EMPLOYMENT TRIBUNALS

Claimant: Miss C Cookson-Smith

Respondent: Cambian Group Plc

Heard at: Manchester **On:** 10-13 September 2018

Before: Employment Judge Franey
Mr Q Shah
Mrs S J Ensell

REPRESENTATION:

Claimant: In person
Respondent: Miss G Roberts, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The correct respondent as the claimant's "employer" under section 83 Equality Act 2010 is Cambian Group Plc.

2. The complaint of pregnancy discrimination contrary to section 18 Equality Act 2010 succeeds in relation to:

    (a) The failure to do a generic pregnancy risk assessment for work at Queen's Park Road on 26 February 2017;

    (b) The failure to do a specific pregnancy risk assessment for the claimant's work at Lyndene House on 19, 20, 22 March and 1 April 2017; and

    (c) The decision to inform a young person that the claimant was pregnant on 20 March 2017 without the permission of the claimant to do so.

3. All other complaints of pregnancy discrimination fail and are dismissed.

4. The claimant has permission to amend her claim to pursue a complaint of victimisation contrary to section 27 Equality Act 2010.

5. The complaint of victimisation fails and is dismissed.

6. The Tribunal makes an award of compensation for pregnancy discrimination as follows:

Injury to feelings	£6,000.00
Interest at 8% per annum	£714.00
Total	**£6,714.00**

7. The recoupment regulations do not apply.

REASONS

Introduction

1. By a claim form presented on 2 August 2017 the claimant complained of pregnancy discrimination in the course of her employment by the respondent as a residential care worker. The heart of her complaint was that once she informed her employer of her pregnancy, she was refused shifts, not given a pregnancy risk assessment, and not given a list of residential homes at which it would be safe for her to work. She also complained that it took too long to respond to her requests and that her grievance was not handled properly.

2. By its response form of 11 December 2017 the respondent made clear that the claimant was a bank worker on a zero hours contract and therefore not working under a contract of employment, although it was clearly a contract personally to do work within section 83(2)(a) Equality Act 2010. It asserted that not all of its homes were suitable environments for a pregnant worker, that a generic risk assessment was in place, and that a risk assessment for the claimant had been done at one of the two homes at which she had worked. The respondent denied any pregnancy discrimination.

3. The complaints and issues were clarified at a preliminary hearing before Employment Judge Warren on 18 February 2018. There were eight discrete allegations of pregnancy discrimination. Case Management Orders were made.

Issues

4. At the start of our hearing the parties confirmed that the case remained as set out in the Case Management Orders of Employment Judge Warren, save for one additional matter. The claimant wished to amend her claim so as to argue that the way in which her grievance was handled amounted to victimisation contrary to section 27 Equality Act 2010, relying on the grievance as a “protected act”. The claim form contained no allegation of victimisation. Pragmatically Miss Roberts recognised that the factual evidence about the grievance would be before the Tribunal in any event, and she therefore suggested that the Tribunal leave a decision on whether

permission should be granted until all the evidence had been heard. The claimant agreed with that suggestion.

5. It followed that the issues to be determined by the Tribunal under the Equality Act 2010 were as follows:

Pregnancy Discrimination

1. Are the facts such that the Tribunal could conclude that on any of the following alleged occasions the claimant was subjected to a detriment under section 39(2)(d) in that the respondent treated her unfavourably because of her pregnancy:

(1) On 6 March 2017 in telling the claimant she could have a shift at Braemar House and then taking that shift away from her when she said she was pregnant;

(2) In refusing to provide the claimant with alternative work and telling her that because she was on a zero hours' contract no alternative work need be found;

(3) On 1 April 2017 in removing from the rota shifts previously allocated to the claimant, without paying her compensation required by her contract when a shift was cancelled with less than 24 hours' notice;

(4) In failing to carry out a risk assessment for the two separate Homes at which the claimant worked in March 2017;

(5) In delaying a response to the claimant's request of 7 March 2017 for a list of Homes which were not high risk and at which she could work, and failing to provide the claimant with any support in that respect;

(6) On 20 March 2017 the Deputy Manager of the Home where the claimant was working told the young people that the claimant was pregnant, and one of them threatened her and her unborn child with violence; there were only minor consequences for the young person and the claimant had to work to the end of the shift;

(7) In failing to respond to a request made on 11 April 2017 for the claimant to work as an administrator; and

(8) In categorising the claimant as a whistle-blower in the course of a grievance meeting on 22 May 2017?

2. If so, can the respondent show that there was no contravention of section 18?

Victimisation

3. Should the claimant be granted permission to amend her claim form so as to complain that the way in which her grievance was handled amounted to victimisation contrary to section 27 Equality Act 2010, her grievance being the "protected act"?

4. If so, are the facts such that the Tribunal could conclude that in the handling of the grievance the respondent subjected the claimant to a detriment because she had done a protected act?

5. If so, can the respondent nevertheless show that there was no contravention of section 27?

6. The Tribunal also had to resolve a factual issue about the identity of the company which employed the claimant. We will deal with that in our conclusions.

7. There had been discussion at the case management hearing about time limit issues, but we concluded that all these complaints were within time. The claimant commenced early conciliation on 25 May 2017, and lodged her claim form within one month of the date the certificate was issued. Any alleged unlawful treatment happening on or after 26 February 2017 would therefore be less than three months before presentation of the claim, allowing for the effect of early conciliation.

Evidence

8. The parties had agreed a bundle of documents running to more than 260 pages. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

9. The Tribunal heard from eight witnesses in total. The claimant gave evidence herself and also called her mother who had been present at the grievance meeting on 22 May 2017.

10. The respondent called six witnesses. Diane Lever was the Senior Human Resources ("HR") Business Partner who dealt with the claimant's grievance; Sarah Boddy and Rachel Renshaw were managers of the two Homes at which the claimant worked; Natasher Shad was the Deputy Manager of one of those Homes; Michael Fletcher was the Deputy Director of People for the Group who received the claimant's appeal against the grievance decision; and Leanne Woodings was the Quality Support Manager who heard the appeal against the grievance.

Relevant Legal Principles

Pregnancy Discrimination

11. Discrimination by way of subjecting an employee to a detriment is rendered unlawful by Section 39(2)(d) of the Equality Act 2010. For these purposes an "employee" includes a person working under a contract personally to do work even if not a contract of employment (section 83).

12. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC [2013] ICR 337.** It does not include an unjustified sense of grievance.

13. Discrimination in this context is defined by Section 18(2)(a), which is headed "Pregnancy and maternity discrimination: work cases":

> **"(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
>
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —**
>
> **(a) because of the pregnancy, or**

> **(b) because of illness suffered by her as a result of it."**

14. The protected period begins when the woman is pregnant.

15. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see for example the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

16. This exercise must be approached in accordance with the burden of proof provision applying to Equality Act claims. That is found in section 136 as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

17. Section 136 goes on to provide that an Employment Tribunal is treated as a Court for these purposes.

Risk Assessments

18. The obligation to conduct a risk assessment is found in regulation 3 of the Management of Health and Safety at Work Regulations 1999:

> **"(1) Every employer shall make a suitable and sufficient assessment of–**
>
> **(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work…**
>
> **(b) ……,**
>
> **For the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions."**

19. The obligation under regulation 3 is extended to risks for new and expectant mothers by regulation 16(1):

> **"(1) Where –**
>
> **(a) the persons working in an undertaking include women of child-bearing age; and**
>
> **(b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding,**

> **the assessment required by regulation 3(1) shall also include an assessment of such risk.**
>
> **(2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.**
>
> **(3) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk.**
>
> **(4) In paragraphs (1) to (3) references to risk, in relation to risk from any infectious or contagious disease, are references to a level of risk at work which is in addition to the level to which a new or expectant mother may be expected to be exposed outside the workplace."**

20. In **Page v Gala Leisure and ors EAT 1398/99** the EAT recognised that there are two types of risk assessment. The first is a generic assessment of the risks for pregnant employees required by regulation 3 when read with regulation 16(1).

21. The second is a specific consideration for an individual implicitly required by regulation 16(2) and (3). The employer must consider whether the action it proposes to take under the generic risk assessment will avoid the risk for the individual, and, if not, further action must be considered, such as altering working conditions or hours of work. If that is not sufficient to avoid the risk, the employee can be suspended.

22. However, the obligation to assess the risks for the individual only arises if regulation 18(1) is satisfied:

> **"Nothing in paragraph (2) or (3) of regulation 16 shall require the employer to take any action in relation to an employee until she has notified the employer in writing that she is pregnant…"**

23. These regulations seek to implement the provisions of the Pregnant Workers Directive (PWD 92/85/EEC – "the Directive"). Article 2 provides that:

> **"For the purposes of this Directive:**
>
> **(a) *pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice…"**

24. These provisions were considered by the EAT in **O'Neill v Buckinghamshire County Council [2010] IRLR 384**. The EAT agreed with a suggestion from Counsel that three preconditions would have to be met before the obligation to assess the risk for an individual would arise (paragraph 30). They were:

> **"(a) that the employee notifies the employer that she is pregnant in writing (clearly satisfied in this case), (b) the work is of a kind which could involve a risk of harm or danger to the health and safety of a new expectant mother or to that of her baby, (c) the risk arises from either processes or working conditions or physical biological chemical agents in the workplace at the time specified in a non-exhaustive list at Annexes I and II of Directive 92/85/EEC."**

25. It was common ground in this case that if a risk assessment was required by regulation 16, failure to conduct one would amount to unfavourable treatment because of pregnancy contrary to section 18 Equality Act 2010, irrespective of the mental processes of the decision-maker: **Hardman v Mallon t/a Orchard Lodge Nursing Home [2002] IRLR 516.** This is because of the special protection afforded to pregnancy under the Directive.

Victimisation

26. Victimisation in this context has a specific legal meaning defined by section 27:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because--**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act--**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**

27. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why". Again that requires consideration of the mental processes of the decision maker.

Relevant Factual Background

28. This section of our reasons sets out the broad chronology of events necessary to put our decision into context. Any disputed factual issues of central importance to our decision will be addressed in the discussions and conclusions section.

