

THE INDUSTRIAL TRIBUNALS

CASE REF: 548/14

CLAIMANT: Elizabeth Kennedy

RESPONDENT: Equality Commission for Northern Ireland

DECISION

The unanimous decision of the tribunal is that:-

- (i) the respondent did indirectly and unlawfully discriminate against the claimant contrary to the Sex Discrimination (Northern Ireland) Order 1976;
- (ii) the unlawful deductions from earnings claim is dismissed;
- (iii) the redundancy claim is dismissed;
- (iv) compensation is awarded as follows:-

Injury to feelings	£7,500.00
Interest	£ <u>637.80</u>
Total	£8,137.80

- (v) a declaration and a recommendation are made as set out in this decision.

Constitution of Tribunal:

Vice President: Mr N Kelly

Members: Ms E Gilmartin
Mr R Hanna

Appearances:

The claimant was represented by Mr M Potter, Barrister-at-Law, instructed by Donnelly & Kinder, Solicitors.

The respondent was represented by Mr G Grainger, Barrister-at-Law, instructed by the Equality Commission for Northern Ireland.

Background

1. The claimant was first employed by the respondent as a Legal Officer (Staff Officer equivalent) from 4 September 2000 on a temporary contract. The claimant's post was made permanent on 1 December 2001.
2. The respondent operates a career break policy.
3. The claimant had a one year career break in 2002/2003 to qualify as a solicitor.
4. The claimant commenced a second career break on 12 January 2009 for childcare reasons. This break was extended on four successive occasions to the maximum of five years permitted under the policy. The career break was therefore due to end on or about 12 January 2014.
5. The claimant was not permitted to return on 12 January 2014 to her original post or to any alternative post within the respondent organisation. From that point she received no wages and was given no work while remaining an employee of the respondent. There was and is no realistic prospect of her ever receiving either wages or work. Funding for the respondent organisation had been significantly reduced during the claimant's career break and continues to be further reduced. Her post in a small office had in any event been filled on a permanent basis some two to three months after she had commenced her career break.
6. The respondent argues that there has been no termination of employment or compulsory redundancy situation. It argues that in accepting a career break, the claimant has accepted a contractual variation allowing her to be retained indefinitely without work, pay or redundancy compensation. It also argues that the career break policy was not interpreted or operated in a discriminatory manner.
7. The claimant alleges that:-
 - (i) The operation of the career break policy, leaving her without work or pay and indeed without any hope of either work or pay, and without access to compulsory redundancy compensation, amounted to unlawful indirect sex discrimination.
 - (ii) The career break policy had been incorrectly interpreted by the respondent and that she had been contractually entitled to pay for the period from 12 January 2014 onwards.
 - (iii) In the alternative, the claimant had effectively been made redundant on 12 January 2014 and was therefore entitled to a contractual compulsory redundancy payment calculated by reference to the provisions at that time.
8. The respondent is the statutory body set up to police and supervise the area of equality of opportunity and, in particular, its impact in the field of employment. This statutory remit includes the area of sex discrimination. The claimant is a lawyer employed by the respondent to assist in that policing operation. Quis custodiet ipsos custodes?

The hearing

9. Much of the factual background to this case was not in contention and it was directed that the case would proceed by way of oral evidence, supplemented by an agreed background statement of facts.
10. The tribunal heard evidence from the claimant and, on the behalf of the respondent, from Mr W McAlorum, the HR Manager, Mr D McKinstry, Director of Policy & Research, and Mr K Brown, the Head of Corporate Services.
11. At the conclusion of the evidence, counsel for both parties gave oral and written submissions. These were extremely thorough and well prepared. The tribunal is grateful for the industry shown by both counsel and by their instructing solicitors.
12. The hearing was over four days, from Tuesday 25 November 2014 to Friday 28 November 2014.
13. The parties were allowed to lodge further written submissions *by 5.00 pm on 12 December 2014* (having first exchanged those submissions).
14. The original written submissions as supplemented are attached to this document.
15. The panel met on 16 December 2014 and again on 9 January 2015 to consider the evidence and submissions to reach a decision. This document is that decision.

Relevant findings of fact

16. The claimant has been employed as a Legal Officer by the respondent from 4 September 2000 to date. Her employment subsisted during her two career breaks in accordance with the policy. The respondent took the view that it continued after the end of the most recent career break and that it is still in existence. The claimant's primary argument accepts that employment has subsisted to date after the ending of the second career break. The tribunal therefore concludes that the claimant and the respondent are still parties to an employment contract.
17. The respondent operates a career break policy. It has been in place since 2001. It was initially requested by NIPSA, the recognised trade union. Following that request, it was negotiated with and agreed by that trade union. The tribunal accepts the evidence of the respondent's witnesses that it was based on, but was not a copy of, the NICS career break policy.
18. Career break policies are simply contractual terms which can contain a variety of different provisions. There is no industry standard or statutory template which prescribes certain provisions within any such policy. Each such policy is a matter for negotiation between the employer and the employees (or the trade union) and has to be interpreted individually as it stands. The correct interpretation of a career break policy is therefore a matter to be approached in the same way as the interpretation of any other contractual provision.
19. The respondent's policy, *at Paragraph 1.1*, provides that:-

“The objective of the Equality Commission’s (‘the Commission’) career break policy is to facilitate staff who wish to take an extended break from work. It is also the aim of the policy to contribute to the provision of equality of opportunity. The decision whether to grant a career break or not will be at the discretion of the Commission.”

20. Career breaks are for specific periods of between one year and five years. There can be extensions of not less than one year on each occasion up to a maximum of a total career break of five years.

21. *Paragraph 3.3 provides:-*

“A request to return from a career break before the due date will be considered if the circumstances giving rise to the request did not exist or could not have been known at the time of the original application.”

22. *Paragraph 4.4 provides:-*

“A staff member who is refused early return from a career break may take up alternative salary/wage earning employment in Northern Ireland for the duration of, but not beyond, the career break. If, however, there is a delay in placing staff at the end of a career break a staff member may remain in employment until a vacancy is identified.”

23. While these two contractual provisions refer specifically to career breakers who want to return earlier than the due date and who are therefore not directly relevant to this case, the clear presumption is that it is anticipated that while there may be a delay, career breakers will be permitted to return at or at some point after the expiry of the fixed career break. The provisions specify that if an individual wants to return early from a career break but is refused, he or she may take up alternative wage earning employment up to, but not beyond the duration of the career break. It is only if, for some reason, there is a delay in the return of the career breaker to the organisation that further alternative wage earning employment may be considered. There is nothing in any of this which suggests any possibility of a career breaker, who wishes to return after the expiry of the career break, simply not being reinstated for an indefinite period or possibly for ever.

24. During the existence of any career break, the career breaker remains an employee of the respondent. *Paragraph 5.1, for example, provides:-*

“During a career break, staff members will be subject to the Commission’s regulations. Clearly some of these will be inapplicable, but others, particularly those relating to conduct or the acceptance of outside appointments must and will be borne in mind. Disciplinary action, where appropriate, may be taken.”

Career breakers have also been included in voluntary severance schemes. According to the respondent’s evidence it is also anticipated that a compulsory redundancy exercise in 2015 or 2016 will include those employees whose career breaks have ended but who have not been permitted to return. That would include the claimant.

25. Career breakers are on special leave without pay during the career break. That period of special leave does not count towards superannuation and annual leave entitlement.

26. *Paragraph 9.1 provides:-*

“In accordance with the Commission’s recruitment and selection procedure, given the duration involved (ie more than 12 months), vacancies that arise when staff take career breaks will normally be filled on a permanent basis by external competition.”

The document contains no explanation of that part of the policy. Furthermore, on the plain wording of paragraph 9.1, it applies only where a vacancy lasts for more than 12 months. In the present case the claimant’s post was filled on a permanent basis by a Mr Conor McBride some two to three months after her career break commenced. At that point, the career break was for 12 months only; not for more than 12 months. In any event, a policy of permanently filling posts left temporarily vacant by career breaks, either before or after a 12 month period, would have had a significant impact on the viability of a career break policy and on the eventual reinstatement of any career breaker, particularly given the small size of the legal office and indeed of the Commission staff in total. The situation would obviously be different with a larger employer such as the Northern Ireland Civil Service which would have had greater flexibility in redeployment and reinstatement.

27. The respondent’s evidence was consistently that they regarded the filling of posts on a temporary basis as impracticable and unfair. That evidence is difficult to understand. It is clear that the claimant herself was originally recruited on a temporary basis and it also seems clear that there were at least six other temporary appointments within the Equality Commission in recent years. Furthermore, the filling of legal posts in the public sector on a temporary basis or on a fixed term basis is relatively common place. No evidence was produced of unsuccessful competitions to fill posts on a temporary basis or on a fixed term basis. No evidence was produced of unsuccessful attempts to use agency staff, eg from Blueprint or Grafton.

28. *Paragraph 10.1 of the respondent’s scheme provides:-*

“It will not always be possible to assign staff returning from a career break to their former positions. If this situation occurs staff will be assigned to vacancies as and when they arise in their grade and department or the equivalent grade or department following any restructuring or re-organisation arrangements.”

29. That paragraph does not say that staff ‘*will be assigned to vacancies only if they arise etc*’. There is again a presumption that there will be a return even if that is a delayed return. It does not contemplate an indefinite or a permanent delay in that return. The paragraph must be interpreted rationally and reasonably having regard to what was in the mind of both contracting parties.

30. *Paragraph 10.2 of the respondent’s policy provides:-*

“If there is a delay in placing staff at the end of a career break staff may take up alternative salary/wage earning employment in Northern Ireland until a vacancy is identified.”

Again there is a presumption that a vacancy will indeed be identified. The paragraph says ‘*until a vacancy is identified*’. It does not say ‘*until or indeed if a vacancy is identified*’.

31. *Paragraph 10.3 of the policy provides:-*

“If a staff member was working in a part-time or job sharing arrangement before the commencement of a career break every effort will be made to allow the staff member to return to work on that basis. However there is no guarantee that this will always be possible.”

This is a clear and specific warning to the effect that a career breaker who has previously been on a particular flexible working arrangement will not be guaranteed that that flexible working arrangement can be replicated on their return to work. However there is again no warning that the career breaker may in fact not be permitted to return at all or that he may not be permitted to return for an indefinite period. If the policy gives a warning in relation to the availability of flexible working arrangements, it is extraordinary that it did not take this opportunity to give a warning as to a possible failure to reinstate at all, if such an outcome is indeed part of the policy and therefore part of any contractual variation put in place by the policy.

32. *Paragraph 10.4 of the policy provides:-*

“Staff on a career break must contact the Commission three months before they are due to return to:

- confirm that they intend to return on the agreed date; or*
- apply for an extension of their career break; or*
- indicate that they wish to resign.”*

33. *Paragraph 10.5 of the policy provides:-*

“In addition staff who take career breaks of more than one year’s duration must contact the Commission at the end of each 12 month period to confirm their intention to resume work at the Commission.”

34. *Paragraph 10.6 of the policy provides:-*

“Staff who are unable to resume work on the due date because of illness will be required to produce a medical statement.”

35. All these provisions are again on the clear assumption that there will be a return to work after the career break. It is after all a career ‘*break*’; not a career ‘*termination*’ or a career ‘*indefinite suspension*’. They go into some detail, including, for example, specifically requiring staff who are unable to resume work on the due

date, because of illness, to provide a medical statement. It is simply inexplicable, if there had been a clear agreement that a career break did not guarantee a return, even if it were agreed that that return to employment could be delayed, that the opportunity was not taken in *Paragraph 10* to make that plain and indeed to include a health warning in block capitals. The tribunal accepts the clear evidence of the respondent in cross-examination that “*no one anticipated this scenario*”. It is therefore clear that no one in 2001 turned their mind to, and therefore they did not agree to, the proposition that an application for a career break could be a resignation, albeit a protracted one.

36. The NICS career break policy, on which the respondent’s policy is based, is as you would expect, similar in purpose and in terms, although it is a longer document than the respondent’s policy. It also anticipates a career break being a break in employment and not a termination of employment. It is again based on the assumption of a return to paid employment. For example, *Paragraph 17.10* deals with a situation where a career break immediately follows a period of maternity leave. It provides for a penalty, ie the repayment of maternity pay, where an individual fails to return at the end of the career break period.

In *Paragraph 17.17* it points out that special leave without pay does not count as reckonable service towards pay progression, pension or annual leave. However, it points out that accumulated benefits will be preserved and built upon when ‘*you return to paid employment*’. It does not say ‘*if you return to paid employment*’.

Again, in *Paragraph 17.19* it provides that a person on a career break will be considered under the same terms as serving members of staff where there is a redundancy or early severance situation. It does not provide that an individual on a career break should simply be left without work and pay indefinitely or indeed permanently rather than being considered, as part of an appropriate pool of employees, within contractual terms relating to a compulsory redundancy.

It is perhaps notable that the respondent’s career break policy contains no similar provision.

37. At *Paragraph 17.24* of the NICS policy provides:-

“You will not normally be posted back to your former post/location, but to vacancies as and when they arise. This will usually be in your former department or the equivalent department following any restructuring or organisation. Every effort will be made to ensure that you return to a post within your substantive grade/pay range, although you may be required to serve in a lower grade on a temporary basis until a suitable posting in a substantive grade can be found. [tribunal’s emphasis] Pay would relate to the substantive grade initially, but would be on a mark time basis until a suitable vacancy in the substantive grade is available.”

Paragraph 17.25 of the policy provides:-

“Departments will endeavour to re-absorb their own staff. If, exceptionally, this is not possible within a reasonable period of time, [tribunal’s emphasis] Departmental HR may negotiate with any departments that have vacancies.”

Paragraph 17.26 of the policy provides:-

“Where a suitable post is not available you may, with the agreement of Departmental HR take up alternative salaried or wage earning employment within Northern Ireland, on a temporary basis, until a suitable post becomes available [tribunal’s emphasis] either in the substantive grade or the lower grade.”

38. All of this indicates that in the NICS policy there is also a clear assumption of a return to work and that there has been no contemplation of a situation where a return to work can simply be deferred indefinitely by management; effectively converting a career break into a protracted and involuntary resignation or into a long goodbye.
39. The use of the words ‘*following any restructuring or re-organisation*’ in the second sentence of *Paragraph 17.24* helps resolve the protracted dispute in this case about the correct interpretation to be applied to the final sentence of *Paragraph 10.1* of the respondent’s policy. It tends to suggest that the interpretation advanced by the respondent is correct. The use in the NICS policy of these words makes it relatively clear that those words should be read with the preceding words, ie ‘*or the equivalent grade or department following any restructuring arrangements*’. It is simply a clarification of ‘*equivalent grade or department*’. There is therefore no specific or express requirement that restructuring or re-organisation should take place in any particular circumstances and, in particular, where a career breaker does not return on the due date.
40. Mr McAlorum in his cross-examination was asked whether there was a general understanding that a career break would allow for a return to work. He appeared reluctant to accept that this was the case but eventually accepted that this was the general understanding of the term “career break”.

Again in his cross-examination, he stated that the career break policy spelt out clearly “what would happen on their return to work”. The tribunal concludes that this was clearly incorrect.
41. The respondent is a statutory body with an annual budget which is fixed from time to time by the Executive. In common with all other parts of the public sector, the respondent organisation has been subject to successive cuts in its budget. That budget had previously gone up and down according to needs and resources. However in the period between 2010 to 2014, there were successive cuts spread over four years, amounting to a reduction of approximately 10% in total or, in cash terms, £700,000. Approximately two thirds of the respondent’s annual budget is spent on staff costs.
42. The respondent’s budget was then cut by a further 4% in the current financial year. It has also been asked to plan for a 15% cut in the next financial year. That projected cut may well exceed the actual cuts over the preceding four years.
43. The respondent has 146 staff. 50% are on part-time or flexible working arrangements and the workforce amounts to 110 full-time equivalent (FTE) staff.

The workforce is currently 2/3 female and 1/3 male.

44. Since 2001 when the career break policy came into force there have been 31 career breaks. Two members of staff have each taken two separate career breaks. There have therefore been 29 career breakers. The gender breakdown of career breakers is approximately 80% female and 20% male.
45. Of the 31 career breaks from 2001 to date, 15 breaks were either wholly or partly for domestic responsibility (14 female and 1 male). The other 16 career breaks were for reasons ranging from living abroad, taking up a post outside the jurisdiction, starting a business and further education/training.
46. At 15 August 2014, nine career breakers had not been permitted to return. The gender breakdown is eight female and one male.

Of those nine career breakers, one has resigned, one has taken flexible early severance and one has taken flexible early retirement. The remaining six consist of five females and one male. They had been without work, pay or a compulsory redundancy payment for periods of between seven months to sixty-four months, at 15 August 2014.

Three of these six employees have now agreed to take a voluntary severance payment. Three, including the claimant, have not.

47. In 2002 the claimant applied for, and was granted, a one year career break to enable her to complete her professional qualifications, ie to complete the second year of her training contract. On that occasion the respondent agreed to fill her post with a temporary placement. That was presented to the claimant as a special concession. She was told in an e-mail dated 15 August 2002 from Barry Fitzpatrick that:-

“ ... we have managed to interpret the career break policy to allow you to finish on 7 September, take a 12 months carer [sic] break and have your post filled by a temporary replacement.”

That e-mail was in response to e-mails from the claimant. In one of those e-mails on 14 August she stated:-

“ ... it would make practical sense to fill the resulting vacancy on a temporary basis.”

It is entirely unclear why the respondent's career break policy needed any particular or strained interpretation to achieve this result. The statement *in Paragraph 9.1* of that policy to the effect that vacant posts would normally be filled on a permanent basis is expressly limited to vacancies lasting more than 12 months. That did not apply to the claimant's first career break in 2002, which at that stage was for only 12 months. Even if paragraph 9.1 had properly applied to the claimant in 2002, it would only have indicated that, for some reason, her post would normally be filled permanently.

48. In late 2008, the claimant was due to return from maternity leave but there were health concerns about her child. Between 5 November 2008 and 13 November 2008 there was an exchange of e-mails in which the use of special leave,

annual leave or a career break was considered. It is clear that it was made plain to the claimant that, in the case of a career break there was no guarantee of a return to the same post in the legal office. However there was no warning that the claimant might not be permitted to return at all or not permitted to return for an indefinite period.

On 5 January 2009 the claimant applied for a career break. Her maternity leave had finished on 30 November 2008 and annual leave had been used thereafter, taking her up to 8 January 2009.

