THE INDUSTRIAL TRIBUNALS

CASE REF: 1147/15

CLAIMANT: **Carol Bridget Veronica Molyneaux**

RESPONDENTS: **1. Department of Agriculture, Environment and Rural Affairs**
2. Department of Finance

Certificate of Correction

Please note the following corrections to the Decision issued on *26 October 2016*:-

(i) Paragraph (iii) on page 28 should contain the sentence:

> "The tribunal is therefore not satisfied, taking into account any additional relevant factors referred to in 6(2) above, that time should be extended on a just and equitable basis in either of these claims."

and not:-

> "The tribunal is therefore not satisfied, taking into account any additional relevant factors referred to in 7(2) above, that time should be extended on a just and equitable basis in either of these claims."

(ii) Paragraph (vii) on page 29 should contain the sentence:

> "Regarding the claimant's indirect discrimination claim, she has referred to the career break policy and a number of other policies referred to at 5(xix) above, to advance an argument that provisions, criteria or practices were such that there was a particular disadvantage for females when compared to men."

and not:-

> "Regarding the claimant's indirect discrimination claim, she has referred to the career break policy and a number of other policies referred to at 5(xix) above, to advance an argument that provisions, criterian or practices were such that there was a particular disadvantage for females when compared to men."

Employment Judge:

Date decision recorded in register and issued to the parties on:

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CLAIMANT: **Carol Bridget Veronica Molyneaux**

RESPONDENTS: **1. Department of Agriculture, Environment and Rural Affairs**
2. Department of Finance

DECISION

The unanimous decision of the tribunal is that the claimant's claims of unlawful direct and indirect sex discrimination together with the claim for unlawful deductions from wages are dismissed as set out in paragraph 9 of this decision.

Constitution of Tribunal:

Employment Judge: **Employment Judge Crothers**

Members: **Mr A White**
Mrs G Ferguson

Appearances:

The claimant represented herself.

The respondents were represented by Mr J Kennedy, Barrister-at-Law instructed by the Departmental Solicitors Office.

BACKGROUND

1. Ten Case Management Discussions were held in this case together with a Pre-Hearing Review which gave leave to amend the claim to include a claim of direct sex discrimination against the first respondent ("DAERA"). Several other matters had to be addressed by the tribunal prior to the substantive hearing. It was evident to the tribunal from the outset that it was a complicated, confusing and unwieldy case. The reference to DAERA also includes reference to its predecessor, the Department of Environment ("DOE").

THE CLAIM

2. The claimant claimed that she had been directly discriminated against by DAERA on the ground of her sex. She also claimed indirect discrimination against DAERA and Department of Finance ("DF"), on the same ground. The claimant also made a claim for unlawful deductions from wages. The respondents denied her allegations in their entirety.

ISSUES BEFORE THE TRIBUNAL

3. (1) Whether or not the claimant has been subjected to indirect Sex Discrimination by both respondents, contrary to Article 3(1)(b) of the Sex Discrimination (Northern Ireland) Order 1976, as amended?

   (a) Has the respondent imposed any provision, criterion or practice (PCP)?

   (b) Do they put females at a particular disadvantage when compared with males?

   (c) Do the PCPs disadvantage the claimant?

   (d) Can the respondent show that the PCPs are proportionate to the aim that they are trying to achieve?

   (2) Was the Claimant treated less favourably, by DAERA, than Andrew McGreevy on the ground of her sex (direct discrimination) by reason of the placement of Andrew McGreevy to the Marine Division in October 2012 contrary to Article 3(1)(b) of the Sex Discrimination (Northern Ireland) Order 1976, as amended?

   (3) Whether or not the respondent failed to pay the claimant wages in contravention of Article 45 of the Employment Rights (NI) Order 1996?

   (4) Are any of the claimant's claims out of time?

   (a) If so, should time be extended? and;

   (b) If so, which claims should have time extended?

SOURCES OF EVIDENCE

4. The tribunal heard evidence from the claimant and, on behalf of the respondents, from Christopher Wilson, retired Grade 7, Kerry Stanley, Staff Officer, Deborah Smith, Assistant Human Resources Business Partner, and John Cuthbert, Staff Officer. The tribunal also received a bundle of documentation.

FINDINGS OF FACT

5. Having considered the evidence insofar as same related to the issues before it, the tribunal made the following findings of fact on the balance of probabilities:-

   (i) The claimant availed of a period of maternity leave from 1 April 2009 until 31 March 2010. She was granted a period of unpaid leave for a further 7½

months. At the beginning of November 2010, the claimant applied for a career break which was granted. This lasted from 15 November 2010 until 14 November 2012.

(ii) The claimant had read DAERA's policy regarding special leave and added her signature to a document acknowledging that she read and understood the relevant career breaks section of the handbook. The granting of a career break is a discretionary matter. According to paragraph 17.1 of the Special Leave section within the handbook:-

> "The objectives of the career breaks scheme are to provide new job opportunities in the NICS and to facilitate you, if you wished, to take a break away from work".

The relevant policy also makes it clear that whilst on career break the individual remains subject to the normal rules applying to civil servants and, in particular, the conditions of service relating to conduct, financial affairs, political activities and outside appointments. Disciplinary action may be taken against anyone on career break. Paragraph 17.19 states that in a redundancy or early severance situation, the individual on a career break will be considered under the same terms as serving members of staff.

The career break policy including the following:-

> "17.24 You will not normally be posted back to your former post/location, but to vacancies as and when they arise. This will usually be in your former department or the equivalent department following any restructuring or reorganisation. Every effort will be made to ensure that you return to a post within your substantive grade/pay range, although you may be required to serve in a lower grade post on a temporary basis until a suitable posting in the substantive grade can be found. Pay would relate to the substantive grade initially, but would be on a mark-time basis until a suitable vacancy in the substantive grade is available.
>
> 17.25 Departments will endeavour to reabsorb their own staff. If, exceptionally, this is not possible within a reasonable period of time, Departmental HR may negotiate with any departments that have vacancies.
>
> 17.26 Where a suitable post is not available you may, with the agreement of Departmental HR take up alternative salaried or wage earning employment within Northern Ireland, on a temporary basis, until a suitable post becomes available either in the substantive grade or the lower grade.
>
> 17.27 For details of salary assessment on return to work refer to the HR Handbook (see section 8.23 of the policy Pay on Return from Career Break).
>
> 17.28 A new posting on return to duty will be regarded as a voluntary transfer. Departments will normally only meet

expenses incurred where you would have been redeployed or permanently transferred had you remained in work".

(iii) Kerry Stanley wrote to the claimant on 4 December 2012 in the following terms:-

"4 December 2012

Dear Carol

Re: Return from Career Break

I refer to your further correspondence to Chris Wilson dated 22 November 2012 in relation to returning to the Department from a Career Break, your letter has been passed to me for a response.

I will respond to each of the queries as you have raised them.

1. In relation to your request for a written statement from the Department advising that your Career Break is being extended indefinitely. I can confirm that your Career Break has been extended until such time as a suitable post is identified in order to enable you to return from Career Break. I would want to assure you that the Department will continue to actively seek to identify a suitable post and will contact you whenever one becomes available.

2. Turning to your query in relation to the section of the HR Handbook which states that the substantive or lower grade on return from career break must be the same discipline. As previously advised, following your original request to return from Career Break to a lower grade, the Department sought advice from Corporate HR and their advice was that in order to return from Career Break into a lower grade, this must be within the employee's own discipline. This in your case would be to the TG1 grade within the Planning discipline.

3. The Department notes your request to apply for lateral transfer into a Scientific Officer or Mapping and Charting Officer post. In order to be considered for lateral transfer to another discipline you will need to be interviewed by an assessment panel and the Department is currently looking into this. In terms of a return to an Admin post, you have already been advised that the current Regrading Scheme does not permit P&T Planners to regrade at a lower grade to the general service EOII. However, if you wish to regrade to the general service grades you will need to apply for regarding opportunities at EOI grade which are circulated by the Department as opportunities arise.

4. The Department also notes that you are willing to downgrade, in order to be able to return from Career Break. However, as you have already been made aware, there are currently no vacant TG1 posts within the Planning discipline for you to return to and as I have said above, the current Regrading scheme does not

permit P&T Planners to regrade at a lower grade in the general service discipline.

5. In terms of the fifth and sixth points you have raised, in terms of any benefits you may be entitled to, this would be a matter for you to raise with the Department of Social Development. However, as your employment with the NICS has not been terminated, you will not be issued with a P45. In addition, whilst you may find alternative employment on a temporary basis, the Department will still continue to actively seek to identify a suitable post to enable you to return to the NICS. I would also want to assure you that in the event of any kind of redundancy situation, staff on career break will not be treated any more detrimentally than their PTO colleagues.

I trust this clarifies the position.

Yours sincerely"

(iv) The tribunal reminded itself of the judgment of Lord Justice Girvan in the Northern Ireland Court of Appeal decision of **Stephen William Nelson v Newry and Mourne District Council (2009) NICA 24**. At paragraph 245 of his judgment he states:-

> "This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In **Curley v The Chief Constable (2009) NICA 8** Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".

(v) In the period between 2002-2006 the Planning Service within the DOE was dealing with an unprecedented growth in the number of planning applications which generated substantial fee income. From 2007-2008 onwards the applications dramatically reduced from 36,000 to 18,000 per annum. However salaries for staff and overheads did not reduce and in fact kept rising. This led to a critical situation within the DOE. Christopher Wilson prepared a review as a matter of urgency into Planning Service operating costs. His report, produced in April 2010, states at paragraph 1.4:-

> "The estimated shortfall of Planning Service funding based on current costs and staffing levels is £9.02m (including an estimated 2009 pay uplift) and includes a shortfall in planning receipts of £6.4m and funding required for planning reform/RPA of £1.4m. Allowing for partial achievement of the saving from the November 2009 review, this still leaves an estimated shortfall in 2010-2011 of c £8.27m".

(vi) Christopher Wilson's report also recommended urgent action to reduce staffing numbers in Planning Service by around 270 across the Professional and Administrative disciplines. This included 51 PTO grade staff. The claimant was employed as a Professional and Technical Officer in the Planning Service ("PTO"). During her career break her post had effectively disappeared. She was not in the head count of staff affected by the recommendations in Christopher Wilson's report and was therefore not considered as being included in the 51 PTO staff. The claimant had previously taken a career break in July 2006 and was familiar with the policy relevant to career break staff at that time. In 2007 she was facilitated in returning to a vacant post in Coleraine after that career break. It was also possible to facilitate the claimant's return to work in September 2008 following maternity leave. However the circumstances pertaining in 2012 were radically different.

(vii) By formal notice of intention dated 7 August 2012, the claimant sought an early return from her career break. Human Resources contacted her on 24 August 2012 stating that they could not accommodate her return as there was a PTO surplus and referred to the fact that her career break was due to end on 14 November 2012. The claimant was allowed to seek paid employment elsewhere outside the Northern Ireland Civil Service. She was also permitted to seek regrading under a special scheme devised for lateral movement of staff to analogous EO1 grades, pending a suitable post becoming available for her. The claimant ultimately found a post in DAERA's Marine Department working in Belfast two days per week and in Portrush three days per week. The tribunal does not accept the claimant's contention that her substantive PTO planning post is the same as an EO1 post, as the latter is designated by DAERA as an analogous grade. This is particularly important in the context of the regrading scheme in operation at the material time which enabled a PTO in Planning Service, such as the claimant, to laterally transfer to an analogous EO1 post. Furthermore, it was clear to the tribunal that a PTO such as the claimant, could not be downgraded to a lower post except within her own professional discipline. The claimant contended that she had passed the competencies test in relation to an application for a Higher Scientific Officer post and, this being the case, she ought to have been provided with a Scientific Officer's post. However, the plain fact is that the claimant achieved 249 marks in her application for the Higher Scientific Officer post, whereas the required mark was 252. This meant that she could not be considered for the Scientific Officer post in the way she envisaged.

(viii) During the claimant's time on the relevant career break DAERA had to continue to deal with the critical situation which had arisen. Staff were being loaned to other Departments and seconded in order to minimise the risk of any redundancies. They could also avail of the regrading scheme and other opportunities arising. Staff on a career break are considered as permanent employees. However, they were clearly not part of the headcount for in-year budgetary purposes and could only be offered a new post when a Department had a suitable funded vacancy. The tribunal again reminded itself of paragraph 17.24 of the career break policy which states:-

> "You will not normally be posted back to your former post/location but to vacancies as and when they arise. This will usually be in your former Department or the equivalent Department following any

restructuring or reorganisation. Every effort will be made to ensure that you return to a post within your substantive grade/pay range, although you may be required to serve in a lower grade post on a temporary basis until a suitable posting in the substantive grade can be found. Pay would relate to the substantive grade initially, but would be on a mark-time basis until a suitable vacancy in the substantive grade is available".

(ix) There is no satisfactory evidence before the tribunal to undergird the claimant's contention that she ought to have been facilitated in a suitable post within two to three months following the end of her career break.

(x) There is no evidence before the tribunal that male and female staff are not treated the same whilst on career break or that following their career break, policies are applied in a discriminatory way on the ground of sex. In the period between April 2008 and January 2016 there were 73 staff in DOE on career breaks – 42 female and 31 male. During this time, two male Administrative Officers, one male Higher Scientific Officer and a female Officer in Planning were unable to return to work when requested.

(xi) In relation to her indirect discrimination claim, the claimant referred to a number of individuals across various disciplines who had been on career breaks and suggested that 69% of these were female. Part of her case was that the concept of a "voluntary transfer" in paragraph 17.28 of the career break policy was indirectly discriminatory against females. However, the tribunal is not satisfied that the claimant has established a correct pool for comparison in relation to her indirect discrimination claim. It accepts that the submissions made on behalf of the respondents are correct in relation to the pool for comparison, ie, PTO staff within the Planning Department on career breaks, comprising two male members of staff who did not return to work, one female who did not return and two females who did return, one of whom was the claimant. This is a pool in which the specificity of the claimant's allegations of indirect sex discrimination can be realistically tested.

(xii) In the period from 8 October 2013 (when the claimant obtained a PTO post) and the date of presentation of her claim to the tribunal, on 11 June 2015, the claimant's indirect discrimination claim is solely in the context of her claim for excess fares allowances ("EFA") for which she also made a claim under Article 45ff of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order"), for unlawful deductions from wages.

(xiii) In the period before 8 October 2013 the claimant had also applied for an externally advertised post as a Mapping and Charting Officer. This was a fixed-term position for two years. However, under section 5.4 of the recruitment policy and procedure's manual, staff employed on permanent contracts within the Northern Ireland Civil Service are not eligible to apply for temporary posts for any grade within NICS. In any event should the claimant be permitted to apply for such a post, and be successful, she would have had to resign from her substantive PTO post. As it happened, the claimant and two male applicants were rejected for this post.

(xiv) In or about September 2014 the claimant made a claim for fare EFA as she was working two days in the Marine Division in Belfast and was living in Portstewart. This application was approved on 12 September 2014.

However, on 22 October 2014, the claimant was informed by Colette Jones that she had no entitlement to EFA. The claimant explained her claim for EFA in an email to Colette Jones on 24 October 2014 as follows:-

> "Colette
>
> It was my understanding from our telephone conversation yesterday that you considered that I had not transferred to Marine Division and that I had instead taken up a new post. However, in the career break section of the handbook, section 17.28 states that 'A new posting on return to duty will be regarded as a voluntary transfer'. Upon reading this it is clear that I have been transferred.
>
> Section 17.28 also states that Departments will normally only meet expenses incurred where you would have been redeployed or permanently transferred had you remained in work.
>
> Other staff who remained in work were transferred to various posts in different business areas. At the time of reassigning these members of planning service staff, the staff were clearly informed that their transfers were compulsory to meet business needs. The Department sought volunteers to make these compulsory moves. Staff were clearly informed that although they were volunteering, their 'voluntary transfers' were being treated as compulsory. Excess fares would be paid, since the moves truly were compulsory in order to meet operational needs.
>
> The post I transferred to in Marine Division was a new post at PTO level. At that time, the DOE had (i) a surplus of PTO staff in planning service posts and (ii) no other PTO Planners awaiting to return from career break.
>
> I therefore consider that had I not been on career break, then the [sic] my new post would have been filled by means of staff transfer. I accordingly refer back to the second part of section 17.28 and ask you to reconsider my claim for expenses to be paid as had I not been on career break, my post would have been filled by transfer to meet operational need.
>
> Given the requirement for equity in the treatment of staff, I feel I should be treated in the same manner as other staff who transferred to meet operational need:
>
> 1. I should be entitled to excess fares and
>
> 2. I should be regarded and treated in the same way as the other planners working within the Marine Plan team, when it comes to the SPS.
>
> I shall appreciate your response.
>
> Carol"

(xv) Paragraph 17.28 of the career break policy states that a new posting on

return to duty will be regarded as a voluntary transfer and that Departments will normally only meet expenses incurred where staff would have been redeployed or permanently transferred had they remained in work. There was absolutely no evidence to suggest that the claimant would have been redeployed or permanently transferred had she remained in work. Indeed other PTO staff in the Coleraine Planning Office where the claimant worked prior to her career break were still in post during her career break. The tribunal is satisfied that her new posting commencing on 8 October 2013 was a voluntary transfer and that she was not entitled to EFA.

(xvi) The tribunal was aware that the claimant further challenged DAERA's refusal to pay EFA, and considered the relevant correspondence between September 2014 and the presentation of her claim to the tribunal, during which time the claimant also lodged a grievance, which was ultimately unsuccessful. Debbie Smith carried out a re-evaluation of her claim for EFA and emailed the claimant on 13 March 2015. The email includes the following:-

> "I note that you have not contested that a new posting on return from career break will be regarded as a voluntary transfer, and so it is considered that your transfer to Marine Division was on a voluntary basis.
>
> I have carefully considered, however, the sentence you have referred to, that Departments will normally only meet expenses incurred where you would have been redeployed or permanently transferred had you remained at work.
>
> Unfortunately, there is no evidence to suggest that you would definitely have been redeployed or permanently transferred had you remained in work – this is because when you returned from career break, other PTOs who were in post during the time you took your career break were still in post, unless they opted to regrade.
>
> You are therefore not entitled to payment of Excess Fares allowance for the period 8 October 2013 to 30 November 2014.
>
> I will instruct HR Connect to continue to recover the amount over paid".

(xvii) In response to an email dated 24 March 2015 from Ina Heikkinen, Payroll, HR Connect, Debbie Smith replies:-

> "Carol Molyneaux has again queried her entitlement to excess fare allowance.
>
> However, she has been advised by DOE HR today that she is definitely not entitled to excess fare[s] allowance, and so please proceed to recover the amount of excess fares already paid".

The claimant agreed to the recovery of the EFA which had been paid. A recovery agreement form was forwarded to the claimant on 2 April 2015. An email from Ina Heikkinen of Payroll, HR Connect, to Debbie Smith on 20 April 2015 confirms that a recovery of the overpayment had been agreed

with the claimant over a period of two months. These recovery amounts cannot be considered as unlawful deductions from wages under Article 45ff of the 1996 Order.

(xviii) The claimant lodged her grievance regarding her EFA claim on 28 April 2015 advising, according to paragraph 159 of her witness statement, that she believed the policy application and the policy itself to be discriminatory. She ends an email to Debbie Smith dated 28 April 2015 as follows:

> "I therefore **restate that my transfer was for operational business reasons and not voluntary** and request that a full and complete consideration be given to this case. In addition, I feel that the particular policy being applied from the NICS handbook is unfair and indirectly discriminates against women as they make up the biggest proportion of career break returners. With regard to this, I am taking this matter further".

