Case Number: 2203231/2020

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms A Nettle **v** **The Walt Disney Company Limited**

Heard at: London Central **On**: 12, 13, 14, 15 October 2021

Before: Employment Judge A James
Mr S Pearlman
Mr S Godecharle

Representation

For the Claimant: Mr G Daley, lay representative

For the Respondent: Mr M Sellwood, counsel

JUDGMENT

(1) The claims for unfavourable treatment because of pregnancy and/or maternity (S.18 Equality Act 2010) are not upheld and are dismissed.

(2) The claims for victimisation (s.27 Equality Act 2010) are not upheld and are dismissed.

REASONS

The Issues

1. The claims are for unfavourable treatment because of pregnancy/maternity (section 18 (2), (3) and (4) Equality Act 2010) and for victimisation (section 27 Equality Act 2010). The agreed issues are set out in Annex A.

The proceedings

2 The hearing took place over four days. Evidence and submissions on liability/remedy were dealt with on the first three days. It was arranged that on

the fourth day, the tribunal would make and then give its decision and reasons. An oral judgement was delivered on the final day of the hearing, but written reasons have since been requested.

3 The tribunal heard evidence from the claimant, and for the respondent from Suzy Macleod, Director of Home in the Regional Softlines Team, Patrycja Bienkiewicz, Category Director, Hannah Jones, HR Advisor (at the material time) and James Thorley, Senior Employee Relations and Wellbeing Manager. There was an agreed trial bundle of 411 pages and a supplementary bundle of 75 pages.

Fact findings

4 The claimant joined the respondent in August 2016 on a 9 month fixed term contract (as maternity cover). The contract was extended in or around March 2017 after a proposal by her director to extend her contract was approved.

5 In October 2017 Liz Shortreed became the new Vice President of Softlines, replacing Fransesca Gianesin, who had been promoted to a senior role at Disneyland Paris.

6 In March 2018 the claimant's then Director Lorraine Brennan committed suicide. The claimant and her colleagues were offered counselling by the respondent.

7 In or around March 2018 the claimant was encouraged by FJ, then the claimant's line manager, to apply for promotion. The claimant did not succeed at that time but was subsequently appointed to the permanent role of 'Manager, Licensing Sales Home'.

8 Early in January 2019 the claimant discovered she was pregnant and began to suffer from Hyperemesis Gravidarum (HG) i.e. severe nausea and vomiting in pregnancy. The claimant notified Suzy MacLeod about this, w/c 21 January 2019.

9 Ms Macleod emailed the claimant as follows on 25 January 2019:

> *Thank you for sending your sick note.*
>
> *I can imagine this has come as a shock and I hope you are ok, I am here if you need me, just let me know.*
>
> *Keep me up to date with how you are doing.*
>
> *Take Care*

10 Ms Macleod emailed the claimant on 6 February 2019 to update her on steps being taken to cover her work whilst she was absent. The email concluded:

> *Please keep me up to date on how you are doing, the team and I are worried about you and if there is anything that you need or you need to see some different faces please let us know.*

11 The claimant emailed Ms Macleod on 7 February to say:

> *Thanks for your very supportive email Suzy. I have been most anxious about being absent from work, particularly at this time of great change, so it helps to know that you've got extra support from Isabel*.

12 On 7 March 2019 an email from Ms Macleod stated:

> *Lovely to hear from you and I am sorry to hear that your condition remains much the same. I have forwarded your sick note to HR and brought Liz up to speed with how you are doing.*
>
> *Regarding the next few weeks, my current thoughts are that we need to wait and see how you are feeling, I know that Fiona has been talking with you and offering some advice and you must now put both yourself and the baby first.*

13 The claimant was referred to Occupational Health (OH) on 23 March 2019. They recommended a staggered return to work involving reduced hours over a reduced number of days per week and to work from home. The report also stated:

> *It is recommended for Ms Nettle to initially be provided with duties that do not require too much client interaction; project work would be beneficial if available".*

14 A letter was sent to the claimant about the claimant's maternity rights on 26 March 2019, which confirmed amongst other things:

> *During the Maternity Leave period you can carry out up to 10 days' work, as long as both you and your Line Manager have agreed for this to happen, and you both agree on what work is to be done. Work doesn't need to be limited to your normal job e.g. it can be used for training events, team events or skills training. It is advisable that a minimum of 5 hours are worked and you will receive payment for a full days' salary.*

15 On 9 April 2019 Ms MacLeod emailed Hannah Jones as follows:

> *My concern is that with her having been out of the business for a significant length of time now we have had to re-structure the team in her absence and therefore it would be good to understand from an HR perspective the remit I have for re-organising her role to take account of this and also the fact that if she is able to return it will only be for a limited period of time before she departs on maternity leave.*

16 Ms Jones replied to say that they would have to see what the WFH recommendation was when they got the report through and that she would discuss the matter further with her. She advised Ms Macleod to input the claimant's leave of absence onto the Head count management system (HAMM).

17 On 18 April 2019 an email from Ms Macleod to the claimant stated:

> *As you know your sick leave is due to expire on Monday and I wanted to see how you are feeling and if there has been any improvement in your condition?*
>
> *I am meeting with HR this afternoon to review the report from the occupational therapist and to discuss the recommendations and understand the next steps with regards a return to work but this obviously depends on how you are feeling in yourself.*

18 The claimant replied to the effect that she was feeling better but was still not able to return to work. She expressed the hope that she would be able to return to work after a few more weeks sickness absence.

Contractual sick pay provisions

19 Clause 13.1 and 13.2 of the claimant's contract of employment, so far as relevant, read as follows:

> *13.1 If you are absent from work due to sickness or injury and comply with the requirements of this clause and clause [12] above regarding notification of absence, you will, if eligible, be paid statutory sick pay and may be paid company sick pay, the latter in accordance with the terms of this Clause.*
>
> *13.2 Company sick pay is paid at the absolute discretion of the Company. When and if payable this will be your salary less any statutory sick pay payable*.

20 For service of between one and five years, the maximum duration of company sick pay was 12 weeks in any 12 month period.

21 Sick pay was extended during the claimant's absence with HG. Ms Macleod and Hannah Jones agreed these were exceptional circumstances.

22 Ms Macleod gave evidence that she was not aware of anyone else who has had their sick pay extended. We accept that. The claimant provided some extracts from 'Glass door', a section of the respondent's intranet for employees to post comments, in which comments are recorded from employees about sick pay. We did not find that evidence helpful, in relation to the claimant's assertion that extending sick pay was usual at the respondent. In particular, there was no evidence in those extracts about the contractual terms, length of service, or particular illness of those individuals, which were provided on an anonymised basis. Similarly, the claimant's evidence in relation to her colleagues did not provide any firm basis on which we could find that extending sick pay was usual.

Return to work

23 The claimant returned to work on 24 May 2019. She was allocated project work on her return in line with the OH recommendations. The claimant did not complain about that at the time. At the conclusion of the claimant's phased return, there were about four weeks remaining until she was due to go on maternity leave. Ms MacLeod did not consider it would be good for client care to move licensees that the claimant had previously been managing to the claimant for a four week period. Instead, they remained with the other colleagues who had been managing those accounts during the claimant's sickness absence and phased return.

24 We accept the claimant's evidence that she was disappointed that she was not able to return to her previous work during this period. We also accept Ms Macleod's evidence that this was nevertheless important work, and the data collected by the claimant is still being used by the respondent now.

25 On 28 May 2019 Ms Macleod emailed the claimant as follows:

> *Thanks for the working hours, this is great and happy to confirm for this week but again, please don't overdo the hours as our focus is on getting you back to full time safely*.

26 On 28 May 2019 Ms Macleod emailed Ms Jones as follows:

> *I just wanted to confirm I am ok to send an email out to the Softlines team welcoming Anna back to the business, advising she will be working from Home part-time but that she/we are keen to make her feel as part of the team as possible?*

Hannah Jones agreed, subject to checking with the claimant first.

27 On 16 and 19 July 2019 there were two team meetings with the Vice President of Softlines, Liz Shortreed. The claimant requested permission to dial-in to the meetings to participate and hear first-hand what was happening. The claimant was told by her line manger FJ that there was no opportunity to dial in. The claimant was not treated any differently to those of her colleagues who were also unable to attend in person, for example because of sickness absence or on annual leave. FJ called the claimant after the meetings, and told her that much of what was said was to be covered in announcements that would be made shortly, and that she would brief the claimant more fully at a later date.

28 On 23 July 2019 the claimant received an email which was critical of her performance, from her line manager FJ. The claimant responded on 23 July. She received a reply with FJ's comments in green. The claimant was told later by FJ that this email was directed by Suzy Macleod. We do not accept that FJ's comment was true. Having heard from Ms Macleod, we are content that she added the brief additions which are shown in red at the beginning of the email. We also accept Ms Macleod's evidence that FJ was under performance management, and that she had been critical to Ms Macleod of the claimant's performance. We found Ms Macleod's evidence about that to be reliable. We were referred by Mr Daley to alleged similarities in the email signature in that email, to those in Ms Macleod's emails. However, we were not convinced by those arguments, in the face of our view as to the reliability of Ms Macleod's evidence about it.