The respondent did not insist on the normal three month notice period and the career break was granted, to commence on Monday 12 January 2009.

49. The respondent confirmed this in a letter of 20 January 2009 and stated that the career break *'has been approved to care for your daughter'*. The claimant was advised that *'during this time, your substantive post may be filled on a permanent basis, this is in line with the Commission's Career Break Policy'*.

That particular statement was not in accordance with the policy, since *Paragraph 9.1* referred to absences of more than one year and at this stage the career break was for one year only.

In any event, the claimant's post was filled on a permanent basis by the appointment of Mr Conor McBride some two to three months after the commencement of the career break. The claimant was not informed until December 2013 that this had happened.

50. The claimant was not advised that, at the end of her career break, she could be indefinitely refused reinstatement, pay or work or that compulsory redundancy could be deferred indefinitely at the respondent's option.
51. The career break was subsequently extended on four occasions up to the maximum five year period.
52. In an e-mail of 19 November 2012 the respondent approved the final extension of the career break. It stated *"Please note that this is the final extension to your career break"*.

It also referred the claimant to the career break policy, which was enclosed, and to *"Section 10, which outlines the return to work provisions"*.

Nothing in this letter indicated that a return to work could be deferred permanently or indefinitely solely at the respondents' option.

53. On 11 September 2013, a few months before the claimant's career break was due to end, the respondent wrote to all staff, including the claimant, inviting an expression of interest in flexible early severance (below age 50) or flexible early retirement (age 50-60). It stated:-

"The Commission is not seeking large scale change in the staffing levels and structure and it is anticipated that only a small number of staff will be interested in availing of this opportunity."

54. On 23 September 2013, the claimant confirmed her intention to return to work. She also expressed interest in voluntary severance or a reduction in working hours. There was no reply from the respondent to that letter telling her that she would not in fact be returning to work. However, it seems clear from the respondent's evidence, particularly that relating to other career breakers who had not been permitted to return, that the respondent would have known at that stage that the claimant was not going to be permitted to return to work as indicated by her, or indeed at all. It seems extraordinary, as a matter of basic fairness, that this was not made plain to the claimant even at this late stage. Again as a matter of basic fairness, any employee was entitled to know at that stage, and indeed much earlier, that her planned return in accordance with the respondent's policy, was merely illusory.

55. The claimant telephoned the respondent on 30 September 2013 to discuss voluntary early severance. She was again not told that she would not be permitted to return to work. The respondent's note of the call states only:-

"Career break – request to return has been received. Will be considered but it is likely to be some weeks before you hear from the Commission."

There was no evidence of what, if anything, was being 'considered' by the respondent over the next nine weeks. This seems to have been a remarkably casual way to treat an employee.

56. The claimant telephoned again on 2 December 2013 to explain that she had heard nothing further about her return to work. The respondent phoned her back later that day and left a voicemail. The respondent's note of this voicemail was:-

"Apologies for delay

Could you poss. ring me

Would like to meet this Friday afternoon if possible to update you on

- *(i) flexible early sev. E of I (early severance expression of interest]*
- *(ii) return to work request"*

The claimant was again not told that she would not be permitted to return to work as indicated by her or indeed at all. The voicemail was confirmed in writing and in similar terms. The arranged meeting was for an 'update' on her return to work in accordance with the respondent's scheme; the claimant was not warned that the 'update' would be a refusal to allow a return.

57. The claimant returned the call on 4 December 2013 and spoke again on 9 December 2013 to arrange a meeting on 10 December 2013. The claimant was again not advised in either call that she would not be permitted to return to work. However it is clear that the respondent would have been aware that that would be the case.

The tribunal is satisfied that the claimant had had very little contact with her colleagues during her career break. She lived in Hillsborough and had family responsibilities. She had occasionally bumped into Sinead Eastwood whose holiday home was near hers. However there was no evidence that the operation of the career break policy had ever been discussed on those occasions. She had on one occasion come across a Ms Rachel Spallen who had told her that she had not been permitted to return from a career break but Ms Spallen could not discuss or explain the issue because it had been covered by a compromise agreement. The tribunal notes the total failure on the part of the respondent to notify the claimant of its interpretation and operation of the policy at any stage and in particular once the claimant had notified her proposed return. In the absence of any indication to the contrary, the claimant had been entitled to assume that she was going to be returned to work and pay in January 2014, with the possibility of a delay.

58. Preparatory notes were prepared by the respondent for the meeting on 10 December 2014. Those notes indicated that there was only one Staff Officer vacancy which had been recommended for internal redeployment and there were three other Staff Officers who had been on career break and who wished to return. Those notes or the substance of those notes were not communicated to the claimant in advance of the meeting.
59. In the meeting on 10 December between the claimant and Mr McAlorum, the respondent's notes indicate that the claimant was told:-

"It is unlikely that a vacancy, cld (sic) be identified or funded to enable her return."

The use of the word '*unlikely*' is puzzling. It was perfectly clear to the respondent at that point that, short of an employee, or rather several employees being simultaneously run over by a bus, there was no prospect of a post being '*identified*'. Equally, there was no rational basis on which the respondent might have anticipated a sudden increase in funding from the Executive. Mr Brown, in cross-examination, accepted that since 2010, the Commission had found it increasingly difficult to guarantee a return to any type of work. He also accepted that in late 2014, there was no realistic prospect of any post for the remaining three career breakers (including the claimant) "unless someone left". In fact, several would have had to leave over and above those whose departure would simply have been absorbed in the reductions in funding.

The claimant expressed the view at that point that she was being made redundant.

60. The claimant wrote to Mr McAlorum on 16 December 2013 asking for details of a compulsory redundancy settlement. The claimant wrote again in similar terms on 20 January 2014.
61. The respondent replied on 21 January 2014 stating:-
- *"it is likely there will be a delay in placing you back in the Commission"*
 - *"it is not the Commission's view that you or your post has been made redundant as you have stated"*

Given the respondent's evidence to the tribunal it is unclear how the Commission concluded in January 2014 there would be a delay in the claimant's return. As indicated above the position was there was at that point no realistic prospect of her ever returning. There were no vacancies; no vacancies were anticipated; funding was severely restricted and there were three other Staff Officers ahead of her in the queue.

62. A further meeting was arranged for 30 January 2014 between the claimant and Mr McAlorum. The respondent's preparatory notes stated:-

"It is likely that there will be a delay in placing you back in the Commission."

"It is not the Commission's view that you or your post has been made redundant ... "

Again the prospect of a return was held out to the claimant when there was no real prospect of such a return with several people ahead of her in the queue, with no vacancies and with severe funding restrictions. This was grossly unfair.

63. At the meeting on 30 January 2014, the claimant stated that she regarded this as a redundancy situation, that she was due wages and that the career break policy was discriminatory. She stated that because she had no post this was not a situation of voluntary severance; this was a situation where the compulsory redundancy terms applied.
64. In a follow up meeting on 31 January 2014, it was agreed that her complaints could be addressed through the grievance procedure.
65. On the same day the respondent sent the claimant indicative figures for voluntary early severance. They amounted to £6,150.00.

In the same letter, some six weeks after the claimant requested these figures, the respondent set out compulsory severance terms. They amounted to £21,500.00.

The difference between the voluntary severance offered by the respondent and the compulsory redundancy sought by the claimant was £15,350.00.

66. A grievance meeting was held on 27 February 2014. The claimant reiterated her complaints. The claimant complained that her request to work for less than four days per week had not been dealt with. She complained that she had not been given an opportunity of applying for a Research Officer post (SO). She also complained that she had not been allowed to apply for an Assistant Research and Policy Officer post (EOI).
67. The respondent set out its answer to the grievances in a letter dated 28 March 2014:-
- (i) The respondent did not accept that she had been made redundant and that the compulsory redundancy terms applied. It stated that:-

“The career break provisions may enable a return to a Staff Officer post in the Commission and resolve this element of Elizabeth’s grievance.”

Given the evidence of the respondent at the hearing and the fact that three other career breakers had already been denied a return, over lengthy periods, the basis for this belief is unclear. In the context of declining funding, the belief was at best absurdly optimistic.

- (ii) The respondent did not accept that pay was contractually due from 12 January 2014; ie from the end of the career break.
- (iii) The respondent did not accept that the career break policy was either illegal or discriminatory in its application.
- (iii) It said of 29 career breaks, 23 (79%) were female and six male (21%). The general workforce varied from 65% to 75% female.

Of the eight current career breakers, five (62.6%) were female and three (37.5%) male.

- (iv) A voluntary reduction in hours had not been considered because her expression of interest in voluntary severance was currently being considered.
- (v) The Research Officer post was during her career break and publically advertised. The letter did not say as the respondent has argued in this tribunal that this was a specialist post for which the claimant had been unsuited.
- (vi) The EO1 post was at a lower grade.
- (vii) The claimant was not in a compulsory severance position. No analogy was drawn with paragraph 17.24 of the NICS scheme and the letter did not say as the respondent said for the first time to this tribunal that the claimant would be included in a compulsory redundancy exercise at some indeterminate point in the future.

68. The claimant did not appeal her grievance. Any such appeal would have been heard by Mr Brown. The claimant’s evidence was that she had believed the interpretation of the career break policy would not have changed. Having heard the evidence of Mr Brown to this tribunal, the claimant’s view was correct. The position would not have altered.

That said, the claimant should have gone through the motions of an appeal and the claimant accepts that she should have done so. It is however clear that any such appeal would have changed nothing.

69. The redundancy procedure, including the compulsory redundancy terms indicated to the claimant was published in June 2010. A later policy appears to have been put in place with reduced benefits but this was not discussed in detail.

CONTENTIONS OF THE PARTIES

70. The contentions of the parties are as set out in the attached written submissions and additional written submissions.

FORMAT OF DECISION

71. Ordinarily, the relevant law is set out separately in any decision. However, the present case involves several separate legal issues. The decision will therefore deal separately with each of those legal issues, setting out the relevant law at the appropriate point; under the general heading of '*Decision*'.

DECISION

Construction of the Contract

72. The correct construction of the employment contract in relation to career breaks needs to be considered first; before the claims of indirect sex discrimination, unauthorised deductions or redundancy can be addressed.
73. A career break policy falls to be construed like any other provision in a contract. There is no industry standard or general template which requires that certain provisions automatically have to be included in such a policy, or automatically have to be implied in such a policy.
74. The respondent argues that the claimant has accepted a variation to her contract by taking a career break. It argues that this variation either expressly or impliedly permits the respondent to indefinitely delay the return of the claimant, as it has in this case, and not to provide work or pay while it does so. The claimant argues that there was no such variation and that she was entitled to be returned to work on 12 January 2014, or at least paid from that date.
75. This is yet another of those cases where two contracting parties, who really should have known better, have negotiated a contract and have left an important issue unclear. In this case, those contracting parties are the Equality Commission and NIPSA.

Anyone contemplating a career break, often, as in this case, because of family circumstances, is entitled to know what they are applying for and, if successful, what they have been granted. However it is clear from the respondent's evidence, and from the documentation, that the implications of general funding cuts and of staff reductions on the operation of the policy were not considered in the negotiations and were not dealt with in that policy.

76. The respondent's career break policy has already been discussed in some detail earlier in this decision. It is clear that the policy was written on the basis that a '*career break*' meant what it said on the tin, ie a break with a departure and a return. It was not written on the basis that the acceptance of a career break was in fact a resignation with no more than a limited form of preferential reinstatement if a suitable vacancy were ever to arise at some indeterminate point in the future.

77. There was no clear notification to any applicant for a career break that he or she was effectively signing a resignation; effectively giving up any right of return, and effectively giving up accumulated employment rights.
78. The terms of the policy and the evidence of the respondent make it clear that a career break was not granted as of right. It had to be applied for by the employee and could be refused by the respondent. The same position applied to any extensions of a career break. At no point was it made clear to the claimant, either in relation to her initial application for a career break, or in relation to her subsequent applications for extensions of that career break, that she was putting her continued employment with the respondent at significant risk.

If, as has been conceded by Mr Brown, it had become difficult from 2010 to guarantee a return to any type of work, the respondent should either have refused career breaks and extensions or should have clearly and unambiguously explained the implications. It did neither. Mr Brown's response in cross-examination was that "the unions would have said it is a person's contractual right to go on a career break – the first time someone was turned down". This is nonsense. There was no such contractual right. Career breaks were discretionary. In any event, no one, even the hypothetical "unions" could have objected if the implications of a career break or an extension had been spelt out clearly.

79. That said, it is clear that the policy did contemplate that there might be a delay in a return to work. *Paragraph 10.2* allowed a career breaker to take up alternative salaried employment in Northern Ireland in such circumstances.

However the policy did not contemplate, or warn an applicant about, any indefinite or permanent delay in a return. It did not, as in the NICS policy, flag up the possibility of compulsory severance being available to all employees, whether on a career break or not.

80. The NICS policy, like the respondent's policy, was written on that basis that there would be a return to work, even if there was a delay. However it provides at *Paragraph 17.19*:-

"In a redundancy or early severance situation, if you are on a career break you will be considered under the same terms of serving members of staff."
[tribunal's emphasis]

There is no such reference in the respondent's policy, apart from a vague statement in *Paragraph 5.1*, that:-

"During a career break staff members will be subject to the Commission's regulations. Clearly some of these will be inapplicable"

81. There is no statement in either policy that where there have been funding cuts and/or overstaffing, career breakers will be retained indefinitely or permanently without work or pay and without any compulsory redundancy entitlement, either to afford preferential treatment to those actually at work by deferring the need for a redundancy scheme, or for any other reason.

82. It is clear from the chart shown at *Page 57* of the bundle that a female career breaker had been refused a return from a career break for a period of some 64 months at 15 August 2014. That means that she had been refused a return on or about 15 June 2009. That was shortly after the granting of the claimant's first career break in January 2009 and very shortly after the permanent filling of the claimant's post some two to three months later. These dates were in a document forward by the respondent in preparation for this hearing. They were not altered or corrected before the hearing or at any point apart from one point in Mr Brown's cross-examination. They were not altered subsequently and it can be presumed that they had been prepared carefully and checked.

In that part of his cross-examination, Mr Brown (for the first and only time) thought the 64 months was wrong but had no precise alternative. He eventually posited "between four and five years" but then immediately went on to say that the proposed return for that employee had been April 2009 rather than February 2009. This does not seem consistent with his earlier answer which to be fair was apparently without checking any documents and was spontaneous. He also accepted that the respondent, given the requirement for three months' notice of return, would have been considering her return from January 2009.

It does not seem possible that the respondent when it granted the claimant's first career break would have been unaware of the pending funding cuts and of the implications which its interpretation of the career break policy would have had on the claimant. Yet no such warning was given, either then or even at the time of the first extension application, when one career breaker had already been refused a return to work and had been placed indefinitely on no pay.

83. Without, at this stage, going into the legal implications, the respondent's actions seem at best grossly unfair. An employee in such circumstances was entitled to be given a proper explanation of her circumstances so that she could at least seek alternative employment. For an employer that holds itself out as an exemplar of fairness, this was extraordinary behaviour.
84. Leaving aside the question of any specific provision in the policy or the contractual variation, permitting an indefinite or permanent suspension, because there clearly was none, the tribunal has to turn to the question of an implied variation, which on the respondent's argument, would permit such a result.
85. The law in relation to the construction of implied contractual terms is well settled and appears repeatedly in EAT decisions; proof if nothing else of the proposition that employment contracts should be properly and specifically drafted in the first instance.

The most recent reference, on 10 November 2014, is ***Goldwater v Sellafeld Ltd [UKEAT/0178/14]***. In that case the EAT had to determine whether a contractual requirement to pay a certain level of pay, within six weeks of an event, referred to just basic pay or whether it included shift supplements and certain bonuses. As in the present case, the negotiating parties to the policy had not managed to make the position clear.

86. The EAT set out the law in *Paragraph 8* of its decision:-

*“There is no dispute that the relevant law as to the construction of a contractual term like this ‘six week rule’ contained in the Employee Handbook is set out in the speech of Lord Hoffman in **Investors Compensation Scheme v West Bromwich Building Society [1998] 1 ALL ER 98**, and in particular the five principles he identifies at pp 114/15. Adapting Lord Hoffman’s words somewhat, the task is to ascertain the meaning which the words of the rule would convey to a reasonable person with all the relevant background knowledge available at the time it was introduced. The relevant background includes absolutely everything that would have affected the way in which the language of the rule would have been understood by a reasonable man, excluding previous negotiations and declarations of subjective intent. The fifth principle identified by Lord Hoffman is this:*

‘The rule that words should be given their ordinary and natural meaning reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.’”

87. In **Lamey v QUB – employment tribunalsni.gov.uk**, the tribunal referred to the decision of the Court of Appeal in **Napier Park European Credit Opportunities Fund Ltd v Harbour Master etc [2014] EWHC 1083 CH**. The broad principles of statutory interpretation were expressed as:-

“37. ... For the purposes of the present proceedings, the following points are of particular relevance. Firstly, the overriding objective of the interpretation of a contract is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (excluding, for policy reasons, prior negotiations and declarations of subjective intent). Secondly, in carrying out that exercise the starting point is always the ordinary, natural and grammatical sense of the language used by the parties in its context because the assumption is that people usually intend the words they use to have their natural and ordinary meaning. The context includes the document and the transaction as a whole. Where it is clear from the context that the parties have adopted a specialist vocabulary, the starting point is the natural and ordinary technical meaning of the specialist terms. Thirdly, in cases where in its context the language used is ambiguous, in the sense that it is capable of bearing more than one meaning, that interpretation is to be preferred which is most consistent with business common sense, that is to say most consistent with the commercial purpose of the transaction. Fourthly, where it is clear both that a mistake has been made in the language used and what a reasonable person would have understood the parties to have meant, the contractual provision must be interpreted in accordance with that meaning. Fifthly, if the words in their context are unambiguous and it cannot be said that something must have gone

wrong with the language, then, subject to a successful claim to rectification, the court must apply that unambiguous meaning even though some other language or meaning would be more commercial. The fact that it would produce a poor bargain for one of the parties is not sufficient to adopt another meaning. The objective of interpretation is to interpret the contract and not to re-write it in the light of hindsight and the judge's, let alone one party's, own notion of what would have been a reasonable solution if the parties, as reasonable people, had ever thought about it."