(xix) The claimant who is an intelligent individual holding a PhD in Geography, had evidently sought advice from NIPSA and the Equality Commission. However no satisfactory evidence regarding the precise nature of any such advice was placed by the claimant in her evidence before the tribunal. The claimant challenged parts of the career break policy, the redeployment policy, the EFA policy, the application of the vacancy management policy, the application of the recruitment policy, and the practice of permanently removing the permanent positions of career break staff in an effort to reduce the Department's pay bill and not reinstating these posts when a career breaker is due to return, as elements to be included in her indirect sex discrimination claim. She contended that the PCP she relied on put women at a disadvantage, as significantly more women avail of career breaks than men. She further contended that due to childcare responsibilities there is an increased likelihood that females will take career breaks and therefore also be disadvantaged by the detrimental outworking of the policies. The claimant went on to assert in her written submissions that given the gender breakdown of the workforce, 40% more females take career breaks than would be expected and 39% less males take career breaks than would be expected. She asserted that the advantaged group is the remainder of the DOE workforce (51% male; 49% female) and the disadvantaged group are those who took career breaks (31% male; 69% female). She contended that the various policies hampered the career breakers likelihood of obtaining paid work.

(xx) The claimant also relied on the case of **Hendricks v The Metropolitan Police Commissioner (2003) IRLR 96** to contend that there was an ongoing situation or continuing state of affairs in which she was treated less favourably on the ground of sex. The respondents contended that the claimant could not show that the claimed acts of discrimination were ongoing up to 3 months prior to her submitting her claim on 11 June 2015. Furthermore, in relation to EFA, the respondents contended that the claimant's interpretation of the limitation point would mean that time would not actually begin to run until such time as she had received the EFA monies claimed, as she would continue to feel aggrieved until such time as this occurred. The respondents further contended that the claims were each distinct and not continuing acts in any event.

(xxi) The tribunal reiterates that it is not satisfied that the claimant has any foundation for claiming EFA in the first place. In these circumstances it is also not satisfied that this could constitute part of an ongoing situation or continuing state of affairs, even though the claimant claimed as late as 28 April 2015, that the relevant policy was itself indirectly discriminatory against females. However, significantly, she also agreed to the recovery of an amount paid to her by DAERA pursuant to her initial claim for EFA in September 2014. In any event the tribunal is further satisfied, in relation to her unlawful deduction of wages claim, that the last possible deduction was in November 2014. The claimant also confirmed to the tribunal that after 8 October 2013, the only element in her indirect discrimination claim related to the non-payment of EFA.

Direct discrimination claim

(xxii) As a result of a Pre-Hearing Review held on 12 February 2016, the claimant was given leave to amend her claim against DAERA to include a direct sex discrimination claim. Her comparator relied upon was Andrew McGreevy who, like the claimant, was a PTO (Planning) based in Coleraine but who, unlike the claimant, had not taken a career break. Indeed, it was the claimant's own choice to take a career break between 2010 and 2012. She was clearly aware of the career break policy and had availed of its relevant provisions on a previous occasion when she had been facilitated in a return to work. However, in this instance, with such critical circumstances pertaining in the Planning Department, there were no funded vacancies for her to return to. She had to wait until a suitable funded vacancy had been identified. To suggest or imply that DAERA must reinstate career break staff to its payroll in the knowledge that there was no work available for the individual and no funding available for the post in question, is, in the tribunal's view, an unreasonable stance to adopt.

(xxiii) The tribunal found Christopher Wilson to be a credible and straightforward witness whose evidence was clear and precise. Andrew McGreevy was in a salaried post as a PTO (Planning) in Coleraine where a surplus had been identified. In or about June 2012 a business need had arisen for a PTO (Planning) in the Marine Division in Belfast. Andrew McGreevy was studying for an MSC which was deemed a relevant and related subject for the Marine post in Belfast. Moving Andrew McGreevy would reduce the number of surplus PTO planning posts in the DOE without increasing costs. This was at a time when the DOE was still running at a very considerable deficit. His transfer from the Coleraine Planning Office to the Marine Division post in Belfast therefore meant that there was one less PTO post in the Coleraine Planning Office but no increase in operating costs. The post in Coleraine ceased to exist. The claimant contended that EU funding had been made available for Andrew McGreevy's post in Belfast. However, as Christopher Wilson explained, this funding went into the overall budget deficit pool. Andrew McGreevy took up his duties in the new post on 22 October 2012, at a time at which the claimant was still on her career break, although having requested an early return by formal notice of intention on 7 August 2012. It follows that the claimant was also on her career break when the decision to transfer Andrew McGreevy was made. The claimant contended that there was still funding for the Coleraine post and she should have been placed either there or in the post filled by Andrew McGreevy in the Marine Division. However, the tribunal is persuaded by Christopher Wilson's

evidence in relation to the reasons for Andrew McGreevy's placement in the Marine Division in Belfast.

(xxiv) The claimant also contended that Andrew McGreevy was moved on a voluntary basis from Coleraine to Belfast and received EFA whereas she was considered as not being entitled to EFA when she moved from Coleraine to Belfast in October 2013, also on a voluntary basis. The tribunal was shown a copy of the excess fares – eligibility criteria (interim guidelines) which emerged from an Establishment Officer's meeting on 16 May 2012. Correspondence from Leonard Brown of Corporate HR to Establishment Officers dated 31 May 2012, states that:-

> "In order to qualify for excess fares, the Officer must be compulsorily transferred. The definition for a compulsory transfer is found in paragraph 9.6 of Chapter 9.01 of the HR Handbook:
>
> > "A transfer of a member of staff at the initiation of the Department to a new permanent station".
>
> The correspondence goes on to state:-
>
> > "Based on this definition and on a previous exercise where Departments were consulted on what they considered to be qualifying moves for excess fares, the following would be an acceptable approach going forward:
> >
> > 1. Officers in the following categories will not be eligible to apply for EFA reimbursement if they:
> >
> > - voluntarily initiated a transfer, ie, a transfer initiated by the Officer such as requesting a career development move, and elective transfer, or a change in working pattern which can be accommodated only by a location move; ... in terms of the process it is up to the Line Manager to assess the application and decide in line with the policy. This is then processed by HR Connect to verify if the application has been correctly authorised and was submitted on time".

(xxv) There is no satisfactory evidence before the tribunal that Andrew McGreevy's placement could be regarded as a voluntary transfer, nor, given the foregoing findings of fact, can the relevant circumstances in the claimant's case be considered as being "the same or not materially different", from those relating to Andrew McGreevy.

(xxvi) The claimant adopted her schedule of loss as part of her evidence before the tribunal. She also confirmed that there was no claim for unpaid wages for the 11 month period between her return from the career break and commencement of new employment on the 8 October 2013.

THE LAW

Out of time issues

6. (1) Article 76 of the Sex Discrimination (Northern Ireland) 1976 ("the 1976 Order") provides that a claim must be presented to the tribunal within three months of when the act complained of was done. Article 76(5) provides that the tribunal may nevertheless consider any such complaint, claim or application which is out-of-time if in all the circumstances of the case, it considers that it is just and equitable to do so.

(2) Harvey on Industrial Relations and Employment Law ("Harvey") states at Division L830-833 as follows:-

> ***"(2) Just and equitable extension of time***
>
> **[830]**
>
> The tribunal has a broad discretion to extend the time limit where it considers it 'just and equitable' so to do; EqA 2010 s 123(1)(b). (See PI [277].) This formula is much broader than the test for example in unfair dismissal claims where the relevant question is whether it was 'reasonably practicable' to have presented the claim within time, and the discrimination 'just and equitable test' allows consideration of circumstances which would not fall within the unfair dismissal test.
>
> **[831]**
>
> In claims before civil courts, s 33 of the Limitation Act 1980 provides that in considering whether to allow a claim which has been presented outside the primary limitation period to proceed, the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see *British Coal Corpn v Keeble [1997] IRLR 336, at para 8*). In the context of the 'just and equitable' formula, the Court of Appeal in *Southwark London Borough v Alfolabi [2003] IRLR 220*, held that while these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'
>
> **[832]**
>
> The following is a non-exhaustive list of factors which may prove helpful in assessing individual cases:
>
> -- the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);

-- the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;

-- the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;

-- the conduct of the claimant over the same period;

-- the length of time by which the application is out of time;

-- the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;

-- the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

Whichever factor is relevant to be taken into account, it must be responsible for causing the time limit to be missed, see for example, *Hunwicks v Royal Mail [2007] All ER (D) 68 (Jun)*, a DDA 1995 case, in which it was held that incorrect legal advice was not a good reason for extending time because that advice had been received after the time limit had already expired and did not therefore cause it to be missed. (See also *Wright v Wolverhampton City Council UKEAT/0117/08*, *[2009] All ER (D) 179 (Feb), EAT*.)

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There is no presumption that a tribunal should exercise its discretion to extend time, and the burden is on a claimant to persuade the tribunal to exercise its discretion in their favour. In *Robertson v Bexley Community Centre [2003] IRLR 434*, Auld LJ held that 'the exercise of discretion is the exception rather than the rule'. While this principle has been echoed in other cases (see *Department of Constitutional Affairs v Jones [2008] IRLR 128*, and also in *Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298*, *[2010] IRLR 327*) it must not be overstated. An employment tribunal in *Pathan v South London Islamic Centre UKEAT/0312/13 (14 May 2014, unreported)* suggested that the result of *Robertson* was that the discretion to extend time would only be exercised in 'exceptional circumstances'. The EAT held that such an interpretation of *Robertson* was erroneous. HHJ Shanks held that 'it does not require exceptional circumstances: what is required is that an extension of time should be just and equitable'."

(3) In relation to an unlawful deduction from wages claim under Article 45ff of the 1996 Order, the claimant has three months to present a claim in the following circumstances as set out in Article 55(2):-

"(2) Subject to paragraph (4), an industrial tribunal shall not consider a complaint under this Article unless it is presented before the end of the period of three months beginning with:-

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received

(3) Where a complaint is brought under this Article in respect of –

(a) a series of deductions or payments, or

(b) a number of payments falling within paragraph (1)(d) and made in pursuance of demands for payment subject to the same limit under Article 53(1) but received by the employer on different dates,

the references in paragraph (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this Article to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable".

(4) The tribunal also considered the cases referred to in both parties written submissions appended to this decision in relation to all the claims. Specifically in relation to the claim under the 1996 Order, the tribunal considered the leading case of **Palmer and Saunders v The Southend-on-Sea Borough Council [1984] IRLR 119**. In that case it was held that the words "reasonably practicable" lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. It further held that best approach is to read "practicable" as the equivalent of "feasible" and ask, "was it reasonably feasible to present a complaint to the Employment Tribunal within the relevant three months?"

(5) The test of reasonable practicability is identical to the test relating to unfair dismissal as set out in Article 145 of the 1996 Order.

(6) The case of **Riley v 1. Tesco Stores Ltd and 2. Greater London Citizens Advice Bureau Services Ltd [1980] IRLR 103 CA**, held that where an employee who presents his complaint of unfair dismissal out of time alleges ignorance of his right or of how and when he should pursue it, or is under some mistaken belief about these matters, an Industrial Tribunal must look at the circumstances of his ignorance or belief and any explanation that he can give for them, including any advice he took, and then ask itself whether the ignorance or mistake is reasonable on his or his advisers part, or whether it was his or his adviser's fault. If either was at fault or unreasonable, it was reasonably practicable to present the complaint in time. When considering the effect of going to an adviser, the employee cannot necessarily prove that it was not reasonably practicable by saying that he took advice. The respondent's representative also referred the tribunal to the case of **Dedman**

v British Building and Engineering Appliances Ltd [1973] IRLR 379 CA, it was held that in deciding whether it was practicable for a complaint of unfair dismissal to be presented within the stipulated time period, the industrial tribunal should enquire into the circumstances and ask itself whether the claimant or his advisers were at fault in allowing the time period to pass by without presenting the complaint. If either were at fault, then it could not be said to have been impracticable for a complaint to have been presented in time.

(7) In the case of **Robinson v Dr Bowskill and six others practising as Fairhill Medical Practice (UKEAT/0313/12/JOJ)** His Honour Jeffrey Burke QC (referring inter alia to the case of **Virdi v Commissioner of Police of the Metropolis and Central Police Training and Development Authority (Centrix), (UKEAT4373-06-1810)**, states at paragraph 49 of his judgment:-

> "It is clear from Virdi and authorities before and since Virdi that where the case of a claimant who seeks an extension of time is that he or she put the claim into the hands of a solicitor or experienced representative, the claimant is putting forward an explanation which is capable of being a satisfactory explanation for delay in the presentation of the claim"

Direct and indirect discrimination on the ground of sex

(8) Article 3 of the Sex Discrimination (Northern Ireland) Order 1976 ("the Order") provides as follows:-

> "(2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if-
>
> (a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or
>
> (b) he applies to her a provision criterion or practice which he applies or would apply equally to a man, but-
>
> (i) which puts or would put women at a particular disadvantage when compared with men,
>
> (ii) which puts her at that disadvantage, and
>
> (iii) which he cannot show to be a proportionate means of achieving a legitimate aim".

Article 8 of the Order provides as follows:-

> "8.—(1) It is unlawful for a person, in relation to employment by him at an establishment in Northern Ireland, to discriminate against a woman—
>
> (a) in the arrangements he makes for the purposes of determining who should be offered that employment, or
>
> (b) in the terms on which he offers her that employment, or

(c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her—

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment".

BURDEN OF PROOF REGULATIONS

7. Article 63 A of the Order states:-

"(2) Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that respondent –

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment against the complainant, the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, he is not to be treated as having committed that act".

(i) In **Igen Ltd (formerly Leeds Carers Guidance) and Others –v- Wong, Chamberlains Solicitors and Another –v- Emokpae; and Brunel University –v- Webster (2006) IRLR 258**, the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race and disability discrimination. This guidance is now set out at Annex to the judgment in the **Igen** case. The guidance is not reproduced but has been taken fully into account.

(ii) The tribunal also considered the following authorities, **McDonagh and Others –v- Hamilton Thom Trading As The Royal Hotel, Dungannon (2007) NICA, Madarassy -v- Nomur International Plc (2007) IRLR 246 ("Madarassy"), Laing –v- Manchester City Council (2006) IRLR 748 and Mohmed –v- West Coast trains Ltd (2006) UK EAT 0682053008**. It is clear from these authorities that in deciding whether a claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination had occurred, the tribunal must consider evidence adduced by both the claimant and the respondent, putting to the one side the employer's explanation for the treatment. As Lord Justice Mummery stated in **Madarassy** at paragraphs 56 and 57:-

"The Court in *Igen –v- Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

"Could conclude" in S63A(2) must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of inadequate explanation" at this stage……., the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complaint were of like with like as required by S5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment".

(iii) The tribunal received valuable assistance from Mr Justice Elias' judgement in the case of ***London Borough of Islington v Ladele & Liberty (EAT) [2009] IRLR 154,*** at paragraphs 40 and 41, which read as follows:-

"Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] *IRLR* 572, 575 – 'this is the crucial question'. He also observed that in most cases this will call for some consideration of the mental processes (conscious or sub-conscious) of the alleged discriminator.

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p.576) as explained by Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37.

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted

the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

> 'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer.'

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal *must* find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference *must* be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in *King v The Great Britain-China Centre* [1991] IRLR 513.)

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in *Zafar v Glasgow City Council* [1997] IRLR 229:

> 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discrimination explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact

– but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC* [2007] IRLR 259 paragraphs 28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in *Anya v University of Oxford* [2001] IRLR 377 esp paragraph 10.

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan* [2008] IRLR 243, a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paragraphs 36-37):

> ’36. The discrimination … is defined … as treating someone on racial grounds “less favourably than he treats or would treat other persons”. The meaning of these apparently simple words was considered by the House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:
>
> > (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the “statutory comparator”) actual or hypothetical, who is not of the same sex or racial group, as the case may be.
> >
> > (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the

relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant …

(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in *Shamoon* at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.

37. It is probably uncommon to find a real person who qualifies … as a statutory comparator. Lord Rodger's example at paragraph 139 of *Shamoon* of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.'

The logic of Lord Hoffmann's analysis is that if the tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then again it is unnecessary to determine what are the characteristics of the statutory comparator. This chimes with Lord Nicholls' observations in *Shamoon* to the effect that the question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

'employment 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' (paragraph 10).

This approach is also consistent with the proposition in point (5) above. The construction of the statutory comparator has to be identified at the first stage of the *Igen* principles. But it may not be necessary to engage with the first stage at all'".

(iv) The tribunal also received considerable assistance from the judgment of Lord Justice Girvan in the Northern Ireland Court of Appeal decision in ***Stephen William Nelson v Newry and Mourne District Council [2009] NICA 24***. Referring to the *Madarassy* decision (supra) he states at paragraph 24 of his judgment:-

> "This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In Curley v Chief Constable [2009] NICA 8 Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".
>
> Again, at paragraph 28 he states in the context of the facts of that particular case, as follows:-
>
> > "The question in the present case however is not one to be determined by reference to the principles of Wednesbury unreasonableness but by reference to the question of whether one could properly infer that the Council was motivated by a sexually discriminatory intention. Even if an employer could rationally reach the decision which it did in this case, it would nevertheless be liable for unlawful sex discrimination if it was truly motivated by a discriminatory intention. However, having regard to the Council's margin of appreciation of the circumstances the fact that the decision-making could not be found to be irrational or perverse must be very relevant in deciding whether there was evidence from which it could properly be inferred that the decision making in this instance was motivated by an improper sexually discriminatory intent. The differences between the cases of Mr Nelson and Ms O'Donnell were such that the employer Council could rationally and sensibly have concluded that they were not in a comparable position demanding equality of disciplinary measures. That is a strong factor tending to point away from a sexually discriminatory intent. Once one recognises that there were sufficient differences between the two cases that could sensibly lead to a difference of treatment it is not possible to conclude in the absence of other evidence pointing to gender based decision-making that an inference or

presumption of sexual discrimination should be drawn because of the disparate treatment of Ms O'Donnell and Mr Nelson".

(v) In relation to the comparator issue, the tribunal took into account the decision in **Macdonald (Appellant) v Advocate General for Scotland (Respondent) Pearce (Appellant) v Governing Body of Mayfield Secondary School (Respondent) [2003] IRLR 512 HL**, which held that the "relevant circumstances" for the purpose of the comparison are those which the alleged discriminator takes into account when deciding to treat the woman or the man as he does. If the relevant circumstances are to be "the same or not materially different", within the meaning of S5(3), all the characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same, but they must not be materially different. That is the basic rule, if one is to compare like with like. Characteristics that have no bearing on the way the woman was treated can be ignored, but those that do have a bearing on the way she was treated must be the same if one is to determine whether, but for her sex, she would have been treated differently.

(vi) In relation to the burden of proof in indirect discrimination cases, useful guidance is to be obtained from the case of **Nelson -v- Carillion Services Ltd (2003) IRLR 428 CA**, where Simon Brown LJ reviewed the state of the law in light of the changes made by the 2001 Regulations and concluded:

> "It seems to me tolerably clear that the effect of S.63A was to codify rather than alter the pre-existing position established by the case law. The burden of proving indirect discrimination under the 1975 Act was … always on the complainant, and there pursuant to S.63A it remains, the complainant still having to prove facts from which the Tribunal could conclude that he or she has been unlawfully discriminated against "in the absence of an adequate explanation from the employer". Unless and until the complainant establishes that the condition in question has had a disproportionate adverse impact upon his/her sex the Tribunal could not in my judgement, even without explanation from the employer, conclude that he or she has been unlawfully discriminated against".

However, there is little guidance from the authorities as to how precisely the burden of proof operates in indirect discrimination cases.

(vii) Harvey on Industrial Relations and Employment Law ("Harvey") comments in Volume 2 at L [193] as follows (in relation to the ***Nelson-v-Carillon Services Ltd* case** (Supra)):-

> "That view of the limited impact to be accorded to S3A in relation to indirect discrimination contrasts with the much wider scope which the provision has been seen to have when it comes to the drawing of inferences of direct discrimination … Whatever the precise scope of S63A, claimants remain under an obligation to bring to the tribunal some evidence in support of allegations of disproportionate impact, and this will usually involve both the use of statistics and the concept of a "pool" of affected individuals, real or hypothetical, to test the

consequences of the provision, criterion or practice which is being subjected to scrutiny".