29 Ms Macleod later concluded that FJ was blaming the claimant for her own failings, for which she was being performance managed. Ms Macleod considered that the claimant was able to carry out the role she was employed to do at that time.

30 In July 2019, the claimant's maternity cover, AMcQ started work for the respondent.

31 On 24 July 2019, as a result of FJ taking sickness absence, the claimant was asked to report to Ms Macleod.

32 On 1 August 2019 Ms Macleod wrote to Liz Shortreed proposing a new senior manager role. The email reads:

> *In terms of the headcount here, given the value of the business and the need for a strong strategy to deliver the growth, I would be proposing a new SM headcount, not having Anna Nettle's role cover that position but if we are not in a position to add additional headcount then I accept that but it is a big job for a manager and they would need to be good. Abi definitely has the capabilities, I would be very concerned about Anna's ability to do it.*

33 Ms Macleod wrote in those terms because she had concluded that the claimant could carry out her role competently, but had come to the conclusion

she was not at that stage capable of carrying out a Senior Licensing Manager role. She based that assessment on her own experience of working with the claimant, and comments of others such as David Lee. Ms Macleod knew that AMcQ had global brand experience which is also why she was of interest in relation to the new higher level role. The SM role was subsequently approved.

34 Ms Macleod sent an email to HR on 5 August 2019 asking if the claimant's attendance at antenatal classes should be covered by holidays. Ms Macleod manages four direct reports, and seven indirect reports, across several countries. She was therefore in the habit of checking with HR, when she was unsure what an employee's entitlement was.

35 The relevant part of the email reads:

> *Can I just check our policy on NCT classes? Anna has booked in 4 1/2 day NCT appointments that she is attending, should these be covered by holiday?*

HR advised that those four half days would be covered and the claimant was paid for the days she attended.

36 On 9 August 2019 a baby shower was organised by Ms Macleod for the claimant, with the rest of her team. In an email sent to her colleagues by the claimant following that event, she said:

> *I wanted to say a BIG THANK YOU SO SO MUCH to you all for coming to my Baby Shower this morning and making it so special. It was truly fantastic to see you and even meet some new faces too. I've just had a look in my swag bag and you've gone above and beyond — so many gorgeous goodies in there; this little one is going to feel thoroughly spoiled!*

37 On 15 August 2019 a Softlines team consultation meeting took lace with the Vice President of Softlines, Liz Shortreed. Again, the claimant was not able to dial into that call; again, that was the same for all absent colleagues, whatever the reason for their absence.

38 Later that same day, Ms Macleod and Ms Shortreed spoke to the claimant by telephone. The claimant was informed of the role which she had been assigned to, as part of the huge restructure of the business which the respondent was at that time undertaking. They had taken over Fox, and were in the process of merging the two organisations. The restructure affected the business across a number of countries. The claimant believed that during this call she was told that she had to accept the role or resign. We accept that was the perception the claimant was left with, but we find that on the balance of probabilities, those words were not used. We do not consider such a comment to be consistent or likely in the context of the wider restructure that was taking place. It is also inconsistent with the email sent by the claimant later that day to Ms Macleod - see below.

39 The claimant was not shown the organisational chart, which would have alerted her to the fact that there were two senior manager roles, which were potential vacancies, within that area of the business. Nor were those roles brought to her attention during the call.

~~40~~ The claimant was told that her new director would be Ms Bienkiewicz, but that the reorganisation was taking place across a number of countries, and until it was rolled out across all those countries, that information was to be kept

confidential. The claimant was also told that Ms Bienkiewicz would in due course arrange a one-to-one call with her to discuss her new role.

41 Following the call, the claimant emailed Ms Macleod (on the same day). The email stated:

> *Thanks for the call earlier today with Liz - very interesting to hear about the new role; I'm intrigued to find out more.*

42 The claimant was contacted by Suzy Macleod and HR on 30 August 2019, to request that she be kept updated on developments and changes within the team and enquired who she should communicate with, as follows:

> *Today is effectively my last day and due to the imminent changes within the team and my new role, I would really like to be kept as updated as possible as to how these changes develop. I am keen to understand who I reach out to during my leave and to discuss KIT days, which I would very much like to organise at the appropriate time. I understand that at the moment things are not quite settled so I will wait to hear more on this when it becomes more clear.*

43 At the end of August, the claimant telephoned Alex Thrussel of HR to discuss who the point of contact would be during her maternity leave, given the changes in the team. It was agreed that Ms Macleod would remain the contact. Hannah Jones agreed to inform Ms Macleod of that and asked Mr Thrussell to let the claimant know. An email was sent to the claimant by HR on 3 September 2019 to say that Suzy Macleod would be the claimant's point of contact until her new director was appointed, at which point they would reach out to her.

44 In a handover email sent on 30 August 2019 by the claimant to Ms Macleod – the claimant concluded by saying:

> *Finally, thank you so much for being such a fantastic support during this really difficult time for me. Without your kindness I don't know what I would have done — it really means a lot. I am very sad to be losing you as my Director as I have immensely enjoyed working with you and have learned a lot, but I am sure there will be lots more changes to come whilst I am away and I am now quite used to the changes at Disney!*

45 The claimant's daughter was born on 10 September 2019, during a period of leave. Her maternity leave officially commenced on 11 September 2019.

46 The Maternity Policy states at 18.2 [74]:

> *Employees are able to stay abreast of current job opportunties via the Disney Careers Portal.*
>
> *- To access externally: UK.DisneyCareers.com*
>
> *- To access internally: MyDisneyCareers.com (Please note: SAP/Inside Disney login credentials will be required to access MyDisney Career) Information on the Careers Portal is also provided to you in your Maternity pack prior to commencing maternity leave.*

47 The policy is dated January 2018. There was an update of the maternity checklist template mid-April 2020 which has had some wording added regarding Job Opportunities. There is also now an attachment, to set up

alerts. The claimant did not have a maternity meeting prior to her leave commencing and nor did she receive a maternity pack.

48 On 28 October 2019 the claimant received a generic docu-sign email, with a contract to sign, stating that her new director was Suzanne Larkin, Licensing Sales director and that the claimant's new role was Licensing Sales Manager – 192 [Explain why SL not PB]. The email was from Ms Larkin rather than Ms Bienkiewicz, because it was still confidential that Ms Bienkiewicz would be managing that team. There was no covering letter or note. The claimant signed the document on 7 November 2019.

49 Ms Macleod emailed the claimant on 19 December 2019 to ask for her mobile number as she wanted to communicate her bonus and pay increase. The claimant replied with her number and Ms Macleod subsequently left a voicemail on her way to the airport and said that she would call back later that day. However, there was no call back. We accept what Ms Macleod told us, that after she left the message, she was informed that she could not tell staff their merit or bonus award at that stage. Unfortunately, Ms Macleod did not communicate that to the claimant.

50 During the Christmas holiday period, a colleague advised the claimant that there had been lots of organisational change at the respondent and that her maternity cover AMcQ had been promoted. So had another member of her team, FK.

51 On 2 January 2020, the claimant emailed Ms Macleod to ask about her pay increase and bonus, and to enquire about changes in the team. Ms Macleod replied on 3 January 2020. She apologised for not telephoning the claimant. She told the claimant that HR had put things on hold with regard to pay and bonus, as they had not provided final clearance. Ms Macleod provided some team news including: the promotion of AMcQ and FK to Senior Manager positions as follows:

> *Regarding team news, Becky Harris has a new manager joining her from Monday, Danielle. In the home team, [AMcQ] has been made permanent as a Snr Manager for gifting and [FK] has been made permanent as Snr Manager for Home. There are still a couple of open headcount in the team and we are recruiting a new headcount for your remaining maternity leave. I think that covers the key changes for now.*

52 On 7 January 2020, Ms Macleod left the claimant a voicemail to say that she would try and call later. Again, there was no follow-up call. Ms Macleod was on annual leave at the time, returning on 10 January 2020.

53 The claimant again emailed Ms Macleod on 15 January 2020 to enquire whether there was any news regarding her bonus and pay rise for the year. She also said she would like to understand the new internal structure and asked for an organisational chart. Ms Macleod replied the same day to say that that a new organisational chart would hopefully be available by the end of February. Regarding pay and bonus she stated:

> *Regards your bonus and pay rise, I am not back in the office until Monday but can confirm at that point if I did not advise the final amounts on the voicemail.*

54 On 15 January 2020 an email was sent by Tony Chambers to the claimant's private email about an update to family friendly policies. The claimant did not receive that. Once the respondent was aware of that, the email was sent to her on 20 February 2020.

55 The claimant sent an email to Ms Macleod on 10 February 2020 to say that she still did not know her pay increase; that she had only received a bonus document without a covering letter; had not previously been told of her targets; and asked where in the London team her positions sits. The claimant said that she felt forgotten and had missed out on promotion opportunities.