88. Both decisions say the same thing. The tribunal should disregard prior negotiation and look at what a reasonable person with all the background knowledge available to the negotiating parties could have taken the policy to mean. The plain wording of the policy is always the starting point and will not easily be set aside.
89. It is clear that the policy was to provide, on a discretionary basis, career breaks. It was not a policy to invite involuntary resignations or to invite an indefinite or permanent exclusion from the workplace. It was not a policy designed to allow the respondent to avoid or to delay a compulsory redundancy situation by suspending former career breakers indefinitely or permanently. The plain wording throughout the policy provided for a return, albeit in certain circumstances with a delay. If the policy had been one providing for an effective resignation with no more than a right of preferential reinstatement, and then only where possible, it would have said so. It did not. No one reasonably looking at the wording of the policy in 2001, with the knowledge available at the time, could have concluded that such a provision should be implied into the policy, contrary to the plain wording of the document.
90. The tribunal therefore concludes that the contractual variation permitted only a delay in a return to work, not an indefinite delay or a permanent delay, with no work, no pay and no compulsory redundancy entitlement until the respondent deemed the time was right for it to address the matter.
91. The tribunal also concludes that the policy provides that during any such temporary delay there was no right to pay under the policy. While again there is no specific provision to this effect, as one might have expected in a document drafted between a trade union and the Equality Commission, it would be right to imply such a provision. The right in *Paragraph 4.4* to undertake alternative salaried employment in Northern Ireland during such a temporary delay can support no other conclusion. If there had been a right to pay during a temporary delay, why would the policy have permitted alternative salaried employment for a period?
92. The tribunal therefore concludes that the respondent acted in breach of the claimant's contract, as varied, when it refused, indefinitely or permanently, to take the claimant back to work, or to pay her following a temporary delay. The respondent, given the number of career breakers already refused entry at that stage by January 2014, knew that there was not merely going to be a temporary delay. The claimant was, in reality, not going to return for an indefinite and probably permanent period.
93. Unsurprisingly, the respondent's contractual redundancy policy does not provide that a permitted measure to avoid or to minimise redundancies is to refuse to take back career breakers.

There is no definition of the word ‘*redundancy*’ in this policy. However it must attract its ordinary meaning. It clearly applies where there is no work and no funding for an employee or employees.

The redundancy policy provides for objective selection criteria to be set in a compulsory redundancy situation. It does not specifically address the situation of career breakers and therefore the position must be that in such a situation, the objective selection criteria should apply equally to career breakers, to person in ‘*limbo*’ following a career break, and to employees actually at work.

There is therefore no clear answer as to whether the claimant would have been selected for compulsory redundancy if the respondent had invoked the redundancy policy at any point since 2009, rather than indefinitely or permanently suspending employees whose career breaks had ended.

94. As if there were not uncertainty enough, there is yet another uncertainty. The claimant, if she was permitted to return, wanted to work reduced hours. The respondent had not considered that possibility. It was clear that she wanted to work for less than her standard four days a week. It is also possible, given the history of the claimant’s employment, that that reduction in hours would have been allowed. The claimant however could not say what reduction in hours she would have wanted:

“I couldn’t say what – but wouldn’t have been two days”.

Quantification of the alleged loss of earnings, after an undetermined ‘delay’ and subject to unknown prospects of redundancy selection, is therefore even more problematic.

APPLICATION OF THE CAREER BREAK POLICY

95. As indicated above, the negotiated career break policy was based on the premise that, if an applicant were afforded a career break by the respondent, that employee would return to employment with the respondent, if necessary after a delay, to a suitable post.
96. The respondent, for reasons which were not made clear in the course of this hearing, operated a policy of filling the posts of career breakers on a permanent basis rather than on a temporary, fixed term, or agency basis. It did not use locum staff for this purpose. The respondent’s evidence was that to do otherwise would have been ‘*unfair*’ and that it would have annoyed the trade union. No evidence has been produced to support the latter assertion. It seems to this tribunal highly unlikely that a trade union would have objected to filling the posts of those employees, who were absent from work on a temporary or fixed term basis, in a similar way, ie on a temporary or fixed term basis. Such an approach would have fulfilled the respondent’s commitment in *Paragraph 1.1* of its redundancy policy where it stated:-

“The Equality Commission for Northern Ireland (‘the Commission’), believes that it is vital for good employee relations, productivity, and morale to, so far

as is practicable, establish and maintain high levels of job security for its employees.”

To state the obvious, permanently filling posts which are temporarily vacant in a small organisation does not promote ‘*high levels of job security*’. It does not recognise the essential nature of a career break ie that it is a temporary break and not a permanent or indefinite break.

97. Mr McAlorum was the respondent’s HR manager and can therefore be presumed to be fully familiar with the operation and basis of the career break policy. He confirmed that it had been the policy of the respondent to permanently fill those posts left temporarily vacant by career breakers. He could not explain why that was the case. He stated that in the present case senior managers in the legal department had asked that the claimant’s post should be filled on a permanent basis. He stated:-

“I am sorry. I do not know why.”

“My view would be look at what senior managers requested.”

Mr McAlorum confirmed that he had not considered filling the claimant’s post on a temporary or fixed term basis.

If there was a considered and objective justification for the respondent’s interpretation of the career break policy, and in particular for filling temporarily vacant posts on a permanent basis, it is surprising that it did not come from the HR manager.

98. Mr McKinstry, the Director of Policy and Research, had nothing to say about the operation or interpretation of the career break policy other than to say that he hadn’t understood that the respondent’s argument was that the former career breakers had agreed to a contractual variation which allowed for them to be put ‘in limbo’.

He put forward a convoluted argument on disparate impact which seemed to be different from everyone else’s. That will be dealt with later in the decision.

99. Mr Brown confirmed in cross-examination that there was a presumption that the respondent would externally recruit posts. That of course does not say why such external recruitment, if there has to be external recruitment, has to be on a permanent rather than on a temporary or fixed-term basis.

He stated that the predecessor bodies to the current respondent had got into trouble with temporary contracts. There was no specific evidence as to how, why or when such “trouble” occurred. However it is clear that any such temporary recruitment occurred some time ago in different labour market conditions. He did not satisfactorily explain why the claimant’s post, which was temporarily vacant, had been permanently filled some two to three months after the commencement of her career break.

100. The suggestion that filling temporary vacant posts on a temporary basis is somehow ‘*unfair*’ does not stand up to any critical scrutiny. The same suggestion is not made where posts are temporarily vacant because of maternity leave or

sick leave. It also disregards the use of temporary appointments elsewhere in the public sector and indeed the claimant's own initial and temporary appointment.

101. In the document entitled '*Justification Defence*', the respondent did not suggest that filling posts on a temporary or fixed term basis would be either unfair or that it would annoy the trade union. The respondent instead argued at that point that temporary posts attracted fewer applicants and that it therefore needed to fill posts permanently '*for effective business planning*'. It did not explain how such "effective business planning" was assisted by leaving career breakers with significantly reduced prospects of a return. It also argued in that document that temporary appointees were more likely to leave early and to breach continuity. No evidence was produced to effectively support either proposition in the period from 2009, when many lawyers were unemployed in this jurisdiction and when temporary or fixed term contracts for public sector lawyers were not unknown.
102. The respondent therefore seems somewhat confused as to its reasons for filling temporarily vacant posts on a permanent basis. It has not provided any convincing or even any arguable reason for its decision to permanently fill those posts left temporary vacant by career breakers.
103. In any event, the respondent is a relatively small employer, with limited flexibility. It currently numbers 110 FTE staff. Numbers are declining and have been declining for some years. It is clear that the respondent knew that staff leaving on a career break since 2008/09 would have had only limited prospects of any return; their prospects were then made much worse when their vacant posts were filled permanently.
104. The respondent should have made its interpretation of the policy clear to those employees who applied for a career break since 2008/09. Those employees were effectively resigning and were being misled about their position.
105. There is no claim for constructive unfair dismissal relying on an alleged repudiatory breach of contract occurring on or about 12 January 2014. It is submitted instead by the claimant that there was such a contractual breach in failing to allow the claimant to return at that point in that the respondent:-
 - (i) failed to instigate a restructuring policy;
 - (ii) failed to treat her as redundant, triggering the contractual redundancy scheme;
 - (iii) failed to pay her wages; and
 - (iv) indirectly discriminated against the claimant on grounds of gender.

That latter point (iv) will be dealt with shortly in this decision. It is the primary argument of the claimant.

As the further submission has stated in *Paragraph 48*, the redundancy argument is advanced in the alternative, ie if the tribunal determines that there was no indirect sex discrimination. The claimant's primary argument is that she remains an

employee in a peculiar situation with no work, pay and contractual redundancy payment (as yet).

106. The first argument (i), that the respondent was contractually obliged to undertake a restructuring exercise, is rejected. The wording of *Paragraph 10.1* of the respondent's career break policy, properly understood and informed by the wording of *Paragraph 17.24* of the NICS policy, does not create such a contractual obligation. It merely points out that the equivalency of grade or department will be judged in the light of any restructuring or re-organisation that might have occurred.
107. The second (ii) and third (iii) arguments are more problematic. First of all, the redundancy argument (ii), at least, is advanced in the alternative. The claimant asserts and the respondent accepts that the claimant remains an employee.
108. It is clear that the core of an employment contract is a contractual obligation to pay an employee if that employee is available for work, whether or not work is actually performed. In the present case, the contract had been varied by the application of the career break policy. However the variation did not extend so far as to permit the respondent, at its election, to suspend an employee indefinitely and, in reality, permanently, leaving an employee without work, pay or redundancy compensation.
109. The contractual variation, agreed to by the claimant, allowed for a temporary delay in a return. It did not allow for a permanent '*delay*'. That is not what the claimant signed up for. It is also clearly not what had been agreed by the negotiating parties in 2001 when the policy had been settled.
110. The obvious issues are the jurisdiction of the tribunal and determination of any remedy for the respondent's breach of contract.

The claimant's primary argument is that she is still employed by the respondent. A tribunal only has general jurisdiction to determine a breach of contract, and then only up to a financial limit, if the employment has been terminated by the date of claim under the Industrial Tribunals Extension of Jurisdiction Order (NI) 1994. The claimant has not therefore relied on that Order. It is mentioned in this decision solely for completeness.

The claimant has made a claim in respect of an unauthorised deduction of wages contrary to the 1996 Order. The UDW claim requires a breach of contract leading to a shortfall in wages.

111. In summary, the tribunal's findings in relation to the contract of employment are:
 - (i) There is no requirement, contrary to the claimant's argument, for a specific restructuring or organisation exercise when a career breaker wishes to return and when there is no vacancy.
 - (ii) The claimant's contract of employment has not been varied by agreement, either expressly or implicitly, to permit a period of either indefinite or permanent suspension from work with no pay and no redundancy selection exercise.

- (iii) There has been an implied contractual variation permitting a delay in a career breakers return. The purpose of any such delay is to identify a suitable post, or if one is not available to invoke the redundancy selection procedure. The length of any such permissible delay is not defined as it perhaps should have been. However any such delay cannot be indefinite or permanent.
- (iv) The respondent is in breach of an implied term in the employment contract to invoke the redundancy selection procedure where there is a clear surplus of staff and/or a shortage of funding. It cannot leave staff with no work, no pay and no contractual redundancy on an indefinite or permanent basis. This has arguably been the case since 2009.
- (v) Following the end of an undetermined period of permitted delay, and if the claimant were not to have been selected for compulsory redundancy before January 2014, the respondent would be in breach of contract in failing to pay the claimant wages.
- (vi) It is impossible to establish the appropriate length of a permitted delay in the return to work, either generally or in the circumstances of the claimant's case. Any attempt by the tribunal to assess the permitted delay would be pure guess work and based on no evidence.
- (vii) It is also impossible to assess the outcome of any redundancy selection process or indeed to determine when or how often such processes should have taken place since 2009. Any attempt by the tribunal to assess the outcome would again be pure guess work and based on no evidence.

112. The permitted length of any delay in returning a career breaker to work would have to have been determined rationally and in good faith by the respondent. The Court of Appeal (GB) in relation to a different problem in **Horkulak v Cantor/Fitzgerald International [2004] IRLR 943** examined the relevant case law and determined that a discretion provided for in an employment contact which is prima facie of an unlimited nature will be regarded as subject to an implied term that it will be exercised genuinely and rationally. The Court in that case determined that the High Court had been correct to calculate and award a sum under a discretionary bonus scheme.

In the present case the length of a permitted delay is not specified. However the respondent must be wrong to argue that this means that a delay can be extended indefinitely. That result would be contrary to the intention of the career break policy and contrary to much of its wording. Unlike **Horkulak**, there is no evidence on which any decision could be made in this case as to the exercise of the discretion i.e. the length of any permitted delay.

113. The potential outcome of, and the dates on which redundancy selection exercises should have taken place, are similarly devoid of any evidence. As with the question of delay, that is not a criticism of either party. It is simply an area of pure speculation where there is no evidence available upon which to reach a finding. Relevant redundancy selection criteria have not been settled between the respondent and the trade union. Even if such criteria had been settled the tribunal knows nothing about the particular circumstances of the claimant or of her fellow

employees and therefore the likelihood of selection under such criteria could not be assessed.

114. Tribunals often have to assess compensation in difficult circumstances with limited evidence. Assessing injury to feelings is one such exercise. **Vento** makes it plain that this can be a difficult exercise. The **Horkulak** decision is an example of another problem area; discretionary bonus schemes. Reaching findings on limited evidence is one thing. Reaching findings by pure guess work is quite another. Where there is no evidence on which the length of a permitted delay, the length of any varied working week and the chances of redundancy selection can be assessed, a tribunal cannot do so. The alleged financial loss in relation to either wages or redundancy is simply unquantifiable.
115. The tribunal has considered listing the case for a separate remedy hearing but it would appear highly unlikely that any helpful evidence would emerge at any such hearing and the tribunal has decided not to do so.
116. There is therefore simply a finding that because of a contractual breach there has been an unauthorised deduction from wages for an indeterminate period. Without the ability to fix the length of a permitted delay in returning a career breaker, the length of any varied working week and the ability to assess the likelihood and timing of any redundancy selection, remedy cannot be properly determined.
117. The jurisdiction of the tribunal is crucial. It is a statutory tribunal with no inherent jurisdiction. If it has no statutory jurisdiction, it has no jurisdiction at all.
118. The claimant accepts that she remains in employment. She does not argue that her contract of employment has been determined. The most that she can argue is that a redundancy selection process or processes should have been invoked at unknown times and with unknown results. In those circumstances, where employment is continuing the tribunal has no jurisdiction to determine any freestanding claim under the 1994 Order and such a claim is not made by the claimant.
119. Furthermore any claim for unauthorised deductions from wages would not be quantifiable; because the length of any permitted delay in a return, the hours to be worked by the claimant in any varied working pattern and the chances of redundancy selection are not capable of determination. There can therefore be no claim for unauthorised deductions from wages under the 1996 Order. In **Coors Brewery v Adcock [2007] ICR 983**, the claim concerned a discretionary bonus. The claim was that the claimant had suffered an unquantified loss and the claimant required the tribunal to quantify it. The Court of Appeal held that this was properly a claim for breach of contract under the GB equivalent of the 1994 Order and not a UDW claim. In the present case it is not merely that the loss of wages or redundancy compensation is difficult to quantify – see **Lucy v BA UKEAT/0038/08** – it is impossible to quantify.
120. The UDW claim must therefore fail. The claim is not quantifiable. The ‘fall back’ argument for a contractual redundancy claim must also fail. The claimant is still in employment and in any event the tribunal is not able to determine when or if the claimant would have been selected for redundancy.

INDIRECT SEX DISCRIMINATION

121. Article 3(2) of the Sex Discrimination (Northern Ireland) Order 1976 provides that indirect sex discrimination occurs where an employer in relation to an employee:-

“Applies to her a provision, criterion or practice which he applies or would apply equally to a man, but:-

- (i) which puts or would put women at a particular disadvantage when compared to men;*
- (ii) which puts her at a disadvantage; and*
- (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.”*

122. The proper approach to assessing disparate impact has been examined many times in reported case law. One recent example is the decision of HHJ McMullen QC in ***Faulkner v Chief Constable of Hampshire Constabulary [UKEAT/0505/05]***. In that decision, the EAT stated:-

“20. The legal principles to be applied in this case appear to us to be as follows. The four elements of this form of statutory indirect discrimination can be extracted from the wording of SDA s.1(2)(b) namely:

- a. The application of a “provision” which the discriminator “applies or would apply equally to a man”;*
- b. Which is such that it “would be to the detriment of a considerably larger proportion of women than of men” [ss.1(2)(b)(i)] (“disparate impact”);*
- c. Which the discriminator cannot show to be justifiable irrespective of the sex of the person to whom it is applied [ss.1(2)(b)(iii)];*
- d. Which is to her “detriment” [ss.1(2)(b)(iii)].”*

21. *The latest and most authoritative ruling on this matter is in **Rutherford** above where the speech of Baroness Hale contains the following statement of the law:-*

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

the figures, the question is whether the rule or requirement can objectively be justified.

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

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

78. *This approach, defining advantage and disadvantage by reference to what people want, chimes with the definition of discrimination given by McIntyre J in the seminal Canadian case of Andrews v British Columbia [1989] 1 SCR 143:*

'...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society' (emphasis supplied).

It also chimes with Sandra Fredman's observation, in Discrimination Law (Clarendon Law Series, 2002, p.115), that 'A disparate impact is not itself discriminatory. Unequal results are legitimate if no exclusionary barrier can be identified...' The sorts of cases where indirect discrimination can be established confirm this.

82. *The common feature is that all these people are in the pool who want the benefit - or not to suffer the disadvantage - and they are differentially affected by a criterion applicable to that benefit or disadvantage. Indirect discrimination cannot be shown by bringing into the equation people who*

have no interest in the advantage or disadvantage in question. If it were, one might well wish to ask whether the fact that they were not interested was itself the product of direct or indirect discrimination in the past.