Background

29. The respondent is part of the Cambian Group which provides specialist education, mental health, residential and foster services for children and young people with a variety of mental health, emotional and behavioural issues. In the North West it runs about 75 residential Homes for young people, and eight schools and colleges. There are over 3,000 employees in the North West alone. It is a substantial employer.

30. The Homes tend to have between one and six young people resident there. Each Home has a Manager and a Deputy Manager. There are also permanent employed members of staff.

Bank Workers

31. However, in the North West the respondent also has a bank of workers on zero hours contracts who can be called into work when necessary. The policy on bank workers appeared at page 50, and made clear that Home Managers or Deputies should look to employed staff to meet staffing levels. They should only bring in bank workers when that was not possible.

32. The policy went on to deal with cancellation of shifts as follows:

> **"Following the assignment of a shift to a bank worker, should there be a need to cancel the assignment, bank workers must be informed within a minimum of 24 hours prior to the start time of the shift.**
>
> **Where bank workers are informed of the cancellation with less than 24 hours' notice the bank worker will be entitled to receive two hours' payment in compensation [for] cancelling the shift at such short notice."**

The Claimant

33. The claimant applied for a role with the respondent as a residential care worker in early 2017. It was her first role of this kind. She was interviewed and due to her need for flexibility because of childcare commitments it was recommended that she take up an appointment on the bank rather than as a permanent employee. Her offer letter of 11 January 2017 appeared at pages 52-53. There was a six month probationary period. The claimant returned the medical questionnaire and other documents, and 13 February 2017 was identified as her start date.

34. The day before that the claimant found out that she was about two weeks pregnant.

Pregnancy Notification

35. The first part of her employment was a training period. On 16 February 2017 she informed one of the trainers that she was pregnant. He said that he would send an email to HR; she did not need to do so. This resulted in an email from a trainer of that same day to Wendy Farnworth in HR (copied to Ms Lever) at page 74. It said that the claimant had informed the trainers that she was pregnant, and:

> **"Although it is in the early stages this prevents her from taking part in the Physical Interventions [training], she will observe so she can act as a witness but will have to re-do this day after her pregnancy."**

36. The claimant understood that her pregnancy would not prevent her working, although having missed that part of the training she would not be able to become involved in any situations where physical intervention was required.

37. The following day Ms Farnworth sent an email to a number of Home Managers in the region. The email of 17 February 2017 said:

> **"Charlotte has informed us this week that she is in the early stages of a pregnancy which has prevented her from taking part in the Physical Intervention [training], she has observed this training session so she can act as a witness. I wanted to make you aware should Charlotte contact your Home to obtain any bank shifts."**

Lyndene Risk Assessment February 2017

38. Ms Renshaw was Home Manager of Lyndene Road Home in South Manchester. She saw the email of 17 February about the claimant. On 19 February 2017 she sent an email to her staff (page 76). It said:

> **"Please just make sure if a Charlotte Cookson-Smith is booking bank shifts she is in the early stages of pregnancy. I have a pregnancy risk assessment in place if she has booked any shifts. If you need this let me know."**

39. The pregnancy risk assessment appeared at pages 77-80A. It was dated 19 February 2017. It was completed by Ms Renshaw without any input from the claimant. It was based on a template found in the respondent's policy documents. It had been personalised in the sense that the claimant's name had been included, and her initials used in the appropriate places, but it was otherwise the generic risk assessment for Lyndene. It recorded that to be effective it should be reviewed every four weeks or if there was a significant change. The claimant was not aware it had been done and she maintained in our hearing that in truth it had been prepared much later on. We will address that in our conclusions (see paragraph 184 below).

40. The young person resident at Lyndene had previously been found on two occasions with a knife. Amongst the risks identified were increasing stress levels and being confronted with sharp instruments such as knives. The threat of potential violence was identified and the control measures were said to be as follows:

- **"The member of staff should avoid lone working where possible.**
- **If a potential violent situation arises the pregnant worker should disengage and go to the closest safe area – staff office.**
- **If the Home or the young people at the Home pose a significant risk the pregnant worker may need to be redeployed in the interests of her own safety."**

Queens Park Shift 26 February 2017

41. On 22 February 2017 the claimant was given a list of Homes in the North West. The list appeared at pages 233-234. There were a number of Homes in the Greater Manchester area within travelling distance for her.

42. Through a series of text messages with Sarah Boddy (page 204) the claimant arranged her first bank shift at Queen's Park. In the text exchange she informed Ms Boddy it was her first bank shift. She did not mention that she was pregnant in those texts. However, for her first shift she should have been allocated to shadow someone else.

43. That first shift took place on 26 February 2017. The claimant thought that all Homes in the area had been informed of her pregnancy but Ms Boddy and the staff at Queen's Park were not aware of it. Ms Boddy was only promoted to Home Manager on 20 February, and had been away at the time. The claimant spoke to Ms

Boddy and was told that there was a generic risk assessment in place. The young person at the Home had Asperger's Syndrome which made her aggressive on meeting new people, and within 30 minutes of meeting the claimant she vandalised the kitchen and back garden.

Telephone Calls 6 March 2017

44. On 6 March 2017 the claimant rang two Homes from the list to introduce herself and pass on her contact details. A person at Brook House told her that they could not give her any shifts after learning she was pregnant. The claimant called Braemar House and was offered a shift, but this was retracted when she said she was pregnant. She was told that the House had "two rowdy boys" and was not suitable for a pregnant worker. The person to whom she spoke suggested that the claimant contacted HR for a list of Homes that were more suitable.

Contact with Wendy Farnworth 7 March 2017

45. The claimant did that on 7 March. Her email to Ms Farnworth appeared at page 87A. In its entirety the email read as follows:

> **"I completed my training course on 22 Feb, and I'm finding it difficult to secure shifts for myself. I have recently found out that I am pregnant and unfortunately a couple of the Homes that I have contacted have advised against me working there while I'm pregnant.**
>
> **The last Home I spoke to suggested that I contact HR to see if you would be able to help me with a list of Homes in the Manchester area that are not as high risk and would be comfortable with me working there. Please can you help me? I'm not sure where to proceed from here."**

46. Ms Farnworth replied the same day. Her email said:

> **"To work in our Homes all employees as part of our safeguarding policy are required to complete physical intervention as and when required, due to the complex needs of the children within our care, this policy applies to all our Homes.**
>
> **Unfortunately we consider all our Homes as high risk."**

47. The claimant was concerned at this as it essentially meant she would not be able to do any work until after her baby was born. She replied promptly to Ms Farnworth in the following terms (page 87B):

> **"Ok, can you please tell me what the next best course of action is? As I was told I wouldn't be refused work because I'm pregnant."**

48. There was no reply to this request.

Statement of Terms and Handbook

49. In the meantime the claimant was provided with a statement of her terms and conditions (pages 50B-50H). It said she was employed by "Cambian Group Limited", and made clear that there was no guarantee of any hours of work being offered. Clause 9(b) confirmed that the claimant was entitled to be paid two hours for each

shift cancelled at less than 24 hours' notice. Clause 20 drew attention to the employee handbook and manual, a copy of which was held at each Home.

50. The claimant did not consider the handbook, but it contained an equal opportunities policy (pages 38-41), a grievance procedure (pages 42-43) and a maternity policy (pages 43D-43S). The maternity policy addressed the question of risk assessment at page 43E. It included the following clauses:

> **"6.11 When a line manager becomes aware that a member of staff is pregnant he/she will ensure that a detailed risk assessment is carried out and recorded of the risks which might be posed to that member of staff by her working conditions. The obligation continues for employees who have given birth in the previous six months or are breast-feeding.**
>
> **6.12 The line manager must then ensure that preventative measures are adopted either to eliminate the hazard or, if that is not possible, to prevent exposure of that member of staff to the hazard or, if that is not possible, to control the risk.**
>
> **6.13 Such measures may involve assigning the member of staff to some alternative non-hazardous work. If none is available it may be necessary to suspend the member of staff on full pay…**
>
> **6.14 If the offer of suitable alternative work is unreasonably refused then it may be necessary to suspend the employee without pay for as long as that offer applies.**
>
> **6.15 If an employee has concerns about their own health and safety at any time they should speak to the line manager immediately."**

Lyndene Shifts 19 March – 1 April 2017

51. The claimant did not receive any immediate reply to her email of 7 March. She rang HR on 9, 10 and 13 March but without success. On 14 March she contacted Lyndene Road and shifts were booked for her for 19 and 22 March, and for three dates in April 2017.

52. Her first shift was on Sunday 19 March. During the shift handover her senior colleague, Natalie Bygrave, told her that a risk assessment did not need to be done and that the claimant would be shadowing Sheree McKay. The third member of staff had to go home because of a bereavement, leaving only two members of staff on duty covering a Home for six young people. Three young people were in the property most of the shift and were smoking cannabis in their rooms. The claimant was asked to do another shift the following day.

53. On Monday 20 March 2017 the claimant did her second shift at Lyndene. There was a confrontation with young people who were smoking cannabis. An incident occurred in the office in the presence of the claimant and Natasher Shad. One young person lit a cannabis cigarette there. Mrs Shad told her that the claimant was pregnant. The young person said:

> **"I don't give a shit, I'll kick the baby out of her."**

54. Mrs Shad told the young person that was a disgusting comment. The young person left the office. The claimant stayed in the office while the rooms in the property were put on lockdown.

55. An incident report was completed, accompanied by a substance related form (page 84) and an entry in the consequences book (page 85). The service user was to have three days of supervision of the money she spent. The claimant and Mrs Shad discussed the limited consequences for such bad behaviour. In June 2017 Mrs Shad prepared a note of that discussion (page 83) for the purposes of the investigation into safeguarding issues raised by the claimant's grievance.