56 On 10 February 2020 Ms Macleod sent an email to HR and to Ms Bienkiewicz, asking for a discussion before she replied. She said that she had made several attempts to contact the claimant regarding her bonus with '*little to no feedback'*.

57 On 11 February 2020, Ms Macleod replied to the claimant's email of 10 February 2020 to say that she had left a message relating to bonus and pay increase but would call the claimant on Monday. Ms MacLeod gave the reasons why the bonus was less than the previous year and said the role remained as per the pre-maternity leave conversation. It was further stated that Ms Bienkiewicz had not reached out to the claimant, as she was respecting the claimant's maternity leave. The claimant was told that the Jobs Board was there for the claimant to apply for available roles. She was also told that Global HR had sent out a communication on changes to the Maternity Policy, and that the claimant should reach out to Hannah Jones if she did not receive that.

58 The email also states:

> *Regarding applying for alternative roles, the jobs board is accessible to you and you are welcome to apply for any of the available roles. You can access it I believe at www.disneycareers.co.uk or by logging into the hub and clicking on the links provided. I would encourage you to discuss your career aspirations with Patrycja as well as any roles you may be interested in applying to. I am about to commence recruitment for a Snr Manager FTC for stationery should this be of interest to you, the job is live on the board now. Kathy Parsons is responsible for supporting the Softlines team with recruitment so if you have any questions you can also reach out directly to her.*

59 The claimant told us that the job referred to is a short term fixed term contract and hence she did not apply. We accept that.

60 Ms Macleod sent an email to Ms Jones and Ms Bienkiewicz on 11 February 2020 stating:

> *I have replied to Anna with you in cc. to allow her to reach out if she needs further clarification.*
>
> *I am back in next week and will give you a call as I still have concerns regards Anna's tone and approach with this email.*

61 In calculating the bonus for the previous year, the Total Home licensee portfolio was used for the team in which the claimant worked. That was not usual. Her colleagues bonuses were worked out in the same way. Had the claimant been judged solely on the claimant's licensees, she would not have

received any bonus. She would have scored 72%, but only those who scored 80% plus received any bonus. Ms Macleod scored 83% as her role covered 'Infants' too. A colleague of the claimant was employed to work on the Infant category, not the claimant. Ms Macleod did not make the decision about how the bonus would be calculated. The decision was made by more senior managers/directors.

62 The claimant also received a 2.5% merit increase. Others in team received 3%. Ms Macleod told us that one other member of the team received a 2.5% rise but that is not reflected in the table and we reject that evidence. We accept that the claimant was one of the more senior in the team so an adjustment was made to bring others more in line with what others received. The respondent does not discuss merit increases within the team.

63 The claimant sent an email to Suzy Macleod in reply on the same day. In the email she pointed out:

63.1 That the voicemail message said simply that Ms McLeod was calling to discuss salary and bonus but would try and call her back.

63.2 The conversation about her role was very brief with little detail.

63.3 She had asked for a job description, but had not received anything.

63.4 She had been sent a new contract which said that Ms Larkin was her new director.

63.5 She was left unclear who she was reporting to, what her role was, and where it sat in the London team.

63.6 The claimant would have expected to be kept informed about the reorganisation and any promotions directly related to her role.

63.7 She did not receive a communication from HR about the changes to the Maternity Policy and would contact Hannah Jones as suggested. 25

64 Ms Jones emailed the claimant to arrange a telephone call with her on 12 February 2020. The conversation subsequently took place on 17 February 2020. The claimant sent an email to Ms Jones following the conversation, summarising her understanding of the discussion. Ms Jones replied and made comments in green in response to the claimant's comments.

65 The Job Description for the Licensing Sales Manager role was attached to an email sent to the claimant by Ms Jones on 20 February 2020 in rely to the claimant's email of 18 February.

66 The claimant responded on 24 February 2020 to say that she still did not understand why it was not possible to tell her about the opportunities, the reorganisation, and the other changes that affected her role whilst she had been on maternity leave. Also, that during the call, Ms Jones didn't mention that she was reached out to in October 2019 when the changes were taking place. She also asked that in preparation for the call, that Ms Jones share the current organisational chart with her.

67 Ms Jones sent an email to Belen Perez on 20 February suggesting that a meeting the claimant was due to attend on 24 February 2020 for about an hour was not a KIT day. Ms Jones was told on 26 February it would count as

a KIT day and Ms Jones asked Mr Perez to process payment for the claimant for that day so that the claimant could be paid.

68 A telephone call took place between the claimant, Ms Macleod, Ms Bienkiewicz, and Ms Jones on 25 February 2020. An email was sent to the claimant by Ms Jones on 26 February 2020, summarising the call. The bonus and the claimant's role were discussed.

69 The claimant pointed out in her reply that the call with Ms MacLeod briefly outlining the new role was in August 2019, prior to her commencing maternity leave. The claimant also asked about a job advert for her maternity cover.

70 The claimant was unhappy with the responses received, so she raised a grievance on 16 March 2020. She confirmed that she was happy for it to be dealt with in writing and noted that it may take longer than usual to deal with her grievance, as a result of the pandemic.

71 We accept Ms Macleod's evidence that during the re-organisation, the business decided to transition stationery from the Hardlines team to the Softlines team but omitted securing a headcount for that role. So at the same time as securing the backfill for the claimant's role, they secured a fixed term contract to manage the stationery business within the team. Unfortunately, both roles. although posted on the jobs board, were subsequently placed on hold due to the pandemic placing significant financial strain on the company. This meant that Ms Macleod's team continued to manage the claimant's licensees plus the additional stationery licensees through 2020.

72 On 12 May 2020 the claimant sent an Acas discrimination questionnaire to the respondent.

73 Nicola Mason, Director of HR/ER sent a Grievance Outcome letter to the claimant on 18 May 2020, giving 5 days for the claimant to appeal, should she wish to do so. The appeal noted:

> *[Regarding the changes at work] Although I understand that Suzy Macleod spoke to you on the phone on a number of occasions, I find that the communication to you regarding the huge changes to the Company during the segment changes and acquisition of Fox was below the standard we would normally expect for our business. However, the Company went through the single largest change in the UK structure it has ever undertaken. During this time circa 1000 employees were put through a consultation process and employee representatives were elected over multiple business areas. Around the same time, the Company also decided to change the way the segments are organised, introducing DTCI (Direct to Consumer & International) and DPEP (Disney Parks Experiences and Products). This added complexity to the reorganisation as the Company also needed to disband integrated functions and move them back into their segments.*
>
> *2) You have stated that you received a lower bonus than others*
>
> *Response: Bonus payments are only required to be made for the period covering ordinary maternity leave and the 2 weeks compulsory maternity leave period.*

The tribunal notes that in fact the claimant was not on maternity leave until the end of the bonus period.

74 The claimant submitted an appeal against the outcome to Karen Mair, Senior Manager on 22 May 2020.

75 On 28 May 2020, Nicola Mason wrote to Janene Bricknall, regarding the other maternity leave person who had been promoted.

> *The other mat leave person who was promoted did we actively contact her about the role (if we did was it because we believed she was operating at this level)? We are waiting for the VP to confirm when this person was approached but please see below detailed business justification as to why they felt this person was operating at senior manager level. There were only 2 managers identified for promotion in the UK as part of the restructure and this is the justification submitted for the one who was on mat leave if that's helpful.*

76 A response to the Acas discrimination questionnaire was sent to the claimant on 29 May 2020. This was completed by Nicola Mason. In relation to question 10 it stated:

> *For the bonus period 2019/2020, the targets were not fully met and so according to the discretionary bonus scheme, a reduced bonus was payable. However, the Company decided to award a bonus payment higher than that reduced figure to the whole team regardless of the targets not being fully met.*
>
> *The same method for calculating bonus awards was used for all team members, in accordance with the bonus scheme rules. As you did not work for the full bonus year, your payment was reduced accordingly. The payment you received was over and above the Company's legal requirement.*

77 Question 12 dealt with the pay increases for FK and AMcQ. It stated that their pay increases were in the range 0-15%. In fact their overall pay increases were 27.3% (due to their promotion).

78 Karen Mair emailed the claimant on 5 June 2020, advising her that Craig Anderson, Finance Director, would hear the Grievance Appeal.

79 On 26 June 2020, Laura Noorits, the Compensation and Benefits Manager, confirmed that the claimant had received a 2.5% pay increase. All the other managers had received a 3% pay increase. The other managers working the full 12 months received bonus pay-outs of: 12.1%; 13.3%; and 15.4%. The claimant received a bonus of 9.01%.

80 Page 398 shows that four others also received a 2.5% merit increase. However, the claimant was the only Licensing Sales Manager to receive 2.5%.