That reflects earlier jurisprudence including London Underground Ltd v Edwards [1999] ICR 494 CA where this was said by Potter LJ:-

- 22. I accept the submissions of Mr. Allen. In my view there is a dual statutory purpose underlying the provisions of section 1(1)(b) of the Act of 1975 and in particular the necessity under sub-paragraph (i) to show that the proportion of women who can comply with a given requirement or condition is “considerably smaller” than the proportion of men who can comply with it. The first is to prescribe as the threshold for intervention a situation in which there exists a substantial and not merely marginal discriminatory effect (disparate impact) as between men and women, so that it can be clearly demonstrated that a prima facie case of (indirect) discrimination exists, sufficient to require the employer to justify the application of the condition or requirement in question: see sub-paragraph (ii). The second is to ensure that a tribunal charged with deciding whether or not the requirement is discriminatory may be confident that its disparate impact is inherent in the application of the requirement or condition and is not simply the product of unreliable statistics or fortuitous circumstance. Since the disparate impact question will require to be resolved in an infinite number of different employment situations, well but by no means comprehensively exemplified in the arguments of Mr. Allen, an area of flexibility (or margin of appreciation), is necessarily applicable to the question of whether a particular percentage is to be regarded as “substantially smaller” in any given case.*
- 23. The first or preliminary matter to be considered by the tribunal is the identification of the appropriate pool within which the exercise of comparison is to be performed. Selection of the wrong pool will invalidate the exercise, see for instance Edwards No. 1 [1995] I.C.R. 574 and University of Manchester v Jones [1993] I.C.R. 474, and cf. the judgment of Stephenson L.J. in Perera v Civil Service Commission (No. 2) [1983] I.C.R. 428, 437 in the context of racial discrimination. The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied. In this case, the pool was all those members of the employer’s workforce, namely train operators, to whom the new rostering arrangements were to be applied (see paragraph 3 above). It did not include all the employer’s employees. Nor did the pool extend to include the wider field of potential new applicants to the employer for a job as a train operator. That is because the discrimination complained of was the requirement for existing employees to enter into a new contract embodying the rostering arrangement; it was not a complaint brought by an applicant from outside complaining about the terms of the job applied for. There has been no dispute between the parties to this appeal on that score. However, Mr. Bean has placed emphasis on the restricted nature of the pool when asserting that the industrial tribunal were not entitled to look outside it in any respect. Thus he submitted they should not have taken into account, as they apparently did, their own knowledge and experience, or the broad national*

“statistic” that the ratio of single parents having care of a child is some 10:1 as between women and men.

25. *Equally, I consider that the industrial tribunal was entitled to have regard to the large discrepancy in numbers between male and female operators making up the pool for its consideration. Not one of the male component of just over 2,000 men was unable to comply with the rostering arrangements. On the other hand, one woman could not comply out of the female component of only 21. It seems to me that the comparatively small size of the female component indicated, again without the need for specific evidence, both that it was either difficult or unattractive for women to work as train operators in any event and that the figure of 95.2 per cent of women unable to comply was likely to be a minimum rather than a maximum figure. Further, if for any reason, fortuitous error was present or comprehensive evidence lacking, an unallowed for increase of no more than one in the women unable to comply would produce an effective figure of some 10 per cent as against the nil figure in respect of men; on the other hand, one male employee unable to comply would scarcely alter the proportional difference at all. Again, I consider Mr. Allen is right to point out in relation to Mrs. Quinlan that, albeit the industrial tribunal lacked the evidence to find as a fact that she could not comply, the reference to her indicates that they had her uncertain position in mind when assessing the firmness of the figure of only 4.8 per cent as the basis for a finding of prima facie discrimination.*

And the following is said by Simon Brown LJ at page 510:-

“I can state my conclusions really quite shortly. Given that this legislation is concerned essentially to contrast the impact of a given requirement or condition as between men and women rather than as between the women in the group, it would seem to me wrong to ignore entirely the striking fact here that not a single man was disadvantaged by this requirement despite the vast preponderance of men within the group. Looked at in the round, this requirement clearly bore disproportionately as between men and women, even though only one woman was affected by it. Had there been an equal number of women drivers to male drivers and the same 5 per cent proportion of them been affected, i.e. 100, Mr. Bean’s argument would remain the same, namely that too large a proportion of women were able to comply with the requirement to leave room for a finding that such proportion was “considerably smaller” than the proportion of men who could comply. It is not an argument I am ultimately prepared to accept. The approach to section 1(1)(b)(i) must, I conclude, be more flexible than this argument allows. Parliament has not, be it noted, chosen to stipulate, as it could, just what difference in proportions would be sufficient. Once, then, one departs from the purely mechanistic approach contended for by the employer, and has regard to other facts besides merely a comparison between 95 per cent and 100 per cent., the applicant’s argument becomes compelling: no other fact could be more relevant than that, whereas 5 per cent of the women were disadvantaged, not one of the 2,023 men was. That further consideration, in my judgment, supports the industrial tribunal’s finding here.”

22. *As to the comparison between the advantaged and disadvantaged groups the judgment of myself and Dr Fitzgerald sitting with Ms Switzer in **British Airways v Grundy** (UKEAT/0676/04) is relevant. The parties asked for full legal reasoning, albeit not strictly necessary*

for our judgment on all of the points, advanced by leading Counsel. In that case we summarised the law as we saw it up to but not including Rutherford in the House of Lords and we came to this conclusion:-

“51. ... the correct approach is to focus on the advantaged group and not the disadvantaged group. It is not incorrect to look at other proportions and other numbers before finally focusing on the advantaged group. The only authority relied upon by the Claimants before the Tribunals to support the proposition that the focus was to be a small disadvantaged group was the judgment of Lord Nicholls in Barry v Midland Bank Plc [1997] ICR 319. In that case the majority of the House dismissed the appeal on the ground that there was no difference in the treatment afforded to either men or women. A dissenting view was taken by Lord Nicholls at paragraph 36, albeit that he concurred in the result on the basis that the difference was justified. He accepted that, following Seymour-Smith in the ECJ,

“a comparison must be made between, on the one hand, the respective proportions of men... who are not disadvantaged and, on the other hand, the like proportions regarding women in the workforce”.

Lord Nicholls went on to suggest (without being prescriptive) that “a better guide” would often be found “in expressing the proportions in the disadvantaged group as a ratio of each other”. However, in our judgment this approach was not endorsed by the majority, it does not address the note of caution struck by the Divisional Court in Seymour-Smith and is with respect out of step with the prevailing (and subsequent) case-law and was not repeated by Lord Nicholls when giving the leading speech of the majority in Seymour-Smith.

23. Although permission to appeal was given in one of those cases on the basis that this matter might be the subject to further treatment in Rutherford by the House of Lords the closest it got in Rutherford is in the speech of Lord Walker, which is this:-

67. I do not express the view that some element of disadvantage-led analysis may not be appropriate in some cases. But it must be recognised that there is a difficulty here: the more extreme the majority of the advantaged in both pools, the more difficult it is, with any intellectual consistency, to pay much attention to the result of a disadvantage-led approach. However I can imagine some (perhaps improbable) cases in which a disadvantage-led approach would serve as an alert to the likelihood of objectionable discrimination. If (in a pool of one thousand persons) the advantaged 95% were split equally between men and women, but the disadvantaged 5% were all women, the very strong disparity of disadvantage would, I think, make it a special case, and the fact that the percentages of the advantaged were not greatly different (100% men and 90.5% women) would not be decisive.

Thus the position remains that the analysis has to pay attention to the advantaged group. If Lord Walker’s approach is to be preferred, and as a matter of precedent we hold that it is not binding on us, there may occasionally be some softening of that line, yet it would yield no different result in this appeal.

24. As to justification, the legal principles are as follows:-

“43. The domestic law has been developed from the principles articulated in the ECJ case law, in particular the “tripartite” test at para 36 in the well known decision of the ECJ in

Bilka – Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317, namely:

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

and the need for national court to apply the principle of proportionality in considering justification [Enderby v Frenchay Health Authority [1993] IRLR 591].

44. The latter was explained by Lord Nicholls in Barry at pp. 587:

“...In other words, the ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact on women or men, as the case may be, the more cogent must be the objective justification...”

45. See also the judgment of Sedley LJ in Allonby at paras 23-25, 27 and 29. As Sedley LJ put it, criticising the approach of the Employment Tribunal in Allonby:

“...Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter...”

That is a reference to the judgment in Allonby v Accrington and Rossendale College [2001] IRLR 364.

Conclusions

25. With those principles in mind, we have decided to accept the arguments of the Respondent on most of the points and that the appeal should be dismissed. We will take an analytic approach to the Act based upon its basic elements.”

123. In *R on the application of Wilson (No 2) v Lord Chancellor* [2014] *EWHC 4198*, the imposition of various fees for employment tribunals cases was challenged. LJ Elias stated:-

“Indirect discrimination

65. *The claimant advances this ground under a number of different statutory provisions. It alleges that the imposition of the new fees regime under the 2013 Order is indirectly discriminatory under EU law, under the Convention (Article 6 read with Article 14), and under section 19 of the Equality Act 2010 as against women, ethnic minorities, disabled people, transgendered people, gay and lesbian people, those holding particular religious or other beliefs and those falling within particular age groups. However, although the grounds were originally cast in those very broad terms, in fact the claimant's case has focused almost exclusively on discrimination against women and therefore I am only going to consider sex discrimination. The court does not have the material to determine whether there has been any other form of discrimination, although if the sex discrimination claim does not succeed, it is unlikely that any claim based on any other protected characteristic would do so.*
66. *Although the argument is addressed via different non-discrimination principles, it is in my view only necessary to focus on the domestic law which gives effect to EU law. It was not suggested that Convention jurisprudence would provide any fuller protection in the context of this case or yield any different result.*
67. *Indirect discrimination under section 19 of the Equality Act is defined as follows:*
- (1) *A person (A) discriminates against another (B) if A applies to B a ‘provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
- (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
- (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
- (c) *it puts, or would put, B at that disadvantage, and*

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim."*

68. *Ms Monaghan sought to establish indirect discrimination by putting her case in three different ways. The first was that those subject to the fee B regime compared with those paying fee A were disproportionately female. The statistics bear this out. However, it seems to me that the logic of this argument is not that fees cannot be charged or that the scheme should be quashed, which is the relief sought; rather it is that women being indirectly discriminated against for level B claims should not have to pay more than level A fees.*
69. *The issue here is whether the difference in the fee is justified rather than whether any fee is justified. The rationale for the distinction between category A and B cases is that those subject to level A fees are in general likely to take less time than claims falling within category B and therefore use fewer resources. Ms Monaghan submitted that there is no direct evidence of this and that the court should not simply accept counsel's assertion to that effect. I do not accept that. In a document produced by HM Courts and Tribunals Service giving information about the fees it is expressly stated that 'Type A claims tend to be more straightforward for the Tribunal to deal with, and so have lower fees'. Moreover, there is clearly some rationale for the different funding arrangements for groups A and B, and in my view the explanation given is consistent both with the reason for imposing the fees in the first place and with the nature of the claims falling within the two groups. In my judgment, it is legitimate to fix the fees by reference to the service - in the sense of court resources - provided. It is true that the scheme adopts bright line rules; some level A claims will take longer than some level B claims and vice versa. But it is legitimate in circumstances like this to regulate by reference to the cost of the service in standard cases. I would therefore reject this ground.*
70. *The second way in which the claim is advanced is that there is discrimination against those who are bringing discrimination claims. It is not, I think, disputed that the proportion of women who bring discrimination claims is greater than the proportion of men. It is not in fact necessary to provide statistics to establish that proposition (although we have been shown them) and indeed, the Lord Chancellor recognised this to be the case in the Equality Impact Assessment. Ms Chan floated an argument that this did not mean that there would necessarily be an adverse impact on women because there may be a greater proportion of women who could benefit from the fee remission arrangements. But we have no evidence on that and even on the Lord Chancellor's own figures, only some 8.5% of claimants can take advantage of the fee remission (and the claimant says it is more like 5%). Whatever the precise percentage, it is not realistically going to alter the basic picture.*
71. *But I do not think that to select a sub-group of cases within category B is a legitimate way to seek to establish indirect discrimination. It is*

necessary to test any potentially adverse effect of the provision, criterion or practice (PCP) by focusing on all those who are subject to it, the overall pool to whom the PCP is applied. It is not legitimate to take a self-selected group. That simply distorts the true effect of the PCP. Moreover, it yields bizarre results. If there is an adverse impact on women for discrimination claims, there must be a corresponding adverse impact on men for all non-discrimination claims (and apparently there is for unfair dismissal cases, for example). Ms Monaghan's riposte is to say that there may well be indirect discrimination against men in those cases, and that this would need to be justified too. But on that analysis, even if the PCP operated to advantage one sex overall, by a judicious selection of a particular subgroup where the claimants were predominantly of the other sex, it could be shown that the rule indirectly disadvantaged the group predominantly advantaged by the PCP as a whole. By choosing a subgroup which is in practice predominantly of one sex - say nurses or building workers - or by selecting claims typically made by one sex rather than the other, as has been done here, it would be possible to show that there was in fact indirect discrimination being practised in a whole variety of ways and each distinct type would have to be justified. I do not accept that the concept of indirect discrimination has such unacceptable and arbitrary consequences.

72. The Lord Chancellor relied upon two decisions of the Court of Appeal to demonstrate the error of this approach. The first was **University of Manchester v Jones [1993] ICR 474**. In that case the **University** placed an advertisement for a careers adviser who would be 'a graduate, preferably age 27-35 years'. The claimant was age 46 and claimed indirect sex discrimination. The tribunal had regarded the relevant pool as mature graduates only, from which it elicited the respective proportions of men and women who could comply with the condition of being age 27 - 35. The Court of Appeal held that this was the wrong approach. Evans LJ said (p. 501):

'... the statutory concept, in my judgment, is that of a 'pool' or 'relevant population,' meaning those persons, male and female, who satisfy all the relevant criteria, apart from the requirement in question.'

73. The relevant pool in that case therefore was all graduates with the relevant experience. The tribunal had erred by subdividing the relevant pool into a smaller group of 'mature graduates'. This gave a distorted result of the impact of the provision in question.
74. The second case was **London Underground v Edwards (No 1) [1995] ICR 574**. This was a case where a female tube driver argued that putting tube drivers on rostered hours indirectly discriminated against women because they were more likely to be single parents. The Tribunal had considered a pool of only single parent tube drivers to see how many women out of that pool could comply with the roster. Mummery J giving judgment in the EAT, applied **University of Manchester v Jones** and held (p. 582) that the Tribunal had:

'erred in law in having regard to a 'pool' which consisted of only those train operators who were single parents, a subdivision not warranted by the statutory provisions. The pool consisted of train operators, male and female, to whom the new rostering arrangements were applied.'

Lord Justice Potter adopted a similar analysis in the Court of Appeal in that case ([1999] ICR 494, 505):

'The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied.'

75. *In Rutherford v Secretary of State for Trade and Industry (No. 2) [2006] IRLR 551, para. 82 Baroness Hale observed that:*

'Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question.'

"It must equally follow that it cannot be shown by excluding those who are disadvantaged by the rule in question. The pool must be all those who have to pay category B fees in order to be allowed to bring their claims. Accordingly I would reject this argument."

124. It is primarily for the claimant to identify the PCP complained of. The claimant argues that the PCP for the purposes of this case is the interpretation of and implementation of the career break policy by the respondent which leaves career breakers at the end of their break *'in limbo'* with no work, no pay and no compulsory redundancy compensation. This interpretation applied to all those employees seeking to return from career breaks since 2009.
125. The next issue is to determine is the pool for comparison with the disadvantaged group to provide evidence of any comparative disadvantage for the purposes of Article 3(2)(b)(i).
126. The claimant states and it seems common case that the workforce of the respondent since 2001 (when the career break policy came into being) is approximately 2/3 female and 1/3 male – 156 (65.59%) female and 82 (34.45%) male. In 2009, the proportions were 65.2% female and 34.8% male. In 2014, the proportions were almost identical: 65.4% female and 34.6% male. It is therefore clear that the proportions of female and male employees in the workforce has remained relatively constant between 2009 and the present day. Of those employees, 29 have taken career breaks. These break down to approximately 4/5 female and 1/5 male – 23 (79.31%) female and 6 (20.68%) male. Of those 29 employees, 10 employees have been refused re-entry to work and have been placed *'in limbo'*. Those comprise 4/5 female and 1/5 male – 8 (80%) female and 2 (20%) male.

127. The claimant therefore argues that there has been disadvantage against females. Starting from the pool of all the employees to whom the scheme applied, or potentially applied, and then looking at either the pool of all those employees who were given career breaks since 2001 or the pool who were placed ‘*in limbo*’ since 2009, the proportion of females increased significantly from 65.54% to either 79.31% or 80%. There has therefore been a significant disparate impact, in that the potential or real disadvantage to females increased by 14% approximately.
128. The respondent argues that the appropriate pool is limited to those members of staff seeking to return from a career break since 2009 when the PCP applied. Before 2009 all staff whose career breaks had ended were permitted to return (one resigned). It argues that since 2009, 14 career breaks have ended: 5/7 female and 2/7 male – 10 (71.42%) female and 4 (28.57%) male. Some resigned. It argues that those proportions are comparable with the disadvantaged group, ie the group who have been refused a return. Eight female and two male, ie 4/5 (80%) female and 1/5 (20%) male.
129. Mr McKinstry, as indicated above, put forward his own statistical argument in evidence in chief. He argued that the first pool should comprise all those career breakers since 2001 who wanted to return, whether or not they were allowed (pre 2009) to return or (post 2009) not allowed to return. It would exclude those who did not want to return. That first pool would comprise 22 employees, 19 females and 3 males i.e. 86% female. The second pool would be the 10 people who were (post 2009) not allowed to return. There were 8 females and 2 males i.e. 80% females.

Mr McKinstry’s analysis meant that women were less impacted by the impugned PCP.

That seems incorrect because, however ingenious, it incorporates an historically different situation between 2001 and 2009 when the practical application of the policy, if not the policy, changed.

130. The tribunal hopes that no one will take offence if it notes that the phrase which resonates at this point is “Lies, damned lies and statistics”. Anyone can pick their pools and play with the numbers. The three versions presented to the tribunal add to the confusion.
131. The determination of the correct pool is a matter for the tribunal using its experience and commonsense – ***London Underground Ltd v Edwards (No 2) [1998] IRLR 364 (1)***.
132. It is also clear, from the case law cited above, that the correct approach in a case such as the present case, is to focus on those employees who were advantaged (or potentially advantaged) by the impugned PCP. The identification of the advantaged (or potentially advantaged) employees is therefore critical. As LJ Elias stated recently in the ***Wilson (No 2)*** decision above (the Court of Appeal decision on tribunal fees):-

“71. ... It is necessary to test any potentially adverse effect of the provision, criterion or practice (PCP) by focusing on all those who are subject to

it, the overall pool to whom the PCP is applied. It is not legitimate to take a self-selected group.”