56. The claimant's third shift at Lyndene was on Wednesday 22 March 2017. The young person from two days earlier apologised to her for her behaviour. During the day Ms Renshaw as Home Manager came to Lyndene. She was called to deal with a particular incident. She knew the claimant was pregnant, having done the risk assessment on 19 February. She did not discuss the risk assessment with the claimant or review it even though it was more than four weeks old. That evening there was a further incident where a number of service users were jumping on and off worktops in the kitchen in the dark, pulling each other about and kicking each other within a few feet of the claimant. The service users were also shrieking at the top of their voices. The claimant found it disturbing and stressful, feeling that she and her baby were at risk. She asked Sheree McKay if she could go and fill in the daybooks in the office, but was told she needed to stay in the kitchen with Ms McKay to supervise the young people.

57. The claimant was also asked to go to the shop later than evening to buy chocolate for the young people. She had to go on her own in the dark. That worried her but she found it less concerning than staying on the premises.

58. The claimant's fourth shift at Lyndene was on Saturday 1 April. She looked at the rota to cancel a shift she had previously booked, but saw that four shifts for which she had been booked in had been removed. They were 2 and 15 April, and 4 and 5 May. Ms McKay told her that a new member of staff had joined and had been given those shifts instead. The claimant was not formally notified of this. She had less than 24 hours' notice of the cancellation of 2 April.

59. During that shift the same young person became aggressive and threatened to smash up the office and the house. She snatched some documents out of the staff cabinets and then alleged that Ms Bygrave had assaulted her. She was verbally abusive and lashed out at Ms Bygrave twice. She began vandalising the house, using a large metal pan to smash the oven door and vandalising the computer room by throwing bookshelves and their contents onto the floor. Ms Bygrave asked the claimant to clean up the computer room. She had to put the bookshelves back and move some furniture back. She also cleaned up the glass in the kitchen. Later that day another service user threw a wooden placemat at the window next to the claimant in the kitchen, missing her by approximately two feet.

<u>HR Contact April 2017</u>

60. The claimant was still waiting to hear back from HR about her query of 7 March. She rang HR on 7 April and was told that Diane Lever was dealing with it. On 8 April (page 88) she sent an email to Ms Farnworth saying she was still waiting for a reply. She said the situation had become very concerning to her and she felt she was being discriminated against because she was pregnant.

61. The reply came on 10 April from Mrs Lever (page 89) She apologised for the delay. She referred to the training on restraint methods. Her email said:

> **"This part of the training I am led to believe you were not able to take part in due to being pregnant, we are then not able to safeguard you in this role and we do not want to put you at risk of injury. Once you have had your child you can complete your training and start the residential care worker role. If there is anything else we can do to support you please let me know and I hope you understand our responsibility in safeguarding our employees."**

62. This appeared to be a reiteration of the fact that the claimant would not be able to work in a Home until after her baby was born.

63. The claimant replied on 11 April (page 90). She emphasised that she had been told in training that she could work in Homes without being required to do physical interventions. She said that no risk assessment had been completed for her. She asked if there were administrative positions she could perform in one of the respondent's schools, or if a list of Homes where she could work could be supplied. Mrs Lever said she would look into it.

HR Contact May 2017

64. After being chased up by the claimant on 25 April (page 91), Mrs Lever confirmed the position by email of 3 May at pages 92-93. She attached a copy of the contract which was a zero hours contract and said:

> **"You can work in the Homes, you need to contact them and let them know you are pregnant so they can risk assess to keep you safe, some Homes may be more vulnerable than others so you need to inform them, however there are no guarantees of work which is included in the terms and conditions of your contract."**

65. This response did not deal with the claimant's query about administrative work, or provide her with a list of Homes at which she could work.

Grievance Email 8 May 2017

66. The claimant responded by email of 8 May at page 92. The email was treated as a grievance. The relevant part said:

> **"I do not feel that the issues I have raised have been resolved. I have requested reasonable alternatives to be looked into, which have been ignored.**
>
> **The guarantee of hours in my contract is not the issue. One issue I raised is that some Homes are offering hours until I say I'm pregnant and then the hours are retracted. Some homes allow me to work there but are not adhering to health and safety, and risk assessments are being completely overlooked. As a result I have been put in dangerous situations which include but are not limited to being threatened to have my unborn child 'kicked out of me'.**
>
> **According to the Equality Act 2010, this would qualify as discrimination in the workplace. I feel that the company is discriminating against me because I am pregnant and because of this, I am now seeking legal advice."**

67. By a letter of 12 May 2017 (page 94) Mrs Lever said that the email would be treated as a formal grievance and she invited the claimant to a grievance meeting on 19 May. She asked the claimant to provide more information and said that she had

the right to be accompanied by a work colleague or a trade union official. That was in line with the grievance procedure (pages 42-43).

68. The claimant provided the further information requested by email of 16 May at pages 96-97. She gave an account of her experiences at Queen's Park and at Lyndene. It was later agreed that the grievance meeting would be delayed to 22 May and would take place at a supermarket nearer to where the claimant lived. Mrs Lever agreed that the claimant could be accompanied by her mother.

Grievance Meeting 22 May 2017

69. The grievance meeting took place on 22 May. The brief note kept by the claimant's mother appeared at page 232. There was reference to the claimant being a "whistle-blower" in relation to the safeguarding concerns she had raised about children. The claimant was given the generic risk assessment form (pages 103-104) and was allowed to take it away to complete it. Mrs Lever apologised that the claimant had been told incorrectly she could not work at Homes. Wrong information had been given. Bank staff should be treated the same as employed staff.

70. There were five matters to be actioned. They included the pregnancy risk assessment, the list of Homes at which the claimant could work, the identity of the manager of those Homes, and the appointment of a mentor. The fifth matter related to the possibility of the claimant being paid remuneration for the days she had not been able to work because of what had been said to her. It was common ground that Mrs Lever said she would have to speak to "the man with the money", but there was a dispute in our hearing about whether she promised to sort this out and make payment by 23 May, or whether it was just that she would speak to that person by then to see whether payment could be made. We will return to that issue in our conclusions (see paragraph 154 below).

After the Grievance Meeting

71. Mrs Lever did come back to the claimant the following day. She sent an email of 23 May at page 99 saying that there would be an investigation into the safeguarding concerns, and that she did have a Home Manager and Homes locally at which the claimant could be offered shifts but was still looking at the rota. She said she would have more information by the end of the week. The claimant responded by asking about the financial detriment and undue stress and Mrs Lever said she was trying to speak to the relevant person and would "come back tomorrow". In reply (page 98) the claimant said that she did not feel comfortable committing to any shifts until her grievances had been satisfied.

72. Although this was not apparent from the documents, Mrs Lever explained that the safeguarding issues were to be investigated by the manager of a different Home, Sue Ball. She also looked at what the claimant had been told about working at Brook House and Braemar House. As to whether Homes could be identified at which the claimant could work, Mrs Lever passed that matter to the Regional Manager, Stacey Brookes, who identified Abby Marron, a manager of three Homes at which there was only one young person housed, all of which were relatively settled. She was happy to give the claimant shifts in all three homes. Ms Marron would also act as a mentor for

the claimant in terms of supervision and training. The query about remuneration was passed to Mr Fletcher.

73. None of this activity was visible to the claimant. From her perspective the response from Mrs Lever came on the evening of 24 May (pages 101-102). There was to be an investigation of the safeguarding matters. A manager over three Homes would be able to offer bank shifts as and when required, including shadow shifts and regular one-to-one supervision. The manager would also deal with the risk assessment. There was an apology for the lateness of the response, but no intention to discriminate in relation to refusing to allow shifts to be done. No financial compensation was to be offered because there had been no intention to cause any financial detriment. The email ended by asking the claimant to confirm if she wanted to continue on bank.

74. The claimant did not regard this response as satisfactory, not just because it had not arrived on 23 May as promised, but because she was not given any name of the manager, there was no list of Homes at which she could work, and she felt that Mrs Lever had gone back on a commitment to ensure that financial compensation would be paid.

75. The claimant's reply of 24 May 2017 appeared at page 101. In its entirety it said:

> **"Diane, this is not satisfactory and does not reflect what you said in the grievance meeting we had on Monday 22 May 2017. You have wasted my time and delayed my case by over another week. In the meeting we had on Monday, you acknowledged the detriment caused to me by yourself and Cambian. I have asked for a quick resolution as I have already waited 11 weeks for this to be resolved, the actions you are taking fall short of the promises that you made in the grievance meeting held at 3.00pm on 22 May, as noted by my witness. Some may say this does not reflect professional integrity. I now have absolutely no confidence in you or Cambian as evidenced by your continued dismissal of the serious mistreatment towards me, which includes personal endangerment, discrimination, lack of support and the length of time for your responses. I am no longer willing to deal with you as this extreme stress has caused my anxiety disorder to resurface, leaving me with sleepless nights, daily adrenaline rushes and distress over being able to provide for my very young child and unborn baby.**
>
> **I will now be escalating this because of your delays and failure to fulfil what was promised. You be hearing from my representative shortly."**

76. The contents of the email from Mrs Lever were reproduced in an outcome letter of 24 May at pages 107-108. The letter gave the claimant the right of appeal by notifying the HR Deputy Director, Mr Fletcher.

77. On 25 May the claimant saw her doctor and was certified unfit because of "stress at work" to 22 June (page 111). She was prescribed medication. She also contacted ACAS to initiate early conciliation.

78. A grievance outcome meeting had been arranged for 26 May, but Mrs Lever assumed that the claimant would not want to attend given what she had said in her email. The claimant attended but there was no-one there from the respondent. She sent an email about this on 26 May at page 109.

Grievance Appeal

79. The claimant lodged her appeal by email of 30 May to Mr Fletcher at page 111. She asked what the next step would be. He replied by asking for grounds of appeal (page 112A). She provided those grounds in an email of 31 May at pages 112C-112E.

80. After providing an introduction about her training and the email of 10 April from Diane Lever, the claimant identified 11 points for her appeal. In summary these were as follows:

(1) Her health and safety during pregnancy had been overlooked and no risk assessment done.

(2) Mrs Lever had arranged three safe Homes for the claimant to work in but that should have been done when she raised the issue on 7 March.

(3) There was generally an understaffing problem which created a higher risk than necessary.