(viii) The tribunal considered the implications arising from the case of **Rutherford & Another –v- Secretary of State for Trade and Industry (No. 2) (2006) UKHL19, [2006] IRLR 551** and in particular the judgement of Baroness Hale at paragraph 72 where she states:-

> "It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and the disadvantaged groups. So it is no answer to say that the rule applies equally to men and women, or to each racial or ethnic or national group, as the case may be. The question is whether it puts one group at a comparative disadvantage to the other. However, the fact that more women than men, or more whites than blacks, are affected by it is not enough. Suppose, for example, a rule requiring that trainee hairdressers be at least 25 years old. The fact that more women than men want to be hairdressers would not make such a rule discriminatory. It would have to be shown that the impact of such a rule worked to the comparative disadvantage of would-be female or male hairdressers as the case might be".

(ix) The tribunal carefully considered the relevant section in Harvey on indirect discrimination at L [171] ff. It also took into account Lord Justice Sedley's judgement in the case of **Grundy -v- British Airways Plc [2007] EWCA Civ 1020, [2008] IRLR 74**, where, in relation to establishing a pool, he states at paragraph 27:-

> "The correct principle, in my judgement, is that the pool must be one which suitably tests the particular discrimination complained of: but this is not the same thing as the proposition that there is a single suitable pool for every case. In fact, one of the striking things about both the race and sex discrimination legislation is that, contrary to early expectations, three decades of litigation have failed to produce any universal formula for locating the correct pool, driving tribunals and courts alike to the conclusion that there is none".

He continues in paragraphs 30 and 31 to state:-

> "The dilemma for fact-finding tribunals is that they can neither select a pool to give a desired result, nor be bound always to take the widest or narrowest available pool, yet have no principle which tells them what is a legally correct or defensible pool … *Rutherford (No.2)* seems to me to be a striking illustration of Lord Nicholls' proposition that the assessment of disparate impact is a question of fact, limited like all questions of fact by the dictates of logic. In discrimination claims the key determinant of both elements is the issue which the claimant has elected to pose and which the tribunal is therefore required to evaluate by finding a pool in which the specificity of the allegation can be realistically tested. Provided it tests the allegation in a suitable pool, the tribunal cannot be said to have erred in law even if a different pool, with a different outcome, could equally legitimately have been chosen. We do not

accept that *Rutherford* is authority for the routine selection of the widest possible pool; nor therefore that any question arises of "looking at" a smaller pool for some unspecified purpose short of determining the case".

(x) In relation to the aspect of justification, the tribunal considered the paragraphs in Harvey at L [207] to [214] and the relevant cases referred to therein beginning with the decision of the European Court of Justice in **Bilka-Kaufhaus GmbH -v- Weber Von Hartz 170/84 [1986] IRLR 317**. In relation to the issue of proportionality it considered the case of **Hardys and Hansons Plc -v- Lax [2005] EWCA Civ 846, (2005) IRLR 726, CA**. As Harvey comments at L 213:-

> "The Court held that there was no scope, in discrimination law, for a test based on "the band of reasonable responses which a reasonable employer would adopt" – ie the test for culpable unfairness in the law of unfair dismissal. The test, emphasised the CA, is what is objectively justified. The principle of proportionality requires the tribunal to take account of the reasonable needs of the business, but at the end of the day it was for the tribunal to make its own judgement as to whether the rule imposed was "reasonably necessary". It is not enough that the view is one which a reasonable employer could take". Harvey then continues to comment that "while this decision was given on the basis of the "old" (ie pre October 2005) definition of indirect discrimination, the reference to the principle of proportionality fits very well with the "new" test of justification "a proportionate means of achieving a legitimate aim". Unless and until superior courts indicate the contrary, it is thought it thus offers a reliable guide to how the new wording should be read".

(xi) The tribunal also reminded itself of the need, in an indirect discrimination case, for the claimant to identify precisely what the alleged provision criterion and practice ("PCP") is and when it applied to the claimant. The claimant has to show that the PCP applied to others in the same group at the same time and that they also were put to a disadvantage. An assumption is therefore made that the PCP applies to all but adversely affects a particular group. Ascertaining when the PCP applies affects:-

(a) the group allegedly suffering the disadvantage as circumstances may fluctuate and therefore timing is crucial.

(b) Whether the claimant actually suffered a disadvantage.

(c) The time limits and in particular if it is alleged that there was a continuous act, when that act was done.

In both direct and indirect discrimination cases a comparison of the cases of persons of different sex must be such that the relevant circumstances in one case are the same, or not materially different in the other (Article 7 of the Order). Moreover, Elias J made clear in the case of *Ladele (supra)* that any defence raised by a respondent to show that the PCP is a proportionate means of achieving a legitimate end must be subjected to "careful and sophisticated analysis".

(xii) The Court of Appeal in the cases of **Essop v Home Office (2015) IRLR 724**, and in **Naeem v The Secretary of State for Justice (2016) IRLR 118**, have held (subject to the Supreme Court's consideration of the cases) that consideration of a "particular disadvantage" requires an analysis of why the disadvantage has been suffered.

(xiii) As Harvey states at L311:-

> "Under the traditional formulation of indirect discrimination one has to identify a pool, whereas now that is permissible but not mandatory".

SUBMISSIONS

8. The tribunal carefully considered the written and brief oral submissions from both parties together with the authorities referred in the written submissions which are appended to this decision.

CONCLUSIONS

9. The tribunal, having carefully considered the evidence together with the submissions and having applied the principles of law to the findings of fact, concludes as follows:-

(i) As reflected in the findings of fact, the tribunal is satisfied that on a proper interpretation of the relevant policy, the claimant is not entitled to EFA. The tribunal is satisfied that the claimant's claim for EFA in the sum of £2,221.48 relates to a period ending on 30 November 2014. She presented her claim to the tribunal on 11 June 2015. Furthermore, there cannot be a deduction if an individual is not entitled to the payment (**Camden Primary Care Trust v Atchoe (2007) EWCA Civ 716 CA**). In any event the tribunal is satisfied that it was reasonably practicable in the sense that it was reasonably feasible for the claimant to present a claim to the tribunal within the relevant three month period. She had access to advice and guidance from NIPSA from in or around the end of her career break until dates in April and May 2015. It also appears that the claimant obtained advice from the Equality Commission regarding lodging a claim. The fact that she submits that she did not have the support of her union, and did not have the resources, either financial, emotional or mental, at the material time, to present a case to the tribunal, does not mean, in the absence of supporting evidence, including medical evidence, (and, if relying on any argument that any advisers were at fault, the nature of any such advice), that it was not reasonably feasible to present an unlawful deduction of wages claim within three months from the end of November 2014. Moreover the fact that the claimant paid back an amount paid to her in respect of EFA also militates against any argument that she was entitled to EFA in the first place. At the oral submission stage the claimant, upon enquiry from the tribunal, confirmed that she was not pursuing a claim for unpaid wages in the 11 month period preceding 8 October 2013, and any such claim is therefore withdrawn from before the tribunal, and accordingly dismissed.

(ii) In relation to the direct and indirect discrimination claims on the ground of sex, the claimant relied of the Court of Appeal decision in **Hendricks v Metropolitan Police Commission (2003) IRLR 96**, in which Mummery LJ stated as follows:-

> "(The claimant) is entitled to pursue her claim beyond the preliminary stage on the basis that the burden is on her to prove either by direct evidence or by inference from primary fact that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period … the question is whether there is an act extending over a period as distinct from a succession of unconnected and isolated specific acts for which time would begin to run from the date when each specific act was committed".

Harvey on Industrial Relations and Employment Law ("Harvey") at T para 118.01 states as follows:-

> "The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (**Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686, [2003] IRLR 96** at para 51-52). According to Mummery LJ, these terms were mentioned in the above authorities as examples of when an act extends over a period, and 'should not be treated as a complete and constricting statement of the indicia' of such an act. In cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for a claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'.

(iii) The direct discrimination claim involving Andrew McGreevy's post ought to have been presented to the tribunal within three months from 22 October 2012 when he took up his duties in the Marine Division in Belfast. The claimant's career break ended on 14 November 2012. The tribunal is not satisfied in all the circumstances of the case, that time should be extended on a just and equitable basis to enable the claimant to present a direct sex discrimination claim to the tribunal. Furthermore, according to her evidence, the claimant's claim for indirect discrimination relates in part, to the period from 14 November 2012 until she obtained a suitable post on 8 October 2013. Similar to the direct discrimination claims involving Andrew McGreevy's post, the claimant has not shown any adequate reason or reasons as to why she was unable to comply with the time-limits for presenting such a claim to the tribunal. The tribunal reiterates that she has not produced any medical evidence or evidence regarding the nature of advice from NIPSA or the Equality Commission if she is seeking to rely upon the fault of any advisors. The tribunal is therefore not satisfied, taking into account any additional relevant factors referred to in 7(2) above, that time should be extended on a just and equitable basis in either of these claims.

(iv) The nature of the claimant's indirect discrimination claim changed in the period from 8 October 2013 until 30 November 2014 as it related to her claim

for EFA. The tribunal has already found that there is no foundation for her claim for EFA, and that she agreed for the recovery of an amount paid in error pursuant to her application in September 2014 for EFA. As was held in the case of **Barclay's Bank v Kapur (1995) IRLR 87 CA**, an unjustified sense of grievance is not a detriment. The fact that the claimant alleged that the policy relating to the voluntary transfer of individuals on a career break was indirectly discriminatory against females, does not in the tribunal's view, in itself justify an extension of time to enable an indirect discrimination claim to be brought in relation to EFA, against the background of the foregoing findings of fact.

(v) In light of the above analysis, the tribunal is satisfied that the claimant cannot show that the alleged acts of discrimination were ongoing up to three months prior to presenting her claim on 11 June 2015. The direct discrimination claim, the indirect discrimination claim preceding 8 October 2013, and the indirect discrimination claim linked to a claim for EFA, are each distinct and not continuing acts. They are not evidence of a 'continuing discriminatory state of affairs'. It is not reasonable for the claimant to expect that time should continue to run to enable her to present an indirect discrimination claim until she actually received EFA monies claimed. She was clearly informed as far back as 22 October 2014 that her application for EFA was refused. The fact that she continued to challenge DAERA's position regarding her claim does not assist her in alleging a continuing act, particularly as she agreed to pay back sums actually paid pursuant to her initial claim for EFA.

(vi) Apart from out-of-time issues, the tribunal is satisfied that the claimant has not proved facts from which the tribunal could conclude in the absence of an adequate explanation that unlawful direct discrimination has occurred on the ground of sex. The tribunal took into account the whole context of the surrounding evidence regarding Andrew McGreevy's post in the Marine Division in Belfast and considered the allegations of unlawful discrimination in the whole relevant factual matrix and stood back and focussed on the issue of discrimination. The tribunal is aware that direct evidence of discrimination is rare and the tribunal frequently had to infer discrimination from all the material facts. However, at the material time, the claimant cannot be considered as being in the same or similar circumstances as Andrew McGreevy. Unlike the claimant, he was in post and receiving a salary. He was also in a PTO planning post where a surplus had been identified. There was clearly an identified business need for a PTO planning post in Belfast. Andrew McGreevy was studying for an MSC which was relevant to the post in the Marine Division. Furthermore, his post in Coleraine was not backfilled. His move therefore reduced the number of surplus PTO planning posts in the DOE without increasing costs. The claimant was still on her career break at the material time of the commencement of his employment on 22 October 2012. In effect, her career break was extended until she took up a post on 8 October 2013, having pursued various avenues previously. DAERA has demonstrated to the tribunal objective non-discriminatory reasons as to why Andrew McGreevy was appointed. There is therefore no foundation for the claimant's allegation that her non-appointment to Andrew McGreevy's post in Belfast or being given the post he left in Coleraine (which no longer exists), was on the ground of sex.

(vii) Regarding the claimant's indirect discrimination claim, she has referred to the career break policy and a number of other policies referred to at 5(xix) above, to advance an argument that provisions, criterian or practices were such that there was a particular disadvantage for females when compared to men. However, the career break policy applies equally to men and women. There was no satisfactory evidence before the tribunal that a higher proportion of women than men had taken a career break. Such a career break is a matter of individual choice. The claimant has not established that a considerably higher proportion of women than men cannot comply with a provision, criterion or practice. She relied on an analysis of statistics across a wide range of disciplines. The tribunal is satisfied that the narrower pool identified in its findings of fact is the appropriate pool to be considered. This pool in itself does not advance the claimant's case. She chose to rely on statistical evidence to establish a pool and no alternative approach was suggested by her. The tribunal reiterates that in an indirect discrimination case, the claimant has to identify precisely what the alleged provision, criterion and practice ("PCP") is and when it applied to the claimant. The claimant has to show that the PCP applied to others in the same group at the same time and that they were put to a disadvantage. An assumption is therefore made that the PCP applies to all but adversely affects a particular group. Ascertaining when the PCP applies affects:-

(a) The group allegedly suffering the disadvantage as circumstances may fluctuate and therefore timing is crucial.

(b) Whether the claimant actually suffered a disadvantage.

(c) The time-limits and in particular if it is alleged that there was a continuous act, when that act was done.

(viii) In both direct and indirect discrimination cases a comparison of the cases of persons of different sex must be such that the relevant circumstances in one case are the same, or not materially different in the other. Elias J made clear in the case of **Ladele (Supra)** that any defence raised by a respondent to show that the PCP is a proportionate means of achieving a legitimate end must be subjected to "careful and sophisticated analysis".

(ix) Furthermore, in the indirect discrimination case, no actual comparator was identified by the claimant. Christopher Wilson referred to a number of comparators (three males and one female), excluding the claimant, who were not able to be returned at the intended end of their career breaks. The claimant has not established that she is part of a disadvantaged group for gender based reasons. She cannot therefore establish the first two elements under Article 3(2)(b)(i) and (ii) of the 1976 Order and it is therefore unnecessary for the tribunal to consider a justification argument.

(x) A similar analysis pertains to the quite separate indirect discrimination claim linked to EFA. The claimant has not established the first two elements required by Article 3(2)(b)(i) and (ii) of the 1976 Order and therefore, apart from the out-of-time issues, her claims of direct and indirect discrimination on the ground of sex, together with her claim for EFA and the associated indirect discrimination claim must fail, and are therefore dismissed.

Employment Judge:

Date and place of hearing: **12, 13, 14, 15 and 20 September 2016, Belfast.**

Date decision recorded in register and issued to parties:

Carol Bridget Veronica Molyneaux

V

Department of Agriculture, Environment and Rural Affairs and

Department of Finance

CLAIMANTS SUBMISSION

Time Issue:

1. The time limit for bringing a claim of sex discrimination is three months from the date of the act, or where there was a series of discriminating acts, three months from the date of the last act.

2. The claimant initially brought the case, understanding that there were time limit issues regarding the earlier period of the alleged discrimination and from the outset, requested that time may be extended, given the nature of the claim.

3. The claimant has latterly discovered the case of *Hendricks v Metropolitan Police Comr* which refers to whether or not a serious of acts amount to a continuing act. This makes it clear that the focus must be on whether there was an ongoing situation or continuing state of affairs in where the claimant was treated less favourably rather than on whether there is something which can be characterised as a policy, rule, scheme, regime or practice.

4. The status or position of the person responsible for the alleged discrimination may also be relevant to continuous acts. Discriminatory acts by a senior employee in a position of power are by the very nature more likely to create a continuing state of affairs than discriminatory acts of a junior employee. Decisions regarding the permanent removal of funding from positions temporarily vacated by career break staff, where taken by senior staff, as were decisions regarding the wording and application of excess fares policies, recruitment, vacancy management and redeployment policies.

5. If a claim is lodged outside the three month time limit and is not considered to be a continuous act, the Tribunal has a discretion to extend time if it is just and equitable to do so. The claimant understands that the exercise of discretion is the exception rather than the rule. However, if the

Tribunal decides that that the case presented does not constitute a series of continuing acts, the claimant appeals to the Tribunal to extend time in this case, on the basis of the Tribunals overriding objectives of justice and equity.

6. If the Tribunal must decide whether it is just and equitable to extend time, then the claimant puts forward her reasons why there was a delay in submitting the claim earlier :

Direct Discrimination 2012: Non Return when Mr. McGreevey moved to new EU funded post

(a) the claimant did not have knowledge of Mr McGreeveys transfer, nor of the details around it.
(b) Documentary evidence of the circumstances is contained within the bundle
(c) the conduct of the respondent after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the claimant for information - During the course of this case, the respondent has presented misleading evidence and conflicting 'facts', relevant to the claimants case, which have served to make the case more difficult for the claimant. Conflicting claims have been made that Mr McGreevey was redeployed/ was not redeployed/ was a surplus individual/ was not a surplus individual/ was on the priority surplus list/ was not on the priority surplus list and that his move was a management move/ a voluntary move/ moved at his own request.
(e) the claimant promptly requested an amendment to her claim, when she obtained what she considers to be evidence base for this claim for direct discrimination.
(f) the claimant contacted relevant advice agencies as soon as she could in relation to this claim

Indirect Discrimination 2012-2013: (i)Removal of Funding from Claimants Post / removal of post and non-return

a. With regards to the earlier acts of alleged indirect discrimination, whilst the claimant was left in limbo at the end of her career break, the claimant sought advice from both her union – NIPSA and also from the Equality Commission. NIPSA (contrary to some

more recent opinion), at that time advised that there were no legal issues to pursue. The Equality Commission did offer advice on lodging a claim. They advised that the claim would have to be lodged within 3 months of the date of non- return, which the claimant now considers incorrect. The EC also advised it was not likely to be discriminatory, since the Equality Commissions own staff overdue return from career break were being treated similarly to the claimant. Without the support of her union, the claimant did not have the resources, either financial, emotion or mental, at that time to bring the case to Tribunal unsupported.

(b) the evidence cited and depended upon in this case is, in the main based upon written documentation and is therefore considered to be as reliable, as it would have been, had the case been brought within the time allowed

(c) the conduct of the respondent after the cause of action arose, must be taken into consideration. Despite numerous suitable alternative posts, the respondent continually placed road blocks to the claimants return to employment. During the course of this case, the respondent has presented misleading evidence and conflicting 'facts', relevant to the claimants case, which have served to make the case more difficult for the claimant to pursue

(d) the claimant was not emotionally/mentally able to pursue a case when originally not returned to work in 2012/2013. Being on the outside of the Department on a day to day basis, leaves females, who have taken career breaks for caring responsibilities and who have been non-returned, in a particularly vulnerable position, with little to no information upon which to bring forward a case.

(e) the claimant contacted relevant support bodies promptly to gain support to gain advice on a return to work and also to obtain legal advice.

<u>imination 2012-2013: (ii) ineligibility criteria (due to being permanent staff members)</u>
<u>ɔ-returned career break surplus staff when applying for temporary NICS posts</u>

(a) the claimant was offered a post to return to shortly after this time and although she was upset and considered this a further act of discrimination, she made the conscious decision to try to put what she felt was further significant discrimination behind her and to move forward with her life and career.

(a) If the Tribunal rejects that the (first and final) request for repayment on 17th April 2015, was the final act of a continuous act and accepts the respondents assertion that this claim is outside the 3 month limit, then the claimant requests the Tribunal to consider that the 'delay' was a consequence of the claimant awaiting the respondents response in re-evaluating her claim. During this time, the respondent had sought and awaited advice from Corporate HR regarding the proper application of the policy. Corporate HR advice was interpreted and the respondent's re-evaluated decision was provided to the claimant on 13th March 2015. The claimant lodged her ET1 form with the Tribunal on 10th June 2015 and considered that her claim was within the three month period on this date.

(b) Having regard to any such delay, the quality of the evidence put forward by both the claimant and respondent is not likely to be diminished from that which would have been presented, had the action been brought earlier.

(c) The claimant took steps to obtain expert advice from the Equality Commission and lodged the claim within 3 months of the date understood to be decision date -13th March 2015.