133. LJ Elias also referred to the decision in **University of Manchester v Jones** (above) where it was determined that the decision at first instance to focus only on a sub-group of graduates gave the wrong impression. The focus should have been on all graduates with the requisite experience. Similarly, he also referred to the **Edwards (No 1)** decision (above) where the tribunal had considered whether rostering arrangements indirectly discriminated against women who were more likely to be single parents. The tribunal had wrongly focused on single parent train operators, when they should have focused on all the train operators to whom the rostering arrangements applied.

134. In the present case, it is clear that the respondent refused a return to work to all those career breakers who wished to return since 2009. They were retained as employees but with no work, pay and no compulsory redundancy compensation. They could apply for the considerably cheaper option of voluntary severance/retirement and some did. It does not really matter whether the respondent always had believed that it could act in this way or whether, as has been argued by the claimant, this was only a later cost-saving measure adopted in 2009. The question is whether any group of employees was advantaged by this PCP?

It is clear that the non-return of career breakers, and the non-payment of wages or of compulsory redundancy compensation, avoided the need for a compulsory redundancy scheme affecting other employees. The evidence before the tribunal is that such a scheme is now envisaged in 2015/2016 and that it would affect all employees. It therefore appears to this tribunal that the employees who were advantaged by the PCP were those employees actually at work, getting paid and avoiding a redundancy selection process for the time being.

135. The advantaged or potentially advantaged group is not those career breakers whose breaks ended before 2009 and who were permitted to return to work (although one resigned). That group is not relevant to the PCP which applied first in June 2009 and which continues to date.

136. The advantaged group (the first pool) must be the entire workforce of the respondent from 2009 to date, ie:-

- (i) the group of employees to whom career breaks were a potential benefit from 2009 to date; or
- (ii) the group of employees who were advantaged by the cost savings achieved by the imposition of the PCP and the deferral of the need for a compulsory redundancy selection until 2015, 2016 or some indeterminate future date.

137. The legal position in relation to the assessment of disparate impact is complex and it becomes more difficult with the publication of each successive decision on this point. No tribunal or appellate court appears able to resist the temptation to add further legal elucidation to the clear words of the statute. This tribunal is of course no different.

The simple facts of the present case is that the respondent has always had a predominantly female workforce – approximately 65.54% female. The career break policy was open to all those employees. The impugned PCP was applied since June 2009 and those employees whose career breaks ended thereafter were not permitted to return, with no wages or compulsory redundancy compensation. The respondent knew at least since 2009 that employees or career breakers would not be permitted to return. The respondent in cross-examination indicated that a redundancy selection procedure for all staff is now anticipated in 2015 or 2016. That planned exercise is not referred to in the pleadings and seems imprecise. The respondent could not commit to further details. There was reference to the need for a ‘business case’ but it appears no such business case has been made. The claimant has now been ‘in limbo’ for one year.

The persons to whom the PCP applied (the disadvantaged pool) were 80% female. The difference in the percentage of females from 65.54% in the advantaged group to 80% in the disadvantaged group is significant. There has therefore been significant disparate impact against females.

138. The tribunal concludes that the claimant has clearly been disadvantaged personally by the application of the PCP.
139. No objective justification has been shown. The use of the PCP, in breach of the employment contract, to indefinitely deny the right to either work or pay, or to potential contractual redundancy compensation would be difficult to justify. Using the **Bilka – Kaufhaus** test (see above) there is no evidence that the PCP corresponded to a real need of the undertaking. It was doubtless convenient in that it saved some money and deferred the need to use ‘the R word’ (to use the respondent’s phrase). However it cannot be described as a real need. Furthermore, it was neither appropriate or necessary. Temporarily vacant posts could and should have been filled on a similar basis. Once it became clear that funding restrictions meant staff cuts, contractual redundancy schemes should have been implemented. Once it became clear that funding and staffing was going to be restricted, career breaks should not have been permitted or extended, or only extended on explicit terms.

The tribunal therefore concludes that there was unlawful indirect sex discrimination.

Remedies

Indirect Sex Discrimination

140. Compensation can now be awarded for unintentional indirect sex discrimination contrary to the 1976 Order. The Sex Discrimination (Amendment) Regulations (Northern Ireland) 1996 provide for an amendment to Article 65. They state at Regulation 2:

“(2) After Article 65(1) there is inserted –

“1A In applying Article 66 for the purposes of Paragraph (1)(b), no account shall be taken of paragraph (3) of that Article.

1B As respects an unlawful act of discrimination falling within Article 3(1)(b) or Article 5(1)(b), if the respondent proves that the requirement or condition in question was not applied with the intention of treating the complainant unfavourably on the ground of his sex or marital status as the case may be, an Order may be made under paragraph (1)(b) only if the Industrial Tribunal

-
- (a) makes such order under paragraph (1)(a) and such recommendation under paragraph (1)(c) (if any) as it would have made if it had no power to make an order under paragraph (1)(b); and*
- (b) (where it makes an order under paragraph (1)(a) or a recommendation under paragraph (1)(c) or both) considers that it is just and equitable to make an Order under paragraph (1)(b) as well.”*

141. The legislation as amended requires therefore that the tribunal should not jump immediately to an award of compensation under Article 65(1)(b). Compensation is not necessarily the primary remedy. An award of compensation may only be made in the case of unintentional indirect sex discrimination where a declaration (Article 65(1)(a)) and/or a recommendation (Article 65(1)(c)) are considered as if there were no power to award compensation, and then where either a declaration or a recommendation is made, if it is just and equitable to also award compensation.
142. The tribunal has concluded that the evidence of the respondent establishes that it did not intentionally apply the PCP to indirectly discriminate on grounds of gender. It seems clear that the management of the respondent organisation positively believed that, on their interpretation of the statistics and on their selection of an appropriate pool, it was not an act of indirect discrimination. In the circumstances of this case, with this particular respondent, it would have required some significant evidence to establish that this respondent either intentionally or knowingly discriminated in contravention of the 1976 Order. That evidence does not exist and in fact the clear evidence from the respondent establishes that their actions were unintentional. Furthermore, the claimant does not argue that any indirect discrimination was intentional.
143. Apart from the provisions of the amended Article 65, it is clear that even where there is a finding of unlawful direct discrimination (where the provision relating to remedies is slightly different), a tribunal has the option of awarding no compensation at all. In **Chief Constable of Manchester v Hope [1999] ICR 338**, the majority (the lay members) and the minority (Clark J), accepted that in a case of direct race discrimination, it had been open to the tribunal at first instance to consider whether it had been just and equitable to award compensation at all. The dispute between the majority and the dissenting minority in the EAT was whether the tribunal had in fact considered this power or whether they had simply ruled out the option of no compensation.
144. In **O’Neill v St Thomas Moore School [1997] ICR 33** at page 48, Mummery J stated:
- “Under Section 66, a claim for race discrimination is to be treated in a like manner as any other claim in tort, for which it is expressly provided that damages may include compensation for injury to feelings; Section 66(4). It is for the Industrial Tribunal to decide, having regard to all the circumstances,*

whether it is just and equitable to award to the applicant in this case, the remedies specified in Section 65”.

145. The objective in compensation for unlawful discrimination is to put the claimant, so far as possible, in the position that she would have been if an unlawful act had not occurred. Compensation must be “adequate and full” – **Marshall v South West Hampshire Area Health Authority [1993] IRLR 445**.

Injury to Feelings

146. In **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102**, the Court of Appeal stated;

“It is self-evident the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedence. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anxiety, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise.”

“Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The Court and Tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available on the calculation of financial loss or compensation for bodily injury”.

147. Awards for injury to feelings are compensatory only. They should not be used as a method of punishing an alleged offender. While an award should not be unduly low in order to avoid diminishing respect for anti discrimination legislation, they should be restrained and should bear some broad general similarity to the range of awards in personal injury cases.
148. The Vento case set out three bands which have now been increased to take account of inflation. The top band is normally within £18,000 and £30,000 and is restricted to the most serious cases, for example where there has been a lengthy period of discriminatory harassment. The middle band which is now generally £6,000 to £18,000 is for less serious cases and the lowest band, now between £500 and £6,000 is for even less serious cases including where an act of discrimination is an isolated or one off occurrence.
149. This case is extremely problematic in terms of assessing an appropriate remedy. The tribunal has concluded that there was an act of unintentional indirect sex discrimination in applying the PCP from 2009 and thereby preventing the return of the claimant, and others, to the workforce. It has also concluded that there was a breach of contract in that the employment contract as varied by the career break policy provided only for a delay in the return and not for a permanent or indefinite delay.

150. As set out earlier in relation to the UDW claim, it is impossible to assess on the evidence before us whether the claimant would indeed have been selected for compulsory redundancy compensation. That would require the assessment of not just the claimant but the assessment of other employees about whom the tribunal knows nothing against objective criteria which have not yet been settled. Trying to assess the outcome of any such redundancy selection exercise at any particular point in time either before or after the claimant intended to return in early 2014 would be highly artificial to the point of absurdity.
151. The tribunal is also entirely unable on the evidence before to assess the appropriate period for a permitted “delay” in the return of the claimant from her career break. That could be determined by a range of factors about which the tribunal has heard nothing. The tribunal is similarly unable to assess monetary loss when a variation of the working week downwards would have been probable but where neither party knows what that variation would have been.
152. The tribunal therefore concludes that it would not be just or equitable to attempt to award monetary compensation in this case where it would appear that the unlawful indirect sex discrimination is entirely unintentional and where the breach of contract is incapable of any monetary quantification. It is impossible to put the claimant in the position she would have been if the indirect sex discrimination had not taken place (**Marshall** above).
153. In terms of the overriding objective the appropriate course of action for this tribunal appears to be to instead make an appropriate declaration and recommendation.
154. The tribunal therefore declares for the purposes of Article 65(1)(a) in the following terms:-
- “The tribunal declares that the respondent has unlawfully and indirectly (albeit unintentionally) discriminated against the claimant contrary to Article 3(2) of the Sex Discrimination (Northern Ireland) Order 1976.”
155. The tribunal therefore recommends for the purposes of Article 65(1)(c) that:-
- “(1) The respondent shall immediately review the operation and wording of its career break policy;
- (2) the respondent shall immediately review the operation and wording of its contractual redundancy policy; and
- (3) the respondent shall immediately determine the implications of the proper application of both the career break policy and the contractual redundancy policy for the claimant.”
156. The tribunal has no evidence on which it can properly award any other remedy.
157. The tribunal concludes that the claimant must have suffered some injury to feelings in this matter. She entered into a clear agreement with the respondent which allowed for a break and a return to work. That agreement allowed only for a delay. As indicated above, that provision must be interpreted rationally. It did not allow for an indefinite or permanent suspension. The respondent repeatedly failed to make

the position clear to the claimant and did not tell her or even hint to her that she would not be permitted to return until 10 December 2014.

The claimant appears to have had little contact with the respondent's workforce during her career break although it is clear that she latterly met once with an employee whose return had been delayed. She had not been able to discuss that case with her colleague or to determine if she would be likely to be similarly affected. She would have been entitled to expect that the respondent would have alerted her to any difficulty and, in the absence of any such warning, to take it that she would be returning as she had notified.

The tribunal therefore concludes that the injury to feelings was significant. There was no medical evidence of any particular mental injury but the tribunal has concluded that it would not be appropriate to assess the injury in the lower **Vento** band. While this is always an imprecise exercise, having heard the evidence of the claimant in respect of the injury to her feelings, the tribunal assesses the injury as at the lower end of the middle band and awards £7,500.

158. The claimant had not pursued an appeal against the decision to reject her grievance. However the approach taken by the respondent was clearly based on their interpretation of the policy. The claimant had been entirely correct to assume that the respondent's position would not change on appeal and that any appeal would be a waste of time. The respondent's position was as a result of a settled interpretation of its policy which had already been challenged at the grievance meeting.
159. In those circumstances the tribunal has to determine whether the claimant had unreasonably failed to invoke an appeal in accordance with the LRA Code and therefore to determine whether compensation should be reduced.
160. For the reasons set out above the tribunal determines that it would not be reasonable to reduce compensation for injury to feelings, particularly since that injury to feelings had crystallised before the grievance meeting and long before any grievance appeal might have been heard. Even a successful appeal (itself highly unlikely) would not have ameliorated that injury to feelings which had already occurred.
161. The tribunal is obliged to consider whether to include interest on an award for injury to feelings – the Industrial Tribunals (Interest on Award in Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996.

Interest at the rate of 8% per annum from the date of the act of discrimination is potentially payable. The EAT stated in ***Derby Specialist Fabrications Ltd –v- Burton [2001] IRLR 69***:

“It is clear that Parliament intended that, unlike interest on other awards where the midpoint was to be taken, interest on an award for injury to feelings should normally be from the date of the discriminatory act.”

There is no indication that serious injustice would be caused by calculating interest over this period.

Interest at 8% is therefore awarded from 12 January 2014 to 4 February 2015:

12 January 2014 to 11 January 2015 £600.00

12 January 2015 to 4 February 2015 (23 days):

$\frac{23}{365} \times 8\% \times £7,500 =$ £ 37.80

Total interest £637.80

Vice President:

Date and place of hearing: 25 – 28 November 2014, Belfast

Date decision recorded in register and issued to parties:

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS AND THE
FAIR EMPLOYMENT TRIBUNAL

Elizabeth Kennedy v Equality Commission for Northern Ireland

CLAIMANT SUBMISSION

Introduction

1. The Claimant, a legal officer with the Respondent, went on a career break in 2009. The career break policy forms part of her contract of employment. The maximum period for a career break is 5 years. Towards the end of that period, in order to facilitate a return to work, a person must give notice of their intention to return to work.
2. Within 3 months of the Claimant going on her career break the Respondent made a permanent legal officer appointment from a reserve list following a recruitment in 2008. Whilst there was significant instability in legal officer posts prior to 2007 (with many people moving to Government legal posts in and around 2006) after the 2007 economic crash public sector legal jobs became much sought after. There has been little movement in the legal officer posts since 2007/8.
3. The Claimant sought to return to work at the end of a five year career break in January 2014. She notified the Commission of her intention and met Mr McAlorum in December 2013. She was informed that there was no suitable position for her to return to and little prospect of an imminent return. She was informed that other staff officers (including a legal officer) were also seeking to return after a career break. The Claimant learned that there had been a permanent legal appointment in the spring of 2009 after she sought to return to work in the autumn of 2013: in the replies provided by the Respondent in the course of proceedings.
4. The Claimant has not been paid since the date her career break ended – 12 January 2014. No effort to reorganize or restructure to facilitate her return has been made and none is likely to occur until 2015 or 2016.
5. It is the Respondent's case that the career break policy impliedly, if not expressly, contains a term or terms triggered by a person taking a career break which permits leaving a person at the end of their career break with no work and no pay, and at the same time does not require

restructuring, reorganization or activation of the redundancy policy. This leaves employees such as the Claimant in employment 'limbo' – with no work and no pay but without the benefit of restructuring or reorganization or application of the redundancy policy. (See Bundle at 104 and notice of appearance at paragraph 19)¹

Claim

6. The Claimant alleges that the Career Break policy as interpreted and applied or operated:
 - a. breaches her contractual and statutory rights to pay when ready and willing to work;
 - b. breaches her contractual and statutory rights to benefit from the application of the redundancy policy where, by reason of changed circumstances (including the ending of her career break), there is a staff surplus;
 - c. constitutes indirect discrimination as predominantly females take career breaks.

Career Break policies

7. Employees rarely have an absolute right to a career break. It is submitted that the objective of career break policies is to facilitate an unpaid break in employment for permanent staff whilst preserving their status as a permanent employee, in particular their right to return to a job.
8. In determining whether an employee can have a career break (or an extension) an industrial balance is struck between the requirements of the business and a commitment to try and accommodate the employee. This is achieved by a number of devices:
 - a. Whether or not to permit a career break is discretionary
 - b. The employer exercises discretion over the length of the career break
 - c. Often temporary and 'fixed term contract' staff are used to discharge the role during the break
 - d. Often the employee is given no guarantee that he or she will return to the job they were doing prior to the break, but will return to a suitable job.
9. The Respondent's Career Break policy is apparently analogous to, and modeled on, the civil service career break policy. The civil service

¹ It is accepted that 'employment purgatory' may be a better term, but the term 'employment limbo' has been used throughout the case to indicate this scenario in which the Claimant and nine others have at some time been placed by the Respondent.

policy is not unusual in its construction. However it is submitted that nowhere in the civil service career break policy is there any indication that a person can be placed in employment limbo.

The impugned policy

10. The Claimant challenges the Respondent's interpretation of the Career Break policy whereby by way of a contractual variation triggered by a person taking a career break, the Respondent can, at the end of the career break, leave the person without work or pay; and, that the Respondent has no obligation to conduct a restructuring or reorganization or apply the redundancy policy.²
11. Specifically by taking a career break the employee is treated as having agreed to the variation and diminution of their contractual rights – specifically that the employee can be left unpaid and without work but not benefiting from the restructuring, reorganization or the redundancy policy. Consequently the way the Respondent operates the policy leaves career breakers (persons taking career breaks) disadvantaged and detrimentally affected by reason of their taking the career break.
12. It is questioned why the Respondent has been appointing permanent staff to temporary vacancies created by career breaks, which appears to be one or the reasons the Claimant (and others) have ended in employment limbo.(See Mr McAlorum's evidence.)
13. Mr McAlorum seemed to accept that the Commission had not fully considered the implications of making such permanent appointments for career breakers. In the Spring of 2009 the Commission had no reason to appoint Conal McBride. In persisting with permanent appointments when it was on notice of the problem of having no room for returning career breakers, the Respondent has failed to fully appreciate one of the main points of a career break policy – to preserve an employees right to return.
14. The question of notice lies at the heart of this case. If when contemplating a career break (or extension) a person is put on notice that by taking a career break they may not have a job to return to, employees would think twice about applying or seeking an extension. It is central to the Claimant's case that the Respondent failed to make its policy (i.e. involving the contractual variation permitting employment limbo) clear to people taking career breaks, either

² As evidenced at page 104 of the bundle and paragraph 19i of IT3 it is the respondents position that by taking a career break a person contractually agrees (expressly or impliedly) to this employment limbo.

verbally or in writing. It failed to explain the potential consequences of taking a career break under the policy as operated by the respondent to career breakers (such as the Claimant).