(4) She had been refused a shift due to her pregnancy.

(5) Her requests for alternative work had been ignored.

(6) It had taken too long to get responses.

(7) A list of the Homes that she could work in had still not been provided.

(8) There was no consequence to the threat made by a young person on 20 March to physically assault the claimant and her unborn baby;

(9) The lack of action from the respondent had caused financial detriment, and the promised remuneration from Mrs Lever had not materialised.

(10) This had all caused the claimant stress.

(11) Shifts booked in were removed from the rota without telling her.

81. On 2 June Mr Fletcher informed the claimant that he was passing the grievance appeal to a colleague because he was about to go on paternity leave (page 120). The Regional Manager, Leanne Woodings, was to look into it. In an exchange of emails in early June (page 120) the claimant made clear that she would proceed to an Employment Tribunal if conciliation through ACAS failed. In an internal email of 5 June (page 123) Mr Fletcher said it was no surprise the claimant had gone to ACAS.

82. The Regional HR Adviser, Mr Greatbatch, wrote to the claimant on 5 June 2017 (page 113) inviting her to a grievance appeal meeting with Leanne Woodings on 13 June. The claimant asked if she could be accompanied by her mother but this was refused. Mr Greatbatch gave the reasons in an email of 9 June at page 130. As it was a formal meeting, policy had to be followed.

83. Around this time Sue Ball carried out an investigation into the safeguarding concerns raised by the claimant. She interviewed Ms Renshaw (pages 83A and 83B), Sarah Boddy (page 83C), and obtained a statement from Mrs Shad (page 83). We do not know what conclusions were reached.

84. The grievance appeal meeting took place on 13 June. Mr Greatbatch took handwritten notes. The claimant was allowed to read them at the end of the meeting. She asked for a copy but they were not provided. Instead Ms Woodings sent her the notes typed by Mr Greatbatch (pages 133-141) and some briefer handwritten notes which she had made (pages 145-153). The claimant also took her own brief handwritten notes (pages 142-143). The meeting discussed the 11 points raised by the claimant. It lasted well over an hour.

85. On 26 June 2017 the claimant submitted form MATB1 (page 163).

86. The appeal outcome letter was issued on 26 July by Mr Fletcher on behalf of Ms Woodings. The letter appeared at pages 175-183. It began by recording the 11 points within the grievance appeal and then sought to deal with each one. The main findings were that there had been no failure to do risk assessments. Not all Homes within the group were safe for expectant mothers to work in. The complaint about a delay in identifying Homes that it was safe for the claimant to work in was upheld. The suggestion that staffing levels were deficient was rejected, based on the logbooks and records at the Homes on the shifts in question. The complaint about being refused shifts because of pregnancy was rejected because the two Homes in question were not suitable: the shifts there involved long periods of lone working. The complaint that there were no consequences of abusive behaviour was rejected, and the claim for financial compensation was also rejected. Ms Woodings concluded that Mrs Lever was saying on 22 May that she would ask whether there could be a payment, not authorising it. There was no clear conclusion in relation to point 10 about stress, as this was said simply to overlap some of the other matters, and the letter contained no determination on point 6, the length of time it took to get responses. There was no further right of appeal against the decision of Ms Woodings.

87. On 2 August 2017 the claimant began these proceedings by presenting her claim form.

Submissions

88. At the conclusion of the evidence each representative made a submission to the Tribunal. Helpfully each side had produced a written submission which the Tribunal read before hearing oral submissions.

Respondent's Submission

89. Miss Roberts had prepared a written submission running to 11 pages with an extract from a passage in *Harvey on Industrial Relations and Employment Law* on specific risk assessments. She began by outlining the legal framework. It was not in dispute that in certain Homes there would be working conditions which would trigger the need for a risk assessment if the other requirements were met. However, Miss Roberts argued that for the shift at Queen's Park on 26 February the obligation to do

a specific risk assessment had not been triggered because the claimant had not notified her pregnancy in writing. She submitted that there were sound policy reasons for the regulations to require the claimant to do it herself rather than rely on others. The claimant had not notified her pregnancy in writing until 7 March 2017.

90. As to Lyndene, she submitted that the risk assessment carried out by Ms Renshaw on 19 February was suitable and sufficient. Although it had been done without consulting the claimant, that was not an absolute requirement. The risks and appropriate control measures had been properly identified. The claimant had not identified any risks which had been omitted from that risk assessment. Rather, her focus had been on whether it had been properly implemented, which was not the case she raised in her claim form.

91. In the alternative, Miss Roberts submitted that even if the duty to perform the risk assessment had arisen and not been satisfied, the Tribunal should take account of the fact that the claimant had only worked for one day at Queen's Park and four days at Lyndene. An employer had to be allowed a reasonable period to conduct a full risk assessment. She relied on the decision in **O'Neill** in support of that proposition.

92. Miss Roberts then turned to the individual allegations. On allegation 1 there was no detriment because the Homes were not suitable for a pregnant woman to work at in any event. For allegation 2, the request for alternative work was not refused. There was no legal duty to find alternative work and it turned out that there were Homes at which the claimant could work in any event. Allegation 3 concerned the cancellation of the rota: there was no evidence this was because of pregnancy. Allegation 5 overlapped with allegation 2. There were some delays, and the claimant was given some incorrect information in March and April, but there was no evidence to support the case that this was because of pregnancy.

93. Allegation 6 concerned the incident on 20 March 2017. It was not discriminatory to require the claimant to work in conditions where the young people exhibited challenging behaviour. The threatening comment by the young person on that occasion was not something for which the respondent could be responsible. In paragraph 24 of her written submission Miss Roberts addressed the argument that the unfavourable treatment occurred when Mrs Shad informed the young person of the claimant's pregnancy, but asserted that could not amount to unfavourable treatment because it was done to prevent the young person from smoking cannabis in the presence of the claimant and in order to de-escalate the situation, which ultimately proved to be correct. As for the lack of consequences, that was a matter of professional judgment and there was no basis for thinking it was linked to pregnancy.

94. Allegation 7 was about the request to work as an administrator. Miss Roberts submitted that this was a request made in the alternative, and the respondent instead dealt with the question of identifying Homes where the claimant could work. There was no evidence this was related to pregnancy. Allegation 8 was the categorisation of the claimant as a whistle-blower. That was not unfavourable treatment and in any event it was because the claimant had raised safeguarding issues. It had nothing to do with pregnancy.

95. Turning to the victimisation complaint Miss Roberts submitted that it was hopeless on the merits because there was no evidence that any of the matters in the grievance which the claimant regarded as unsatisfactory were linked to her pregnancy. In any event permission to amend should be refused given the timing and manner of the application and the fact it was made well outside the primary time limit.

96. As to the correct respondent, Miss Roberts indicated that there had been some structural changes in the Cambian Group after the claimant was employed but she accepted that the documentation showed an inconsistent picture. The submission was that the correct respondent should be Cambian Childcare Limited.

Claimant's Submission

97. The claimant's written submission concisely summarised her complaints in six bullet points and offered a summary of the impact upon her of the unlawful treatment.

98. In her oral submission the claimant went through each of the individual allegations, assisted by the Tribunal. For allegation 1 she accepted that working at the two Homes in question would not have been suitable.

99. On allegation 2 the claimant emphasised that she was looking for a list of suitable Homes because she was pregnant and therefore this treatment was because of pregnancy. She said there was no evidence that the list existed and she thought lip service had been paid to this.

100. As for the cancellation of shifts in allegation 3, the claimant said that the true reason the shift was cancelled was because she was making complaints about the pregnancy risk assessment and staffing issues. Allegation 5 concerned delays and she submitted that the respondent did not want to accommodate someone who was pregnant. She felt that the respondent was hoping she would go away, not least because of the emails from Wendy Farnworth and Diane Lever which effectively said she could not have a job until her baby was born. She pointed out that if she had not challenged this she would not have done any work for the respondent save for her very first shift. The same was true of allegation 7, the failure to reply to her request about an administrative role.

101. Allegation 8 concerned use of the term “whistle-blower”. The claimant accepted it was not due to pregnancy but thought it was because she had put forward her concerns. She thought it was not a nice term with which to be labelled.

102. In relation to allegation 6 the Tribunal asked the claimant which element of this allegation in her claim form amounted to the detriment. Her response emphasised the lack of any risk assessment but pointed out that her witness statement did say that she had not given any permission for the individual to be told that she was pregnant. She confirmed that was part of the unfavourable treatment on which she relied.

103. In relation to risk assessments (allegation 4) the claimant invited us to accept that written notice had been given when the email was sent by the trainer on 16

February 2017. There had been no suitable or sufficient risk assessment at Queen's Park at all. The risk assessment which appeared to have been done on 19 February had not in reality been done then. It was not plausible that it had been done for one of the only two Homes at which she subsequently worked. The respondent had no way of knowing in mid-February which Homes she would approach for work. No other risk assessments for other Homes at which she had not worked had been disclosed to her in her subject access request. Between 19 March and 1 April there had been 11 days in which there was time for a discussion with her to do the risk assessment properly.

104. In relation to the grievance (allegation 9) the claimant said that the respondent was trying to put her at a disadvantage due to the complaints she had made. She reminded us that Mrs Lever's witness statement said she had no role in decision making in the appeal, but in fact behind the scenes she had made a decision in relation to the venue for the appeal meeting and whether the claimant could be accompanied by her mother. Her position was that this claim was well-founded and that permission to amend should be granted.

105. Finally, in relation to the identity of the respondent the claimant said it was ambiguous and pointed out that there was yet another title in the statutory maternity pay correspondence on page 168.

Discussion and Conclusions - Introduction

106. The Tribunal was concerned primarily with allegations of pregnancy discrimination contrary to section 18 Equality Act 2010 and (subject to permission to amend) with allegations of victimisation contrary to section 27.

107. For some of those allegations we had to decide what the relevant facts were. In others the facts were clear. Either way the Tribunal had to apply the relevant law.

108. We reminded ourselves that whether there has been a detriment under section 39 turns upon whether the claimant can reasonably view the treatment as detrimental.