81 The claimant sent an email to Ms Bienkiewicz on 21 July 2020, pointing out that around two months had passed and she was still in the dark regarding the outcome of her Grievance. She complained this was unfair and had added considerably to the distress she had suffered. She was left feeling that she was of little value to the company. She stated:

> *Colleagues have warned me that it was very brave to challenge a director at the respondent and that serious consequences were likely to follow. …*

> *If you agree to my return to work on 12th October what will this new role entail? Has anyone been undertaking these duties and responsibilities over previous months, and if so, could I please have a chat with them during a KIT day just prior starting work again?*

82 Karen Mair drafted a response for Ms Bienkiewicz to send to the claimant on 29 July 2020, suggesting that they set-up a KIT day.

83 The grievance appeal outcome was sent to the claimant on 30 July 2020. Mr Anderson asserted, regarding the pay increase:

> *Your salary increase was also in line with others at your level. Salary increases are discretionary and can always vary by person depending on a number of factors. Your salary increase was not affected in any way by your period of maternity leave.*

84 As to the 'missed' promotion opportunities he concluded, having quoted from section 18.2 of the maternity policy:

> *HR are not able to send out tailored vacancy reports to those on maternity leave as they do not have the capacity or the expertise to know which jobs are relevant or of potential interest for every employee. This is why those on maternity leave who would like sight of vacancies are expressly directed to the careers portal prior to commencing their maternity leave. Since April 2019 additional information is now provided to those going on maternity leave regarding accessing the careers portal.*

85 Also on 12 August 2020, The Vice President of Softlines, Ms Shortreed, Ms Macleod and Ms Bienkiewicz spoke by telephone and put together a plan for the claimant's KIT day. Emails were exchanged with those who it was intended would attend and they sent calendar invites to the claimant.

86 Therefore, on the evening of 12 August 2020 the claimant received an invitation to a meeting with Ms Macleod and the two members of her team who had been promoted whilst the claimant had been on maternity leave and others.

87 On 13 August 2020 the claimant sent an email to Ms Bienkiewicz to say that the previous evening she had unexpectedly received an invite to a meeting with Suzy Macleod and the two others who were promoted above her whilst she was on maternity leave. She noted:

> *Since your email I have not had any details about my KIT day on Monday 17 August. Last night I unexpectedly received an invite to a meeting with Suzy and the two others who were promoted above me whilst I was on maternity leave. You can imagine how daunting this prospect is, particularly given what Suzy has said about me.*

88 On 13 August 2020 Ms Shortreed stated in an email to Ms Mair and Ms Bienkiewicz:

> *I'm concerned about Anna's tone in the email especially If she continues to refer to her grievance in every email ….*

89 Ms Shortreed also emailed Ms Macleod on 13 August 2020, asking her to make sure the claimant was aware of the fixed term contract role.

90 The claimant received multiple meeting requests from Ms Macleod and Ms Bienkiewicz's PA on 13 August 2020. The same say, Ms Bienkiewicz sent an

email to the claimant with an agenda for the KIT day. All the accounts it was intended the claimant would take over were managed by employees within Ms Macleod's team and hence the proposed involvement of her and her team. These started to come through to the claimant prior to the proposed agenda, which would have provided some context. The covering email with the agenda referred to it being 'proposed'. We find that Ms Bienkiewicz was open to discussing it. Her email also said:

> *We can also go through [the] plan for each meeting during our Monday morning catch up.*

91 On 14 August 2020 the claimant emailed Ms Bienkiewicz to say that her mother was with her on 13 August 2020 when she was bombarded with invitations to meetings. She complained that the KIT day had been changed to back-to-back meetings between 9am-5.30pm, all presided over by the director at the heart of what she alleged was the discrimination against her. Ms Bienkiewicz subsequently agreed to reduce the scale of the KIT day. Unfortunately, by that stage the claimant was too unwell to take part.

92 On 21 August 2020 Ms Bienkiewicz emailed a reply to the claimant apologising for the slight delay in responding to her email.

93 The claimant emailed Ms Bienkiewicz on 24 August 2020 alleging that someone had decided to change the KIT day. The claimant alleged that Ms Macleod was at the centre of it. The claimant raises a number of complaints, including the way her grievance was dealt with; requests for information being ignored; a SAR request had been made on 1 June, but nearly 3 months later no information had been provided.

94 The claimant returned to work from her maternity leave on 12 October 2020. The claimant felt that she had been given accounts that were insignificant to the company.

95 On 29 November 2020 the claimant had contact with the respondent's solicitor and subsequently took sick leave.

96 A letter was sent to the claimant on 8 February 2021 confirming the end of Company Sick Pay.

97 The claimant sent an email to Ms Jones on 9 February 2021 seeking an extension of Company Sick Pay for the full 26 weeks, and asked for consideration of an application for Permanent Health Insurance. She also asked for a copy of the Group Income Protection (GIP) Policy.

98 Ms Jones responded by informing the claimant that since the GIP process is lengthy, they could start process now, although it would not be payable until after 26 weeks sick leave. On 25 February Ms Jones sent more information to the claimant about GIP. On 4 March, a further document was sent by the benefits team.

99 A reply was sent to the claimant on 19 February 2021 by Hannah Jones, in conjunction with Ms Bienkiewicz, to say that the request for an extension to sick pay had been refused.

100 The claimant sent an email on 26 February 2021complaining that she felt that she had been treated differently, and victimised for complaining of pregnancy and maternity discrimination. She again requested the details of the Disney GIP scheme.

101 Ms Jones replies to the claimant's email of 26 February on 4 March, confirming the earlier decision not to extend Company Sick Pay. Examples of the criteria were set out.

102 On 5 March 2021 the claimant sent an email in reply, stating: *It feels cruel and heartless that I have been treated this way. No wonder Lorraine Brennan committed suicide.*

103 The claimant also said that she still had no information about how much was paid under the GIP scheme, or the terms of cover. And that according to everyone she had spoken to at Disney, sick pay was normally extended to 6 months and then the GIP comes in to pay 50% of salary.

104 Janene Bricknall, of HR replied on behalf of Ms Jones on 8 March at 13:47, saying:

> *I note from the email chain that Hannah has already explained that we have provided you with all of the information that the HR team has in relation to the GIP scheme. The information provided does not differ from what is provided to any other employee who is hoping to utilise the scheme. I can also confirm that your completed forms were received and have been provided to the benefits team to action. We will be in touch if they have any further questions or when there is an update.*
>
> *I can also see that Hannah has confirmed the position in relation to the extension of sick pay in her previous emails and there is nothing further I can add other than to reiterate that it is not common place for Company sick pay to be extended.*
>
> *Owing to how you have conveyed that you are feeling, I want to remind you that you have access to the EAP scheme should you require any support. I have included the details below.*

105 On 8 March 2021 at 14:29, the respondent's solicitor sent an email to Mr Daley which states:

> *We have recently been forwarded an email Ms Nettle has sent to Hannah Jones of the HR team at our client.*
>
> *We consider it is unreasonable and inappropriate to email an individual, who Ms Nettle knows is shortly about to commence maternity leave, mentioning another individual's suicide that has no direct relation or even parallels to the content of the discussion. The tone and approach of that email was clearly going to cause upset to an individual who is only undertaking her role.*
>
> *Our client will be (or may already have done so by the time this email is sent) responding to Ms Nettle's email and will be providing Ms Nettle with alternative contact details. No further correspondence should be directed to Ms Jones.*

106 Mr Daley, the claimant's father, responded on behalf of the claimant to the respondent's solicitor on the same day. The response asserted that the respondent had discriminated against the claimant, then victimised her for having raised a complaint about the pregnancy and maternity discrimination she suffered. It was also alleged that the claimant had been warned about how ruthless those individuals at the respondent could be, and how the

claimant's colleague felt vulnerable at work to the extent that she took her own life.

107 On 9 April 2021, the claimant received some further details about the respondent's GIP scheme.

108 James Thorley, Employee Relations Manager wrote to the claimant on 21 July 2021, inviting her to a meeting on 29 July 2021 with him and Janene Bricknall of HR. The meeting was in accordance with the respondent's Sickness Absence Policy. This meeting began a period or review, following which if the situation had not changed significantly then a potential outcome may be the termination of the claimant's employment. The letter states:

> *During the meeting, I will consider your current state of health, as well as discuss a proposed occupational health referral with you so that we are able to establish whether your ongoing absence is likely to change.*

109 Clause 10.2 of the Sickness Absence Policy states:

> *If the employee has been deemed ineligible for PHI but remains away from work on long term sickness absence (or is expected to do so), they will be invited to a sickness absence review meeting. This meeting will seek to establish whether the situation is likely to change, and the employee may be warned of the risk of dismissal due to ill-health capability if there is no significant change within a stated reasonable period. The Company may also consider redeployment opportunities at that stage.*