15. Mr McAlorum accepted that no restructuring or reorganization had occurred in relation to, or that could facilitate, the Claimant since she indicated her intention to return. She was left in a state of uncertainty, not knowing when there may be restructuring or re-organisation that might create an opening for her. The policy operated permits potentially indefinite (until retirement) deferral of her return to work. (Given Mr Brown's evidence, it does seem that a redundancy process is contemplated in 2015 or 2016.)
16. Where at the end of her career break an employee such as the Claimant has indicated that she is ready and willing to return to work and the Respondent cannot find a suitable position for the Claimant, it is contended the Respondent must:
 - (a) pay the Claimant while she remains an employee; and,
 - (b) undertake a reorganization potentially involving a redundancy selection exercise wherein the Claimant may be amongst the pool of potentially redundant employees and at the end of that process either make the Claimant redundant or place her in a suitable position, or
 - (c) simply terminate her employment lawfully in accordance with contract and statute.
17. It is the Claimant's case that the career break policy being operated by the Respondent is aberrant, defective and irrational - the means are at odds or at war with the ends. It is hallmarked by a lack of transparency.
18. It is submitted that the challenged interpretation of the policy may well be a pragmatic response to the problem created by making permanent appointments when people were on career breaks. That by taking a career break one's contract is varied leaving a person uncertain of their employment future and vulnerable to being placed in employment limbo is not clearly spelt out in the policy. It is submitted that this particular aspect of the policy as operated by the Respondent may only have been conceived or thought up when surpluses started to surface after 2008. [See page 57] It was first introduced in early 2009. Whenever it was first conceived, it is not visible in the career break policy document. It is submitted that it was an irrational, wrong and impermissible response to the problem of having an over complement of staff that occurred after 2008, created in part by appointing permanent staff to temporary vacancies.

Contract

19. If an employee is ready and willing to work, she is entitled to her wages unless there is a specific term which provides otherwise.³
20. To effectively lay someone off and not pay them, without contractual authority, amounts to a fundamental breach of contract.⁴
21. A person is entitled to their wages unless there is a **specific** term providing otherwise. (*Harvey*, as cited above)
22. Until she attempted to return to work, the Claimant was never informed by her employer in words or writing that this right to leave her with no work or pay was part of the career break policy.
23. A proper interpretation of Paragraph 10(1) involves reading the entirety of the clause and contextualizing same. The clause provides for a returning career breaker to return to work as follows:

It will not always be possible to assign staff returning from a career break to their former positions. If this situation occurs staff will be assigned to vacancies as and when they arise in their grade and department or the equivalent grade or department following any restructuring or reorganization arrangements.

24. The policy clearly contemplates restructuring or re-organisation to address the implications of a returning career breaker, which presumably can include application of the redundancy policy. It is submitted that the clause cannot be taken to contemplate a huge delay during which a person is not paid and no such restructuring or reorganization takes place. Indeed the tension in this clause appears to lie between having to pay a person where there is no work to discharge, and expediting the restructuring or reorganization to ensure any pay for no work period is minimized. From a pay perspective, any delay in paying an employee ready and willing to work without authority is presumptively unlawful.⁵
25. At paragraph 10(2) the Policy appears to lift a clause from the civil service policy, but leaves out the part which requires agreement with Human Resources for a person to take up a temporary position. Here

³ *Harvey on Industrial Relations and Employment Law*, Division B1 / B Employers duty to pay wages, at para 7; *Miller v Hannworthy Engineering Limited* [1986] ICR 846; *Beveridge v KLM UK Ltd* [2000] IRLR 765; *Burns v Santander UK* [2011] IRLR 639

⁴ *Devonald v Rosser and Sons* [1906] 2 KB 728; *Neads v CAV Ltd* [1983] IRLR 360 and paragraph 48 onwards.

⁵ See below in relation to the implications of delay for justification.

the Equality Commission policy does not address the issue raised by the Claimant in her evidence that the uncertainty over her employment future would be unattractive to an alternative prospective employer. The civil service policy clearly references an employee taking up temporary work only and by agreement with Human Resources.

26. It is not accepted that paragraph 10(2) expressly or implicitly makes it clear that persons will not be paid if there is no job or work on their return. Indeed it is lifted from the civil service policy and there is no evidence or indication that the civil service policy contemplated withholding of pay.⁶
27. It is the Respondents case that on taking the career break the employees agrees to the variation of the contract leaving her potentially in limbo. It is submitted that the law would only countenance such a 'mutual' variation on a very clear understanding of same on the part of the employee. The policy does not make it clear that on taking a career break a person forfeits the right to return to a job and pay.
28. Whilst a term can be implied into a contractual agreement, the relevant test for implying terms is *what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*⁷
29. It is submitted that no such term permitting employment limbo can be implied into this contract:
 - a. The alleged contractual variation so fundamentally compromises an employees contractual and statutory legal rights that such a term cannot be implied lightly; [as outlined above, it is submitted that the law would not imply a term without it being abundantly clear to an employee that the contract contained such a term.]
 - b. It is not accepted that such a policy was contemplated by the drafters;
 - c. There is no custom or practice in the respondent organization establishing an accepted practice amounting to a contractual term;

⁶ In the Respondent's latest submission, the contention at paragraph 34 that the NICS policy is the same or broadly similar to the Equality Commission policy is rejected. There is no evidence or reason to believe that civil servants can be condemned to unpaid limbo.

⁷ See *Chitty on Contracts*, Volume 1 Chapter 13, extract; and the IRS extracts found in the authorities bundle.

- d. The implied term is not consistent with the objectives of a career break policy, whereby it would compromise fundamental rights of a career breaker;
- e. The Respondent can achieve its objectives in other ways without having a policy or practice which is so diametrically at odds with fundamental employment principles (redundancy rights, contractual rights), equality and rationality;⁸
- f. It must be highly questionable whether the law would imply discriminatory terms and the following is relevant:
 - i. Section 1 of the Equal Pay Act (NI) 1970 is relevant which implies an equality clause into a contract;
 - ii. Articles 77 and 77A of the Sex Discrimination (NI) Order 1976 are relevant – prohibiting discriminatory contractual terms;
 - iii. That the import would be to disproportionately disadvantage females.

30. It is the Claimant's case that no such term can be implied – without clear words the law could not countenance such a contractual variation permitting the placement of an employee such as the Claimant in employment 'limbo' – i.e. where they remain an employee but without work or wages (effectively laid off) but unable to avail of reorganization, restructuring or the application of the redundancy policy, i.e. the opportunity to compete for a position or obtain the benefit of a redundancy payment.

31. Moreover the law is not sympathetic to policies which are inherently irrational and flawed and operate to the disadvantage of the people they were designed to accommodate.

Indirect discrimination

32. As set out above, the career break policy operated and applied by the Respondent involves a variation of a career breakers contract to their detriment – opening the door to employment limbo. Consequently those to whom it is applied (i.e. career breakers) are disadvantaged by having their contractual rights diluted and being placed in a vulnerable position regarding their future employment. Moreover

⁸ It is submitted that there is in this case a nexus between the 'Implied term' issue and the issues of indirect discrimination and the justification defence. A Tribunal or Court could only countenance implying a term which would potentially justify indirect discrimination after very careful consideration of all the relevant factors. And it is questionable how permissible such a step would be. (See bullet point f above)

some career breakers are actually disadvantaged by being placed in employment limbo.⁹

33. The relevant statutory provision is article 3(2) of the Sex Discrimination (NI) Order 1976 which reads:

(2) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if—

(b) he applies to her a provision criterion or practice which he applies or would apply equally to a man, but—

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

(ii) which puts her at that disadvantage, and

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

34. In a nutshell the Provision Criterion or Practice is the Respondent's interpretation of the Career Break policy whereby by reason of the person taking the career break by reason of a contractual variation the Respondent can, at the end of the career break, leave the person without work or pay (effectively laid off); and that it has no obligation to reorganize or restructure or apply the redundancy policy.¹⁰

35. Specifically a person is disadvantaged and detrimentally affected by taking the career break because, according to the employer's interpretation and operation of the policy, by taking a career break the employee is agreeing to the variation and diminution of their contractual rights – specifically that the employee can be left unpaid and without work but not benefiting from the redundancy policy.

36. Career breakers are subjected to **potential** disadvantage by reason of the terms of the policy as it is interpreted by the employer – their contractual rights are diminished. (See Article 3(2)(b)(i), above)¹¹

37. They can then be put to **actual** disadvantage when they seek to return, as was the Claimant along with 9 others.

⁹ The Respondent's latest submission at paragraph 36 retrospectively and inaccurately seeks to unpick the Claimant's case on the PCP. The PCP was clearly and consistently referenced throughout the case, as defined in this submission, and is premised upon the Respondent's interpretation and application of the career break policy as evidenced in the relevant decision (see page 104 of the bundle). The Respondent's witnesses took no issue with the PCP in their evidence. As evidenced at page 104 and para 19 of IT3 it is the Respondent's position that by taking a career break a person contractually agrees (expressly or impliedly) to this employment limbo.

¹⁰ See *Wellworthy v Singh* EAT

38. Relevant statistics disclosed by the Respondent indicate as follows:

- a. Since 6/9/01 to date there have been 156 females employed and 82 males; [ratio of approximately 2-1]
- b. In that time 31 career breaks have been taken (6 males) with 29 individuals taking career breaks (6 males); [ratio of approximately 4-1]
- c. 8 Females have been placed in the Claimant's position, i.e. 'employment limbo', and 2 males. [ratio of approximately 4-1]

39. It is submitted that the career break policy predominantly affects females. This is clear from the above statistics: even making allowance for the greater number of females employed by the Respondent, the number taking career breaks is significantly greater and the number actually put to a disadvantage (limbo) is greater. The comparison is between women and men who are potentially disadvantaged. Four times more women than men have been placed at a potential disadvantage by taking the career break. (Unsurprisingly the same ratio were ultimately placed in employment limbo.)

40. It is not essential to demonstrate the disadvantage by the use of pools.¹² However, where possible, Tribunals and Courts look to see if disadvantage can be established using pools, and whether the 'McCausland' formula can be applied.¹³ In this case it can and one ends up with the same statistical result.¹⁴

41. It is submitted that this is indirect discrimination. [*Eweida v British Airways* [2010] IRLR 322, paragraphs 12-18.]

42. The Respondent's pool (being career breakers) incorporates the impugned discriminatory PCP and is therefore flawed. In *ex parte Schaffter* [1987] IRLR 53 Schieman J stated as follows:

13

In order to understand the argument it is convenient to establish an agreed nomenclature. I propose to use the following terms: Lone Parents; Single Lone Parents; and Married Lone

¹² See generally Harvey, part L, Indirect Discrimination

¹³ *McCausland v Dungannon District Council* [1993] IRLR 583

¹⁴ Applying *McCausland* - F means females employed in the relevant period, M means males employed in that period, FCB means females taking career breaks in that period and MCB means males taking career breaks in that period - the calculation is FCB divided by F as against MCB divided by M. The comparison is between the proportionate number of men who would be disadvantaged by the policy and the number of women who would be disadvantaged by the policy. Using the statistics - $6/82 = 0.073 \times 100 = 7.3\%$ males potentially adversely affected by the policy compared to $23/156 = 0.147 \times 100 = 14.7\%$ females potentially adversely affected by the policy involving an alleged contractual variation. Taking the *McCausland* formula to its further point, those numbers of 7.3% males and 14.7% can be expressed as demonstrating that twice as many females than males (or 49.66% of males as against females) are subject to the alleged contractual variation and would potentially be disadvantaged by the policy. Roughly the same ratio or percentage applies to those who have actually been put to the disadvantage, i.e. placed in employment limbo.

Parents. Lone Parents are parents not co-habiting with a partner, but who have one or more dependent children. The group of Lone Parents I propose to sub-divide into two sub-groups: Married Lone Parents and Single Lone Parents. The sub-group Married Lone Parents comprises those Lone Parents who were married but whose marriage has terminated as that term is defined in Regulation 5(3) of the Principal Regulations, which provides: 'For the purposes of these Regulations a person's marriage is to be treated as having been terminated, not only by the death of the other spouse or annulment or dissolution of the marriage by an order of a court of competent jurisdiction, but also by virtue of the parties to the marriage ceasing ordinarily to live together, whether or not an order for their separation has been made by any court'.

14

Single Lone Parents are those Lone Parents who have never married. It is manifest that the group of Lone Parents and each of the two sub-groups can also be divided into male and female.

15

While there is room for argument about detail, the essential demographical facts are not substantially disputed, and are the same whether one looks at the population as a whole, or merely at the student population, and they have broadly remained constant during the relevant years. They are as follows, and I take the figures, not directly, but in substance from paragraph 14 of Mr Lewis's affidavit sworn on behalf of the respondent. 1. About 80% of lone parents are female. 2. About 80% of married lone parents are female. 3. About 80% of single lone parents are female. 4. About 20% of female lone parents are single. 5. About 20% of male lone parents are single. 6. The male and female population in the country at large are roughly equal.

16

The Regulations operate so as to give Hardship Grants to married lone parents, but so as to deny Hardship Grants to single lone parents. The effect of this, and of the statistics I have just set out, is this:

1. There is no significant difference between the percentage of female lone parents who are single, and the percentage of male lone parents who are single.
2. There is a decisive difference between the percentage of lone parents who are female and the percentage of lone parents who are male.
3. In consequence, there are some four times as many female lone parents who are ineligible for Hardship Grants as there are male lone parents who are ineligible for Hardship Grants.

17

Thus far, there is no substantial dispute between the parties. What is at issue here is whether this agreed background reveals a *prima facie* case of indirect discrimination which the Secretary of State would need to justify.

18

Mr Mummery, for the Secretary of State, points to the first effect, and submits that the sexes are being treated alike. Clearly, there is discrimination between married lone parents and single lone parents, but that is not complained of as such.

19

Mr Sedley, for the applicant, points to the third effect and says that it is clear that the effect of the eligibility for the Hardship Grant test is that many more women will be inhibited from taking vocational training than men, or alternatively be financially disadvantaged if they do so. This

shows, he submits, on the face of it, that the principle of equal treatment enshrined in the directive is not being observed. He acknowledges that the Secretary of State can still attempt to establish that the eligibility test can be explained by objectively justified factors unconnected with sex – but that is a second issue with which I will deal later in this judgment.

20

Mr Mummery, for the Secretary of State, seeks to meet this attack as follows. He submits:

1. In order to determine whether there is indirect discrimination a comparison has to be made in order to see whether one sex has been treated less favourably than the other.
2. The eligibility test complained of only disadvantages single lone parents. One can ignore married lone parents.
3. The proportion of female lone parents who are single is the same as the proportion of male lone parents who are single, that this is conclusive on the point of discrimination and thus shows there is no discrimination.
4. The fact that in absolute numbers substantially more females than males are adversely affected by the eligibility test is irrelevant.

21

612.1, 698

I do not accept either the last 16 words of point 3 or point 4. In my judgment, leaving aside the question of jurisdiction for the moment, the principle of equal treatment enshrined in the directive is, *prima facie*, not being observed if, in a situation where there is an equal number of men and women in the population, one sees a practice working in reality in such a way that many more women than men are adversely affected by it.

22

S.1 of the Sex Discrimination Act, 1975 is not directly relevant, but does not in my view point to any other conclusion. The section provides: 'A person discriminates against a woman ... if ... he applies to her a requirement or condition which he applies or would apply equally to a man but – (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (iii) which is to her detriment because she cannot comply with it'.

23

Looked at on its own, the subsection would seem to indicate that what you should do is to establish: firstly, the proportion of all women who can comply with the requirement – I shall call this X%; secondly, the proportion of all men who can comply with the requirement – I shall call this Y%; thirdly, compare X and Y and determine whether one is considerably smaller than the other.

24

In most cases, both X and Y will be very small percentages, but since one is comparing X with Y the difference between one percent and two percent is no less significant than the difference between 30% and 60%. In consequence, if the pool of which the percentages are taken includes all humanity it does not matter if the practice under attack has no impact on the vast bulk of humanity. You may land up comparing two small percentages, but looked at in terms of each other rather than in terms of the whole, the difference between them is significant.

11

However, if one goes down Mr Mummery's path and reduces the size of the pool under consideration to a very small size there is, as Mr Sedley points out, a very real risk that you have incorporated an act of discrimination into your definition. If I were to adopt Mr Mummery's submission in this case and only look at single lone parents, and then compare the proportion of female lone parents which is single with the proportion of male lone parents which is single, I would indeed find no significant difference, but I would have fallen into precisely that trap.

Mr Sedley urged on me a choice of larger pools consisting either of all students claiming grants, or of all students with dependent children claiming grants. Either of these would get him home on this limb of the argument. In my judgment, the pool should at least be large enough to include all students with dependent children claiming grants. My inclination as at present advised would be to go even wider, but since it would make no difference in the present case I need not pause to consider the point further. It might be relevant were one considering the position of someone who had never become a student, because the exclusion of single lone parents from eligibility for dependants' grants had left her with insufficient money to pursue a vocational course.

43. If one reduces the pool to the career breakers one incorporates the act of discrimination – the contractual variation permitting employment limbo – into the definition. The pool must be broader. The correct pool is all the people with the career break policy in their contract who could potentially go on a career break.

Justification

44. Indirect discrimination can be justified. A policy can be justified where it is a proportionate means of achieving a legitimate aim. As a general rule the justification should not simply be a matter of saving money.
45. *Harvey on Industrial Relations and Employment Law* at Part L provides as follows:

The leading case is a decision of the European Court of Justice: *Bilka-Kaufhaus GmbH v Weber von Hartz* 170/84, [1986] IRLR 317, [1987] ICR 110, ECJ.

'*Bilka-Kaufhaus* was a reference to the ECJ from Germany in which the ECJ was asked to rule on the legality of the exclusion of part-time workers from an occupational pension scheme. The ECJ held (cp *Defrenne* in the case of Statutory Retirement Pension Provisions) that an occupational pension scheme, albeit one supplementing a State benefit, did fall within the scope of art 119 and the benefits provided under such a scheme were 'pay' for the purposes of the article. Cross referring to their decision in *Jenkins*, the ECJ ruled that if 'it should be found that a much lower proportion of women than of men work full-time, the exclusion of part-time workers from the occupational pension scheme would be contrary to art 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex'. Resolving the doubts raised in their decision in *Jenkins* the ECJ then

proceeded to find that 'in order to establish that there has been no breach of art 119, it is not sufficient to show that in adopting a pay practice which in fact discriminates against women workers, the employers sought to achieve objectives other than discrimination against women. The Commission considers that in order to justify such a pay practice from the point of view of art 119, the employer must, as the court held in its judgment of 31 March 1981 [*Jenkins*], put forward objective economic grounds relating to the management of the undertaking. It is also necessary to ascertain whether the pay practice in question is necessary and in proportion to the objectives pursued by the employer'.