109. On the question of causation, the legal test is whether the treatment was "because of" pregnancy under section 18 (or "because of" a protected act under section 27). In general terms it is not enough for a claimant to show that but for her pregnancy (or protected act) there would have been no detrimental treatment. Rather, the question is whether the fact the claimant was pregnant (or had done a protected act) had a material influence, consciously or subconsciously, on the mental processes of the decision maker.

110. The exception to that was the question of risk assessments under the 1999 Regulations as explained in paragraph 25 above.

111. The burden of proof shifts if the claimant has proven facts from which the Tribunal could reasonably conclude in her favour, but it is not generally enough for a claimant to say, "I am pregnant and I was treated badly". That will not be sufficient to shift the burden of proof as to the reason for that treatment. However, it is permissible in practice in many cases for the Tribunal to avoid a two stage approach

and simply to make a firm finding as to the reason for the treatment on the assumption the burden has shifted to the respondent.

112. As we did in our oral reasons, these written reasons will first address the pregnancy discrimination allegations, excluding risk assessments, then the victimisation complaint. Our conclusions on risk assessments will follow, and then the identity of the employer. Finally, these reasons will explain the award we made by way of remedy.

Discussion and Conclusions – Pregnancy Discrimination Allegations

113. We will deal with each allegation from the list of issues in paragraph 5 above in turn, save where it is convenient to deal with allegations together or out of order.

Allegation 1 – Shifts not Available/ Withdrawn 6 March 2017

114. We found that the facts were as set out in paragraph 12 of the claimant's witness statement. She was told by Brook House that she could not be given shifts because she was pregnant, whilst at Braemar House she was told that there was a shift but that was retracted when the claimant said she was pregnant, and she was told to contact HR. The position at both of those Homes is that lone working is required.

115. The question was whether that amounted to detrimental treatment. Lone working is required of staff at both of those Homes; the claimant accepted that it would not have been appropriate for her as a pregnant worker to work at either at those Homes. We concluded, therefore, that it was not reasonable to see the withdrawal of those shifts as detrimental[1]. This allegation of pregnancy discrimination failed.

Allegations 2, 5 and 7 – Suitable Homes/Alternative Work

116. These allegations were considered together as they all concerned a request for a list of Homes at which the claimant could safely work, alternative work, and delayed responses.

117. The relevant facts were evident from the series of emails. On 7 March at page 87A the claimant asked for a list of Homes. The response from Ms Farnworth was effectively to say that she could not work in any Homes. The claimant replied immediately asking for her next course of action. There was no reply to that email.

118. The claimant chased it up by telephone on 9, 10 and 13 March but without success. She then arranged some shifts at Lyndene between 19 March and April 2017.

119. On 7 April the claimant rang HR again and was given Diane Lever's name but was unable to contact Mrs Lever by her mobile. On 8 April (page 88) she sent an email to Ms Farnworth emphasising that the situation needed to be rectified. Mrs

[1] In submissions the claimant suggested that there might have been indirect sex discrimination but that was a claim never raised in the claim form.

Lever responded by email on 10 April. She did not ring the claimant to discuss but instead gave the same message as Ms Farnworth had given just over a month earlier, that effectively the claimant could not work in any Homes until she had had her baby. There was no list of Homes at which she could work provided and the email did not address the possibility of alternatives to that work.

120. The claimant responded the next day at page 90. She explained the training she had had and she made a request to be considered for an administrative position in one of the respondent's schools, or to work in Homes which were considered quite settled. Mrs Lever responded that evening saying she had not been informed of the true position and would look into it and contact the claimant "on Thursday". The claimant subsequently confirmed which Homes she had already worked in. However, there was no response from Mrs Lever for about two or three weeks.

121. The claimant chased up a reply on 25 April at page 91. The substantive response came on 3 May at page 92. Mrs Lever pointed out the claimant was on a zero hours contract and there was no guarantee of work but said that she needed to contact the Homes and tell them she was pregnant. This was accurate information but it should have been given to the claimant in March or (at the latest) on 10 April. The claimant had been left with incorrect information about her position for about a month.

122. The claimant sent an email on 8 May saying that her requests for alternatives had been ignored, and alleging pregnancy discrimination (page 92). By her response of 12 May at page 94 Mrs Lever treated that as a grievance and invited the claimant to a meeting on 19 May. That was changed at the claimant's request to 22 May. After the meeting on that day a partial update was provided by Mrs Lever on 23 May at page 99. She said that she had a Home Manager and Homes locally where the claimant could be supported but no details or list of Homes were given. The claimant responded asking if there was any information on the other points and Mrs Lever said she would respond "tomorrow". The claimant said in an email she would not commit to any shifts until the grievance had been resolved.

123. On 24 May the claimant chased Mrs Lever for an update and the response came in the outcome email at 6.30pm that day at pages 101-102. Mrs Lever reiterated that she had a Home Manager and three Homes at which the claimant could work but no details were given. In fact Mrs Lever had identified the manager, Abby Marron, who managed three Homes where there was a single young person in residence, each of which was regarded as a settled Home.

124. The claimant responded at 10.00pm (page 101). She expressed that this was an unsatisfactory situation and she had no confidence any longer and refused to deal with Mrs Lever any further. The consequence of that was that Mrs Lever did not turn up for the planned outcome meeting on 26 May.

125. Against that factual background we considered whether the claimant could reasonably view this as detrimental or unfavourable treatment. We were satisfied that she could. There were long delays in giving her the information, and when information was given in early March and early April it was incorrect. It was not corrected until early May. It was plain that the claimant's issue was given low priority by the respondent's managers, no doubt because of the pressure of other work.

There was a failure to appreciate that for the claimant it was of the highest priority because once her shifts at Lyndene had finished, she was not able to earn whilst this was unresolved. There were serious shortcomings in how this was dealt with by the respondent. In contrast, leading up to the outcome of her grievance the claimant handled matters in an exemplary fashion, and indeed might be viewed as remarkably patient given the length of time it took to get clarity. We were satisfied there was a detriment and unfavourable treatment.

126. That left the question of the reason for the treatment. It was necessary to look at this in two different periods.

127. The first period was when Ms Farnworth was dealing with it between 7 March and 10 April. This was not a matter within Ms Farnworth's area of expertise. She specialised in the "onboarding" (i.e. recruitment and induction) section of the HR Department. She should have passed it on to a colleague who did have knowledge who could have responded to the claimant more quickly. She failed to respond to the claimant's follow up question after the initial information was given. However, it was clear to us that Ms Farnworth wanted to speak to Mrs Lever, and Mrs Lever was working away in Shropshire at that time. The two of them only met face to face when Mrs Lever was next in Ms Farnworth's office in early April. It was regrettable that Ms Farnworth did not deal with it by email with Mrs Lever, or speak to someone else, but there was no evidence that these failings were because of the claimant being pregnant. There was no simply no evidence from which the Tribunal could reach the conclusion that this matter was handled in any different way because it was a pregnancy matter as opposed to any other HR query. In that first period we were satisfied there was no unfavourable treatment because of pregnancy.

128. The second period was when Mrs Lever was dealing with it between 10 April and 24 May. Mrs Lever gave the claimant incorrect information on 10 April, but even once the claimant corrected her understanding about the extent of training, which was within a day or so, there was still a three week gap with no action or response. It was not until 3 May that the claimant was given accurate information, albeit no list of the Homes at which she could work. The claimant responded on 8 May and this was immediately identified as a grievance by Mrs Lever. Mrs Lever delayed, at the claimant's request, the meeting until 22 May, and after that meeting the outcome came on 24 May.

129. We were satisfied that Mrs Lever dealt with matters reasonably promptly once it was identified as a grievance, but there had already been a month's delay while the matter was with Ms Farnworth and a delay of over three weeks by Mrs Lever between 10 April and 3 May. The claimant had also been given misleading information on two occasions. There was no good explanation given by Mrs Lever for the position she took on 10 April at page 89; it was clear from that email that she did know the claimant had been through training save for the physical intervention element. However, the question for the Tribunal was not whether this was handled well or badly, but whether it was handled as it was because of the claimant's pregnancy. We were satisfied that was not the case. Mrs Lever was plainly very busy. She explained she had 300 emails a day and was copied into many more. She was working away in Shropshire for several weeks. It was clear that she was someone on whom problems in the HR Department were "dumped". She had to deal with issues about pregnancy almost every day given the predominantly female

workforce of the respondent. It may have been the case that the fact the claimant was a bank worker rather than an employed permanent member of staff might have influenced the priority which Mrs Lever gave the matter, but in any event the Tribunal was unanimously satisfied that Mrs Lever was not influenced, consciously or subconsciously, by the fact that the claimant was pregnant.

130. As a result allegations 2, 5 and 7 about lack of response and delay failed and were dismissed.

Allegation 3 – Cancelled Shifts April 2017

131. Allegation 3 was about the cancellation of the shifts for 2 and 15 April and 4 and 5 May. We accepted the factual evidence given by the claimant that she found out about these cancellations on 1 April when she looked at the rota at Lyndene and saw these shifts had been cancelled. The claimant was given no official explanation for this or even any proper notification, and her suspicion that her pregnancy played a part in this was perhaps understandable.

132. However, the Tribunal accepted Ms Renshaw's unchallenged evidence that a permanent member of staff had completed her shadowing in the previous week and needed to complete her contractual hours, and therefore in line with the bank worker's policy at page 50 the claimant was cancelled for 2 April and the later dates.

133. It is right to say that the claimant was entitled to be paid two hours for the shift on 2 April 2017 because she was not given more than 24 hours' notice of cancellation, but that was not a claim pursued before this Tribunal. We were satisfied that the pregnancy played no part in the cancellation of these shifts and therefore that complaint failed and was dismissed.

Allegation 6 – 20 March 2017 at Lyndene

134. The first matter for the Tribunal was to identify the detriment or the unfavourable treatment on which the claimant relied. There was a suggestion the unfavourable treatment was not telling people that the claimant was pregnant, but simply the actions of the young person. However, we noted the following:

- The claim form at page 13 contained three elements in the narrative: the disclosure that the claimant was pregnant, the threat from the young person and the limited consequences which ensued for the young person.