Direct Discrimination Claim:

The Claimant alleges that:

- the claimants non-return at the end of her career break - when additional funding (from the EU) was available for an new funded vacancy and subsequently filled by Mr McGreevey, whilst the claimant had requested an early return and the Department not backfilling Mr McGreeveys old post- constitutes direct sex discrimination

The relevant statutory provision is Article 3 (2) of the Sex Discrimination (Northern Ireland) Order 1976: In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if—

(a)on the ground of her sex, he treats her less favourably than he treats or would treat a man.

Indirect Discrimination Claim:

The Claimant alleges that:

- the career break policy as interpreted and applied or operated constitutes indirect sex discrimination, both in (i) its failure to facilitate a return to a suitable post and (ii) its categorisation of returners as being voluntary movers
- the redeployment policy as applied and operated constitutes indirect sex discrimination, by differentiating between the treatment of career break staff at the end of their career break and non- career break staff, reducing the likelihood a career breaker will be returned to post
- the excess fares policy as written and applied during the surplus situation constitutes indirect sex discrimination when career break returners are excluded from this benefit, particularly at a time when (i) the return to a new post is not voluntary, given that the majority of career break staff suffer a significant delay in being returned to post (ii) non career break staff are eligible to apply for excess fares when moving on a voluntary basis due to redeployment
- The application of vacancy management policy, in its failure to prioritise the return of staff on the career break pool (return list) to a suitable post.
- The application of recruitment policy which prevents non returned career break staff from accessing temporary employment opportunities within NICS Departments
- The practice of permanently removing the permanent positions of career break staff, in an effort to reduce the departments paybill, and not reinstating these posts when a career breaker is due

to return

The relevant statutory provision is Article 3 (2) of the Sex Discrimination (Northern Ireland) Order 1976:

> In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if—
> (b)he applies to her a provision criterion or practice which he applies or would apply equally to a man, but
>
> (i)which puts or would put women at a particular disadvantage when compared with men,
> (ii)which puts ,or would put, her at that disadvantage, and
> (iii)which he cannot show to be a proportionate means of achieving a legitimate aim.

The PCPs in question put women at a disadvantage, since significantly more women avail of career breaks than men. Due to childcare responsibilities, there is increase likelihood that females will take career breaks and therefore also be disadvantaged by the detrimental outworkings of the policies.

Given the gender breakdown of the workforce, 40% more females take career breaks than would be expected and 39% less males take career breaks than would be expected. In the PCPs, the advantage group is the rest of the DoE workforce (51% Male : 49% Female) and the disadvantage group are those who took career breaks (31% Male ; 69% Female). The PCPs hamper the career breakers likelihood of obtaining paid work.

Unlawful Deduction of Wages:

First principles of employment law are that where a person is employed, they have the right to be paid and if there services are no longer required, they ought to be lawfully dismissed. The claimant has her right to be paid under contract law and Part IV of the Employment Rights (Northern Ireland) Order 1996.

ɔstantive Issues:

1. The claimant, a PTO planning assistant with the Respondent, commenced a 2 year career break with the respondent in November 2010. The career break policy sits within the NICS Staff handbook and as such forms part of her contract of employment. An employee must provide

notice three months before the career break end date of their intention to return. He/she can also request an early return from career break.

2. The claimant was aware there was a surplus of staff of planning staff when she applied for her career break. She therefore considered the likelihood of her post being temporarily filled to be very small or not at all. The claimant considered there would be a position for her to return to at the end of her two year break. She was aware that returning to the same post and location was not guaranteed.

3. The claimant considered that the planning position she was temporarily vacating in Coleraine Area Planning Office, was unlikely to be temporarily filled in her absence, given the surplus position the Planning Service had at that time.

4. She considered that if for some reason she could not be returned to her planning post she would be returned to a post within her substantive grade- which she understood was Executive Officer 1 analogous.

5. Nowhere in the Career Break policy is there any indication that the employee can be placed in employment limbo at the end of their career break.

6. The Department had a surplus of planning officers , prior to the claimants career break. At the tim the claimant applied for her career break (A56), the claimant understood that there was a surplus and that she was part of that surplus. The claimant believed she continued to be part of a surplus throughout her career break.

7. Towards the end of her 2 year career break, on 7th August 2012, the claimant requested an early return, with a proposed return date of 1st September 2012. An early return was refused, upon the basis that the department remained in a surplus staff position at that time.

8. On 24th August 2012, HR Connect wrote to the claimant to confirm that her career break would end on 14th November 2012.

9. The department included career break staff in their efforts to redeploy surplus staff, including the Departments regrading scheme, which Mr Wilson notes was a pre-redundancy measure. Opportunites to avail of the on–loan scheme which redeployed surplus planning staff to Land

and Property Services on a two year basis was offered out to Career break staff, contrary to evidence presented by Mr.Wilson in paragraph 15. At least one member of staff was returned early from career break to an on-loan post in LPS. This would not have happened if career breakers were not part of the surplus.

10. In his witness statement, the respondents witness, Mr Christopher Wilson has *stated in paragraph 21 that 'at the time of the claimant seeking a return to work, the position was that if an officer left such a post, the funding for the post was withdrawn as a cost-saving and the post no longer existed.' However, when cross examined it is the claimants understanding that Mr Wilson indicated that this was the position prior to the claimant commencing her career break.* The claimant does not consider this oral evidence credible and considers that staff were not aware of this position prior to the commencement of her career break. Since the claimant is self-represented, an inexperience in the proceedures at hearing, the claimant did not take sufficient contemporaneous notes at hearing. The claimant must therefore rely on the Tribunals notes notes to verify this point and any further points made.

11. I consider that the evidence, in relation to this point, given in Mr Wilsons written statement is more credible than his oral offering. I, the claimant, contest that Mr Wilson advised staff of the possibility of non-return from career break, back in 2010. I do not believe that either staff nor their line managers were informed of the serious 'limbo' consequences of taking a career break, nor of the removal of funding and the removal of the post itself. However, I understand there was an awareness at the higher grades that there was an issue regarding the return of staff prior to the claimants career break being agreed.

12. The claimant does not consider much of Mr Wilsons evidence to be a credible. Contrary to claims made, it seems highly unlikely that the posts of all those (with the exception of those on maternity leave) taking any type of leave were not removed. The evidence in the bundle shows that there were only two new vacancies created between October 2012 and September 2013 and these were both in the Marine Plan Team. Since (i) Mr Wilson suggests that the temporarily vacated posts of all those who took any type of leave, excepting maternity, (defined as temporarily vacated positions in the Vacancy Management Policy- Substantive Vacancies definition) were permanently removed and (ii) since Ms Smith was unaware of any individuals (with the exception of career break staff) not posted back after taking such leave, then surely the evidence would show that there were numerous posts created during that time to accommodate those who were returning from other types of leave. The evidence does not reveal this to be the case. Only two posts were created between Oct 2012 and October 2013 The first taken up by Mr McGreevey, the second by the claimant.

13. One of the issues at the crux of this case, is the definition of Substantive Grade. It is obvious that the 'interpretation' offered by the respondent, both at hearing and within the bundle –bottom of page A42- are at odds with other definitions provided by the respondent and understood by the claimant. The table on D9 of the bundle was provided by the respondent, when directed by the employment judge at CMD on 16th May 2016, under paragraph 4-(2)-(i), to provide the gender breakdown of staff by substantive grade. The respondent provided this document in reply, referring to these as the substantive grades. However, at the same time, the respondent also provided a payscale document, which included individual grade names and stated these were the Departments 'substantive grades', inverted commas included.

14. Through discovery, the respondent also provided a further spread sheet, similar the one provided at C52 and relabelled the substantive grade column to analogous grade. In this same additional spreadsheet, the respondent added a column entitle grade name, which set out the name of the grade of each individual career breaker. The respondent is now asserting that this grade name is the same as substantive grade. The claimants understanding is that the grade names, is quite different to the NICS substantive grades. I would ask the Tribunal to consider why has the respondent put forward his interpretation of 'substantive grade'.

15. An interpretation should not be required. Mr Wilson indicated at cross examination that everyone in HR was clear on what substantive grade means. Unfortunately this term is not defined within the handbook.

16. Mr Wilson , in his statement, paragraph7 states that career breakers are aware that there can be no guarantee that a funded vacancy will be available at the time of their expected or desired return date. Although not disagreeing, the claimant asserts that the handbook indicates that the posts of career breakers are permanent post and the vacation of such posts is only on a temporary basis. Nowhere in the handbook does it indicate that career breakers posts can be permanently removed as has happened and confirmed by Mr Wilson under cross examination.

17. Mr Wilson in paragraph 14 of his statement, states that staff already on career breaks could not have their returns facilitated as this would have increased costs. However, under cross examination Mr Wilson admitted that during the surplus period, when there was a recruitment embargo in place, some staff on career break may have been/were facilitated. The spreadsheet at C52 reveals that on 6th December 2010 a male member of staff was returned

(during a surplus and embargo period) to post. Therefore the argument that the department could not bring staff back from career break, as this would increase headcount and costs seems null and void, since obviously the return of this individual and any others would have increased costs, during the surplus period. This is of particular relevance, considering that the respondent had a new EU funded post, which the claimant believes should have resulted in one way or another, in her return from career break.

18. The respondent in answering additional information queries posed by the claimant (both (i)prior to the false claims that Mr Mc Greevey was on the priority surplus list-which were made both before the application to amend the claim and (ii) after, in the amended response), has repeatedly stated that no individual PTO staff members were identified as surplus and the case in fact was that there was a surplus situation within the department (A52-question 4b). It is the claimants understanding that the department did not move into propoer redeployment procedures by identifying individual PTO staff as surplus and accordingly putting these individuals forward for inclusion on a priority surplus list. Staff on this list should then have been considered along with DDA and Welfare pool staff, according to vacancy management policy. Following that career break staff should have been considered, as agreed with TU side, as was the case in other departments (B72). Instead, the Department chose to manage redeployment of as many PTOs as possible instead of a select 51. All these individuals were prioritised over the claimant.

19. Under cross examination , Mr Wilson advised that Mr McGreevey was assigned to the Marine Plan post , as management identified him as most suitable, given that Mr McGreevey was studying for a relevant qualification. Mr McGreevey did not have the qualification referred to. I argue that on that basis, he was no more suitable than any other PTO and that he was favoured on the basis of his gender by senior management, whilst at the same time I was discriminated on the basis of mine. I consider the respondent had an obligation to consider my position, when filling the post in question or any other post that became available as a result of the filling of the new post in question. This is because, since on 7th August 2012, I had requested an early return to recommence work on 1st September 2012. The Marine Plan team post was created on 18th October 2012 and filled by Mr McGreevey, who was transferred to Belfast on 22nd October 2012. Furthermore, the original evidence put forward, prior to my claim of direct sex discrimination shows that Mr Mc Greevey was moved on a voluntary basis at his own request.

20. It is my understanding through the cross examination of Mr. Wilson that rather than re-brigading resources, Mr McGreeveys post was funded by EU project money and the Coleraine based post vacated by Mr. McGreevey was not backfilled.

21. A post was available in the Coleraine Office- covering the Ballymoney Council Area- in August 2013. Mr McGreevey previously worked in as a PTO covering the Ballymoney area prior to his move. There is no evidence that his old post disappeared, or was suppressed. Similarly, there is no evidence to show that a new post was created in the Coleraine Office to cover the Ballymoney area, nor is there any evidence of a second post created in the Belfast office- these two vacant posts are referred to at page B228- during the summer of 2013. In fact, it is clear from the answer to question 21 at A4 of the bundle, that these were not newly created posts. It

Case No: 1147/15

CLAM TO THE OFFICE OF THE INDUSTRIAL TRIBUNAL AND FAIR EMPLOYMENT TRIBUNAL

22. **Between**

CAROL BRIDGET VERONICA MOLYNEAUX

Claimant

and

DEPARTMENT OF THE AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS

And

DEPARTMENT OF FINANCE AND PERSONNEL

Respondents

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

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23. 1. Per the Statement of Legal & Factual Issues, the Legal issues in this case are **(See Trial Bundle at Tab A P 12)**:-

- *Whether or not the claimant has been subjected to indirect Sex Discrimination the first respondent contrary to Article 3(1)(b) of the Sex Discrimination (Northern Ireland) Order 1976, as amended?*

  a) *Has the respondent imposed any provision, criterion or practice (PCP)?*
  b) *Do they put females at a particular disadvantage when compared with males?*
  c) *Do the PCPs disadvantage the claimant?*
  d) *Can the respondent show that the PCPs are proportionate to the aim that they are trying to achieve?*

- *Was the Claimant treated less favourably by the first respondent than Andrew McGreevy on the grounds of her sex (direct discrimination) by reason of the placement of Andrew McGreevy to the Marine Division in October 2012 contrary to Article 3(1)(b) of the Sex Discrimination (Northern Ireland) Order 1976, as amended?*

- *Whether or not the respondent failed to pay the claimant wages in contravention of Article 45 of the Employment Rights (NI) Order 1996?*

- *Are any of the claimant's claims out of time?*

  a) *If so, should time be extended? and;*
  b) *If so, which claims should have time extended?*

Background

2. The Claimant claims indirect sex discrimination in respect of several matters, a failure to allow the Claimant to return to paid work at the end of a career break, and, the failure to pay excess fares when she did return to work and worked some distance from home (Belfast), secondly, she claims direct discrimination on the grounds of sex by being treated less favourably then a comparator, Andrew McGreevy, in that he was transferred to the Marine Division in October 2012, lastly, the Claimant claims a breach of Article 45 of the Employment Rights Order in that she alleges that the Respondents failed to pay her wages for an 11 month period and refused to pay Excess Fares Allowance (EFA) in the period October 13 – November 14.

3. Further to the above issues the Respondent's position is that the claims are out of time and time should not be extended.

4. The Claimant's third maternity leave ran from the 1 April 2009 to 31 March 2010. Prior to the end of her maternity leave she wrote to Mary McIntyre on the 11 March 2010 to request a further seven and half months unpaid leave to care for her three pre-school children and return on a part-time basis due to the families demands. The request for unpaid special leave was granted. The Claimant goes onto discuss the issue of surplus staff, she does accept that there was a surplus position for professional technical officer grades. At the start of November 2010 the Claimant applied for a career break and this was granted.

5. The Claimant further alleged in her statement that within the staff handbook that she understood that in taking a career break her post remained for her to return to at the end of what was within a reasonable period of the end date of the career break. The claimant however, when cross-examined, accepted that under the applicable career break policy she could not expect to be returned to her old post or that she would be returned into work immediately upon the intended end of her career break. The claimant stated

that she felt that she could expect a return within a 2-3 month period and cited the Special Leave sections on Promotion and Transfer (**See Trial Bundle Tab E P 6 – 2.16 & 2.17**)

6. The Claimant's career break started on the 15 November 2010 and was approved for two years the end date being the 14 November 2012.

7. At paragraph 36 the Claimant alleges that the Respondents used non-return of career break staff to reduce operating costs and further goes on to state that *"a combination of staff on secondment, the Respondent used career breaks to remove staff from its payroll, whilst maintaining the employment of staff in post"*.

8. In paragraphs 50 through to 56 the Claimant talks about her expectation that she would be redeployed within suitable grades. The Claimant sought an early return from her career break by correspondence dated 7 August 2012. She was contacted by HR Connect on 24 August 2012 advising that an early return could not be accommodated with the reason being given that there was a PTO surplus and confirmation that her career break would end on 14 November 2012. The respondents provided evidence that the claimant was permitted to seek paid employment outside of the NICE, was permitted to seek to be regraded and applied for other posts within NICS until the first respondent found a suitable post for the claimant.

9. At paragraph 73 the Claimant states that *"I believe it was discriminatory to fill it the Marine post filled by Mr McGreevy by transferring an existing member of staff who was in paid employment, when I was a permanent member of staff without a post. It was discriminatory to not return me, when a vacant PTO post were available within the Department, on the basis of a cost saving exercise"*. Further, at paragraph 74 *"I believe I was excluded because management viewed that (as) unprofessional that I had taken a career break to care for my young family"*. Chris Wilson provided evidence as to why Mr McGreevy was moved into the Marine role in Belfast.

10. At paragraph 78 the Claimant states *"I was informed by HR Connect whilst struggling to find a return to paid work, that career break staff had the lowest priority. They are listed below DDA priority pools, surplus pools and welfare pools. This discrimination cannot be justified. I did not sign up to this when agreeing my career break"*.

11. The Claimant then goes on to discuss her seeking to temporarily downgrade. At paragraph 84 she talks about contacting a NISPSA Union Rep who contacted HR on her behalf. The issue of priority pools was then discussed and it seems that NIPSA *"resigned"* to HR's opinion and whilst they discussed the issue with the Respondents NIPSA certainly do not seem to have taken and run with the Claimant's challenges.

12. At paragraph 107 the Claimant states that in December 2012 she made a third request for an update on her level transfer application to Scientific Officer and she was informed that recruitment panels for a Scientific Post would take place in late January early/February 2013. She states that an assessment panel could not be set up earlier, so she was informed, and she alleges that there appears to be no good reason why this was the case. Debbie Smyth gave evidence regarding the Higher Scientific Officer Post and the fact that the claimant had not passed the assessment as the claimant previously believed and so it was not possible for her assessment for the Higher Scientific Officer post to be used for the Scientific Officer post.

13. On the 8 October 2013 the Claimant returned to Marine PTO post working in Belfast (two days in Belfast, three days per week in Portrush). The following year in and around September 2014 the Claimant applied for EFA (excess fairs allowances) and it was approved on 12 September 2014. Subsequent to this however Collette Jones phoned the Claimant on 22 October 2014 advising her that the Claimant had no entitlement to EFA. Following on a grievance appeal the Claimant's request for EFA was not upheld and the grievance and appeal were rejected. The Claimant, in paragraph 165, states that she feels she has been indirectly discriminated against as a result of having taken a career break.

14. The witness statement from Debbie Smith deals with the claim for EFA by the Claimant. At paragraph 5 the witness states that she considered the Claimant's request in line with the policy provisions in the NICS handbook which states at paragraph 17.28 that *"a new posting on return to duty will be recorded as a voluntary transfer. Departments will normally only meet expenses occurred where staff would have been redeployed or permanently transferred had they remained in work"*. Upon being cross-examined Mrs Smith confirmed that she looked to see if anyone else had been given EFA upon return from a career break and confirmed that she could not find any example.

15. Paragraph 6 then states that it is clear from the policy the Department would normally only meet expenses occurred where a member of staff would have been re-deployed or permanently transferred had they remained in work. Debbie Smith states that she carefully considered with reference to the above policy to ascertain whether there could be any exceptions to this. She said that she contacted Corporate HR by telephone to check her interpretation of the policy was correct. Following on from these investigations and all considerations Debbie Smith concluded that there was no reason to justify payment of EFA in this case.

16. Paragraph 14, the witness states that the Claimant's name was placed on the NICS career break pools list by HR Connect three months prior to her due date to return for work. Further, the witness states that the post applies to all staff returning from a career break both male and female. Debbie Smith then goes on to discuss efforts that were made to return the Claimant into paid employment.

17. There is a statement from Kerry Stanley who was the HR Case Manager responsible for responding to a number of queries raised by the Claimant in relation to her request to return from her career break.

18. Paragraph 5 the witness sets out the fact that the Claimant would have been advised that they will not normally be posted back to their former post/location, but to vacancies as and when they arise, as was the position in the Claimant's case.

19. Paragraph 6 the witness sets out the relevant provision from part 1 (1) of the Application Form which confirms that the individual has read and understood the career break section from the NICS handbook. (**See Trial Bundle Tab B P 59**)

20. NICS handbook, Chapter 3.08 special leave, section 17 career break; "*17.26 staff should be aware that they are not guaranteed that a post will be available when their career break is finished. Where a suitable post is not available staff may, with the agreement of Departmental HR, take up alternative salaried or wage earning employment within Northern Ireland, on a temporary basis, until a suitable post becomes available either in a substantive grade or the lower grade*".