110 Clause 6.1 says:

> *All employees on long-term sickness absences will normally be referred to Occupational Health and the following procedure must be followed:*
>
> *• Human Resources will contact the employee to request that they see a member of the Company's Occupational Health providers.*
>
> *• Occupational Health will, in all cases, obtain the permission of the employee to contact their own GP or medical specialist for medical records and, after meeting with the employee, will then provide the Company with a medical report to which the employee will be entitled to have access.*
>
> *• The report may contain advice on possible changes that the Company should make to the work environment in order to facilitate an employee's recovery, or it may recommend a course of treatment by Occupational Health. Where necessary Occupational Health may suggest modified duties or reduced hours. Recommendations will also be made on the employee's expected date of return to work.*
>
> *• At the Company's discretion, the employee may be asked to undergo a medical examination at the Company's expense if they are unable to perform their duties due to illness or injury.*
>
> *• Prior to the employee's actual return to work, they should meet with their Line Manager and/or Human Resources, and Occupational Health (where appropriate) to agree their fitness for work. In all cases, suitable arrangements for returning to work should be made.*

111 The claimant raised a Grievance on 22 July 2021, in accordance with the respondent's Grievance Procedure. The Grievance include allegations about:

111.1 the conduct of Disney since she had made her claim;

111.2 that to cause additional stress and humiliation she had to face Janene Bricknall, one of the alleged perpetrators;

111.3 she had been subjected to pressure and serious financial hardship to force her to give up on a legitimate claim:

111.4 owing to disclosure she can now prove previous Grievance/Appeal Process was a sham;

111.5 that she can now prove that Disney discriminated against her, and that Disney attempted to cover up the pregnancy and maternity discrimination;

111.6 that senior people in Disney victimised her; that the Sickness Absence Policy was not being followed, in particular paragraph 6 of the policy;

111.7 and that having been absent from work for over 8 months she should have been referred to OH much sooner – SB18 and SB21.

112 The respondent's solicitor wrote to Mr Daley on 23 July 2021. Referring to the previous Grievance Outcome letter, it was stated that the response may have caused some confusion, but the claimant's bonus was not reduced because of her maternity leave and that the Grievance Appeal letter rectified the position.

113 James Thorley responded to the Grievance letter submitted by the claimant on 23 July 2021, declining to follow the Company Grievance Procedure, since in his view the issues that the claimant was raising could all be properly dealt with as part of the Sickness Absence Review Process. He also stated that they could discuss an OH referral on 29 July. Further, that points already dealt with as part of a Grievance Process would not be revisited and re-investigated.

114 The claimant sent a reply to James Thorley on 25 July 2021 which asserted that the UK based HR/ER team of the respondent had been heavily involved in victimising her and that Janene Bricknall had been part of it. She asserted that Acas had confirmed to her that it did not comply with the Code of Practice to treat her Grievance in this way. However, she had no objection to being referred to OH.

115 In a response sent by email on 27 July, James Thorley confirmed that he would not be following the Grievance Procedure, the Sickness Review Process would instead be followed and that he was a suitably senior and independent person to chair this process, and would continue to do so. He confirmed that the referral to OH was underway.

116 The claimant replied to Mr Thorley's email on 29 July, asking for reasons why the company did not follow its own Sickness Absence Procedure (Section 6.1) and why was she not referred to OH sooner? Further, that since her Grievance was against ER/HR and very senior people at the respondent (including directors) it did not feel right that a senior manager in ER/HR was a suitably senior and independent person to chair the process.

117 On 30 July 2021 James Thorley emailed the claimant to confirm that following receipt of the OH report he would invite her to a meeting to discuss the report

and respond to any queries the claimant had. He reiterated that he considered that he was suitably senior and independent to chair the process.

118 On the same day the claimant made a further data protection Subject Access Request (SAR).

119 AXA provide an OH report on 26 August 2021.

120 On 14 September 2021 the Information Commissioners Office confirmed that following a complaint by the claimant, the respondent Company had not complied with its data protection obligations.

121 James Thorley emailed the claimant on 21 September 2021 to inform her that he was in receipt of the OH Report. He told her that he would consider the content and be in touch in due course. He asked whether in the meantime, there was any update in relation to the Financial Ombudsman Service complaint.

122 On 21 September 2021 the claimant emailed the respondent's data protection department, regarding her request for information dated 30 July 2021.

123 On the same date, the claimant emailed James Thorley answering his question in relation to the Financial Ombudsman Service – that an officer had asked if the respondent as policyholders have sent a copy of the OH Report to Unum. Also, as the respondent now had evidence supporting the claim for GIP Insurance, she asked if Disney were supporting her claim for benefits under the scheme.

Law

124 The relevant parts of Section 18 Equality Act 2010 state:

(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.

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

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

125 Section 27 Equality Act 2010 states:

(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.

126 The pre-Equality Act discrimination provisions did not require a person claiming victimisation to prove that the treatment of the claimant was solely by reason of the protected act. In *Nagarajan v London Regional Transport 1999 ICR 877* HL Lord Nicholls stated that, if protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out. In Igen Ltd v Wong 2005 ICR 931 CA, Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather an influence that is more than trivial. The change of language pre and post the Equality Act from 'for a reason' to 'because of' is not substantive and the test remains essentially the same: *Amnesty International v Ahmed 2009 ICR 1450, EAT*.

Burden of proof

127 Section136 Equality Act 2010 provides that if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

128 Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258*. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA*.)

129 The Court of Appeal in *Madarassy*, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

130 Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in *Hewage v Grampian Health Board [2012] IRLR 870* at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

131 When considering whether the Claimant has been treated 'unfavourably' for the purposes of section 18, no comparator is required, as set out by Langstaff P in Williams v Trustees of Swansea University Pension & Assurance Society [2015] IRLR 885, EAT. As further stated at paragraphs 27 and 29:

"Less" invites evidence to be provided in proof of "less than whom?"; "un.." is by contrast to be measured against an objective sense of that which is adverse as compared with that which is beneficial. …in this use it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person…

The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be.

132 Simler P stated in Interserve FM Ltd v Tuleikyte [2017] UKEAT/0267/16/JOJ [21, 25] (an approach approved by the Court of Appeal in City of London Police v Geldart [2021] EWCA Civ 611) at paragraph 21:

It follows that it is necessary to show that the reason or grounds for the treatment - whether conscious or subconscious - must be absence on maternity leave and the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish unlawful direct discrimination under section 18.

It is not in other words a 'but for' test.

Conclusions

133 We were asked by Mr Daley to draw adverse inferences from a number of matters. These include the following.

133.1 The fact that a 2.5% pay rise was given to the claimant, whereas her colleagues in her team received 3%; coupled with the dearth of information about that issue. This is also one of the alleged acts of unfavourable treatment. We did find this issue the most difficult to reach a conclusion in relation to, but for the reasons set out below, we are satisfied that there was not a discriminatory reason for this treatment.

133.2 The answers given in the response to the Acas Questionnaire and the grievance. As noted above in the fact findings, there were errors in the responses given. However, we put those errors down to human error,

rather than any deliberate intent on the part of the respondent to mislead the claimant, or to conceal discriminatory conduct.

133.3 The lack of contact with the claimant after she went on maternity leave. We do not consider that this demonstrates any prejudicial behaviour towards the claimant. On the contrary, since the claimant was on maternity leave, it would be anticipated that she would be given time to bond with the new baby; and that the claimant would make contact again with her colleagues/the company when she felt ready to do so.

134 Further, this is a case where we have, as demonstrated below, been able to come to clear conclusions, as to the reasons for each of the alleged acts of unfavourable/detrimental treatment.

135 Below, we deal first with the section 18 Equality Act 2010 claims. Second, with the section 27 claims.

Unfavourable treatment – s.18 Equality Act 2010

136 The Tribunal has to consider whether the Respondent treated the Claimant unfavourably, in the various ways asserted by the Claimant, and, if so, whether any such unfavourable treatment was because of her pregnancy and/or maternity i.e. those matters within s.18(2), (3) and (4) above - which we refer to below as 'the Proscribed Reasons'.

137 We deal with each alleged act of unfavourable treatment in turn.

When the Claimant returned to work after pregnancy related illness on or around 24 May 2019 the work given to the Claimant was changed. The duties changed to work on specific projects – Issue 1.1 (a)

a) Conclusion: we conclude that this was unfavourable treatment in that the work was less interesting and less stimulating. However, we conclude that the reason was not for any of the Proscribed Reasons. Such work was recommended by OH. It was not changed after the phased return ended because the claimant was due to go on maternity leave a few weeks later and the respondent reasonably concluded that it would be poor client care to swap the licensees back to the claimant for such a short period of time.

During a restructure in 2019 no information given to the Claimant and no consultation with her about important developments at her place of work - Issue 1.1 (b)

b) Conclusion – see Issue 1.1 (e) below.

The Claimant understands that important meetings took place with her team on 16 July 2019 and 19 July 2019. As she was working from home a request was made that she be able to dial in to enable her to participate in the meetings. However, the Claimant was told that this was not possible - Issue 1.1(c)

c) We conclude that this did amount to unfavourable treatment. The claimant was not in as good a position as other members of her team, who were at the meeting, and so were able to fully participate in it and ask questions. However, we conclude that the reason that the claimant was not able to dial in was because a policy decision was made that those absent from work for whatever reason (eg sick leave, annual

leave or maternity leave), would not be able to participate and would be contacted separately by their manager at a later time. The claimant was therefore treated the way she was because of her absence, not because that absence was maternity sickness-related. We refer to our findings of fact as to the little information that the claimant's manager FJ subsequently gave to her. There was however nothing stopping FJ providing the claimant with more information at that time. That was down to her individual discretion, (and arguably, not doing her job fully). It had nothing to do with the Proscribed Reasons.