- The response form at page 26 paragraph 16 did not engage with all three of those matters save to say that it was dealt with in accordance with procedures.

- The Case Management Order at pages 30 and 31 recorded all three of those elements as part of the treatment on which the claimant relies under section 18.

- The claimant's witness statement (paragraph 21) said that the fact she was pregnant was said openly to everyone without her permission, as well as dealing with the threat that ensued from the young person and her view of the limited consequences for that threat.

- Mrs Shad's witness statement at paragraph 2 gave a factual account rather than an explanation of what was done.

- In her helpful written submission Miss Roberts had addressed all three elements of the treatment in successive paragraphs 23, 24 and 25.

135. Overall, therefore, the Tribunal was satisfied that the claimant's case as to the unfavourable treatment encompassed all three elements.

136. The first element was the disclosure of her pregnancy to the young person by Mrs Shad. Could the claimant reasonably see that as a detriment? We accepted that Mrs Shad acted out of the best of intentions. She was faced with a challenging situation. She wanted the young person to stop smoking cannabis in the presence of the claimant. She knew the young person from previous experience and the action she took did have the desired effect, albeit after the young person made a threat to the claimant. Nevertheless, we were satisfied the claimant could reasonably see this disclosure without her permission as a detriment. Telling the young person the claimant was pregnant allowed the young person to identify a further vulnerability on the part of the claimant, beyond being a new member of staff on her second shift. That vulnerability was immediately exploited by the young person in the threat she made. We were satisfied that the disclosure, albeit well intentioned and ultimately effective, could still reasonably be seen by the claimant as a detriment. It also amounted to unfavourable treatment, and plainly it was done because of pregnancy. The complaint of pregnancy discrimination succeeded in relation to that element.

137. The second element was the threat made by the young person, but it was not suggested that the respondent could be liable for that. We rejected the complaint insofar as it was based upon what the young person said to the claimant, upsetting and disturbing as that was.

138. The third element was the limited consequences for the young person of her behaviour on that occasion. That was a matter of professional judgment for the managers and for Mrs Shad. The decision as to the consequences was not linked to pregnancy in any way: it was a consequence of the behaviour and the circumstances in the Home.

139. The claimant succeeded on allegation 6 but only in relation to the disclosure of her pregnancy to the young person without her permission.

<u>Allegation 8 – Calling the Claimant a "Whistleblower"</u>

140. We found as a fact that on 22 May 2017 the claimant was referred to as a whistleblower in relation to those elements of her complaint which disclosed possible safeguarding concerns for the young people at Lyndene.

141. The question of whether it could reasonably be seen as a detriment was a difficult one. The claimant said that she did not view it as a nice term but much more frequently, in the experience of this Tribunal, it is seen as a positive label because it engages the protection of internal policies, and the protection against detrimental treatment or dismissal because of a protected disclosure.

142. However, even if the claimant was reasonable in seeing that as a negative matter there was no evidence it was because of pregnancy. The claimant accepted that in cross examination. The complaint that this was unfavourable treatment because of pregnancy failed and was dismissed.

Discussion and Conclusions – Victimisation

Permission to Amend

143. The first matter we considered was whether to grant the claimant permission to amend her claim so as to raise this complaint.

144. It is inherent within the general case management power in rule 29 of the Employment Tribunal Rules of Procedure 2013 that the Tribunal has a discretion to permit amendments. In common with all such powers under the rules, the Tribunal must have in mind the overriding objective in rule 2, which is to deal with the case fairly and justly. The leading case on how this discretion should be exercised remains **Selkent Bus Co Limited v Moore [1996] ICR 836**. We applied the guidance given in that case.

145. The amendment which the claimant sought to introduce to the claim form was effectively the addition of these words,

> **"The conduct of my grievance and the appeal was victimisation contrary to section 27 Equality Act 2010 because of my protected act in raising a grievance about pregnancy discrimination".**

146. The application was made at a very late stage in the proceedings - at the start of the final hearing. It was made orally rather than in writing, although that was no doubt attributable to the fact the claimant was representing herself.

147. As to the nature of the application, we were satisfied that it was a sense a pure relabelling. As Miss Roberts recognised, the facts which the Tribunal would need to deal with that allegation were already there in the evidence and no new information or evidence was required.

148. It was made well outside the three month time limit for complaints of discrimination, but that carried much less weight where it was essentially a relabelling exercise (see paragraph 50 of **Abercrombie and others v AGA Rangemaster Ltd [2014] ICR 209)**.

149. Helpfully Miss Roberts accepted that the respondent was not prejudiced by the grant of permission because it was able to deal with the matter fairly on the evidence available. If, however, we refused permission to amend the claimant would be prejudiced if the complaint proved to be well-founded but could not be considered.

150. Putting that together we decided that the balance of prejudice favoured allowing the claimant permission to amend. We moved to look at the merits of the complaint.

Merits

151. It was accepted the claimant did a protected act in her grievance of 8 May at page 92 alleging pregnancy discrimination. The question was whether she was subjected to a detriment because of that protected act. As with section 18, this was not a "but for" test but rather a question of analysing the mental processes, conscious or subconscious, of the decision makers to see whether they were influenced in their handling of the grievance and the appeal by the fact it was a grievance about pregnancy discrimination.

152. We were satisfied that there were some matters which the claimant could reasonably see as detrimental. That did not include the period between 8 and 22 May. Mrs Lever promptly identified the email of 8 May as a grievance and dealt with it appropriately. She agreed to delay the meeting and hold it at an alternative venue and allowed the claimant to be accompanied by her mother even though that was outside the respondent's policy and beyond her the legal entitlement. Indeed, we noted from Mrs Cookson-Smith's witness statement (paragraph 12) that at the end of the meeting the claimant and her mother were both pleased and felt it had gone well.

153. However, there were some matters after that meeting of which the claimant was very critical. She did not get a reply on all five points the day after the meeting; she thought that she had been promised compensation or remuneration but in fact that was not to be paid; she was not given the name of the manager and the list of Homes she could work at, and she came to doubt the integrity of Mrs Lever because of what she saw as a failure to do what had been promised at the meeting.

154. The Tribunal found as a fact that Mrs Lever had not guaranteed that there would be remuneration at the meeting even though the claimant thought she had. Mrs Lever, we were satisfied, was sympathetic and expected compensation to be authorised by the person she termed as "the man with the money". In her oral evidence to us she said on two occasions that she had been "overruled" by him, but we were satisfied that Mrs Lever knew she was not authorised to confirm that there would definitely be a payment. The claimant, perhaps understandably, mistook Mrs Lever's supportive tone as being a guarantee.

155. Mrs Lever did a response in two days accepting some of the claimant's points, apologising for past failings and identifying a way forward. In most cases it would be unreasonable to see this as detrimental. However, in the particular circumstances of this case the Tribunal was satisfied unanimously the claimant could reasonably see it as detrimental. Those circumstances were the fact that she had been given the wrong information twice already; there had been unexplained delays and lack of responses for several weeks, at two different stages; and the real issue about whether there were Homes at which she could safely work was of fundamental importance because she could not work and earn any more money until that was sorted out. In those unusual circumstances the claimant acted reasonably in seeing the grievance outcome and the way that was handled as a detriment.

156. However, was that because it was a grievance about pregnancy discrimination? Mrs Lever told us she dealt with this grievance no differently from any other grievance and she emphasised that with the respondent's predominantly

female workforce, pregnancy and related issues are an every day matter for her as an HR Business Partner.

157. The claimant said in her submission to us after the evidence that she saw this as part of an attempt to make her go away, but that was not directly put to Mrs Lever in cross examination. The claimant did rely upon paragraph 28 of Mrs Lever's witness statement which said that in the appeal stage she had not been a decision maker, whereas it was clear that in the course of the appeal Mrs Lever either made decisions or at the least gave advice which was then followed about the venue for the appeal meeting and whether the claimant's mother could accompany her once again. However, we were satisfied that these were administrative matters. Mrs Lever was not involved in the substantive decision on the outcome of the appeal and therefore the way in which her witness statement was worded did not impair her credibility as the claimant suggested.

158. Overall the Tribunal was unanimously satisfied that the reason for the shortcomings in the handling of the grievance was not that the claimant had alleged pregnancy discrimination. Mrs Lever was genuinely trying to resolve the situation as best she could but unfortunately failed to appreciate how significant and urgent this issue was to the claimant. We rejected the contention that her handling of the grievance amounted to victimisation contrary to section 27.

159. As for the appeal stage of the grievance, the claimant was unhappy with a number of things. They included the fact that Mr Fletcher appeared to be dealing with it then said he had to pass it to someone else because of his paternity leave; the refusal to allow a different venue or for her to be accompanied by her mother; the fact that she was not given Mr Greatbatch's handwritten notes at the end; the fact that the typed notes produced were a composite of two different sets of written notes, and the outcome provided by Leanne Woodings. In the outcome letter element 6 was not addressed, it was not clear what conclusion had been reached on element 10 and of course some of the appeal points were rejected.

160. Mrs Woodings said she dealt with this appeal in the same as she would deal with any other grievance appeal. Her practice in relation to the venue, the taking of notes and other administrative arrangements was exactly the same. There was no evidence to suggest she had dealt with a grievance not about pregnancy discrimination in any different way.

161. Overall the Tribunal was satisfied that there was no evidence that the way in which the appeal was handled amounted to discrimination because the claimant had alleged pregnancy discrimination. A grievance about a matter which was not an Equality Act issue would have been handled in the same way.

162. The complaint of victimisation in relation to the grievance and the appeal therefore failed and was dismissed.

Discussion and Conclusions – Risk Assessments – Allegation 4

Identifying the Complaint

163. We sought to identify the complaint made by the claimant about pregnancy risk assessments.

164. In her claim form at page 12 the claimant complained that there was no risk assessment for her work at Queen's Park Road on 26 February 2017. She made the same complaint on page 13 about her work at Lyndene from 19 March 2017. She also complained on page 14 that the plan for her to fill in the risk assessment on 26 May did not happen because that meeting did not take place after the first grievance meeting.