21. The witness also goes on to deal with the issue of the Claimant's request to return into a lower grade (EO2) in general service discipline. Advice sought

by Corporate HR on this issue and that they had confirmed that any such move would have to be within her own professional and technical discipline (i.e. TG1 planner) and as there was no vacancies at that time it would not have been possible for her to return in this fashion.

22. We also have a statement from John Cuthbert, Staff Officer in Appointments and Marketing Branch in Department of Finance. This deals with the application by the Claimant for an external advertised Mapping and Charting Officer (MCO) fixed term position. At paragraph 6 states that HR Connect made the following comment: *"Carol has been rejected on the basis of section 5.4 of the recruitment policy and procedures manual"*. This effectively states that staff employed on permanent contracts within the NICS are not eligible to apply for temporary posts for any grade within NICS – the relevant policy is referred to. This witness confirmed under cross-examination that the claimant would have had to resign from her permanent position in the NICS in order to take up the MCO post. Indeed, it is notable that the claimant and 2 male applicants were rejected **(See Trial Bundle Tab A P 64)**

23. Lastly, there is a statement from Christopher Wilson (a recently retired Grade 7) who worked in DOE Human Resources and Organisational Change Division. The witness deals with the relevant background in terms of the changes in Planning Service between 2002-2006 especially in terms of the increase in number of planning applications and associated fee income which states at paragraph 5, the situation dramatically changed and declaration of formal staff surplus in the Department had the effect of restricting recruitment on new staff across NICS and also ensured that no vacancy could be filled in the NICS without staff and DOE being considered first.

24. Relating back to redeployment of surplus staff, mainly administrative and general staff, in 2010 the witness identifies that there are material differences between general staff and the professional and technical staff grade to which the Claimant belongs.

25. Paragraph 8 the witness states *"In normal circumstances it is usually possible to facilitate an Officer's return from a career break within the previously set timescale for return, this is particularly so in the general service grades, where there are significantly more staff and therefore vacancies. The Claimant's circumstances, as professional planner seeking to return from a career break during this period and declining application numbers and significant staff reductions, were unusual but not entirely unique to the Department"*.

26. Mid-way through paragraph 9 then the witness identifies four relevant comparators, three male and one female.

27. Paragraph 13 the witness discusses the difficulties with moving laterally and into a lower grade post stating that it would outside the terms of the handbook on lateral movement would encounter significant resistance from general service staff and the feeder grade and from trade union side.

28. Distinction is made at paragraph 14 in terms of the Claimant and other members of staff in that for payroll purposes the Claimant was not on the head count though she was a permanent member of staff so surplus staff and other priority staff pool members took precedence over her as a career break returner. He states that staff who had posts on maternity leave, DDA, surplus and welfare posts given priority over staff on career breaks and who are not actually in posts. He further states that it was unfortunately the case that, in the period until late 2013, no funded vacancies existed in Planning Service to facilitate the Claimant's return.

29. Fundamentally, Chris Wilson identified that the Department had a financial deficit, a surplus of planners and efforts were being made to find work/posts for the surplus planners and not just the claimant. There was a surplus of 51 PTO Planners and all had to be dealt with – not simply the claimant.

30. The relevant sections of the policies are set out in the witness statements and are contained within the bundle. It is submitted that the claimant has not been able to identify any specific breaches of the policies.

31. The Career Break Policy (**See Trial Bundle Tab C P 8 - 13**) includes a number of relevant provisions, including:-

> *"17.4 The granting of a career break is a discretionary matter and not an entitlement...*
>
> *17.19 In a redundancy or early severance situation, if you are on a career break you will be considered under the same terms as serving members of staff.*
>
> *17.24 You will not normally be posted back to your former post/location, but to vacancies as and when they arise. This will usually be in your former department or the equivalent department following any restructuring or reorganisation. Every effort will be*

made to ensure that you return to a post within your substantive grade/pay range, although you may be required to serve in a lower post on a temporary basis until a suitable posting in the substantive grade can be found...

17.25 departments will endeavour to reabsorb their own staff. If, exceptionally, this is not possible within a reasonable period of time, Departmental HR may negotiate with any departments that have vacancies.

17.26 Where a suitable post is not available you may, with the agreement of Departmental HR take up alternative salaried or wage employment within Northern Ireland, on a temporary basis, until a suitable post becomes available either in the substantive grade or the lower grade.

17.28 A new posting on return to duty will be regarded as a voluntary transfer. Departments will normally only meet expenses incurred where you would have been redeployed or permanently transferred had you remained in work."

LIMITATION/EXTENSION OF TIME

32. The claimant's claims are out of time.

a. The claimant's intended return to work was November 2012.
b. The claimant returned to work on 8 October 2013.
c. The excess fares are only claimed as payable up to November 2014.
d. The claimant lodged her ET1 with the OITFET on 10 June 2015.

33. I would submit that there are a number of further relevant dates/events:-

a. The claimant alleged in correspondence dated 22 November 2012 that the failure to provide her with work and wags at the end of her career break was indirect discrimination. **(See final Bullet Point at Page 137 of the Trial Bundle)**
b. The claimant was engaging with NIPSA around the time she was intending to return from her career break. **(See Paras 84 - 87 of the claimant's witness statement Tab A P 12)**

c. The claimant was informed by Colette Jones on 22 October 2014 that she was not entitled to EFA. **(See Para 148 of the claimant's witness statement Tab A P 21)**
d. The claimant corresponded with the relevant officers in the period from October 2014 to April 2015.
e. The claimant agreed to the recovery of the EFA which had been paid. **(See Para 158 of the claimant's witness statement Tab A P 22)**
f. The claimant lodged a grievance about the claim for EFA on 28 April 2015. **(See Para 159 of the claimant's witness statement Tab A P 22)**

34. Under the Art 45 Claim (Deductions from Wages) The claimant has three months in which to lodge a claim. Art 55(2) of the Employment Rights (NI) Order 1996

> *"(2) Subject to paragraph (4), an industrial tribunal shall not consider a complaint under this Article unless it is presented before the end of the period of three months beginning with-*
> *(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*
> *(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*
> *(3) Where a complaint is brought under this Article in respect of--*
> *(a) a series of deductions or payments, or*
> *(b) a number of payments falling within paragraph (1)(d) and made in pursuance of demands for payment subject to the same limit under Article 53(1) but received by the employer on different dates,*
> *the references in paragraph (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.*
> *(4) Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this Article to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

35. The relevant dates here are the dates when the claimant suffered any deduction. In this case, given the earlier payment of EFA, the time should be

taken to run from, at the latest, November 2014. This being the final date that a 'deduction' would have been made.

36. The claimant has not set out why it was not reasonably practicable for her to comply with the time limit in this case nor that any such further time post the time limit was reasonable. As set out in Harvey (PI.1.G(2)(a) at Para 187:-

> *"First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the applicant (Porter v Bandridge Ltd [1978] IRLR 271, [1978] ICR 943, CA). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable."*

37. *In* Wall's Meat Co Ltd v Khan [1979] ICR 52, Lord Denning repeated his own earlier formulation of the test to be applied:

> *"It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights--or ignorance of the time limit--is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences'.'*

38. The Court of Appeal in Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945 considered the test to be applied and May LJ concluded:-

> "[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done--different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360, HL.* In the context in which

> the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [*Singh v Post Office [1973] ICR 437, NIRC*] and to ask colloquially and untrammelled by too much legal logic--"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"--is the best approach to the correct application of the relevant subsection."

And, further:-

> *"There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not reasonably practicable to complain to the ... tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the ... tribunal'."*

39. In this case, there is nothing to suggest that it was not reasonably practicable for the claimant to lodge her claim within time. There is nothing to suggest that illness, bad advice or other intervening factors were at play. Further, the utilisation of an internal appeal is no reason to extend time and certainly does not suspend time from running.

40. Under the Art 76 of the SD(NI)O 1976, proceedings must be lodged within three months of when the act complained of was done. Art 76(5) provides that *"a court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if in all the circumstances of the case, it considers that it is just and equitable to do so."*

41. *"It has been noted that under some jurisdictions a tribunal is empowered to grant an extension of time 'if, in all the circumstances of the case, it considers that it is just and equitable to do so', or according to some such formula. Where these words appear, it has been held that they give the tribunal 'a wide discretion to do what it thinks is just and equitable in the circumstances*

... they entitle the [employment] tribunal to take into account anything which it judges to be relevant': Hutchison v Westward Television Ltd [1977] IRLR 69, [1977] ICR 279, EAT. The discretion is broader than that given to tribunals under the 'not reasonably practicable' formula: Hawkins v Ball and Barclays Bank plc [1996] IRLR 258, EAT; British Coal Corpn v Keeble [1997] IRLR 336, EAT; Mills and Crown Prosecution Service v Marshall [1998] IRLR 494, sub nom DPP v Marshall [1998] ICR 518, EAT. Notwithstanding the breadth of the discretion, ***it has been held that 'the time limits are exercised strictly in employment ... cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule'*** *(Robertson v Bexley Community Centre [2003] EWCA Civ 576, [2003] IRLR 434, at para 25, per Auld LJ); Department of Constitutional Affairs v Jones [2007] EWCA Civ 894, [2008] IRLR 128, at paras 14-15, per Pill LJ)."* (Harvey (PI.1.G(3) at Para 277) (Emphasis Added)

42. Further, at 277.01, *"As Langstaff J put it in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT//0305/13 (18 February 2014, unreported), a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions (para 52):*

> *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was.'"*

43. It is submitted that the claimant has not shown any or any adequate reason as to why she was unable to comply with the time limits in her claims for discrimination. The time began to run in the claim for Direct Discrimination as early as October 2012 and from November 2012 for Indirect Discrimination (the intended and of the Career Break) bit crucially ceased when the claimant returned to work on 8 October 2013. The claimant for EFA ceased in November 2014 by which time the claimant had been informed that she was not entitled to the EFA.

44. Even should the tribunal find that some reasons have been given as to why the claimant did not present her claims within time, it is submitted that in the circumstances that time should not be extended.

Direct Discrimination

45. The Sex Discrimination (NI) Order 1976 proscribes direct discrimination under Article 3:- *"a person discriminates against a woman if... on the ground of her sex, he treats her less favourably than he treats or would treat a man."*

46. An example of this type of direct sex discrimination appears in The Equality Commission's Short Guide on Sex discrimination and Equal Pay Law (Page 4)[1]:-

> *"A female candidate is not appointed to a post even though, at interview, she achieved a higher score than the successful male. The employer based its decision on discriminatory assumptions about the woman's ability to carry out the job."*

47. The comparator relied upon by the claimant is Andrew McGreevy. The comparator was in a PTO Planner role in Coleraine and did share those characteristics with the claimant had she not taken a career break. The claimant's complaint is that the comparator was selected for the Marine Team in Belfast (moving from Coleraine) and she was not.

48. Chris Wilson, in his statement and evidence, identified the differences between the claimant and the comparator:-

    a. The comparator was in post and receiving a salary;
    b. The comparator was in a PTO Planning post where a surplus had been identified;
    c. The comparator was studying towards an MSc - a relevant and related subject to the Marine post, and;
    d. Moving the comparator would reduce the number of surplus PTO Planning posts in the DOE without increasing costs – at a time when the DOE was still running a deficit.

49. So far as a claim for Direct Discrimination is concerned, there is no basis for this claim. The 1st respondent has set out clearly why the claimant was not

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[1] http://www.equalityni.org/ECNI/media/ECNI/Publications/Individuals/SexDiscrimShortGuide2010.pdf

considered for the post and there is nothing to suggest that she was treated less favourably than the comparator ***on the ground*** of her sex.

Test/Burden

50. Article 63A of the SD(NI)O 1976 sets out the burden of proof:-

> *"63A. - (1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.*
> *(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent-*
> *(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or*
> *(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination against the complainant, or*
> *(c) has contravened Article 40 or 41 in relation to an act which is unlawful by virtue of Part III, [added SR 2011/156 on 31 March 2011]*
> *the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."*

51. The cases of *Igen v Wong [2005] 3 ALL ER 812* and Madarassy v Nomura International Plc [2007] IRLR 246 deal with the shifting of the burden of proof. In the case of *Nelson v Newry and Mourne District Council [2009] NICA 24*, the Court of Appeal said:-

> *"This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in Igen v Wong [2005] 3 ALL ER 812 considered the equivalent English provision and pointed to the need for a tribunal to go through a two stage decision-making process. The first stage requires the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the tribunal has so concluded, the respondent has to prove*

that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333. It stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In McDonagh v Royal Hotel Dungannon [2007] NICA 3 the Court of Appeal in Northern Ireland commended adherence to the Igen guidance."

52. In the case of *Madarassy v Nomura International Plc [2007] IRLR 246* the Court of Appeal provided further clarification of the tribunal's task in deciding whether the tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. The Court stated:-

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; and "could conclude" in Section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in*

status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage, the tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the claimant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment."

53. That decision makes clear that the words "could conclude" are not to be read as equivalent to "might possibly conclude". The facts must lead to an inference of discrimination. Network Rail Infrastructure Limited v Griffiths-Henry [2006] IRLR 865, the Employment Appeal Tribunal held that:-

    i. *"A Tribunal at the second stage is simply concerned with the reason why the employer acted as he did. The burden imposed on the employer will depend on the strength of the prima facie case ....*

    ii. *It would be inappropriate to find discrimination simply because an explanation given by the employer for the difference in treatment is not one which the Tribunal considers objectively to be justified or reasonable. Unfairness is not itself sufficient to establish discrimination."*

54. The complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. Again, in Nelson v Newry & Mourne District Council [2009] NICA 24:-

    *"**[24]** This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in*

the absence of adequate explanation that the respondent has committed an act of discrimination. In Curley v Chief Constable [2009] NICA 8 Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination.

[25] *In Laing v. Manchester City [2006] IRLR 748 Elias J stated in paragraph 71:-*

> *"There seems to be much confusion created by the decision in Igen. What must be borne in mind by a Tribunal faced with a risk claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting of the burden of proof simply recognises that there are problems of proof facing an employee which would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race.*
>
> *73. No doubt in most cases it would be sensible for a Tribunal to formally analyse a case by reference to the two stages. It is not obligatory on them normally formally to go through each step in each case.*
>
> *74. The focus of the Tribunal analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination that is the end of the matter. It is not improper for a Tribunal to say in effect "there is nice*

question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race.""

55. The question therefore is not one of reasonableness but as to whether or not discrimination has occurred.

56. In *Ladele v London Borough of Islington (2009) IRLR 154* (affirmed on appeal at [2009] EWCA Civ 1357) the court looked at a policy which applied to Registrars and a requirement to carry out civil partnerships:-

"

29. *The ET's conclusion that Ms Ladele suffered direct discrimination on the core issue, namely, by being required by Islington to conduct civil partnerships, is as the EAT said, in paragraph 52 of Elias J's impressive and cogent judgment, "quite unsustainable". As he went on to explain, Ms Ladele's complaint "is not that she was treated differently from others; rather it was that she was not treated differently when she ought to have been", and her complaint was "about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference". As Elias J said in the next paragraph of his judgment, "[i]t cannot constitute direct discrimination to treat all employees in precisely the same way." This error also applied to virtually all of the other findings of direct discrimination by the ET, as summarised in paragraph 19 above.*

30. *A similar error of law in the ET's approach, which applies to virtually every allegation of direct discrimination, was identified by the EAT, and was expressed by Elias J in paragraph 59 in these terms: "Even if ... there is sufficient evidence from which an inference of discrimination could be made, [the allegation] requires consideration of the explanation given by the employer for the less favourable treatment", as, if the ET had been "satisfied that the reason is non-discriminatory (even if in other respects the conduct is unreasonable) then no discrimination has occurred." As Elias J said in the next paragraph, the ET did not adopt that approach, but, instead, considered "whether the employer has satisfied them that the alleged*

detriment did not occur" which tells one "nothing about why it occurred, which is the focus of the enquiry"."

57. In the present case, the claimant is being treated as all employees of NICS are in that she was not returned until a post was identified for her. There is nothing to suggest that a male on a Career Break in the same circumstances as the claimant would have been treated any differently.

58. As is well settled, a difference in status and a difference in treatment is not, without more, sufficient to establish a *prima facie* case for discrimination. *Network Rail Infrastructure Limited v Griffiths-Henry [2006] IRLR 865* (Para 15).

Indirect Discrimination

59. The Sex Discrimination (NI) Order 1976 proscribes indirect discrimination under Article 3(2):- *"a person discriminates against a woman if... (b) he applies to her a provision criterion or practice which he applies or would apply equally to a man, but—*

(i) which puts or would put women at a particular disadvantage when compared with men,

(ii) which puts, or would put, her at that disadvantage, and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim."

60. An example of this type of direct sex discrimination appears in The Equality Commission's Short Guide on Sex discrimination and Equal Pay Law (Page 4)[2]:-

*"In a factory, a new roster requires the early shift to start at 4 am. This affects 100 shift workers, of whom only five are women. One of the five women, a lone parent, **cannot** get a child minder so early. As she **cannot** meet the employer's requirement, she is forced to give up her job. None of the men is disadvantaged by the new roster. A tribunal may find that the woman was indirectly discriminated against because the new roster puts women at a particular disadvantage (as women are more likely than men to be the primary providers of childcare) and the individual complainant was actually disadvantaged by it. The*

[2] http://www.equalityni.org/ECNI/media/ECNI/Publications/Individuals/SexDiscrimShortGuide2010.pdf

employer would have to show that the requirement to start work at 4 am was a proportionate means of achieving a legitimate aim." **(Emphasis Added)**

61. Lady Hale in *R (On the application of E) v Governing Body of JFS [2009] UKSC 15, [2010] IRLR 136* said (paras 56-7):

> "The basic difference between direct and indirect discrimination is plain: see Mummery LJ in *R (Elias) v Secretary of State for Defence [2006] EWCA 1293, [2006] 1 WLR 3213, para 119*. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.
>
> Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias at para 117 "the conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.'

62. It is for the claimant to make out a prima facie case if indirect discrimination by proving disparate adverse impact. *Nelson v Carillion Services ltd [2003] ICR 1256* (Para 39).

63. First, the prohibition under this section relates to Provisions, Criterion or Practices that are such that there is a particular disadvantage when compared to men. In this case, the stipulations of the career break policy apply equally to men as to women. Moreover, in contrast to the example provided by the ECNI, there is no evidence to suggest that there is a higher proportion of women than men who have to take a career break. Taking a

career break is a choice, the claimant has not established that a considerably higher proportion of women than men **cannot** comply with a provision – she merely asserts and seeks to establish that a higher proportion of women than men take a career break.

64. No actual comparator was identified by the claimant in this case, Chris Wilson referred to a number of comparators, (3 males and 1 female – not including the claimant) (**See witness bundle at Tab B P5 Para 9**), all of whom were not able to be returned at the intended end of their career break.

65. Further, the comparator pool of the disadvantaged should, it is submitted, be limited to the analogous grade of the claimant. The claimant was a PTO Planner within the DOE. That substantive grade (and discipline) is analogous to Executive Officer 1 ("EO1"). In the bundle (**See Trial Bundle at A52**) there is a table containing the details of career breakers in DOE (Staff in DOE who started a Career Break in DOE between Nov 2008 & Jan 2016).

66. Of the EO1 staff listed they can be broken down as follows:-

e.	**7 Female**	**2 Returned**	**- 28.6% Returned**
f.	**5 Male**	**0 Returned**	**- 00.0% Returned**

67. It is submitted that this pool (of the disadvantaged) is correct as it was in the claimant's particular Grade and Discipline that there was a particular surplus. The Review of Planning Service Operating Costs reveals that 51 PTO Planning posts out of a total of 271 posts in Planning as a whole were identified for redeployment (**See Trial Bundle Tab B P 35 Table**). This was not DOE wide but related to Planning only. Further, as Chris Wilson stated (**See Witness Bundle Tab B P 3 Para 6**), *"professional planning staff are a small professional group almost entirely based in the Department (DOE). There would be no practical use ... in having an NICS wide surplus priority list for professional planners when over 95% were based in DOE alone."*

68. If the pool identified at 66 above is correct then the claimant cannot establish that she is part of a disadvantaged group for gender based reasons.