The Claimant understands that on or around 15 August 2019 a consultation meeting took place with all of the Softlines team, apart from the Claimant. Initially, she had been invited to take part by telephone conference call, but the invitation was withdrawn. Later on the same day she received a telephone call from Suzy Macleod. The Claimant was told that she had a new role that was more strategic, but few details were given. The Claimant was told that she must accept this role or resign – Issue 1.1 (d).

d) Conclusion – to the extent that the claimant is complaining that she wasn't able to dial into the meeting, we refer to our conclusion at c) above.

e) Insofar as the claimant is complaining that she was told that she must accept the role or resign, we refer to our findings of fact above. We have found that those words were not used, so this part of the claim cannot succeed.

f) In relation to the final part of this complaint, that the claimant was provided with few details, we conclude that this was not unfavourable treatment. The claimant was in as good a position as others in her team who were present at the meeting. They were all given a broad overview only, rather than specific details in relation to each of their specific roles.

g) Further, the lack of detail was not for any of the Proscribed Reasons. It was because the reorganisation was at an early stage. The claimant was given sufficient information to reassure her that she had a new role in the restructure, on the same salary, and at the same level as her then current role. In line with all other employees affected by the reorganisation, a meeting was to be arranged on a one-to-one basis in due course, between the claimant and her new manager, to discuss the role in more detail. Again, in that respect, the claimant was not treated any differently to her other colleagues. In saying that, we do of course recognise that we aren't here dealing with less favourable treatment - we simply refer to that fact, because in deciding whether or not this treatment was for any of the Proscribed Reasons, it is instructive to consider how other colleagues were treated.

Following the telephone call on 15 August 2019 the Claimant requested a job description. The job description was not provided to her throughout 2019. The Claimant had asked to be kept informed of changes that affect her role. On 3 September 2019 HR sent an e mail to say that Suzy Macleod would be her point of contact until her new Director was appointed – at which point the appointed contact would

reach out to her. There was no contact until the Claimant received a letter dated 22 October 2020 informing her that Suzanne Larkin was now her Director – Issue 1.1 (e)

h) Conclusion in issues 1.1 (b), (e) and (f). There are a number of related sub issues in (b), (e) and (f).

i) In relation to the failure to provide a job description until much later, the claimant was not treated differently initially, in that the job descriptions had not been finalised. However, once they were finalised, other colleagues received copies of those before the claimant, and therefore the claimant was not in as favourable a position as colleagues who were at work. That did therefore amount to unfavourable treatment.

j) However, whilst it would have been good practice for the respondent to provide the claimant with the job description at the same time, we conclude that the failure to do so was not for any of the Proscribed Reasons. The respondent did not deliberately set out to withhold a job description from the claimant because she was on maternity leave. Indeed, there would have been no possible advantage to them in doing so. It was an oversight.

k) As for the lack of contact/information/consultation about changes affecting her role, we conclude this was because there was nothing to report, after the initial meeting about the new role on 15 August 2019. Further, the respondent did not consult at all about the changes with any staff. The respondent provided information about the changes they intended to implement but did not consult. That may be surprising - but all staff were treated the same. There was no unfavourable treatment. The claimant had been told all that she could be told.

l) As for the failure to give the claimant the organisational chart, we conclude that the failure to show that to the claimant did amount to unfavourable treatment. That could have been shown to her on screen.

m) However, whilst we conclude this was unfavourable treatment, it was not for any of the Proscribed Reasons. It was not given to any member of staff and the respondent did not think to show it to her on screen. That was again an oversight.

There was no consultation with her about the reorganisation that took place at work during her Maternity leave. The Respondent did not inform her of any of the changes that took place during her Maternity leave until the Claimant began to raise concerns in January 2020 – Issue 1.1 (f)

n) Conclusion – see (l) above.

There was no contact regarding career development opportunities taking place within her department, depriving her of an opportunity to be promoted. The Claimant was not told that her maternity cover had been promoted in her absence – Issue 1.1 (g)

o) Conclusion – in terms of the general allegation that there was no contact regarding career development opportunities, we conclude that

this did not amount to unfavourable treatment of the claimant. The claimant had access to the jobs portal through the intranet, which she could access at home, in the same way that colleagues present at work could access it.

p) In any event, we conclude that the failure to advise the claimant about career development opportunities was not for any of the Proscribed Reasons. We refer to our conclusions above, in relation to the failure to show the claimant the organisational chart (see l) and m)). Ms Macleod did confirm in the hearing that she specifically spoke to FK about one of the senior manager roles. Ms Macleod did so because she knew that FK had a background in textiles.

q) The role was available as a result of FJ leaving the business. We refer to our findings of fact above, to the effect that Ms Macleod had formed the view that whilst the claimant was perfectly capable to carry out her then current role, she was not at that time capable of carrying out a more senior role. We have found as a fact that throughout the claimant's pregnancy and maternity leave, Ms Macleod was extremely supportive of her, something that the claimant acknowledged and expressed gratitude to her for. We conclude that Ms Macleod did not form that view for any of the Proscribed Reasons.

The Claimant was not advised or consulted on the changes being made to the bonus scheme - Issue 1.1 (h)

r) Conclusion: we conclude that this did not amount to unfavourable treatment. The way the bonus scheme operated the previous year was a one-off due to the tragic death of a Director. The changes that were made to the bonus scheme the following year were to the claimant's advantage. Had they not been made, the claimant would not have received any bonus at all. Further, none of the claimant's colleagues were consulted. The bonus scheme is entirely discretionary.

s) In any event, even if we had found that any lack of consultation did amount to unfavourable treatment, we would have concluded that it was not for any of the Proscribed Reasons. The scheme is operated entirely at the discretion of the most senior managers. There was no evidence before us upon which we could have reasonably concluded that they were adversely influenced by any of the Proscribed Reasons. To the contrary, none of the claimant's colleagues were told about the changes to the scheme or how it was to operate.

The Claimant was not given information about her pay increase, bonus payment, and changes to Family Friendly Policies until much later than those in work, not taking Maternity leave - Issue 1.1 (i)

t) Conclusion – we conclude that this did amount to unfavourable treatment. The claimant did not receive the Family Friendly polices document until February 2020, later than colleagues who received those documents in January. The same goes for information about her pay and bonus. The claimant's colleagues received the information/documents earlier.

u) As for the reason however, we have seen an email which the respondent intended to send earlier to the claimant with the family

friendly policies attached. We conclude that there was no intention on the part of the respondent to send that out later, for any of the Proscribed Reasons. It was an error.

v) The failure to send the claimant the documentation about her pay and bonus earlier was perhaps poor practice, as was sending the bonus information out without any covering letter. That is something the respondent may want to look at for the future. But we conclude that it was not for any of the Proscribed Reasons. It was an oversight; it was not discrimination.

The Claimant believes that she received a pay increase that is lower than it would have been had she not been on Maternity leave – Issue 1.1 (j)

w) Conclusion - we assume that what the claimant is complaining about is that her pay increase was lower than other members of the team, for proscribed reasons. We conclude that the fact that the claimant received a 2.5% salary increase, compared to others in her team who received 3% or more, amounts to unfavourable treatment.

x) We have found coming to a conclusion as to the reason for this unfavourable treatment rather more finely balanced on this issue than the others in this case. Ultimately however, we have come to the conclusion that the burden of proof does not shift. There was no other persuasive evidence on which we could have drawn an inference of discrimination on the Proscribed Grounds. The answers to the discrimination questionnaire referred to above, and some of the explanations given in the grievance, demonstrate that the respondent failed to properly get to grips with all of the facts and issues in relation to the claimant's complaint. That is perhaps indicative of a lack of care on the respondent's part. We do not consider that it is evidence which gives rise to an inference of discriminatory treatment. We are left here with the fact that the claimant was on maternity leave, when she received a salary increase lower than her colleagues. Without more however, we do not consider that the burden of proof shifts.

y) Taking into account the table on pay increases, we note that there were others in the business who received a 2.5% salary increase. We accept the evidence of the respondent that salary increases are used to bring salaries into line, as the number of years experience in a role increases. We did consider this issue finally balanced, due to the dearth of evidence from the respondent, and the opaque way in which salary increases are decided. It is surprising that no explanation is given to employees when they are told their salary increase. Such opacity may itself lead to a suspicion that there is some discriminatory treatment going on.

z) However, on the balance of probabilities, we do not consider it likely that senior managers in an organisation would award half a percent less in a salary increase, (which in terms of the immediate salary, amounts to about £300), because an employee was on maternity leave. Especially in circumstances where, because of changes made to the bonus scheme which benefited the claimant, she received the sum of over £9,000, instead of nothing. The respondent may however

wish to consider implementing a rather less opaque system in relation to salary increases in future.