Bilka was cited with approval by the Supreme Court in *Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority* [2012] UKSC 15, [2012] IRLR 601 in which, at paragraph 19, Lade Hale stated 'The approach to justification of what would otherwise be indirect discrimination is well settled. A provision criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination ... [and] can encompass a real need on the part of the employer's business.'

[Jumping to the part specifically addressing proportionality]

(iii) *Proportionate means*

[352]

The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. While domestic legislation uses the word 'proportionate' in preference to the phrase 'appropriate and necessary' which appears in the Equal Treatment Framework Directive (2000/78/EC; see arts 2.2(b) and 6.1), it is considered that the ECJ has used the two terms interchangeably. The more serious the disparate adverse impact on a protected group, the more cogent must be the justification for it. Guidance on the way in which this balancing exercise should be carried out was provided by the Court of Appeal in *Hardys & Hansons plc v Lax* [2005] IRLR 726, [2005] ICR 1565 (see para [340]), an appeal relating to a complaint of indirect discrimination on grounds of sex. The court held that it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The court emphasised that there is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal.

[352.01]

In an education case determined by the Administrative Court— *G v St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin), [2011] All ER (D) 113 (Jun), [2011] EqLR 859, a school uniform policy prohibiting boys from wearing their hair in cornrows was found to indirectly discriminate on grounds of race. It was accepted that the school had a legitimate aim—to discourage gang culture—but where the blanket nature of the prohibition did not allow for exceptions where there was a genuine cultural or family practice of not cutting hair and wearing cornrows, the policy was found not to be a 'proportionate' one.

[353]

Where indirect discrimination arises in the context of action by the State, a similar principle arises. It is not enough for the State, in seeking to show justification for a particular act or policy, to show that the relevant minister (as Secretary of State) has acted in a way that would be open to a reasonable Secretary of State: *Hockenos v Secretary of State for Social Security* [2004]

EWCA Civ 1749, [2005] IRLR 471, CA. Instead, proportionality must be taken into account and, in order to succeed, the Secretary of State must be able to demonstrate that he has weighed up the discriminatory aspects of the disputed acts against the countervailing social advantages that he considers would apply if the policy were to be followed. Put shortly, it is not for the disadvantaged claimant to show that there is another way of bringing about the State's objectives.

[354]

There is nothing to prevent an employer relying on 'after the event' justifications which were not actually considered at the time. In *Cadman v Health and Safety Executive [2004] IRLR 971, [2005] ICR 1546* the Court of Appeal held that there is no rule of law that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer. But it may be more difficult for an employer to discharge the burden of establishing justification where there is no evidence to show that it ever applied its mind to the question of whether there was another way of achieving the legitimate aim that would avoid or diminish the disparate adverse impact on the protected group – see *Hockenjos v Secretary of State for Social Security [2005] IRLR 471, CA*.

[355]

The decision of the European Court of Justice in *Mangold v Helm C-144/04, [2006] IRLR 143* illustrates the application of the principle of proportionality to legislation which contravened the age discrimination provisions of the Framework Directive. Under German law, restrictions on the maximum term of a fixed-term contract and the number of times that a fixed-term contract could be renewed did not apply to an employee who had reached the age of 52. The purpose of the exception was to promote the vocational integration of unemployed older workers, on the ground that they encounter considerable difficulties in finding work. The Court of Justice held that although this was a legitimate public-interest objective, the means used to achieve that objective could not be regarded as appropriate and necessary. The legislation in question excluded workers from the benefit of stable employment solely on the basis of age, regardless of any other consideration linked to the structure of the German labour market or the personal situation of the worker concerned. It therefore went beyond what was appropriate and necessary in order to attain the vocational integration of unemployed older workers.

[356]

Confirmation that even where the respondent has a legitimate aim, if the means used to achieve that aim are disproportionate, justification will not be established can be found in the decision of the Court of Appeal in *Allen v GMB [2008] EWCA Civ 810, [2008] IRLR 690, [2008] ICR 1407* held, in the context of a trade union that – whilst seeking to pursue legitimate aims of avoiding job losses, privatisation and cuts in hours, and achieving the best possible pay protection for a larger group of male and female members – had sought to persuade a smaller group of female members to accept a deal with their employer by means that were not proportionate and were, therefore, not justified.

The availability of alternatives to the discriminatory means being considered will be relevant to the question of whether the means adopted are proportionate. The employment tribunal in *Harrod v Chief Constable of West Midlands Police [2014] EqLR 345* considered a claim of indirect age discrimination brought by more than 200 police officers who had been forced to retire, having at least 30 years service and being at least 48 years old. There were legitimate aims, relating not only to cost but also increased efficiency, but the failure to consider alternatives to compulsory redundancies was such that the means adopted to achieve the aims were not proportionate.

46. It is submitted that the respondent cannot justify its policy for the following reasons:

- a. Without clear agreement, it cannot be proportionate to impose a detrimental variation of contract compromising contractual and statutory rights on persons seeking to avail of a career break. The Respondent ought to have negotiated specific terms with NIPSA if it wanted to compromise its employees contracts in such fashion. It is submitted that NIPSA would have baulked at such a proposal.
- b. Failing to clearly explain to an employee the potential implications of the policy which involves a fundamental breach of contract – i.e. leaving them on their putative return to work without a job or pay or the benefit of restructuring / redundancy - appears manifestly unreasonable.
- c. It is submitted that the Respondent has failed to apply the terms of the contract i.e. undertake restructuring and reorganization to facilitate work opportunities for returning career breakers.
- d. It cannot be proportionate to rely upon the implication of a term into a contract which is clearly indirectly discriminatory.
- e. It cannot be proportionate to rely upon the implication of a term into a contract in a case such as this which breaches fundamental principles of employment law i.e. the right to work and be paid; and the right to lawful redundancy selection and fair process.
- f. The policy appears to have been arbitrarily introduced because of the substantial change in the level of transience around 2007/2008/2009. But at the same time there was a failure to properly or fully consider the matter as admitted by Mr McAlorum, when more considered analysis may have led to a reassessment of the clear preference to making permanent appointments when people went on career breaks.
- g. Indeed Mr Brown's approach appeared to be that permanent appointments are necessary and if one does not interpret the career break policy as permitting 'employment limbo', then the career break policy would have to be scrapped. He pointed to anticipated pressure from staff and unions if career breaks were not granted. However it is respectfully submitted that this analysis and justification of the policy is obviously flawed:

- i. An employer has discretion whether to permit career breaks – there is no right to a career break;
 - ii. Permanent appointments are not always necessary.
- h. The policy as applied since 2008/9 appears defective and aberrant, the policy as applied is at war with the objective of a career break.
- i. There was and is a clear alternative approach – i.e. how employers ordinarily operate such policies:
 - i. Use discretion whether to grant a break;
 - ii. Give the employee a clear understanding of the implications of a career break;
 - iii. Use of temporary staff;
 - iv. No guarantee of a return to the specific job discharged prior to the break;
 - v. Use of redundancy, if need be.
- j. Temporary solicitors are regularly used in legal offices and departments. The Equality Commission used temporary solicitors from time to time including during the period 1998 to 2006. From 2007/8 onwards, the Respondent was under reduced and little pressure in relation to transience in the workforce – and in particular the legal department. There has been little or no staff movement in the legal department since the departure of Mr Gillam in 2007 and his replacement by Ms Armstrong. There was no need to appoint a permanent member of staff to the Claimant's job.
- k. Appointment of a permanent member of staff in Spring 2009 compromised the Claimant's position. The appointment appears particularly puzzling when, prior to the appointment, there was a problem facilitating the return to work of a legal officer, who had been on a career break, and was seeking to return at that time, i.e. spring 2009. It ought to have been apparent that, given reduced staff transience given labour market change following the crash, by persisting in making permanent appointments to cover temporary staff vacancies management would potentially create an over complement of permanent staff in certain grades and departments.
- l. The appointment of a permanent staff member as soon as the Claimant went on her one year break appears to breach the career break policy at paragraph 9.1.

- m. The policy is internally contradictory and flawed – one cannot justify discrimination on the basis of an unnecessarily illogical and irrationally operated policy.
- n. A Tribunal would be more willing to contemplate justifying an indirectly discriminatory policy which provides for and/or in fact causes a short delay in a return to work (for example of up two months) whilst the employer endeavours to identify a suitable opening; whereas a Tribunal is less likely to be sympathetic to an open-ended policy which leaves people in limbo for many months and in some cases years with little employer proactivity in seeking to identify a suitable opening and no foreseeable return date.

Redundancy

- 47. Articles 170-171 of the *Employment Rights (NI) Order 1996* define dismissal for the purposes of redundancy. Redundancy is defined at article 174. Lay-off is provided for at articles 182-183.
- 48. For the purposes of this case, the redundancy argument is made in the alternative. The Claimant's first position is that she was not made redundant but remains an employee in this 'limbo' situation. Indeed all of the evidence points in the direction that the parties understand the employment relationship to be subsisting.
- 49. It is contended that the Claimant remains an employee – that she is owed wages to the date of hearing – that she stands ready to benefit from reorganization, restructuring and the application of the redundancy policy to include redundancy selection and redundancy.

Preferential reinstatement

- 50. This is a contractual or quasi contractual mechanism which involves an employee resigning subject to an agreement or mutual understanding with the employer that he or she may or will be given priority in relation to future vacancies if interested.
- 51. It is submitted that the Respondent's interpretation and application of its policy bears some significant similarity to preferential reinstatement. However permanent employees going on a career break ordinarily expect a job on their return – they have not waived their status as permanent employees with a right to work and be paid. As submitted above, an employee would or should only be taken to have waived such rights where they have done so in clear terms.

Unlawful deduction of wages

52. First principles of employment law establish that where a person is employed they have the right to be paid - arguably the most fundamental rule in employment law is the right of an employed person making themselves available for work to be remunerated - and if an employee's services are no longer required they ought to be lawfully dismissed.
53. The closest the law comes to contemplating non-payment is in provision for short time working and lay-offs to avert redundancies. The Equality Commission has not sought to avail of such lawful possibilities and it is submitted that it would not be entitled to in any event.
54. The Claimant has the right to her pay under contract law and Part IV of the Employment Rights (NI) Order 1996.
55. It is submitted that there was no lawful contractual variation removing the Claimant's statutory or contractual entitlement to pay since 14 January 2014 for the purposes of article 45 of the Order.
56. In not paying the Claimant it is submitted that the Commission is acting unlawfully under legislation and common law.

Conclusion

57. In conclusion the Claimant as a female alleges that she and other females have suffered indirect sex discrimination by reason of the Respondent's operation of the career break policy since 2009. She alleges that the discrimination was triggered by taking the career break because of the interpretation given to the policy, i.e. that a person taking a career break had agreed to the possibility of being left without work, pay or closure at the end of the career break. The Claimant was left in that position from 14 January 2014.
58. The Respondent asks this Tribunal to interpret the career break policy by implying a term giving effect to the Respondent's interpretation of the policy, as referenced above, essentially to give legitimacy to the management of the Claimant's abortive return to work. This is a big ask because the Respondent is not only asking the Tribunal to imply a term that is indirectly discriminatory by disadvantaging females; but also asking the Tribunal then to justify the policy for the purposes of Article 3 of the Sex Discrimination (NI) Order 1976.

59. It is submitted that the Claimant should be successful in this case for the reasons set out above.

Michael Potter BL
Bar Library, Belfast;
Cloisters Chambers, London;
Neil Gillam, Solicitor
Donnelly and Kinder Solicitors

For the Claimant
28th November 2014 (as amended following receipt of the
Respondent's submission 10th December 2014)

IN THE MATTER OF AN APPLICATION TO AN INDUSTRIAL TRIBUNAL

Case Ref. No. 548/14 IT

Between:

ELIZABETH KENNEDY

person discriminates against a woman if the person applies to her a provision, criterion or practice that is applied equally or would be applied equally to a man but:

- which puts or would put women at a particular disadvantage when compared with men; and
 - which puts her at that disadvantage; and
 - which the person cannot show to be a proportionate means of achieving a legitimate aim.
5. The test for disproportionate impact was amended in 2001 and again in 2005. This part of the definition now requires the claimant to show that the application of the provision, criterion or practice puts or would put women at a particular disadvantage when compared with men who are in the same circumstances.
 6. It is for the Claimant to make out a prima facie case of indirect discrimination by proving disparate adverse impact: **Nelson v Carillion Services Ltd [2003] ICR 1256**.
 7. The test for whether or not the complainant is put at a disadvantage is an objective test. There must be actual disadvantage to the individual at the time the discriminatory provision, criterion or practice was being applied. It is not enough to show that the provision, criterion or practice is discriminatory in a general sense.
 8. Even where a complainant establishes that there is an adverse impact it remains open to an employer to defend the discriminatory result of a provision, criterion or practice by establishing that it is justifiable because the application of that provision, criterion or practice is a proportionate means of achieving a legitimate aim. The burden is on the employer to prove the defence on objective grounds and the tribunal will carry out a balancing exercise between the employer's reasonable need to impose the provision, criterion or practice and the discriminatory effect of the provision, criterion or practice.
 9. Consideration should be given as to whether or not the aim could have been achieved in a non-discriminatory manner. It is necessary to weigh up the needs of the enterprise against the discriminatory effects of the requirement or condition.

The Pool for Comparison

10. The legislation requires that the relevant circumstances of the comparison be the same or not materially different. It is of the utmost importance that the correct pool should be identified. The choice of the appropriate pool is a matter for the tribunal to determine on the basis of their common sense and experience. (*London*

Underground Ltd v Edwards (No.2) [1998] IRLR 364 CA) The issue of the pool, in the absence of agreement between the parties, will be a matter for the tribunal.

11. If the PCP is being applied to existing employees then it appears that for these purposes the correct pool comprises all those who are actually or potentially affected by the requirement or condition. It is well established that pools should not include people who have no interest in the particular PCP in question
12. The Court of Appeal in *Jones v University of Manchester [1993] IRLR 218 CA* held that the appropriate pool for comparison in a recruitment case was all those people who could comply with the other selection criteria, apart from the requirement at issue. In *Hacking & Paterson and another v Wilson EAT/0054/09* the EAT reaffirmed that where an indirect sex discrimination complaint is based on an employer's refusal to grant a benefit, the appropriate pool of comparators should include only those employees who want the benefit.
13. In *Chief Constable of Avon & Somerset Constabulary v Chew EAT/503/00* the EAT upheld a tribunal's finding that a requirement to comply with shift rosters in order to be entitled to work part time was indirectly discriminatory. The tribunal considered the appropriate pool to be all officers to whom the condition was applied.
14. In *Rutherford v Secretary of State for Trade and Industry [2006] UKHL 19*, Rutherford and Bentley were two men who had both continued to work beyond the age of 65 and were both subsequently dismissed. R wished to claim redundancy payment and compensation for unfair dismissal, but s.109 and s.156 of the Employment Rights Act prevented this. Statistics showed that a higher proportion of men continued to work beyond the age of 65 compared to women. R contended that since more men than women over the age of 65 were still in employment, relatively more men than women were prevented by the statutory bar from making claims for unfair dismissal or redundancy. R argued that that disparate effect constituted indirect discrimination. R submitted that in determining the proportions of those adversely affected it was necessary to have regard to the statistics for employees under 65 and over 65, but that particular weight should be given to statistics for those over 65. The secretary of state contended that the employment tribunal should look at all the statistics, but in a case like the instant case where the percentages of men and women under 65 who could fulfil the preconditions for having the rights to compensation and to redundancy pay were so close, there was no need to look at the figures for those over 65 who could not.
15. The House of Lords held, inter alia, that the only persons who would be affected by the statutory bar were those who decided to continue in employment after the age of 65. The statistical evidence that more women than men retired before the age of

65, with the consequence that relatively more men were affected by the statutory bar, did not constitute evidence that the statutory bar discriminated against men. All the evidence showed was that the statutory bar applied to relatively more men than women. A difference in treatment of individuals that was based purely on age could not be transformed by statistics from age discrimination into sex discrimination. In order for R to establish indirect discrimination they would have to show that a substantially higher proportion of male workers over the age of 65 than female workers were affected by the rule. It is not sufficient to show that the rule confers an advantage or disadvantage of the post-retirement pension rules and that the reasoning and conclusions of the EAT on the pool issue were correct. As the EAT said while all teachers were affected by the rule it applied only to returners.

19. Accordingly, it is submitted that the appropriate pool for comparison in this case consists of those members of staff seeking to return from a career break to whom the impugned PCP applies. Indeed, since it appears that prior to 2009 all staff taking a career break were facilitated to return to work (one male resigned) that the appropriate pool is those staff seeking to return from a career break since 2009.

20. During 2009 and since it appears that 14 career breaks have ended (10 female and 4 male). The appropriate pool is arguably those male and female members of staff who have sought to return and who have not been able to do so. All of those staff are, of course, equally impacted by the PCP. The pool is coextensive with the entire disadvantaged group.

21. This question was considered by Baroness Hale in **Rutherford**. She stated:

"73 But the notion of comparative disadvantage or advantage is not straightforward. It involves defining the right groups for comparison. The twists and turns of the domestic case law on indirect discrimination show that this is no easy matter. But some points stand out. First, the concept is normally applied to a rule or requirement which selects people for a particular advantage or disadvantage. Second, the rule or requirement is applied to a group of people who want something. The disparate impact complained of is that they cannot have what they want because of the rule or requirement, whereas others can. (Counsel's emphasis)

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

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

76 If that is so, it matters not that there are other men and women who have left the workforce at an earlier age and are thus uninterested in whether or not they will continue to be protected. The people who want the protection are the people who

are still in the workforce at the age of 65. And the rule has no disproportionate effect upon any particular group within that group. It applies to the same proportion of women in that group as it applies to men. There is no comparison group who wants this particular benefit and can more easily obtain it.

...