165. The response form (paragraph 13 page 26) asserted that both generic and specific risk assessments were done, and in particular that there was a specific risk assessment done for Lyndene.

166. The characterisation of the claimant's complaint in the Case Management Order at page 30 was that no risk assessment was carried out when the respondent was told the claimant was pregnant, and some of the detail was narrated there.

167. It followed that the unfavourable treatment on which the claim of a breach of section 18 relied was that no risk assessment was done at either of the two Homes at which she worked in February and March 2017.

Legal Framework

168. We reminded ourselves of the legal framework summarised above. The case law establishes that there are two different types of pregnancy risk assessment.

169. The first is a generic risk assessment required if the employer employs women of childbearing age. It must comply with regulation 3(1) and regulation 16(1) by being suitable and sufficient. It need not be carried out by reference to any specific individual but is rather an assessment of the generic risks in the workplace which any pregnant worker would face.

170. The second is a specific risk assessment for an individual employee which is required by regulation 16(2) and (3), but only if three conditions are met. Those three conditions were helpfully summarised by the Employment Appeal Tribunal in paragraph 30 of the **O'Neill** decision. They are:

(a) That the employee must have notified the employer in writing that she is pregnant as required by regulation 18(1);

(b) That the work is of a kind which creates a risk for the pregnant worker; and

(c) That the risks must arise from certain specified features of the work which can include the working conditions.

171. As to whether a risk assessment is suitable and sufficient so as to comply with regulation 3, that is essentially a matter for the Tribunal, but two points should be noted.

172. Firstly, there is no absolute requirement that it will only be suitable and sufficient if the employee is consulted. That may be good practice but it is not a requirement. There are examples in the case law of suitable and sufficient risk assessments being done where the employee has not been consulted over them.

173. Secondly, the question of how long an employer should reasonably be allowed before the risk assessment should be done is unclear. Paragraph 36 of the **O'Neill** judgment appears to us very unclear in what is being said, but in any event that is not part of the basis on which the appeal in that case was dismissed. We were satisfied broadly that unreasonable delay may mean there has been a breach of the Regulations, but the length of time an employer should reasonably be allowed to carry out a specific risk assessment will depend on the circumstances in each case, including the length of the delay and the nature of the work in question.

174. It was not disputed in this case that each Home with its different populations of young people might present different risks and therefore a risk assessment would be needed in relation to each individual Home. We considered Queen's Park Road then Lyndene.

Queen's Park Road 26 February 2017 – Generic Risk Assessment

175. Was there a generic risk assessment for Queen's Park Road? None was produced in the evidence before us. A template risk assessment across the whole business was produced. It was the document which Mrs Lever gave the claimant on 22 May at pages 103-104, but that was simply a template which would appear applicable to almost any role and not in itself something which could be regarded as suitable and sufficient for the purposes of regulation 3.

176. Ms Renshaw told us that the risk assessment she did at page 77 onwards for Lyndene was based on a generic risk assessment, and that she had simply had to add in the claimant's initials. We noted that some of the risks on that template were specific to Lyndene, for example reference to the smoking policy there and details of the young person resident at Lyndene having been found in possession of a knife on previous occasion. We concluded that the template which Ms Renshaw was talking about was a template for Lyndene, not a general template for all the respondent's Homes. There was no such template for Queen's Park Road. Accordingly, on the evidence before us we concluded that there was no suitable and sufficient generic pregnancy risk assessment applicable to Queen's Park Road.

177. We were satisfied that the failure to comply with the obligations in regulation 3 and regulation 16 amounted to unfavourable treatment of the claimant, because it meant that when she worked there the risks to her as a pregnant woman had not been properly considered. Based on **Hardman** a failure to do a pregnancy risk assessment is inherently because of pregnancy and therefore a breach of section 18 of the Equality Act 2010.

Queen's Park Road 26 February 2017 – Specific Risk Assessment

178. The dispute between the parties was whether the obligation arose. It was not disputed by the respondent that working conditions there did present a risk and we accepted the claimant's evidence that in fact the young person there became aggressive early on in the start of the shift. The question was whether the claimant had by that stage notified the respondent in writing that she was pregnant as required by regulation 18.

179. We accepted the claimant's factual evidence that she gave the information verbally to trainers in her training. She was told that they would inform HR, and that led to the internal emails at pages 74 and 75. However, there was nothing in writing from the claimant herself until 7 March - after she had worked at Queen's Park Road.

180. Article 2 of the Directive defines a pregnant worker as someone who informs her employer in accordance with requirements of national legislation, and therefore it is left to each member state within the EU to determine for itself what the requirements of notification will be. There is no basis for arguing that regulation 18 fails properly to implement the Directive in requiring written notice from the employee herself, as opposed from anyone else.

181. Beyond that Miss Roberts submitted that there was good reason for regulation 18 to require the written notice to come from the employee personally, because it gives the employee control over when the notification arises and when the obligation to do a specific risk assessment is triggered.

182. The Tribunal accepted the argument Miss Roberts raised. We rejected the claimant's argument that regulation 18 is satisfied if written notice is given by someone else. It would have been easy for Parliament to have made provision to that effect in regulation 18 had it thought that appropriate.

183. In reaching that conclusion the Tribunal acknowledged that the respondent treated the claimant as if she had complied with regulation 18, and in particular the email sent to Home Managers about her pregnancy was a sensible and appropriate step, but as a matter of law the Tribunal concluded that regulation 18(1) was not satisfied until 7 March 2017, and therefore there was no obligation to do a specific risk assessment for the claimant when she worked at Queen's Park Road. The complaint in relation to that matter failed.

Lyndene – Generic and Specific Risk Assessment

184. There was a factual issue the Tribunal had to resolve: was the risk assessment appearing at pages 77-80A prepared in February 2017 as Ms Renshaw maintained, or was it done later and backdated?

185. We noted that there were some peculiarities about that risk assessment. The heading on the second page appeared to be "Gambian" rather than Cambian Group, and the claimant also said it was suspicious that of all the recipients of the email from Wendy Farnworth of 18 February 2017, the only manager who then did a pregnancy risk assessment was the manager of one of the only two Homes at which

she ever worked. No other risk assessments had been produced in response to her data protection subject access request.

186. However, we also took account of the email at page 76 in which Ms Renshaw told staff at Lyndene that a risk assessment for the claimant had been done. That was a commendable and proactive step by Ms Renshaw and we concluded that it was due to her being the most proactive of the managers who received the email at page 75, and to the fact that she had three vacancies for permanent staff in Lyndene at the time and so perhaps was more likely to anticipate needing bank staff than her colleagues who managed other Homes. Overall the Tribunal was unanimously satisfied that the risk assessment was prepared on 17 February as Ms Renshaw told us, even though it was not shown to the claimant at any stage and she only saw it much later in that year.

187. Having made that finding of fact we first considered whether there was a generic risk assessment for Lyndene. We were satisfied there was. The template used by Ms Renshaw was for Lyndene and it identified risks for pregnant workers there resulting from the young people resident at the Home. There was therefore no breach of section 18 on that point.

188. The next question was whether there had been a specific risk assessment for Lyndene. We were satisfied the obligation to do a specific risk assessment arose; the claimant gave written notice on 7 March 2017, and the working conditions at Lyndene did create a risk as required by the Regulations and the Directive. The question for us was whether that specific risk assessment which bore the claimant's initials was suitable and sufficient so as to comply with regulation 3.

189. The Tribunal accepted there is no absolute requirement for a meeting, and the fact there was no meeting with the claimant or discussion with her does not inevitably mean that it was unsuitable or insufficient. However, this was a risk assessment prepared with no input from the claimant at all. The claimant had not identified in the course of this hearing any additional risks, but effectively this was a paper exercise. The claimant was not made aware of the risk which had been identified or of the control measures authorised. That did have an impact. For example, on 22 March 2017 when there was excessive noise in the kitchen the claimant was told by a colleague she had to stay in the kitchen, yet the pregnancy risk assessment at page 79 identified that the claimant should remove herself from situations of excessive noise. Staff had not been made aware when the claimant began work what the contents of the risk assessment were.

190. Ultimately we concluded that this was really nothing more than a generic risk assessment for Lyndene with the claimant's initials inserted. There was no consideration of the claimant's individual circumstances and no attempt to discuss them with her. The only information Ms Renshaw had when this risk assessment was completed was that the claimant was pregnant and was a bank worker who might come to work at Lyndene. Because the control measures in particular were not known to the claimant, we found that this was not a sufficient and suitable risk assessment for a specific employee, and therefore we concluded that in principle the respondent was in breach of its obligation to do a specific risk assessment for Lyndene.

191. That left, however, the question of timing. The claimant only did four shifts at Lyndene between 19 March and 1 April 2017. Was the respondent still within a reasonable period to do a specific risk assessment and therefore not yet in breach of the Regulations?

192. The respondent's case was that four shifts was a very short period, that Ms Renshaw did not actually work with the claimant at Lyndene until 22 March and had intended to speak to the claimant that day but was prevented from doing so by a significant incident that she had to deal with. The claimant then did only one more shift on Saturday 1 April, a day on which Ms Renshaw was not workin,g before her work at Lyndene ceased.

193. The claimant's case in contrast was that the respondent knew in mid February she was a pregnant bank worker. The first of her shifts at Lyndene was about a month later. The young people at Lyndene did present a significant risk: one of the young people there had been found in possession of a knife on two occasions. This was not one of those Homes later identified to the claimant where there were only one or two young people who were in a relatively settled environment, and of course it was not one of the Homes that was later identified through Mrs Lever as being suitable. There were plainly risks to a pregnant worker at Lyndene which required careful management.

194. It was also a new environment for the claimant. She was not a longstanding bank worker already familiar with that environment and the young people there who became pregnant; she was on her first few days of working there. She had not had the full extent of her induction training. She had not been able to undertake the physical intervention part.