69. Further, and relevant to the pool at 66 above, the claimant seeks to rely upon a pool of 100 however that pool (all the individuals who took a career break in the table at A52 of the Trial Bundle) includes all grades and disciplines whereas the surplus was most concentrated at the PTO and HPTO roles in Planning. As set out by Chris Wilson, general service staff are easier to place

with other departments that PTO Planners given the difference in the number of roles available for each.

70. The respondent expended every effort to place the claimant, including:-

    a. Allowing her to take part in the special regarding scheme for PTO Planners;
    b. Allowing her to apply for available roles in other departments, and;
    c. The claimant was permitted to seek employment outside of the NICS.

71. The claimant seeks to rely upon the case of *Kennedy -v- Equality Commission for Northern Ireland 548/14IT* (I will refer to the claimant in the Kennedy case as Kennedy to avoid confusion). The tribunal found "*... the variation did not extend so far as to permit the respondent, at its election, to suspend an employee indefinitely and, in reality, permanently, leaving an employee without work, pay or redundancy compensation... It did not allow for a permanent 'delay'.*" **(Para 108 & 109 of the decision)**. That case was an OITFET decision and is not binding on this tribunal. Further, there are a number of distinguishing features:-

    a. The respondent replaced Kennedy by making a permanent appointment to the role. The claimant was not replaced.
    b. Kennedy had no prospect of a return in that case. The claimant has been returned.
    c. The policies under consideration in Kennedy and this case are different policies.
    d. In this case the claimant accepts that there was a surplus situation prior to her applying for a career break. **(See claimant's witness statement at Para 6 Tab A P 1)**
    e. The claimant further accepts that she looked at the transfer on-loan to the Land and Property Service in 2010 but that it was not suitable for her **(See Trial Bundle at Tab B P 49)**. This was specifically with reference to the surplus of PTO Planners. Further, she accepts that it was public knowledge that a reduction in staff costs was a priority. **(See claimant's witness statement at Paras 15 and 21 Tab A P 2 & 3)**

72. As was held in *Barclays Bank v Kapur [1995] IRLR 87 CA*, an unjustified sense of grievance was not a detriment. The claimant in this case is clearly aggrieved but the sense of grievance is, on the facts of the case, unjustified.

73. The pool for comparison is a further issue, the pool should include all of those 'advantaged' by the PCP. In this case, arguably, the advantaged group is those employees that remained in work and therefore did not face redundancy. In a small group that may be the case however with the Surplus situation and VES that took place the advantaged group may not be so defined. The disadvantaged group (including the claimant) also included those identified by Chris Wilson – 3 male and 1 female – so the disadvantaged group was arguably on the evidence of Chris Wilson 60:40 men.

74. The numbers of EO1 career break staff (**See Trial Bundle Tab A P 52**) is 7 female and 5 male. 2 females returned and 0 males returned. As the surplus was most acute in the Professional and Technological grades it would, it is submitted, be more proper to have a narrower pool than the whole range of grades and disciplines. As stated by Chris Wilson, general service staff were more easily absorbed given the number of posts in the NICS.

75. In *London Underground v Edwards (No 2) [1999] IRLR 364*, (Para 23) the Court of Appeal looked at pools and the correct pool in that case was the entire complement of Train Operators and concluded:-

> *"The first or preliminary matter to be considered by the tribunal is the identification of the appropriate pool within which the exercise of comparison is to be performed. Selection of the wrong pool will invalidate the exercise, see for instance Edwards No.1 and University of Manchester -v- Jones [1993] ICR 474, and c.p. the judgment of Stephenson LJ in Perera -v- Civil Service (No.2) [1983] ICR 428 at 437 in the context of racial discrimination. The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied. In this case, the pool was all those members of the LU workforce, namely train operators, to whom the new rostering arrangements were to be applied (see paragraph 3 above). It did not include all LU employees. Nor did the pool extend to include the wider field of potential new applicants to LU for a job as a train operator. That is because the discrimination complained of was the requirement for existing employees to enter into a new contract embodying the rostering arrangement; it was not a complaint brought by an applicant from outside complaining about*

the terms of the job applied for. There has been no dispute between the parties to this appeal on that score. However, Mr Bean has placed emphasis on the restricted nature of the pool when asserting that the Industrial Tribunal were not entitled to look outside it in any respect. Thus he submitted they should not have taken into account, as it apparently did, its own knowledge and experience, or the broad national "statistic" that the ratio of single parents having care of a child is some 10:1 as between women and men."

76. In *Rutherford v Secretary of State for Trade and Industry (No.2) [2006] IRLR 551, Baroness Hale stated:-*

"71 The essence of indirect discrimination is that an apparently neutral requirement or condition (under the old formulation) or provision, criterion or practice (under the new) in reality has a disproportionate adverse impact upon a particular group. It looks beyond the formal equality achieved by the prohibition of direct discrimination towards the more substantive equality of results. A smaller proportion of one group can comply with the requirement, condition or criterion or a larger proportion of them are adversely affected by the rule or practice. This is meant to be a simple objective enquiry. Once disproportionate adverse impact is demonstrated by the figures, the question is whether the rule or requirement can objectively be justified.

72 It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and the disadvantaged groups. So it is no answer to say that the rule applies equally to men and women, or to each racial or ethnic or national group, as the case may be. The question is whether it puts one group at a comparative disadvantage to the other. However, the fact that more women than men, or more whites than blacks, are affected by it is not enough. Suppose, for example, a rule requiring that trainee hairdressers be at least 25 years old. The fact that more women than men want to be hairdressers would not make such a rule discriminatory. It would have to be shown that the impact of such a rule worked to the comparative disadvantage of would-be female or male hairdressers as the case might be.

73 But the notion of comparative disadvantage or advantage is not straightforward. It involves defining the right groups for comparison.

The twists and turns of the domestic case law on indirect discrimination show that this is no easy matter. But some points stand out. First, the concept is normally applied to a rule or requirement which selects *people for a particular advantage or disadvantage. Second, the rule or requirement is applied to a group of people who* want *something. The disparate impact complained of is that they cannot have what they want because of the rule or requirement, whereas others can.*

74 What is the comparative advantage and disadvantage in this case? It cannot simply be being under or over the age of 65. That in itself is neither an advantage nor a disadvantage, until it is linked to what the people concerned want to have or not to have. If one wants to have a pension, then reaching pensionable age is an advantage. If one wants to go on working beyond pensionable age, then reaching that age may be a disadvantage.

75 The advantage or disadvantage in question here is going on working over the age of 65 while still enjoying the protection from unfair dismissal and redundancy that younger employees enjoy. As Mr Allen QC for the appellants pointed out, that protection has an impact, not only when employment comes to an end, but also upon whether or not it is brought to an end, and if so, how."

77. Of note is the fact that Baroness Hale talks of the disadvantage in terms of the proportions of those groups who can comply with certain requirements. In this case, there is no individual or group who can or cannot comply with a requirement of a PCP – in contract to a height requirement or the requirement (as in *London Underground*) to carry out work at anti-social times of the day.

78. The recent cases (dealing with amended Indirect Discrimination provisions brought in by the Equality Act 2010) of *Home Office (UK Border Agency) v Essop 2015 ICR 1063* and *Naeem v Secretary of State for Justice 2015 EWCA Civ 1264* both refer to the tribunal having to address "the reason why" In *Essop* the Court held that that it is necessary for a claimant in an indirect discrimination claim to show not merely that a particular PCP disadvantages both her and the group sharing her protected characteristic, but also why that is the case.

79. Indirectly Discriminatory treatment can be justified. The ECJ, in Bilka Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317, set out the principles fc Justification, namely:

    a. *the measure (ie the provision) must correspond to a real need of th employer/undertaking;*
    b. *it must appropriate with a view to achieving that objective;*
    c. *and necessary to that end;*

    In this case the justification is set out in the statements and refers in no sma part to the pressing economic and staffing issues that the 1st responden faced in terms of a Surplus and the need for the numbers in the P&T grade to be managed. The comparator, McGreevy, was in work and being paid anc the claimant was not.

80. In *Kapenova v Department of Health [2014] ICR 884* (Para 83) the cour rejected "*the suggestion made... that in accordance with European law that c defence of justification cannot be made out if there is a less discriminatory means of achieving the Respondent's aim.*" Even should the tribunal consider that there were other means of dealing with the claimant that does not lead to a conclusion that the respondents' actions cannot be justified.

81. The UKSC had, in the earlier case of *Homer v CC West Yorkshire Police [2012] IRLR 601 UKSC* (para 22), found that a real business need on the part of the employer alone may be sufficient. In addition to pursuing a legitimate aim, the treatment must be proportionate which means it is "*...both an appropriate means of achieving the legitimate aim* and *(reasonably) necessary in order to do so.*" The earlier case of *Cross & Ors v British Airways plc [2005] IRLR 423* (Para 72) accepted that cost could be a consideration put into the balance but could not be the sole factor to justify a PCP.

82. Further, the EAT considered a retirement scheme which excluded officers of a certain age range (the ET finding discrimination) The employment tribunal in *Harrod v Chief Constable of West Midlands Police [2014] IRLR 790* considered a claim of indirect age discrimination brought by more than 200 police officers who had been forced to retire, having at least 30 years' service and being at least 48 years old. There were legitimate aims, relating not only to cost but also increased efficiency, but the ET found that the failure to consider alternatives to compulsory redundancies was such that the means adopted to achieve the aims were not proportionate. This judgment was overturned by Langstaff at the EAT and the case was not remitted. In the present case the position of the respondent was not simply financial (where

there was money to fund a furtehr salary) but an actual and serious financial deficit coupled with a lack of work for PTO Planners and surplus of 51 PTO Planner roles. See further, *HM Land Registry v Benson [2012] IRLR 373* (Paras 34 - 37):-

> *"37. The essence of the Tribunal's reasoning was that the Appellant had not demonstrated a "real need" to limit its spending on the Scheme to £12m – or, to put it another way, to limit its spending on all three schemes to £50m. It held that it had not done so because it had not shown that payment of the additional £19.7m was "unaffordable". By that it evidently meant that the Appellant had not shown that the funds were absolutely unavailable, in the sense that they could not be paid without insolvency: it pointed out that the Appellant's reserves far exceeded that amount (albeit that Treasury approval was needed to spend them6) and that later in the same year, in the ATP, it contemplated spending a far greater figure. In our view, to apply a test of unaffordability in that sense is to fall into the error of treating the language of "real need", or "reasonable needs", as Balcombe LJ put it in Hampson, as connoting a requirement of absolute necessity. It is well established that that is not the case: see the judgments of the Court of Appeal in Barry ([1999] ICR 319, at p. 336 A-B) and in Cadman v Health and Safety Executive [2005] ICR 1546, and of Elias P in this Tribunal in Blackburn (above), at paras. 17-21 (pp. 509-510). In Cadman Maurice Kay LJ said, at para. 31 (p. 1560 B-C):*
>
> > *"The test does not require the employer to establish that the measure complained of was "necessary" in the sense of being the only course open to him. That is plain from* Barry. *... The difference between "necessary" and "reasonably necessary" is a significant one ..."*
>
> *The effect of that principle, applied to a case like the present, seems to us to be that an employer's decision about how to allocate his resources, and specifically his financial resources, should constitute a "real need" – or, to revert to the language of aim and means, a "legitimate aim" – even if it is shown that he could have afforded to make a different allocation with a lesser impact on the class of employee in question. To say that an employer can only establish justification if he shows that he could not make the payment in question without insolvency is to adopt a test of absolute necessity. The task of the employment tribunal is to accept the employer's legitimate decision as to the allocation of his*

resources as representing a genuine "need" but to balance it against the impact complained of. This is of course essentially the same point, adjusted to the different formulation of the test, as we make at para. 34 above. If the Tribunal had carried out that exercise it would, we believe, inevitably have come to the same conclusion as we have reached, on our approach, at para. 35. "

83. In the present case, it is submitted that even if the claimant has proven what is required of her then the respondents have provided sufficient evidence to justify any indirect discrimination.

BREACH OF ARTICLE 45 OF THE EMPLOYMENT RIGHTS (NI) ORDER 1996

84. The claimant applied for and was granted a career break. During the currency of the career break she was not entitled to be paid. That the career break was extended does not change this position.

85. The claimant in evidence accepted that the policy made it clear that she could not expect to be returned immediately upon the intended end of the career break. In these circumstances then it is that there could be a period after the intended end of the career break where the claimant would not be returned to work and would not be paid.

86. The claimant's contention is that she would be returned within a period of 2 – 3 months. This is not supported by the policy and is not, it is submitted, correct in law. The claimant was returned to work after a longer than desired period but she has been returned to work.

87. So far as the claim for EFA is concerned, again under the career break policy, there is no entitlement to be paid the same.

88. In the circumstances, the claimant has been paid all that is properly due and there have been no deductions from her wages. In *Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714 CA* (Para 33 – 35) the court held that it cannot be said to be a deduction if the individual is not entitled to the payment. On neither the claim for wages or EFA can the claimant be said to be legally entitled to the wage/allowance.

89. It is submitted that the claimant is estopped from making a claim for the EFA - she has confirmed that she agreed to the recovery of the EFA which had been paid. **(See Para 158 of the claimant's witness statement Tab A P 22)**

Conclusion

90. The claimant's claims are out of time and time should not be extended. In any event, the claims are not well founded and should be dismissed.

Joseph Kennedy BL

19 September 2016

Case No: 1147/15

CLAM TO THE OFFICE OF THE INDUSTRIAL TRIBUNAL
AND FAIR EMPLOYMENT TRIBUNAL

Between

CAROL BRIDGET VERONICA MOLYNEAUX

Claimant

and

DEPARTMENT OF THE AGRICULTURE,
ENVIRONMENT AND RURAL AFFAIRS

And

DEPARTMENT OF FINANCE AND PERSONNEL

Respondents

LIST OF AUTHOURITIES

- Walls' Meat Co Ltd v Khan [1979] ICR 52
- Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945
- Bilka – Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317
- Barclays Bank v Kapur [1995] IRLR 87 CA
- London Underground Ltd v Edwards (No 2) [1998] IRLR 364 (1)
- ~~Nagarajan v London Regional Transport [1999] IRLR 572 HL~~
- Robertson v Bexley Community Centre [2003] EWCA Civ 576
- Nelson v Carillion Services Ltd [2003] ICR 1256
- Igen v Wong [2005] IRLR 258 CA
- Cross and others v British Airways plc [2005] IRLR 423 EAT
- Rutherford v Secretary of State for Trade and Industry (No. 2) [2006] IRLR 551
- Network Rail Infrastructure Limited v Griffiths-Henry [2006] IRLR 865
- Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714 CA

- Madarassy v Nomura International Plc [2007] IRLR 246
- Ladele v London Borough of Islington [2009] EWCA Civ 1357
- Nelson v Newry and Mourne District Council [2009] NICA 24
- R (on the application of E) v Governing Body of JFS [2010] IRLR 136 SC
- HM Land Registry v Benson [2012] IRLR 373
- Homer v CC West Yorkshire Police [2012] IRLR 601 UKSC
- *Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT//0305/13*
- Kapenova v Department of Health [2014] ICR 884
- Harrod v CC West Midlands Police [2014] *[2015] IRLR 790*
- Home Office (UK Border Agency) v Essop [2015] IRLR 724
- Naeem v. SoS For Justice [2015] EWCA Civ 1264

Claim to the Office of The Industrial Tribunal and Fair Employment Tribunal

Carol Bridget Veronica Molyneaux

V

Department of Agriculture, Environment and Rural Affairs

And Fepartment of Finance

Response to Respondents Submission

1. The claimant has noted that there are typographic errors in the statement of facts and issues and in the Respondents written submission relating to the Article of the Sex Discrimination (Northern Ireland) 1976. The Indirect claim is being made under Article 3(2)(b), whilst the direct claim is being made under Article 3(1)(a). The wording in the statement of facts and issues reflect the Articles quoted above.

2. No comment.

3. The claimant has set out details in her submission , with regards to the discrimination being a continuous act. Should the Tribunal consider this not to be the case, the claimant requests that the Tribunal uses its discretion to extend time, given the details of the case.

4. The claimants written request for a part time return was not replied to , either verbally or in writing at the time it was requested. Towards the end of the additional seven and a half months additional unpaid leave, the claimant re-requested a part time return and was advised that this would be highly unlikely by Mary MacIntyre (Divisional Planning Manager), due to the need to reduce staff. Following this conversation, at the end of October, Ms MacIntyres secretary forwarded the claimant an application for career break.

5. The claimant has been misquoted here. In paragraph 25 of the claimants statement, the claimant states that she believed 'a post' remained for her not 'her post, as stated by the respondent in paragraph 5 of his written submission. As explained at the hearing , the claimant understood that she had a permanent position within the NICS and the that permanent position would remain.

6. This is correct. The career break, as agreed ended on 14th November 2012, after which the claimant was recorded as being on unpaid leave.

7. The respondents paragraph 7 has misquoted the claimants comments in her witness statement.

8. This is not correct. I have referred to a return to a suitable graded post in paragraphs 50 and 51. I have not referred to an expectation to be redeployed in the paragraphs 50-56, as claimed by the respondent. An early return was requested by the claimant on 7th August 2012. Permission to seek alternative paid employment outside of the NICS was provided on 26th November 2012. The claimant was advised that she could seek to be regraded through the special regrading scheme, however the respondents witness, Ms Smith , under cross examination indicated that she did not consider that the claimant fell into either the direct or indirect pool of staff who could potentially be regraded.

9. The claimant is misquoted again here. In paragraph 73 of her witness statement, the claimant refers to vacant posts within the department (including Mr McGreeveys post which was not backfilled), not just to the single post which was taken up by Mr McGreevey. Mr Wilson did provide evidence under cross examination, as to why Mr McGreevey was moved to the post. He advised that Mr McGreevey was a management transfer, not because he held relevant qualifications but because he was studying for a postgraduate qualification at that time which was in part related to the new post. Mr Wilson put forward the argument that Mr McGreevey's move was a management move- not a voluntary move. Clearly emails in the bundle dated September 2012, show that Mr McGreevey was not being compulsorily moved by management but rather that he was very interested in applying for a variety of opportunities outside of the area planning office, whilst at the same time being very interested in applying for the Marine Plan post, should it become available.

10. This is slightly misquoted in the past tense. It is the claimants understanding that this is still the case. Career break staff still have lowest priority.

11. It is correct that NIPSA does not appear to have taken and run with the claimants issues. The claimant considers that NIPSA has let her and all other career breakers who have been placed in the same position as her, down. NIPSA have since advised that they feel the claimants case is a strong one of discrimination. NIPSA has advised the claimant that they have not done enough for career break staff, since they have been focusing on keeping staff in post, in their posts.

12. With regards to the assessment for promotion to the higher scientific grade, the claimant was assessed by her line manager as suitable to be put forward for the Higher Scientific Officer grade interview. At this interview, the claimant was assessed against the competencies for the post. The claimant was assessed as competent in the professional and technical skills required for the post and the panel agreed that the claimant had met the requirements. The line manager score and interview panel score were combined by the respondent to assess whether the candidate was suitable for promotion to the Higher Scientific Officer grade. The claimant was not assessed as suitable for promotion and never claimed she was. The claimant was assessed as having the professional and technical competence for the higher scientific officer role. A lower level of professional and technical competence is required for the Scientific Officer grade. The claimant has already proved that she has passed all the remaining competencies for the scientific officer grade, since this

grade, similar to her PTO grade, is analogous to EO1. It is considered that the respondent could have investigated this further at the time. Instead, the respondent simply advised that the claimants assessment at the higher grade could not be considered. The respondent did not state that this was because he considered the claimant had not met the requirements for Higher Scientific Officer Grade. Furthermore, the respondent was advised by HRConnect on 4th January 2013, that applicants for lateral transfer should not be included in an external competition, however the respondent issued the claimant with an application form for the external competition and assessed her against the criteria set for the external competition, whilst at the same time, did not interview the claimant as an external candidate, despite the fact that the claimant had previously applied as an external candidate prior to her application for a lateral transfer.