The Claimant believes that she received a bonus payment that was lower than it would have been had she not been on Maternity leave – Issue 1.1 (k)

aa) Conclusion – we conclude that it did not amount to unfavourable treatment for the claimant to receive the bonus that she did. As noted above, the way that the bonus was worked out was adjusted, by the Direct to Retail (DTR) amounts being included in the calculation, which brought the claimant into the bonus scheme. Had that not been done, the claimant would not have received any bonus at all.

bb) As for the reason for the bonus being lower than colleagues, that was because for example, those colleagues either were closer to their target figure, and/or because they had responsibility for other areas of the business, such as Infant. In concluding that the level of the claimant's bonus was not for any of the Proscribed Reasons, we take into account the fact that the scheme itself was adjusted to ensure the claimant did receive a bonus, rather than nothing. In those circumstances, we reject the conclusion that the bonus paid was for any of the prescribed reasons.

The Claimant asked on several occasions for a copy of the organisational structure after the reorganisation/restructuring but it was not provided – Issue 1.1 (l)

cc) Conclusion: see above at m).

Victimisation

138 The first issue is whether or not the claimant did any protected acts. The respondent accepts that the claimant did two protected acts – the submission of the grievance on 15 March 2020 and the ET1 claim form on 31 May 2020. If we conclude that any of the matters complained about were detriments, the key issue is one of causation.

139 The alleged detrimental acts and our conclusions in relation to them are as follows.

On 12 and 13 August 2020 the Claimant alleges that the changes made to the nature of the Keeping in Touch Day (KIT day) purposely created a hostile and humiliating environment for her to work in – Issue 2.4 (a)

a) Conclusion - we are not convinced that this amounted to a detriment. In any event however, we conclude that the reasons for the KIT Agenda had nothing to do with the claimant's grievance or her claim form. On the contrary, the Agenda was put together with the best of intentions, to ensure that the claimant had the opportunity to speak to those colleagues who were carrying out her work. In retrospect, the Agenda was perhaps too packed. But when the claimant objected to it, Ms Bienkiewicz offered to discuss the Agenda and reduced the number of people involved in the day.

On 8 February 2021 the Respondent wrote to the Claimant to advise her that her company sick pay would cease on 24 February 2021, but

there was no mention of the Group Income Protection (GIP) Scheme (providing 50% of salary) in this letter – Issue 2.4 (b)

b) Conclusion - we conclude that this did not amount to a detriment. It was good practice to inform the claimant that her company sick pay was due to come to an end, and was in line with the sickness absence policy. The claimant was aware of the GIP, the payment of which did not commence until a person had been absent for 26 weeks. In any event, we are satisfied that the failure to inform the claimant about the GIP scheme had nothing to do with the protected acts. Further, informing the claimant that her company sick pay was about to run out, in line with the sickness absence scheme, had nothing to do with the protected acts either. On the contrary, it was done to ensure that the policy was followed.

The Claimant believes that her company sick pay would in normal circumstances have been extended to 6 months. This had been the case for other employees, and the Claimant when she had been absent from work in the past – Issue 2.4 (c)

c) Conclusion - whilst we accept that on the face of it, not extending an employee's Company Sick Pay is a detriment, we conclude that this decision had nothing to do with the protected acts. In our findings of fact, we have held that paying beyond the entitlement set out in the company sick pay scheme is very much the exception rather than the rule. The claimant's sick pay was extended when she was on sick leave in 2019, because those circumstances were deemed to be exceptional. The respondent took a different view in 2020. None of the evidence draws us to the conclusion that the respondent's decision was in any way influenced by either of the protected acts.

The Claimant believes that the Respondent had been attempting to conceal the truth about her victimisation. That documents that should have been disclosed have not been, and that certain emails - part of a trail have been deliberately left out to present an inaccurate and misleading picture – Issue 2.4 (d)

d) Conclusion - whilst we accept that this may potentially be a detriment, we conclude that it is not made out on the facts. We do not understand the allegation that the respondent 'has tried to conceal the truth about the claimant's victimisation'. It is not unusual for documents to come to light close to a hearing taking place, as final preparations for a hearing are undertaken by the parties and their representatives; or for documents to be inadvertently missed out of a bundle. We are satisfied that is what has happened here and that there is no link between those omissions and the alleged protected acts.

The Claimant asked for a copy of the Disney (GIP) Policy on 9 February 2021, and made further requests on 19 February 2021; and in an email marked urgent on 26 February 2021. The Respondent replied without providing the information requested and again on 4 March 2021, but did not include further information on the scheme benefits or eligibility criteria. The Respondent confirmed they had shared all of the information they are supplied with to give to employees as well as attaching further information and directing the

Claimant to the UNUM website. On 5 March 2021 - the Claimant sent another email requesting this information. The Respondent eventually sent some details of the GIP Scheme on 9 April 2021. This was exactly 2 months after the Claimant had first requested this important information – Issue 2.4 (e)

e) Conclusion - we conclude in relation to this issue that it did not amount to a detriment and that the claimant has an unjustified sense of grievance in relation to it. Unfortunately, by this stage, the claimant had taken the view that she had been subjected to discrimination. Whilst we accept that was her genuine belief, we conclude that by this stage the claimant had unreasonably concluded that anything the employer did that she did not agree with was discrimination/victimisation. The respondent did provide information on request. When the claimant asked for more details, further information was provided, once it was available, within a reasonable period of time. Even if we had concluded that this was a detriment, we are satisfied that the gradual provision of information had nothing to do with the protected acts.

In the email dated 5 March 2021 the Claimant told the Respondents Human Resources department that she felt helpless and vulnerable. On behalf of the Respondents - the HR manager, Janene Bricknall responded unsympathetically and reminded the Claimant about the Employee Assistance Scheme should she require support – Issue 2.4 (f)

f) Conclusion - we refer to the contents of Ms Bricknall's email dated 8 March 2021, quoted above in the fact findings. We conclude that this did not amount to a detriment. Ms Bricknall responded in a reasonable manner and tone.

There was a further email on 8 March 2021 - sent by the Respondents Solicitor on behalf of the Respondents. The email criticised and censured the Claimant. It went on to allege that the Claimant had deliberately set out to cause upset and that she was being unreasonable and inappropriate – Issue 2.4 (g)

g) Conclusion: we conclude that the email sent by the respondent's solicitors did not amount to a detriment. We consider it was a reasonable and measured response to an email from the claimant which, understandably, upset Ms Jones. Further, we are entirely satisfied that the sending of that email by the claimant's representative had nothing whatsoever to do with either of the protected acts.

On 23 July 2021 James Thorley, Employee Relations Manager wrote inviting the Claimant to a meeting with him and Janene Bricknall, HR Manager. The letter claimed that the meeting was in accordance with the Company's sickness absence policy. However, the Claimant does not believe that the procedure was being followed, and asked why. Mr Thorley has so far failed to provide an explanation – Issue 2.4 (h)

h) Conclusion - we conclude that the sending of this letter did not amount to a detriment. Mr Thorley had been drafted in to try and resolve the position, in relation to the claimant's ongoing sickness absence. The claimant had by that stage been on sick leave for nine months. We

accept that Mr Thorley's intention was to hold an initial meeting with the claimant, with a view to getting her back into the workplace. The intention behind the letter was not to dismiss the claimant at the earliest opportunity. There was no need to obtain an occupational health report prior to that meeting taking place, because it was not a meeting which had been organised with the intention or possibility of dismissing the claimant, following that meeting. Further, a referral to Occupational Health was a matter which Mr Thorley specifically stated in his letter that he wanted to discuss with the claimant at that meeting. We are satisfied that the sending of the letter had nothing whatsoever to do with the protected facts.

The Claimant raised a grievance in accordance with the Disney Grievance Policy. The Claimants grievance included; being misled; that there had been a cover up of the Respondents discrimination and victimisation; that the previous grievance process had been a sham; there had been a series of false and derogatory statements about her; and that the Respondents conduct during the litigation has been malicious and insulting – Issue 2.4 (i)

i) Conclusion: see (j) below.

Mr Thorley on behalf of the Respondents wrote on 23 July 2021 to refuse a grievance meeting, and say that the issues raised could all be properly dealt with as part of the sickness absence process – Issue 2.4 (j)

j) Conclusion - the claimant's letter of 22 July 2021 was written in response to what she saw as an attempt by the respondent to dismiss her. Whilst we accept this was the claimant's genuine belief, we do not believe it was a reasonable conclusion. The claimant's letter contained a series of broad allegations, without particulars. Mr Thorley took the view that the grievance had been conducted fairly, and that the best way forward was to meet with the claimant, in order to discuss with her the barriers to her returning to the workplace within a reasonable period. We conclude therefore that Mr Thorley's response was not a detriment. In any event, we conclude that it had nothing whatsoever to do with the protected acts. It was the result of his reasonable assessment of the situation. Rather, it was a reasonable attempt by Mr Thorley to manage the situation.

