every employee's work shall contain a "sex equality clause", as defined in section 66 (read with section 79), which (broadly) requires employers to afford equal terms to men and women doing equal work – it is important to note that in this context an actual comparator is required; and

    (b) that the employer shall have a "material factor defence", as provided for in section 68, by which "[t]he sex equality clause … has no effect" if it shows that the difference complained of is because of a non-discriminatory "factor".

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[11] The relevant order of the ET does not make that clear, but it was common ground before us that that was the intention.

"Terms of work" are defined in section 80 (2) (b) so as to cover the terms of appointment to a public office and would accordingly include the terms applicable to police officers under the Regulations.

87. The broad scheme of Part 5 is that the rights conferred by Chapter 2 and Chapter 3 are mutually exclusive, and thus that a complaint about terms of work which discriminate between men and women can only be brought under the latter; but the demarcation lines are drawn in rather elaborate terms. They are primarily to be found in sections 70 and 71. In this case we are concerned only with section 71, which reads (so far as material):

> "(1) This section applies in relation to a term of a person's work –
>
> (a) that relates to pay, but
>
> (b) in relation to which a sex equality clause … has no effect.
>
> (2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 … ."

The "relevant sex discrimination provision (as defined by section 70)" is for our purposes section 39 (2), which I set out at para. 31 above.

88. The Commissioner contends that the Claimant's indirect discrimination claim is excluded by section 71. In her skeleton argument Ms Chudleigh says that the effect of the section is that section 39 (2), which is the basis of the claim (see para. 47 above), "has no effect in relation to a claim about contractual pay" save in so far as it constitutes *direct* discrimination under section 13.

89. The drafting of section 71 is rather opaque and needs some unpacking. I would analyse it as follows:

(1) The operative words are in subsection (2), which (ignoring the exception) deprive section 39 (2) of effect "in relation to" a term of the kind defined in subsection (1).

(2) A term falls within subsection (1) if it is a term of the claimant's work, i.e. a contractual term or the equivalent (see para. 86 above) – I will say "contractual term" for short – (a) which relates to pay and (b) in relation to which the sex equality clause "has no effect". I take (a) and (b) in turn.

(3) As to (a), this seems fairly straightforward. A contractual term that relates to pay must mean a term which defines the employee's rights as regards pay. There is no definition of what constitutes "pay", and no doubt there may be some problematic cases at the margins, but no issue was raised before us as to whether London Allowance constituted pay in this context.

(4) As to (b), it is not immediately obvious in what (relevant) circumstances the sex equality clause would have "no effect" in relation to a term which defines pay. As noted above, section 69 provides that the sex equality clause will have no

effect where the material factor defence is proved, but in such a case it is hard to see what purpose subsection (2) would serve. However, paras. 245-246 of the Explanatory Notes to the Act say that one possible situation is where "there is no comparator doing equal work with whom a claimant can compare his or her pay or other terms" and give as an example a case where an employer tells a female employee "I would pay you more if you were a man" but there is no actual man doing equal work. In *BMC Software Ltd v Shaikh* [2017] UKEAT 0092/16, [2017] IRLR 1074, the EAT (Judge Hand QC) accepted that that must be the kind of case at which section 71 is directed (see paras. 75-76 of his judgment), and I agree.

(5) In a case where the term in question satisfies both (a) and (b) the effect of subsection (2) is that section 39 (2) has no effect in relation to it except to the extent that the treatment complained of constitutes direct sex discrimination.

In summary, therefore, the effect of section 71 is to allow an employee who is unable to rely on an actual comparator of the opposite sex to bring a claim of direct, but not indirect, discrimination in relation to a term which defines their rights as regards pay.

90. I do not believe that section 71 has any application to the present case. Specifically, I do not accept that the Claimant's claim involves reliance on the particular kind of discrimination with which section 71 is concerned. As Mr Leach pointed out, her claim is not that she has been discriminated against "as to [her] terms of employment" within the meaning of section 39 (2) (a): those terms afford her the same rights to London Allowance as a man. Rather, her claim is that the Commissioner has discriminated against her by failing to accord her her "contractual" rights – that is, by acting in breach of them. As a matter of formal analysis, the relevant head of section 39 (2) is (d) – "subjecting [her] to any other detriment".

DISPOSAL

91. I would dismiss the appeal on ground 1 but allow it on grounds 2 and 3. That means that the Claimant was entitled under the Regulations to receive London Allowance throughout the period of her maternity absence, but that its non-payment did not constitute direct sex discrimination and that she should not have been awarded compensation on that basis, either as regards the shortfall or for injury to feelings. Whether she may yet be entitled to such compensation depends on the outcome of the indirect discrimination claim.

92. As to that, I would allow the cross-appeal and remit the indirect discrimination claim to the ET to decide, in the first place, whether the Claimant is entitled to pursue the claim at all and, if so, whether, it is well-founded. However, I would strongly urge the parties to consider whether they cannot reach a compromise in this regard. The issue of principle about the payability of London Allowance during maternity absence has been decided. The amount at stake in the discrimination claim seems disproportionate to the costs that the parties would inevitably incur in fighting it.

Baker LJ:

93. I agree.

Newey LJ:

94. I also agree.

ORDER

UPON the Court of Appeal hearing counsel for the Appellant and counsel for the Respondent on 14th and 15th January 2021

AND UPON judgment being reserved and handed down on 28th April 2021

IT IS HEREBY ORDERED THAT

1. The appeal be allowed on grounds 2 and 3 only; the Order of the Employment Appeal Tribunal dated 10th December 2019 and the Order of the Employment Tribunal sent to the parties on 6th November 2018 be set aside; and the Respondent's claim of direct sex discrimination be dismissed.

2. The Respondent's cross-appeal be allowed and her claim of indirect sex discrimination (including the Appellant's objection that it is out of time) be remitted to the London Central Employment Tribunal, to be heard by the same constitution unless the Regional Employment Judge determines that that is not reasonably practicable.

3. There be no order as to costs.

4. Permission for the Respondent to appeal to the Supreme Court be refused.