13. The claimant feels she has been discriminated against as a consequence of taking a two year career break. At the end of her career break she was non-returned for almost 11 months, after which she was posted to Belfast. Similar to Mr McGreveey, she worked approximately half of her time close to home and the other half in Belfast. Mr McGreevey had a similar set up. Both staff members were permanently based in Belfast, however there was the flexibility within the team to work remotely from the North Coast, on a regular basis. Both staff members had previously worked in Coleraine Area Planning Office prior to their relocation to the Belfast Marine Plan Office. The claimant had already suffered the detriment of almost 11 months without work or pay. The comparator, Mr McGreevey did not suffer that detriment as he had not vacated his post for a career break. As well as not suffering from an extended unpaid period, Mr McGreevey was awarded excess fares for his voluntary transfer to his Belfast post. In comparison, the claimant found herself in a comparably disadvantaged position, having to pay the excess in travel costs from her wages. The claimant was placed in a small team, defined by the respondent as a 'voluntary move' and found herself working with a further two more males who were receiving EFA, due to their voluntary transfers. At the same time, the claimant was also working alongside another female, who despite travelling excessive distances to work, was not entitled to apply for EFA, when she like the claimant had returned from a career.

14. This is paragraph is not contested.

15. This is paragraph is not contested. However, as stated at the hearing, the claimant feels that the department has taken the wrong approach to the application of this policy and the policy itself is discriminatory, at a time when the department has no alternative but to relocated staff to meet business needs. The claimant does not consider the exclusion of career break returners from receipt of EFA, to be justified. Since it is only done on the basis of reducing costs rather than on the basis of not increasing cost. The claimant considers the second basis would be justifiable, however the first basis is not justifiable.

16. This paragraph states that Ms Smith discussed efforts to return the claimant into paid employment. Ms Stanley was unable to identify /name an individual within HR who was responsible for trying to return the claimant prior to Summer 2013. Ms Smith lists eight different opportunities the claimant applied to. No other PTOs were being put in the

position of having to regrade. Ms Smith has duplicated some of these opportunities. Furthermore it is untrue that I applied to go on loan to Land and Property Services and as Mr Wilson claims in his statement, career break staff would not have been returned to go on loan as this would not have reduced the departments surplus. However, the claimant is aware of at least one other planning officer who was returned from career break to go on loan to Land and Property Services. Regardless of claims of opportunities made by Ms Smith in her statement at paragraph 18, under cross examination, Ms Smith did not consider that the claimant fell into either of the two pools (direct and indirect) to be eligible for regrading.

17. This is not disputed.

18. The policy indicated returning career breakers are posted to vacancies..'as and when they arise'. The respondent states I paragraph 18 of their written submission that this was the position in the claimants case. The respondent had at least one, if not many vacancies which were not backfilled , due to a cost saving exercise. The career break policy did not state that vacancies that arise may not be filled, in accordance with any cost saving exercise. This was not within the terms of the agreement. Many posts 'arose' throughout the claimants limbo period, to accommodate the return of staff who went on loan to LPS. The department was aware of the due return of these members of staff and held vacant post by for on-loan staff to return to , whilst seemingly, permanently deleting the posts of career break staff from the system. Furthermore, the evidence appears to show that the vacancy that arose following the re-location of Mr McGreevey (ie vacent Ballymoney team post) remained unfilled and was available to be filled by the claimant in the summer of 2013. However Marine Division management requested that I be posted in the Marine Plan team due to my skills and qualifications. This further delayed my return by a further 6 weeks.

19. The claimant did read and understand the relevant Career break section of the handbook.

20. <u>This is FALSE.</u> Again, the respondent is misquoting policy. The words 'no guarantee', not guaranteed' in relation to a return from career break, at the time agreed or otherwise did not appear in any policy at the time the claimant agreed her career break. The policy is again misquoted in other lines here also.

21. It was not that there were no TG1 planning vacancies available at the time, but rather that the TG1 planning grade had been removed from the NICS during the claimants career break period. As such, the claimant, under the terms of the respondents interpretation of the career break was only going to be facilitated a return to a vacant post at PTO Planning Assistant grade, which the respondent claims it had no vacancies in , despite being able to return on-loan staff at various junctures of the 'limbo period'. These posts seemed to suddenly be created and filled on the various dates each individual officers on-loan period ended. Whilst at the same time the respondent maintains in it's answers to additional information sought, that the department only created 2 vacancies between October 2012 and October 2013.

22. One of the males rejected was a temporary employee. The other male was a permanent employee and not on career break. Both these male members of staff were being afforded the opportunity to earn wages and have an income. The claimant was not afforded this opportunity. During the entire period, the claimant had no income (with the exception of holiday pay and two one of mileage payments- approximately totalling less than one week of pay for the entire limbo period (almost 11 months)).

23. This is misleading. This embargo on recruitment was lifted on 7th November 2011(B72) for posts within the Staff Officer and EO1 grades and earlier on 12 August 2011 (B67) for all other grades effected. During the claimants limbo period staff were being recruited externally into the NICS. For example, the external recruitment drive for 54 Scientific Officers. Also recruitment agencies were hiring Mapping and Charting Officers for Land and Propoerty Services Posts. I could not be moved internally to one of these posts, however I was advised that I could apply to work through a recruitment agency, which at the time was paying little more than minimum wage for these posts. This was not a feasible option for me, since once travel costs to Belfast and childcare fees would have been deducted from my wages, I would have been in deficit.

24. 'Material change', is understood to be a difference. The difference is that General Service staff do not require any additional professional and technical competence to fulfil the needs of their posts, whereas professional and technical staff do.

25. The 'normal circumstances' referred to in paragraph 25 of the respondents submission, today appear to be long gone. The circumstances from 2010 onwards are the new 'normal'. With Departments under pressure to reduce headcounts and pay bills, the claimant asks , why , given that six years have since passed, does the respondent not set out clearly within the career break terms in the handbook, that the post vacated by career break, is being being permanently removed and the chances of return following career break are significantly diminished? Why does the respondent not set out to employees, within the career break policy that they will be excluded in a surplus situation?

26. The claimant has also identified comparators. Not all career breakers were not returned at the end of their career breaks, despite the surplus situation and recruitment embargoes at that time and despite the claims made that the Departments head count could not be increased.

27. <u>This claim is False.</u> Lateral movement to a lower grade is possible, under the terms of the handbook- see E13, policy 15.5. Lateral movement to lower grade was also possible under the special regrading scheme. Therefore the claimant could have been considered under this policy for a return on her due date, to the EO post she applied for, based in the Coleraine/Derry office.

28. If Mr Wilsons assertions are true, that no funded vacancies existed in Planning Service and that surplus staff had priority over career break returners, Then why did all staff have priority over career break returners, when the respondent has repeatedly stated that no

individuals were identified as surplus members of staff. There was a surplus situation, but no individuals were identified as surplus. Therefore the claimant asks, why was every member of staff prioritised over the PTO Career break returner- ie the claimant?

29. The department had a surplus situation and prior to the claimants career break the surplus was identified to be 51 in total. No one individual was identified as surplus, as repeatedly stated by the respondent. The claimant was truly surplus, unlike all other staff who fell within the 'surplus situation' definition but these individuals were not surplus- there were perhaps some 150 PTOs, possibly more. Not everyone of them was surplus, yet every one was prioritised ahead of the career break returner.

30. Vacancy management policy was not adhered to. The temporarily vacated posts of staff on career break, were permanently removed from the NICS.

31. 17.24 of the career break policy was not adhered to- every effort should have been made to return me to a post within my susbstantive grade or a lower grade. 17.26 was not adhered to , suitable posts did become available in the substantive grade. 17.28. Although not breached, is considered to be unjustifiably discriminatory.

Claim to the Office of The Industrial Tribunal and Fair Employment Tribunal

Carol Bridget Veronica Molyneaux

V

Department of Agriculture, Environment and Rural Affairs

And Department of Finance

Claimants Further Response to Respondents Submission

32. The respondent confirmed that the recovery of excess fares had not been discussed with the claimant on 24th March 2015 (B294). The respondent requested repayment of excess fares from the claimant on 17th April 2015 and that was the final act of discrimination against the claimant (B293). This, it is submitted was the final act in a series and was well within the 3 month time limit, as the claim was submitted on 10th June 2015.

33.

a. The claimant asked the question whether it could be discrimination; she did not allege it was discrimination at that point. These questions were put to her union rep. The union replied advising it was not there job to gather this information or to take sides between the employer and the employee.
b. The union was complacent regarding the issue and have since stated that they have not given the career break issue the attention it deserves, since they have been focusing on keeping staff in-post in paid posts.
c. Colette Jones made a number of claims by telephone, including (i)that the claimant had started a new contract of employment, (ii)that unlike the other planners in the Marine Plan team, she was not eligible for the Staff Preference Scheme (for RPA) as she was a returning career breaker and (ii) non entitlement to excess fares. Ms Jones never confirmed any of these claims in writing. The assertions made were incorrect. The claimant was and is still employed under her original employment contract and the claimant was at the relevant time, considered for the SPS, in the same way as other marine plan staff in the move towards RPA.
d. The claim was re-evaluated between December 2014- March 2015, and considered under relevant policies, which had not been previously considered.
e. Recovery was agreed on 20th April 2015. The claimant was not given any choice but to pay back the money. The claimant never agreed that the recovery was fair or just.

f. The EFA claim was passed from Planning HR to Mr Moore's who covers Marine HR. Mr Moore's team dealt with the query into EFA. Mr Moore was the officer who heard the appeal.

34. The deduction from wages was made from two payments at the end of April and May 2015. If discretion is required, the claimant asks for the Tribunal to exercise discretion in the interest of the overriding objective.

35. Deductions were made from the claimant's wages for the two monthly pay cycles following the 20th April 2015.

36. – 40. The claimant does not recall nor have notes to show that the respondent directly challenging her under cross examination with regards to any medical evidence that was relevant to her not complying with any time limit. Perhaps the claimant should have volunteered this information at the hearing when discussing other reasons (misadvice0 why she had not brought a claim earlier. However, as the claimant was not represented, she felt that she would be challenged on this aspect at a later point under cross examination. Had she been directly challenged regarding her personal health capacity to comply with the time limits, she would have advised of medical evidence to show that it was not reasonably practicable to lodge the claim earlier. The claimant was receiving medical treatment from October 2012 through to August 2013, for a specific anxiety condition which prevented her from making a claim at the time and beyond. The claimant has spoken recently with the clinical consultant in charge of the service she received, who has advised that confirmation of the condition, treatment and treatment dates/period can be provided by letter to the Tribunal, if needed. This condition was not a caused by or a result of her delayed return. The claimant has previously referred to this health issue in the first version of the witness statement originally provided to the respondent in December 2015 and has also been referred to at paragraph 167 of her submitted witness statement to support received from health care professionals during the period.

41. The claimant appeals for an extension of time, if required, since the operation of this policy had a significant detrimental impact on her as a female who availed of the scheme for childcare purposes. The respondents claims that the practical application of the career break scheme has not changed at any point (A63, q.32), however previously within NICS, career breakers permanently allocated positions were not removed from the NICS- they continued to remain throughout the career break period and their continuation facilitated the return of permanent employees at the end of their career break. Although not clear in the policy, the career break scheme as operated appears to be more of a voluntary resignation scheme with reinstatement, should a post become available. In the interest of justice, the claimant appeals for discretion to be exercised on the time limit, if the case or elements of it are considered to be out of time.

42. As stated above, the primary time limit could not have been met, due to the claimant's health at the time and beyond.

43. If time runs from October 2012 for the direct discrimination claim, the claimant asserts that she was not aware of the creation of the new post filled by the comparator at the time. She became aware of the circumstances surrounding its creation and filling at the end of November/December 2015, whilst working on the claim for indirect discrimination. At the prehearing review, the claimant advised that she had not submitted a claim for discrimination earlier and that at the time of just having been returned to paid employment, she did not feel that she was in any position to challenge previous decisions that had detrimentally impacted upon her. This was at least in part influenced by her anxiety issues and anxiety based perception relating to the pursuance of a claim at that time. The claimant's condition played a significant role in her decision to try to put the negative experience of the delayed return behind her and to try to make the best of her new post, since amongst other things she did not have the capacity needed to pursue a claim and she considered that in terms of her health at that point, the best course of action was to move forward and not dwell on past detriments.

    With regards to the claim for EFA, the claimant suffered deduction from wages (17th April) at the end of April/May 2015.

44. The claimant requests the Tribunals discretion in extending time, if necessary, in the interest of justice and equity.

Direct Discrimination

45. The removal of career breakers posts discriminates disproportionately against females, since staff availing of career breaks are disproportionately female (69%).

46.

47. Not only was the claimant not considered for the new post the comparator was moved to, she was not considered for the post he vacated.

48.

    a. The claimant had requested a return on 7th August and with no individual on the surplus priority list/other priority pool, the claimant should have been considered for the next available vacancy. There were no male PTOs awaiting a return to vacancy at the time, but if there had been, it is submitted that the department would have adhered to policy and returned the male PTO to the next available vacancy.
    b. The respondent decided that the permanent post within the system, allocated to the claimant was surplus. The respondent did not identify any individual PTO as surplus at any point. It is concluded that the claimant, with her post removed and needing a return to paid work, was more 'surplus' than any member of staff. At the time, the only PTO planner out of post, seeking return and not provided with a return was the claimant- a female who took a career break to look after

her young children. No other planner post was left in the position of not being returned at that time.

c. The claimant had a postgraduate qualification relevant to the duties of the 2012 Marine post. The comparator was studying towards a relevant qualification but at that time had not attained the qualification.

d. Returning the claimant to post, would not have increased the department's surplus at that time, since Mr Wilson indicated that the claimant was surplus, nor would it have exceeded the Executives budget, since the Respondent received EU funding for the new Marine Plan post in 2012. Additionally, when the Respondent eventually returned the claimant, the department was still in surplus- no explanation of this has been provided.

49. In line with vacancy management procedures, staff on DDA, surplus and welfare pools are given priority over staff on career breaks. This is reiterated by NIPSA at B72. The respondent claims at A57 (just above paragraph 20), that according to vacancy management policy, staff in post are also prioritised over career break staff. The claimant can find no evidence of this within the vacancy management policy (C67-69). PTO planning staffs in post were not on the priority surplus list. No individual staff member was identified as surplus. As such, PTO staff members in post should not have been prioritised for redeployment or otherwise, over the returning career breaker. B36-37 of the bundle clearly indicates that specific individuals needed to be named before redeployment could be progressed. No specific individuals PTOs were identified. No PTOS were put on the surplus priority list. Management were aware that under the career break policy, the claimant should have been returned to a vacancy that arose at the time of return. The respondent was under notice of the claimants return from 7th August 2012, prior to posting of the comparator to the new Marine Plan post on 22nd October 2012. There was no other career breaker, male or female awaiting return from August 2012 through to November 2012 (B124). It is submitted that the claimant was excluded from employment by management due to having prioritised the care of her young family ahead of her career. There was no policy basis upon which the exclusion of the claimant from paid employment can be justified. In addition, the respondent has stated at D1-2 that a female in the same position as the comparator would have been treated the same as the comparator and a male in the same position as the claimant would have been treated the same as the claimant. No females in the comparators position were offered the new post nor the opportunity to apply for the new post and although there were no male PTOs seeking a return from career break at that time, there was a male member of staff at the AA grade, in a similar position as the claimant, who was returned to post at the end of his career break, despite the declared surplus in his grade (A52 row 95th record out of 100).

Test/Burden

50. The respondent has claimed that the claimant could not be returned since the staff in-post headcount could not be increased. However, this argument does not appear to be true, since the respondent returned a male member of staff (to AA grade- 5th record

from the bottom, on reverse of page A52) during this period of surplus staff. This was at the time when there was a staff surplus, with staff in post at this grade on the priority surplus list and an embargo on recruitment* at this grade and all grades from AA-Grade7 (see B56 and B67). In returning this male the respondent increased the headcount. *The NICS views the return of career breakers as 'recruitment'.

51. The respondent has not provided an adequate explanation for all the various reason that have been given to explain the posting of the comparator (i.e. he moved voluntarily, he was redeployed, he was on the priority surplus list, he was not priority surplus, he was not identified as surplus, he transferred at his own request and so on). This array of reasons had been both confusing and misleading.

52. -55

56. The claimant has included in her argument that her permanent post should not have been removed in the first instance and further, since this had occurred, she should have been considered for any new post/ any resultant vacancy ahead of other staff already in post (including her male comparator), since she was truly surplus and the comparator had not been identified as surplus. She had come to be in this position due to her gender and childcare responsibilities.

57. Mr Wilson advised under cross examination, that staff may have been returned during the same period, when the department was in surplus, unable to increase its headcount and running costs. With reference to paragraph 50 above, a male on career break in similar circumstances, was treated differently than the claimant and also differently to other females in the same grade and discipline to him. He was placed in post, whilst females in the same grade (as well as in different grades (including the claimant)) were not returned and remained in limbo.

    The claimant considers that she was not treated the same as all other NICS returners. It is understood that returners are accommodated after individuals on the surplus priority list, DDA and welfare lists are accommodated. With regards to PTO planners, the department was accommodating <u>all</u> PTO staff already in posts, ahead of the claimant, despite not one individual PTO being placed on the surplus priority list.

58. There were no other PTO Planning Assistants awaiting a return at the time the claimant was due to return, as confirmed by both the Department and NIPSA (B124). The spreadsheet provided at A52 indicates that there was a male PTO awaiting return from March 2010, however this does not fit with what the fact that from November 2012, I was the only PTO Planner awaiting a return. It is understood that the male PTO planner is the same individual referred to in document B284 and that this individual extended his career break at his own request and that despite the spreadsheet indicating that the male left the service in October 2013, he actually remained in the service and was instructed to return in 2015 prior to the move to local councils. It is also understood that he did not return and this was his own choice.

Indirect Discrimination

59. (i) Women are less likely to be returned to post at the end of their career break. Only 11.5% of female career breakers are returned at the end of their career break, compared to 22% of male career breakers (D3 of bundle). Furthermore, the records in A52, reveal the reason why staff are not returned to post at the end of their career break. Besides the respondent being unable to post the individual at the end of career break (recorded under column 15 of A52 as 'unposted from career break'), some staff are not returned due to other reasons, such as domestic circumstances (recorded under column 15 of A52 'domestic circumstances').

The records before the Tribunal show disparate impact between males and females who avail of career breaks. Should the Tribunal other/further evidence of disparate impact, the evidence in the form of a spreadsheet of data related to individual career breakers, reveals further disadvantage to females who take career breaks. The claimant acknowledges that the further analyses has not been properly put in evidence before now, however when analysed, the records at A52 reveal that at the end of their career break, staff on average spend 335 days in limbo, unpaid, without work, awaiting return to a paid post. When broken down by gender, the data analyses reveal that on average females endure 423 days awaiting a return, whilst males on average endure 151 days for return to a paid post. Therefore females clearly suffer greater detriment due to longer periods of 'limbo'. Females wait much longer periods for return to employment than their male counterparts- on average, more than twice as long as males.

(i) Female employees are therefore disadvantaged more by the processes that occur when they are on career break (including the removal of career breakers permanent posts) and the processes that occur when return is due.

(ii) The claimant was in limbo for 324 days, without work or wages.

(iii) The claimant does not consider the approach of the respondent (particularly, the removal of permanent positions allocated to career break staff to save money) to be a proportionate means of achieving a legitimate end.

The figures quoted above have not previously been summarised in the evidence, however the statistics can be deduced from the analyses of the records presented in A52 of the bundle. A summary of the methodology and further analyses showing the disparate detrimental impact on females are appended at the end of this submission in Annex 1.