195. We noted also that the Home had a Deputy Manager and employed staff who could have dealt with the risk assessment in place of Ms Renshaw, and we also found as a fact that the claimant did ask about the risk assessment at the start of her first shift on 19 March.

196. Weighing those matters up the Tribunal was unanimously satisfied that the fact that no risk assessment was done on the claimant's first day was beyond what was reasonable. Ms Renshaw had been very proactive in February in laying the groundwork for a specific risk assessment to be done and telling staff at the Home that a risk assessment existed, but that unfortunately was not followed through. The respondent could reasonably have consulted the claimant about it on 19 March, the following day, or Ms Renshaw could have delegated it to someone else when she found there was insufficient time for her to do it herself on 22 March. We therefore concluded that there was a breach of regulation 3 and regulation 16 in relation to the requirement for a specific risk assessment at Lyndene. Because of **Hardman** the complaint under section 18 of the Equality Act succeeded.

Conclusions – Correct Respondent

197. Save for remedy, the final point for us to decide was the identity of the respondent in this case. This was a question of identifying the legal person which employed the claimant. The claimant said it was Cambian Group Limited; the respondent that it was Cambian Childcare Limited.

198. The starting point is always the contract of employment. The offer letter simply referred to The Cambian Group without identifying which specific company in that group, but the statement of terms and conditions required by section 1 of the Employment Rights Act at page 44 identified the employer as "The Cambian Group Limited".

199. There were references to other entities and companies elsewhere in the documentation. The P60 for April 2017 at page 201 referred to "Advanced Childcare" which does not appear to be a limited company, and the SMP declaration at page 168 referred to Cambian Care Services Limited although the employer is said to be "The Cambian Group".

200. The only reference in the information before us, apart from the response form, to Cambian Childcare Limited was in the information provided by HMRC to the claimant in September 2017, but on any view that information at page 214 was in error because the claimant's employment did not terminate at the end of April 2017, no P45 was issued, there was no dismissal or any resignation. We placed little weight on that.

201. Miss Roberts suggested that there had been restructuring within the Group since the claimant was first engaged as a bank worker but we had no evidence about that, or evidence of any mechanism by which the claimant's employment might have transferred to a different company in the Group. The only reliable evidence before us was the section 1 statement, and therefore we concluded that the correct respondent in these proceedings was the company referred to as "The Cambian Group Limited". In fact, according to Companies House that is a public limited company. The proper respondent therefore appeared to be Cambian Group Plc.

202. The parties can apply for reconsideration of that issue if paperwork emerges which establishes the correct respondent.

Remedy

203. After delivering oral judgment with reasons the Tribunal considered remedy. We heard oral evidence from the claimant and submissions from both sides. The claimant sought an award for injury to feelings and an award for injury to her health.

Facts

204. The claimant was very worried about risks to her pregnancy at Queen's Park Road. She described the lack of risk assessment as very upsetting. At Lyndene she felt extremely vulnerable, and experienced adrenaline rushes during her shifts there. Once her pregnancy was revealed to the young person without her consent she felt even more vulnerable and at risk. She thought there was going to be some injury to her unborn child. She suffered from anxiety, sleepless nights and felt after each shift that her stomach would "flip" at the thought of going in again. These feelings continued even after her last shift (as it turned out) at Lyndene.

205. As to her health, the claimant had seen her General Practitioner on 25 May after receiving the grievance outcome, and had been certified unfit for work due to stress at work for a period of one month. She had also been prescribed diazepam

which she took for two months for anxiety symptoms. There had been a further prescription of painkillers in September 2017 for severe headaches which came on each time she had contact with the respondent.

Law

206. The starting point is section 124 of the Equality Act 2010:

> **(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
>
> **(2) The tribunal may—**
>
> **(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;**
>
> **(b) order the respondent to pay compensation to the complainant;**
>
> **(c) make an appropriate recommendation.**
>
> **…….**
>
> **(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court or the sheriff under section 119.**

207. In relation to an award of compensation for injury to feelings, the onus is on the claimant to establish the nature and extent of the injury to feelings. The amount of the award under this head should be made taking into account the degree of hurt, distress and humiliation caused to the complainant by the discrimination. We applied the principles identified in **Armitage Marsden & HM Prison Service -v- Johnson (1997) ICR 275.**

208. In **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102** the Court of Appeal gave guidance ws in paragraphs 65-68 on levels of awards for injury to feelings. We took account of that guidance.:

209. Subsequently in **Da'bell v NSPCC [2010] IRLR** in September 2009 the EAT said that in line with inflation the **Vento** bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000. However, a Tribunal is not bound to consider the effect of inflation solely pursuant to **Da'Bell.** In **Bullimore v Pothecary Witham Weld Solicitors and another [2011] IRLR 18** the EAT chaired by Underhill P said in paragraph 31

> "**As a matter of principle, employment tribunals ought to assess the quantum of compensation for non-pecuniary loss in "today's money"; and it follows that an award in 2009 should – on the basis that there has been significant inflation in the meantime – be higher than it would have been had the case been decided in 2002. But this point of principle does not require tribunals explicitly to perform an uprating exercise when referring to previous decided cases or to guidelines such as those enunciated in Vento. The assessment of compensation for non-pecuniary loss is simply too subjective (which is not a dirty word in this context) and too imprecise for any such exercise to be worthwhile. Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. "Uprating" such as occurred in Da'Bell is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision referring to such a case which has not itself expressly included an uprating was wrong."**

210. The Court of Appeal confirmed in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879** that the 10% uplift approved by the Court of Appeal in personal injury cases (see **Simmons v Castle [2012] EWCA Civ 1288)** should apply to awards for injury to feelings and injury to health in discrimination complaints.

211. Separate awards for injury to health are possible where the Tribunal is satisfied that the unlawful conduct caused such an injury or made a pre-existing condition worse. The Judicial College publishes Guidelines for the civil courts on awards for psychiatric damage which can be taken into account. Generally medical evidence will be required to prove that the unlawful treatment caused the injury or exacerbation.

212. Finally, interest on discrimination awards is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Where an award is made the Tribunal must consider awarding interest but has a discretion whether to make any award. For injury to feelings awards interest is in principle calculated over the period between the discriminatory act and the award (Regulation 6(1)(a)). The applicable rate for cases presented in 2017 is the rate prescribed by the Judgments Act 1838 (currently 8% per annum).

Decision

213. Having heard the evidence from the claimant and submissions as to the appropriate remedy, the Tribunal decided not to make a separate award for injury to health. There was no medical evidence that established a causal link between the acts we found unlawful and the claimant seeking medical attention some weeks later, and on her own case she was seriously affected by then by the delays in the process and the handling of her grievance, both of which were matters that we found did not contravene the Equality Act.

214. However, it was appropriate to take into account what the claimant said about the symptoms she experienced from February onwards in compensating her for injured feelings. We considered it appropriate to make a single award covering all three matters.

215. The work at Queen's Park Road on 26 February was the claimant's first day working for the respondent. It was a challenging environment and the fact that there was no risk assessment in place caused injury to her feelings. However, we took into account that this was a single day working at Queen's Park Road, and therefore in that sense the impact was relatively short-lived.

216. As for Lyndene, Mrs Shad (out of the best of intentions) telling the young person that the claimant was pregnant on 20 March 2017 had a relatively short-term effect on injury to feelings because it was superseded immediately by a much more concerning incident where the claimant and her baby were threatened by the young person concerned. It was understandable that for those reasons the claimant's emphasis in the internal documentation, and indeed in her witness statement, was on the threat itself and the lack of appropriate consequences, rather than the well intentioned disclosure of her pregnancy.

217. The absence of a specific risk assessment at Lyndene, however, was more serious. This was the second Home at which the claimant worked and the second Home at which there was no risk assessment in place for her. The importance of that to her was evident from the fact that she asked about it at the start of her first shift there and was told it was not needed. The Home was plainly a challenging and risky environment given the population of young people there, and the incident on 22 March was a good example of the effect of not having a risk assessment in place. Neither the claimant nor her colleague knew that she was in fact authorised by the generic risk assessment to leave the kitchen when the noise from the young people became excessive. We accepted the claimant's evidence that these matters in particular left her feeling extremely vulnerable, with adrenaline rushes, concern for her baby and she found herself anxious and haunted by events. Even though she only worked at Lyndene four times, we were satisfied these were significant feelings which were not short-term.

218. The fact that they continued was in part a consequence of the fact that the grievance failed adequately to deal with the risk assessment point. An opportunity for the respondent to put matters right and get a risk assessment done properly was lost, even though Mrs Lever was saying that those matters would be attended to by the manager of the next Home at which the claimant worked.

219. However, the Tribunal must distinguish the injury to feelings resulting from the three matters we have found to be unlawful from the effect on the claimant's feelings of the rest of her experience in the relevant period, and it is clear to us the claimant was particularly affected by two matters which we found not to be a breach of the Equality Act, namely the delays and misinformation, and then her view of the grievance outcome.

220. Putting those matters together we concluded the appropriate award lies between the respondent’s suggested figure of £1,500 and the claimant's suggestion of the top band of the **Vento** bands.

221. Taking account of the guidance in **Vento**, the uprating of the awards in **Da’Bell**, the 10% uplift required by **Simmons v Castle** and the current value of money (compared in particular to when the **Da’Bell** case was decided) the Tribunal unanimously concluded that the appropriate award for injury to feelings was £6,000, which is almost at the top of the lowest band.

222. Interest at 8% is calculated from 20 March 2017, which is in the middle of the period during which there was unlawful treatment and which was also the date of the disclosure. That is a period of 543 days.

223. The annual rate of interest at 8% on £6,000 is £480 so the calculation (480/365 x 543) produces a figure rounded down by eight pence to £714.

224. The total award the Tribunal made for those matters we found to be unlawful was £6,714.

_____

Employment Judge Franey

9 October 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 October 2018

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2403535/2017**

Name of case: **Miss C Cookson-Smith** v **Cambian Group Plc**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **22 October 2018**

"the calculation day" is: **23 October 2018**

"the stipulated rate of interest" is: **8%**

Mr S Harlow
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.