The Claimant responded by email on 25 July 2021 as she believed that the company was in breach of the Acas Code of Practice, and that as she was making very serious allegations against senior people in the Disney organisation, Mr Thorley was not an appropriate person to investigate or hear the grievance – Issue 2.4 (k)

k) Conclusion - we conclude that this allegation does not begin to succeed, because Mr Thorley had, for understandable reasons, decided that the matters raised in the claimant's letter of 22nd of July 2021 had already been dealt with in the previous grievance process, and/or could be considered as part of the sickness absence meeting that he was proposing. He was not going to investigate the grievance. Logically therefore, he could not be an inappropriate person in relation to a grievance investigation which was not going to happen. In any

event, we are entirely satisfied that Mr Thorley's decision as to the appropriate way forward had nothing to do with the protected acts

The Claimant believes that she should have been referred to Occupational Health much sooner (the Respondents waited around 10 months) – Issue 2.4 (l)

l) Conclusion - as the respondent's witnesses stated in evidence, one of the factors which could trigger an occupational health referral is the expiry of company sick pay. That happened at the end of February 2021. The failure to refer the claimant to occupational health earlier was we conclude a detriment. However, we do not consider the burden of proof shifts. We accept that the claimant had carried out protected acts and the respondent has failed to make an earlier referral to occupational health. Without more however, the burden of proof does not shift. In any event, taking our findings of fact and conclusions as a whole, we conclude that there is no evidence on which we could reasonably conclude that the reason for the failure to refer the claimant to Occupational Health at an earlier time was because of the protected acts.

Time-limits

140 Given our conclusions above in relation to the issues in the case, the question of time limits does not arise.

Employment Judge A James
London Central Region

Dated 20 December 2021

Sent to the parties on:

20/12/2012.

For the Tribunals Office

ANNEX A - AGREED LIST OF ISSUES

1 Discrimination on the grounds of pregnancy and/or maternity

The Tribunal to consider whether the Respondent treated the Claimant unfavourably, in the various ways asserted by the Claimant, and, if so, whether any such unfavourable treatment was because of her pregnancy and/or maternity.

1.1 The specific acts and/or omissions relied upon by the Claimant as acts of direct discrimination are set out below:

a) When the Claimant returned to work after pregnancy related illness on or around 24 May 2019 the work given to the Claimant was changed. The duties changed to work on specific projects.

b) During a restructure in 2019 no information given to the Claimant and no consultation with her about important developments at her place of work.

c) The Claimant understands that important meetings took place with her team on 16 July 2019 and 19 July 2019. As she was working from home a request was made that she be able to dial in to enable her to participate in the meetings. However, the Claimant was told that this was not possible.

d) The Claimant understands that on or around 15 August 2019 a consultation meeting took place with all of the Softlines team, apart from the Claimant. Initially, she had been invited to take part by telephone conference call, but the invitation was withdrawn. Later on the same day she received a telephone call from Suzy Macleod. The Claimant was told that she had a new role that was more strategic, but few details were given. The Claimant was told that she must accept this role or resign.

e) Following the telephone call on 15 August 2019 the Claimant requested a job description. The job description was not provided to her throughout 2019. The Claimant had asked to be kept informed of changes that affect her role. On 3 September 2019 HR sent an e mail to say that Suzy Macleod would be her point of contact until her new Director was appointed – at which point the appointed contact would reach out to her. There was no contact until the Claimant received a letter dated 22 October 2020 informing her that Suzanne Larkin was now her Director.

f) There was no consultation with her about the reorganisation that took place at work during her Maternity leave. The Respondent did not inform her of any of the changes that took place during her Maternity leave until the Claimant began to raise concerns in January 2020.

g) There was no contact regarding career development opportunities taking place within her department, depriving her

of an opportunity to be promoted. The Claimant was not told that her maternity cover had been promoted in her absence.

h) The Claimant was not advised or consulted on the changes being made to the bonus scheme.

i) The Claimant was not given information about her pay increase, bonus payment, and changes to Family Friendly Policies until much later than those in work, not taking Maternity leave.

j) The Claimant believes that she received a pay increase that is lower than it would have been had she not been on Maternity leave.

k) The Claimant believes that she received a bonus payment that was lower than it would have been had she not been on Maternity leave.

l) The Claimant asked on several occasions for a copy of the organisational structure after the reorganisation/restructuring but it was not provided.

1.2 Has the Claimant brought her claim in respect of the above allegations of discrimination within time taking into account any extension of time for taking part in Acas Early Conciliation and, if not, would it be just and equitable to extend the time limit for the Claimant to do so?

1.3 Has the Claimant proven facts from which the Tribunal could draw an inference of discrimination on the grounds of the Claimant's pregnancy and/or maternity, notwithstanding the Respondent's explanation?

1.4 If so, can the Respondent provide a non-discriminatory explanation(s) for the relevant acts and/or omissions?

2 Victimisation

2.1 Did the Claimant do a protected act?

2.1.1 The Claimant believes that raising a grievance and bringing proceedings under the Equality Act 2010 is a protected act.

2.2 Did the Respondent know that the Claimant had done or may do a protected act?

2.3 Did the Respondent subject the Claimant to any detrimental treatment because of the protected act?

2.4 The alleged acts/detriments relied upon by the Claimant are set out below:

a) On 12 and 13 August 2020 the Claimant alleges that the changes made to the nature of the Keeping in Touch Day (KIT day) purposely created a hostile and humiliating environment for her to work in.

b) On 8 February 2021 the Respondent wrote to the Claimant to advise her that her company sick pay would cease on 24 February 2021, but there was no mention of the Group Income Protection (GIP) Scheme (providing 50% of salary) - in this letter.

c) The Claimant believes that her company sick pay would in normal circumstances have been extended to 6 months. This had been the case for other employees, and the Claimant when she had been absent from work in the past.

d) The Claimant believes that the Respondent had been attempting to conceal the truth about her victimisation. That documents that should have been disclosed have not been, and that certain emails - part of a trail have been deliberately left out to present an inaccurate and misleading picture.

e) The Claimant asked for a copy of the Disney (GIP) Policy on 9 February 2021, and made further requests on 19 February 2021; and in an email marked urgent on 26 February 2021. The Respondent replied without providing the information requested and again on 4 March 2021, but did not include further information on the scheme benefits or eligibility criteria. The Respondent confirmed they had shared all of the information they are supplied with to give to employees as well as attaching further information and directing the Claimant to the UNUM website. On 5 March 2021 - the Claimant sent another email requesting this information. The Respondent eventually sent some details of the GIP Scheme on 9 April 2021. This was exactly 2 months after the Claimant had first requested this important information.

f) In the email dated 5 March 2021 the Claimant told the Respondents Human Resources department that she felt helpless and vulnerable. On behalf of the Respondents - the HR manager, Janene Bricknall responded unsympathetically and reminded the Claimant about the Employee Assistance Scheme - should she require support.

g) There was a further email on 8 March 2021 - sent by the Respondents Solicitor on behalf of the Respondents. The email criticised and censured the Claimant. It went on to allege that the Claimant had deliberately set out to cause upset and that she was being unreasonable and inappropriate.

h) On 23 July 2021 James Thorley, Employee Relations Manager wrote inviting the Claimant to a meeting with him and Janene Bricknall, HR Manager. The letter claimed that the meeting was in accordance with the Company's sickness absence policy. However, the Claimant does not believe that the procedure was being followed, and asked why. Mr Thorley has so far failed to provide an explanation.

i) The Claimant raised a grievance in accordance with the Disney Grievance Policy. The Claimants grievance included; being misled; that there had been a cover up of the Respondents discrimination and victimisation; that the previous grievance process had been a

sham; there had been a series of false and derogatory statements about her; and that the Respondents conduct during the litigation has been malicious and insulting.

j) Mr Thorley on behalf of the Respondents wrote on 23 July 2021 to refuse a grievance meeting, and say that the issues raised could all be properly dealt with as part of the sickness absence process.

k) The Claimant responded by email on 25 July 2021 as she believed that the company was in breach of the Acas Code of Practice, and that as she was making very serious allegations against senior people in the Disney organisation, Mr Thorley was not an appropriate person to investigate or hear the grievance.

l) The Claimant believes that she should have been referred to Occupational Health much sooner (the Respondents waited around 10 months).

2.5 Has the Claimant proven facts from which the Tribunal could draw an inference of victimisation notwithstanding the Respondent's explanation?

2.6 If so, can the Respondent provide a non-discriminatory explanation(s) for the relevant acts and/or omissions?

3 Remedies

3.1 If the Respondent is found to be liable, what, if any, is the appropriate remedy:

3.1.1 Is the Claimant entitled to an award for injury to feelings and, if so, at what level?

3.1.2 Should any uplift or reduction be applied due to either party's failure to comply with the ACAS Code of Practice?