60. -62

63. Evidence in the bundle reveals that in between 2010-2013, there were on average over the period, 2719 staff employed by the respondent. This can be broken down by year and gender as follows:

Gender	2010*	2011*	2012*	2013~
Males	1396	1376	1399	1416
Female	1374	1326	1315	1273

This data can also reveal that the average over the period was 1397 males and 1322 females employed. Therefore there were 51% males and 49% females employed by the respondent over the period.

*Figures taken from averages at D9 of bundle

~Figures taken from A54 (paragraph 11) of bundle

Therefore in a proportionate sample of 1000 employees, it would be expected that there would be 510 males and 490 females.

All things being equal, one would expect that the same proportions would pertain within the career break group. That is, that there would be 51% males taking career break and 49% females taking career break. However, the ratio during the period is revealed through analyses of A52 to be 31% male and 69% female. At this rate, when extrapolated out, 310 males and 690 females would be expected to take career breaks in a group of 1000 staff. At this rate, the reality shows that there are 39% less males taking a career break, than would be expected and 40% more females taking a career break, than would be expected.

The respondent in paragraph 3 states that there is no evidence to suggest that there is a higher proportion of women than men taking a career break. The evidence in the bundle, analysed here, would indicate otherwise. There is clearly a higher proportion of women than men taking career breaks, having accounted for the gender structure of the workforce.

The evidence in D3 clearly shows that whilst 22% of male career breakers are returned at the end of their agreed career break, only 11% of females are returned at the end of their agreed career break on the agreed date.

64. The claimant has stated that the advantaged group were all the staff in post who were able to take advantage of the career break policy, they were given protection from a possible redundancy situation- which was helped kept at bay, by (i) the removal of permanent posts which had prior to their career break, been allocated to career break staff and (ii) the subsequent non-return of career break staff. Staff who did not take career breaks were also advantaged, since their voluntary moves were awarded eligibility for EFA allowances (according to exceptional policy guidance at that time). Furthermore non career break staff were not denied the opportunity of paid work.

65. The respondent proposes narrowing the pool of the disadvantaged to a limited group of staff in the EO1 substantive grade. The respondent has in paragraph 65 stated that the table at A52 relates to staff in DOE who started a career break between November 2008 and January 2016. This is incorrect. The respondent previously advised when supplying

this table that it contained the records of all staff on career break between 2010 and 2013. This is different to the respondent's current description. This is because (i) the table does not contain records on any staff commencing a career break after 2013 (ii) many staff who commenced career break in 2008 and 2009 are not included, since their career breaks were due to end prior to 2010.

It is considered that the pool should not be narrowed to PTO planners nor to staff in the EO1 Substantive grade, since (i) the practice of removing the permanent posts of staff was not restricted to staff in the PTO/EO1 grade and (ii) the surplus situation impacted on all grades (see B72-73 and B67-69 of the bundle).

66. The respondent has now submitted that their proposed comparator pool consists of 5 staff who were PTO planners (2 males and 3 females), with a 66% return rate for females and a 0% return rate for males. Discovery from the respondent shows that both males voluntarily resigned their posts.

    Following the analyses of limbo periods, set out in Annex 1, it is submitted that a more appropriate comparison may be one based upon the length of time spent in limbo. It has been noted above that there is an issue with the data provided relating to the male PTO who was due to return in March 2010. It is submitted that this individual, who took a career break to work abroad, extended his own career break through his own choice. He was not awaiting return, he extended his career break and was therefore not in limbo awaiting return to paid work within the NICS between the end date of his career break and the date of voluntary resignation. Both the Department and NIPSA confirmed that in November 2012, there was no other PTO (male or female) awaiting a return at that time (B124). It is therefore not considered appropriate to include this individual in any analyses of limbo periods or non-return.

67. Contrary to what is implied in the Respondents submission at paragraph 67, the Review of Planning Service Operating Costs did not identify 51 'posts' for redeployment. The review merely identified there was a surplus of 51 staff members. The review did not identify any individual staff members, nor did it identify specific posts. Throughout the period of the claimants career break and limbo period, no individual staff were identified as surplus. This is repeated in the evidence in section A of the bundle (A42, Q4b; A43, q3; A65, q3).

    Furthermore, contrary to the respondent's submission, that the surplus situation related to planning only, Mr Wilson indicated in paragraph 3 of his witness statement that the surplus in planning effected vacancy filling throughout the NICS and this is true. He also states in paragraph 9 that all staff in the department were similarly affected by the Review of Planning Service Costs and he goes on to illustrate how other non-planning staff were affected, with his individual examples of comparators.

    The respondent in his submission quotes Mr Wilson's argument that there would be no practical use in having an NICS surplus priority list for professional planners. The

claimant submits that it would have been very useful, since it would have had the effect of limiting her time in 'limbo', as unwelcome as they would have been, redundancy procedures would have had to have been instigated.

68. It is submitted that the pool presented at 66 of the respondent's submission is not correct. The pool should be much wider and consider all staff in the department who were on career break, as they were all affected by the surplus situation and the removal of their permanent posts.

69. The non-return of career breakers when due and the prolonged limbo experienced has been exacerbated by the removal of permanent posts previously held by career breakers, posts that were not substantive vacancies and posts that it is considered, should not have been removed as standard. Within the Department and Planning section, the review identified a surplus of 271 staff. 108 of these were in the PTO and HPTO grades. 173 surplus staff were outside the PTO and HPTO grades (See B35 of the bundle). The respondent submits that the surplus was most concentrated within the two grades above. However, there was an even greater surplus outside of these two grades.

70. It is considered that the claimant's permanent position should never have been removed. It is not considered that every effort was expended to return the claimant.

    a. With regards to the regrading scheme, Ms Smith under cross examination, did not consider that the claimant would have been eligible, whist Mr Wilson in his statement at paragraph 18 that regrading would only have been approved if it helped to achieve a cost reduction.
    b. Outside of the regrading scheme, the claimant was 'allowed' to apply for a temporary MCO post in DFP. However, she was advised she would have to resign her permanent post' and then later advised she was not eligible as she was a permanent civil servant.
    c. Permission to seek alternative employment outside of the NICS, is not considered to be an effort in 'placing' the claimant in a post.

71. With regards to the 'distinguishing features':
    a. The respondents act of permanently removing career breakers posts, is even more detrimental than filling posts with alternative permanent staff, since it further reduces the likelihood of a return. If a post still exists, at least there is still a chance (albeit very small) that the post will become vacant again.
    b. The claimant has nonetheless suffered significant detriment.
    c. The Tribunal in the Kennedy case stated in paragraph 38 of their decision, that 'All of this indicates that in the NICS policy there is also a clear assumption of a return to work and that there has been no contemplation of a situation where a return to work can simply be deferred indefinitely by management'.
    d. There was no indication that the claimant would no longer be considered to be surplus and would be treated to her detriment.

e. It was not public knowledge, nor was it widely disseminated internal knowledge that the taking of a career break would result in the reduction /removal of a permanent post. At the time of taking her career break, the claimant was not informed that a two year career break equated to a permanent reduction in the number of posts.

72. There is clear detriment in this case. The claimant suffered almost 11 months without work or pay, rejection from opportunities for paid employment and additional travel expenses due to her voluntary transfer, at a time when other non-career break staff were awarded excess fares to cover their additional travel cost, following the transfers they volunteered for.

73. The surplus situation impacted on the whole NICS and affected not just the planning grades but also all grades from AA-G7 (B67-69 and B72-73). The first exits under the VES scheme did not happen until November 2015- had the 100 career breakers all been returned when due, a redundancy situation would have been much more likely, at an earlier point.

74. The career break policy did not refer to discipline. It would be inappropriate to narrow the pool by discipline. The decision to remove the permanent post allocations of all career break staff affected all grades and discipline. 62 out of the 100 staff on career break during 2010-2013 were from the general service administrative discipline. 48 were female and 14 male. Only 1 female returned on her agreed career break end date, whilst 4 males returned on their agreed end date. In the general service administrative grades, staff waited on average 354 days in limbo. In all other grades, staff awaited 296 days in limbo. Therefore this statistic does not show that general service staff were more easily absorbed, given the number of posts in the NICS. Further analyses reveal that females in the general service grades on average waited 496 days in limbo, whilst males on average waited only 20 days before their limbo period ended. Therefore the out workings of the career break policy have a disproportionate impact on female employees who have availed of the scheme across all grades and disciplines. It is submitted that it would be improper to focus the pool on a narrow group within the planning discipline, as proposed by the respondent. It would be appropriate to consider the wider group, since the policy and practices in question affect all staff who have availed of a career break.

75. -77.

78. It is submitted that, given the evidence on limbo periods presented in Annex 1 and the relationship between length of limbo period and gender, the reason for the detriment (i.e. prolonged delay in return) is gender related.

79. -81

82. -83. The respondent chose to continue funding the permanent positions of all staff, including the surplus posts, occupied by staff who had not taken a career break. The

only individual that the respondent chose not to support in post, from August 2012 through to the eventual date of her return was the claimant, a female, who belonged to a predominantly female group, who had taken a career break because of her childcare responsibilities, which traditionally falls on females. The claimant was returned following the decision recorded by the Workforce Planning Group, to manage the surplus of 15-20 within the Department. Therefore the claimant was returned when there was still a surplus. No justification or explanation has been provided as to why the Department could not 'carry' the surplus career breaker (along with the other surplus staff it maintained in posts) in 2012, but could do so in 2013.

Breach of Article 45 of the Employment Rights (NI) Order 1996

At the Tribunal hearing, on the morning of Tuesday 20th September, the claimant was questioned regarding the claim for the unlawful deduction of wages and whether it related to EFA only or EFA and 11 months unpaid salary. The claimants claim had originally included both elements under the unlawful deduction of wages claim and she had stated at the hearing on Thursday 15th September that the unpaid salary figure in the statement of financial loss related to the unlawful deduction of wages. However, between times and prior to the Tuesday morning hearing, she had read a document which had led to confusion, regarding any entitlement to this claim. Her confusion was a factor when she initially struggled to answer the Employment Judge's question regarding the elements to be included under the unlawful deduction claim. Having reflected on the eventual answer given to the Employment Judge, she now considers it was incorrect to advise that she was not including the 11 month wages claim in her claim for unlawful deduction of wages. The claimant apologises to the tribunal for any issue(s) that may arise out of this confusion. The claimant requests, if possible for the unlawful deduction of wages claim to take both the EFA and unpaid wages over the 11 months into consideration.

84. The career break was agreed for a two year period. The career break ended on 14th November 2012 (B26, B106 and B325). The career break policy was silent on an extended unpaid leave period to be appended at the end by the respondent.

85. The claimant was aware, prior to taking her career break, that the Department had a career break compensation scheme, used to provide an income for staff unreturned from career break. Despite the respondent stating that no such scheme exists within the NICS (A47, q23), when the NICS restructured to new departments in May 2016, the continued existence of the scheme became evident on the computer system post May 2016 (E36). The claimant expected that during any short delay in return, she would be paid wages under the arrangements of this scheme, as had previously applied to others. The claimant was never informed that she risked being without work or income for a prolonged 11 month period after her career break ended.

86. The career break policy does not contemplate a prolonged period in limbo. This is not only claimant's interpretation, but also the interpretation of the Employment Judge in the Kennedy V Equality Commission case. The Tribunal in the Kennedy case stated in paragraph 38 of their decision, that 'All of this indicates that in the NICS policy there is also a clear assumption of a return to work and that there has been no contemplation of a situation where a return to work can simply be deferred indefinitely by management'.

87. The career break policy does not state that there is no entitlement to EFA. The career break policy states that a return from career break is regarded as a voluntary transfer. The claimant has already submitted that the evidence shows that all other PTO planning staff who were volunteering for transfers between the period of her career break and extended unpaid leave, were entitled to be paid EFA (provided the conditions of EFA were met), since their voluntary transfers were treated as compulsory management moves(B48-49, B84 q.17).

88. The claimant considers that it is unjustifiably to classify a transfer on return as a voluntary move. This policy in itself has a disproportionate impact on females since 69% of those, to whom it applies, are female.

89. The claimant never agreed with the respondent's decision that she was not entitled to EFA. The claimant was advised repayment had to be taken in a maximum of two installments. The claimant was provided with no option but to adhere to the 2 month repayment plan put to her.

Conclusion

90. If the Tribunal decides that the acts do not constitute a continuous act or that any part is out of time, the claimant requests the Tribunal to exercise its discretion in the interest of the overriding objective, given the significant disproportionate detrimental impact the protracted delay in return to paid employment (as an outworking of the career break policy) has had on her as a female who took a career break to care for her young family.

Annex 1

For the purpose of these analyses, the number of days between (a) the career break end date and (b) either (i) the eventual return date or (ii) 21st November 2015 – the date the records were supplied, has been used as a surrogate indicator of days in limbo. It is taken that the period between these two dates is the best indicator available to show disparities in disadvantage between male and females career breakers. The claimant has not previously put this specific case forward, however following the respondents submissions, the claimant has interpreted that she may be required to show how there is disadvantage between male and female career break returners. If the tribunal considers that this is the approach that must be taken, then the claimant requests that the tribunal consider these analyses of the evidence already included as evidence at A52 of the bundle.

25 records from the 100 provided in A52 have been excluded from the 'limbo period' analyses for the following reason:

(i)	Returned before 21/11/15 but return date unknown	7 records
(ii)	Career break ongoing and return not due at time of data provided	7 records
(iii)	Left the NICS before they were due to return from career break	8 records
(iv)	Individual extended their own career breaks (domestic reasons)	2 records
(v)	Known erroneous record	1 record

There are 75 staff included in the analyses. 8 were returned on their due date. 69 spent a period of time in employment 'limbo'. Of the 69, 30 were never returned and left the NICS after a period of limbo, 21 were returned to post at some point, whilst the remaining 18 remained unposted on 21st November 2015. These 18 staff (14 females and 8 men) most likely continued to be in limbo beyond the date the statistics were supplied (21st November 2015). Therefore the total limbo days are most likely underestimated for these individuals. As a consequence of this, the statistics revealing average 'limbo days' are therefore also likely to be underestimated (especially for females since there are 14 females and 4 males in this subgroup)..

All Grades

	All (n=75)	Males(n=24)	Females(n=51)
Total Days in Limbo	24998	3162	21826
Average number of days in limbo	333	131	427

All Admin Grades

	All (n=47)	Males(n=12)	Females n=35)
Total Days in Limbo	16684	248	16436
Average number of days in limbo	354	20	496

All Non-Admin Grade

	All(n=28)	Males(n=12)	Females(n=16)
Total Days in Limbo	8307	2914	5390
Average number of days in limbo	296	271	336

Planning Grades

	All (n= 4)	Males (n=1)	Females (n=3)
Total Days in Limbo	858	95	763
Average number of days in limbo	214	95	254

PTO Grade

	All (n=2)	Males(n=1)	Females (n=1)
Total Days in Limbo	419	95	324
Average number of days in limbo	370	95	324

Care of Young family

	All (n=11)	Males (n=2)	Females (n=9)
Total Days in Limbo	4248	100	4148
Average number of days in limbo	386	50	460

CLAM TO THE OFFICE OF THE INDUSTRIAL TRIBUNAL
AND FAIR EMPLOYMENT TRIBUNAL

Between

CAROL BRIDGET VERONICA MOLYNEAUX

Claimant

and

DEPARTMENT OF THE AGRICULTURE,
ENVIRONMENT AND RURAL AFFAIRS

And

DEPARTMENT OF FINANCE

Respondents

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

Time Limits / Limitation

1. The claimant seeks to rely upon *Hendricks v Metropolitan Police Commissioner [2003] IRLR 96* in which a claimant complained that ongoing acts over an 11 year period amounted to a series of acts. As a preliminary issue it was found that The focus should have been on the substance of the complaint that C was responsible for an ongoing

4. As referred in my earlier submission, the claimant alleged indirect discrimination as regards the Career Break return situation on 22 November 2012. **(See final Bullet Point Tab B at Page 137 of the Trial Bundle)**

5. It is submitted that the claimant's reliance on *Hendricks* is misconceived and that the tribunal is entitled to regard the claims as out of time. The claimant's interpretation of the limitation point would mean that time would not actually begin to run until such time as the claimant has received the monies claimed – as she would continue to feel aggrieved until such time as this occurs.

6. The claimant accepts in her ET1 that her claim, in respect of returning from her career break is out of time. **(See 3rd Para Tab A at Page 2 of the Trial Bundle)**

7. Where a delay is as a result of negligent advice the remedy usually lies against the advisors at fault and not through an extension of time. Further, in order to properly consider the advice, it should be produced.

8. The claimant has not produced medical (or other) evidence to substantiate incapacity in terms of being unable to comply with time limits.

9. It is denied that the Respondents have acted improperly produced 'misleading' evidence and this allegation is not accurate or proper to make.

10. The Respondent's rely upon their earlier submissions.

Joe Kennedy BL

20 September 2016

CLAM TO THE OFFICE OF THE INDUSTRIAL TRIBUNAL
AND FAIR EMPLOYMENT TRIBUNAL

Between

CAROL BRIDGET VERONICA MOLYNEAUX

Claimant

and

DEPARTMENT OF AGRICULTURE,
ENVIRONMENT AND RURAL AFFAIRS

And

DEPARTMENT OF FINANCE

Respondents

COMMENTS ON BEHALF OF THE RESPONDENTS REGARDING CLAIMANT'S FURTHER RESPONSE TO RESPONDENTS' SUBMISSIONS

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1. The Respondents do not seek to prolong the tribunal's deliberation processes however it is felt necessary to provide a limited response to some of the most contentious elements contained within the claimant's further response as no further hearing is to be convened in this case.

2. So far the response to paragraphs 36-40, 41 & 42 are concerned, it appears that the claimant is seeking to make an evidential case in her response which was not made out in her statement, evidence to the tribunal or in the documentation put before the tribunal. Medical issues have not been substantiated and any inaccurate or poor quality legal advice has not been produced and the respondents would object to any findings being made on the basis of the assertions contained which are not backed with evidence introduced to the tribunal.

3. So far the response to paragraphs 48c. & 49 are concerned, the claimant now asserts that she had a relevant postgraduate qualification however, beyond referring to her having a doctorate in Geology (per counsel's note upon the claimant being questioned by the tribunal) this is not in evidence and the claimant has not provided proof as to how that was a relevant qualification. In any event, the respondents have provided the rationale for the appointment of Andrew McGreevy above and beyond simply working towards a relevant qualification.

4. So far as response the response to paras 58, 59, 65, 66 and Annex 1 are concerned, the respondent denies that the analysis provided is fair and accurate. As previously submitted, the reasons for taking, extending and non-returning from a career break are various and without having full reasons from each career break staff as to when and why they returned/did not the numbers cannot be read in as stark terms as suggested by the claimant. The disadvantaged pool as previously submitted on behalf of the respondents is repeated in particular given the specialist post in which the claimant was employed and the particularly acute surplus faced by the DOE in Planning and PTO roles. The claimant (at 58) talks about a male PTO planner extending a career break and this is another example of the claimant attempting to introduce further evidence – whilst also demonstrating the point above regarding individual circumstances. So far as days in 'limbo' are concerned, the claimant's analysis does not take into account individual circumstances and the claimant accepts that the analysis has not been properly put in evidence (at 59) – see further below. The respondents' witness (Debbie Smith) gave evidence as to the make-up of the career break staff in terms of the period involved (at 65). Further, the claimant now appears to be making a new claim regarding 'time in limbo' – the respondent did not prepare for such a claim and none has been made until this final response. As such, the tribunal must decline to adjudicate upon this issue as the respondents have not been asked to address this in evidence (at 66).

5. So far as response the response to paras 84 - 89 are concerned, the claimant confirmed to the tribunal that this claim was not being made. In any event, this claim is out of time and that issue has been dealt with in the initial submissions.

Joe Kennedy BL

12 October 2016