*82 The common feature is that all these people are in the pool who want the benefit — or not to suffer the disadvantage — and they are differentially affected by a criterion applicable to that benefit or disadvantage. Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question. (Counsel's emphasis) *If it were, one might well wish to ask whether the fact that they were not interested was itself the product of direct or indirect discrimination in the past.*"*

22. In the case currently before the tribunal no male or female in the pool seeking to return is currently able to do so. 100% of men and 100% of women are disadvantaged.
23. In **Eweida v British Airways Plc [2010] EWCA Civ 80** Sedley LJ also considered the question of the appropriate pool. At paragraph 17 of his judgment he stated: "The argument loads far too much on to the word "would". Its purpose, in my judgment, is the simple one indicated at the end of §12 above: to include in the disadvantaged group not only employees to whom the condition has actually been applied but those to whom it potentially applies. Thus, if you take facts like those in the seminal case of **Griggs**, the group of manual workers adversely affected by the unnecessary academic requirement will have included not only those to whom it had been applied but those to whom it stood to be applied."
24. This is not inconsistent with the pool advanced by the Respondent in this case. The only persons in this case to whom the impugned PCP applied or could have applied were those persons who had applied for a career break under the scheme. The established case law principles on the pool for comparison remain relevant. As Sedley LJ observed in the case of **Grundy**: "The correct principle, in my judgment, is that the pool must be one which suitably tests the particular discrimination complained of ..."
25. Of course, it is important to avoid the danger of importing discrimination into the definition of the pool. But that is not what is suggested here. The Respondent contends, as set out by Mr McKinstry in his evidence, that the data supplied comprises career break outcomes since 2001 and contains 31 persons across 4 outcome categories. As suggested by Mr McKinstry it is submitted that considerations regarding 'being facilitated to return' within the career break policy

itself would seem to only meaningfully impact on those who have applied for AND availed of a career break. The only people who *could* be subject to a meaningful consideration regarding whether a return from career break could be facilitated are those who availed of a career break and are thus eligible to return at the end of the agreed period. The pool of those *actually* subject to a decision as to whether their imminent return from career break could be facilitated are those approaching the end of their approved career break who have confirmed their intention to return on the agreed date (i.e. did not resign nor apply for an extension to the agreed career break).

26. Two of the categories within the data have been subject to a decision regarding whether a return could be facilitated – (a) those categorised as ‘return’ (the individual is facilitated to return and thus achieves the outcome requested); and those categorised as ‘impacted’ (the individual is not facilitated to return and thus does not achieve the outcome requested).
27. The data indicates that, over the period, 22 people were subject to a decision regarding whether a return could be facilitated (i.e. those in the ‘return’ or ‘impacted’ categories) comprising 19 females and 3 males. The gender composition of those, over the entire period, who were subject to a decision regarding whether a return could be facilitated was accordingly 86.36% female and 13.64% male.
28. The data indicates 10 people are classified as ‘impacted’ over the period, comprising 8 females and 2 males. The gender composition of those ‘impacted’ over the period a career was therefore 80.00% female and 20.00% male.
29. The gender composition of those impacted i.e. those subject to a decision regarding whether a return from career break could be facilitated (the ‘pool’) was 80.00% female. The gender composition of those subject to a decision regarding whether a return could be facilitated (the ‘pool’) was 86.36% female, the difference being 6.36%. Accordingly, the female proportion (80.00%) of those not facilitated to return to work (‘impacted’), was 6.36 percentage points lower than the female proportion (86.36%) of those subject to a decision (the ‘pool’). Women were proportionally less likely to be ‘impacted’, relative to their representation in the pool.
30. Of those who were facilitated to return 11 were female (91.67%) compared to one male (8.33%). Accordingly, a consideration of the advantaged group also militates against the suggestion that women are adversely impacted.
31. Accordingly, it is submitted that there is insufficient evidence of disparate adverse impact and the Claimant has failed to make out her case to the requisite standard required by **Nelson v Carillion Services Ltd [2003] ICR 1256**. In that case it is not necessary for the Respondent to make out the justification defence.

32. Recent cases have also raised the issue as to whether, in order for an indirect discrimination claim to succeed the relevant protected characteristics must actually have caused the particular disadvantage complained of. In **Homer v Chief Constable of West Yorkshire Police [2010] ICR 987, CA** the Court of Appeal suggested that the PCP complained of must place the claimant's group at a disadvantage on account of the relevant protected characteristic and not because of some other factor. Although the Supreme Court overturned the Court of Appeal decision on the basis that the claimant's group was not a protected group, it did not appear to
37. The Respondent has set out a number of reasons upon which it relies. It is perfectly entitled, indeed as a statutory body it is obliged, to properly and efficiently deliver its services and to do so within budget. The objective of the career break policy is to facilitate staff who wish to take an extended break from work. The career break policy strives to achieve a balance between the wishes of the employee and the impact of the policy on the Respondent's operations as well as on those employees not participating in the scheme. It is also the aim of this policy to contribute to the provision of equality of opportunity.
38. The Respondent contends that the policy's conditions with regard to the duration and number of extensions are a proportionate response to the objective of not overly restricting practical access to the policy. Similarly, the Return to Duty provisions are considered a proportionate means of delivering the policy within the practical constraints imposed by the need to maintain continuity and efficiency of service delivery within the finite financial allocation provided. These correspond to the real business needs and operational requirements of the Respondent and they are entirely legitimate considerations.
39. The Respondent also gave evidence that a number of alternatives to the present arrangements were considered to be less beneficial to potential applicants to or those availing of the scheme and/or not conducive to cost effective and continuous service delivery. These included:
- not filling career break vacancies
 - filling career break vacancies from within the existing pool of employees or by short term temporary contracts
 - restricting opportunities for extensions, removing the option for extension or placing greater restrictions on duration
 - requiring termination of contracts prior to the start of the career break, with limited opportunities for reinstatement at the end
 - requiring contracts to be terminated at the conclusion of a career break if no suitable vacancy can be identified at that time.
40. The attack on the policy from the discrimination angle is essentially two-pronged:
- (a) that appointments should have been temporary or fixed term to facilitate the return of the career breaker;

(b) That if a return could not be facilitated he/she should have been paid or made redundant.

41. It is important not to confuse the discrimination issues and the "employment law" issues in this case. While clearly there is a factual matrix which is interwoven separate considerations apply. The primary issue is whether the application of the PCP is discriminatory and if it is, is it justified.
42. An employer is entitled to consider how best its business and operational needs might be met. In this case the Legal Officer post was filled on a permanent basis from a reserve list following an earlier 2008 recruitment exercise. The Claimant was at all material times aware of the provisions and conditions of the Career Break Policy. It is clearly the case that the Respondent was entitled under the express terms of the policy to fill vacancies which arise as a result of staff taking career breaks on a permanent basis by external competition and it makes clear that this was what it normally did. The Claimant entered this agreement with open eyes. She is "an experienced discrimination lawyer". It is inconceivable that she was not aware of this prospect. Whether the Respondent should have waited until the break was more than 12 months is irrelevant to the discrimination case. The evidence is that the Claimant availed of the full duration of career breaks available to her, that it was the Respondent who had to follow up on her intentions since she breached the deadlines for contacting the Respondent and she expressed, and continued to express, an interest in voluntary exit. In those circumstances it is entirely legitimate that the Respondent should fill her post. It is also entirely reasonable that in such circumstances the Respondent should be prevented from availing of the services of a permanent employee and should be compelled to rely on temporary or fixed terms employees with the attendant difficulties that entailed as evidenced by Mr Brown.
43. Secondly, there was a suggestion made to the Respondent's witnesses that the provisions of 10.1 amounted to "an injunction" to carry out a restructuring or reorganisation. It is submitted that the wording of this part of 10.1 are open to a clear and different meaning. Any other construction would be laboured and contrived. It was also suggested to Mr McAlorum that a redundancy exercise should be carried out each time a career breaker wished to return and there was no vacancy. It is submitted that this is an absurdity.
44. It is also clear from the evidence that not every career breaker wishes to return and there is certainly no evidence that every career breaker wishes to be made compulsorily redundant in the event that there is no vacancy at the time it is anticipated they are to return. Indeed, the "injunction" that such a situation must give rise to a compulsory redundancy exercise is potentially likely to attract the

suggestion that it is indirectly discriminatory on the same grounds posited by the Claimant.

45. Employees who apply for a period of unpaid special leave by career break may apply for a number of years, from one year up to a maximum of five years. However in practice many employees only apply for one year initially. Extensions for a further

50. In *Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714 CA, the Court of Appeal held that an employer who removes an employee from a contractual on-call roster can deny the employee the payment associated with that roster, in circumstances where the employer has the right to remove the employee for health and safety reasons. As a result, the non-payment of the allowance was not an unlawful deduction from the employee's wages.

51. It is submitted (a) that in the particular circumstances of this case the non-payment of the Claimant was not a deduction and/or (b) that if there was a deduction it was agreed in advance and authorised.

52. The basis for a career break is as agreed between the employer and the individual employee. It is governed by the agreement/arrangement between the parties and is not governed by legislation per se. In this case the Respondent has a written policy on career breaks and it is clear that the application for a career break was made under the terms of that policy. It is clear that once the Claimant agreed to enter into the arrangement which she had with the Respondent under the terms of the Career Break Policy, by consent that these provisions governed the return to work. Alternatively, the agreement between the parties authorised the "deduction", if any.

53. There is an additional argument. The Claimant in her email to Bill McAlorum dated 20 January 2014 suggests that she considered her employer to have compulsorily severed her contract, that is dismissed her. While the Respondent does not accept this contention it is difficult to understand how the Claimant can contend she is entitled to ongoing payments where she considered herself dismissed at that time.

Redundancy

54. The final argument relied on by the Claimant is that she is redundant and therefore entitled to a redundancy payment pursuant to her contract.

55. An employer is obliged to pay an employee a redundancy payment if the employee is dismissed by reason of redundancy or is eligible for a redundancy payment by reason of being laid off or kept on short time. (Article 170 of the Employment Rights (Northern Ireland) Order 1996).

56. Under Article 174 of the Employment Rights (Northern Ireland) Order 1996, an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

- the fact that the employer has ceased or intends to cease: to carry on the business for the purposes for which the employee was employed, or to carry on that business in the place where the employee was so employed, or

- the fact that the requirements of the business: for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish.
57. Clearly, the first limb does not apply. It is submitted that given the nature of the career break policy and the fact that the Claimant's vacancy was filled is not the same as concluding that "the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish". The requirements of the employer for work of a particular kind to be done has not ceased or diminished and is not for the purposes of this case to date expected to cease or diminished.
58. It has also been open to the Claimant at all material times to avail of the voluntary exit scheme in which she continues to express an interest and which remains open for her to accept. She is again required to mitigate her loss.
59. Although in most cases an employee can only claim a redundancy payment if he or she has been dismissed for redundancy (as defined above) the Employment Rights (Northern Ireland) Order 1996 provides for a scheme that permits an employee who has been paid off or put on short-time to claim a redundancy payment provided the employee complies meticulously with the statutory procedure. The scheme does not apply if the employee has been dismissed. Articles 182-189 of the Employment Rights Order set out the special provisions for redundancy payments for workers who have been laid off or are on short-time working.
60. For the purposes of the statutory scheme an employee is laid off if he or she is employed under a contract on terms and conditions such that remuneration under the contract depends on the employee being provided by the employer with work of the kind that he or she is employed to do, but the employee is not entitled to any remuneration under the contract in respect of any week where the employer does not provide such work for him or her (Article 182(1) of the Employment Rights Order). An employer provides work if it offers the employee work within the terms of the contract of employment.
61. An employee is on short time for a week if by reason of a diminution in the work provided for the employee by the employer (being work of a kind that the employee is employed to do) the employee's remuneration for the week is less than half a week's pay (Article 182(2) of the Employment Rights Order).
62. If an employee has been kept on short time or laid off the employee will be eligible for a redundancy payment if he or she gives notice in writing to the employer

indicating his or her intention to claim a redundancy payment (notice of intention to claim) within four weeks of being laid off or kept on short time for four or more consecutive weeks (see Order).

63. An employee was laid off or kept on short time for four or more weeks of notice as is required by the end of the

64. Although the Claimant was paid the payment the Claimant

65. In this case (the Claimant dismissed at all

66. Dismissal is given under the contract under the employer (a limited-term contract) without being a contract under the circumstances of the employment

67. The Claimant was dismissed with constructive dismissal. There are specific provisions in the statutory implied terms of the partnership or partnership agreement which were not dismissed.

68. The case of N v. B. The Claimant was easily be disturbed by the fact that he was employed on a permanent basis. CAV Co require the Claimant to follow the normal procedure in this case. A temporary arrangement was engineered by the Claimant to receive bonuses the same

For the rest of the week (four days) CAV Co allowed them to continue working but then told them not to attend unless prepared to work normally. Others in another department whose work was affected (including N) were laid off. They all attended but for two days (until the dispute was settled), the setters were prevented from working and N worked on rectification rather than normal production. It was held, that CAV Co were obliged to pay B for the four-day period and both B and N for the two-day period. The contracts of service envisaged supplemental agreements with contractual force but which could be terminated on reasonable notice whilst the main agreement remained. Reasonable notice would have been no more than a week and in this case an alternative could have been worked out quickly given the will to do so. The setters' breach in failing to give notice had been waived by CAV Co's conduct in assisting them in working during the four-day period. The refusal to work the relevant machines was notice to terminate the "Ad Hoc Arrangement." That notice expired before the two-day period, when the setters were therefore no longer in breach and CAV Co were not entitled to prevent them working.

69. It is proposed to expand on this submission in oral argument and to avail of the tribunal's helpful suggestion that further written submissions may be presented.

G. Grainger

Bar Library

28 November 2014

Between:

ELIZABETH KENNEDY

Claimant

-and-

EQUALITY COMMISSION FOR NORTHERN IRELAND

Respondent

**SUPPLEMENTAL WRITTEN SUBMISSION ON BEHALF OF THE
RESPONDENT**

1. The representations contained herein are supplemental to the written submission furnished on behalf of the Respondent on 28 November 2014 and to the oral representations also made on that date.
2. It is accepted that the Respondent operates a career break policy. It is not disputed that this is a laudable social objective with the capacity to enhance equality of opportunity. It is a policy which operates in addition to other measures operated by the Respondent, such as provisions for flexible working. It was introduced as a result of staff demand and the policy was drawn up after consultation and by agreement with the staff trade union.
3. It is important to note that there is no obligation on an employer to offer a career break. There is no law that deals specifically with taking a career break. It is a matter of agreement between the employer and employee. In general terms it is acknowledged by government that although employees can make arrangements to return to work after a career

break these agreements may not be legally binding and that it could mean ending the existing contract of employment. In short, career breaks in employment, where they are provided for at all, come in many shapes and sizes. As is clear from the decision in **Curr v Marks & Spencer Plc [2002] EWCA Civ 1852** an employee may, under a particular career

7. In September 2004 the Claimant applied for and was granted a flexible working arrangement whereby she was contracted to work four days per week instead of five days. She commenced this new working arrangement on her return from maternity leave in January 2005.
8. In April 2008 while on maternity leave the Claimant advised the Respondent that she wished to further reduce her working hours and requested the relevant documentation which was sent to her in both April and June 2008 but no application for a further reduction in working hours was received from the Claimant.
9. In September 2008 the Claimant requested a copy of the Career Break Policy and the Policy and an application form were sent to her on 16 September 2008. In November 2008 the Claimant again requested that the Career Break Policy be sent to her and a copy of the Policy was sent again. On 4 January 2009 the Claimant made a further request for the career break application forms and these were sent to her.
10. On 6 January 2009 the Claimant applied for a one year career break. The Respondent waived the normal 3 month notice period, the Claimant having been due to return to work on 12 January 2009, and approved the application. The Claimant was formally advised of this by letter of 20 January 2009 in which she was informed that during the period of the career break her substantive post may be filled on a permanent basis in line with the Respondent's Career Break Policy and that the career break period would not accrue for pensionable service or annual leave entitlement.
11. The Claimant's career break commenced on 12 January 2009 and she subsequently sought and was granted four extensions to her career break on an annual basis up until 12 January 2014.
12. During a telephone conversation between Bill McAlorum, the Respondent's HR Manager, and the Claimant on 30 September 2013 Mr McAlorum confirmed that the Claimant's request to return to work had been received and would be considered. The Claimant met with Mr McAlorum on 10 December 2013 to discuss her application for voluntary severance and consideration of her return to work from career break.

Mr McAlorum advised her of the various considerations regarding her return to work including the current vacancies at staff officer grade. He explained that the position with regard to available vacancies was continually under review and advised the Claimant that at that time it was unlikely that a vacancy could be identified or funded to enable her to return.

13. The Claimant expressed the view that she was being laid off and that she was in a redundancy position. Mr McAlorum referred her to the provisions of the Career Break Policy.

14. The Claimant wrote to Mr McAlorum on 16 December 2013 contending that the Respondent was making her redundant.

15. Mr McAlorum wrote to the Claimant on 20 December 2013 offering her a meeting on the 8 January 2014. By email of 7 January 2014 the Claimant confirmed to Mr McAlorum that she was happy to attend a meeting but was unable to attend on 8 January 2014 due to other commitments. She also requested confirmation of Mr McAlorum's position in writing and asked for pension and other financial information. Mr McAlorum acknowledged receipt of that email on 7 January 2014 and wrote again on 16 January 2014 to the Claimant asking for times and dates when she would be available to meet.

16. On 20 January 2014 the Claimant wrote to Mr McAlorum. Mr McAlorum replied to that correspondence by email of 21 January 2014 stating that the return to duty provisions with the Career Break Policy had been applied. He attached a copy of the Career Break Policy.

17. The Claimant and Mr McAlorum met on 30 January 2014 to discuss her career break and her expression of interest in voluntary severance.

18. By letter dated 13 February 2014 Mr McAlorum invited the Claimant to a meeting under the Respondent's Grievance Procedure in relation to the Claimant's disagreement with the Commission's view that she or her post had not been made redundant and her contentions that the Respondent was currently unlawfully deducting her salary, that its Career Break Policy is discriminatory and that its Career Break Policy is

illegal in its application. The grievance meeting was arranged for the 20 February 2014 but at the Claimant's request was postponed and was rearranged.

19. This meeting took place on 27 February 2014.

20. On 28 March 2014 Mr McAlorum wrote to the Claimant enclosing his consideration of her grievances, advising her that he had not been able to resolve all her grievances in the way she had sought and advising her that if she was not content with his response they could be dealt with by the Head of Corporate Services.

21. The Claimant did not request that her grievance be dealt with by the Head of Corporate Services and did not pursue her grievance further.

22. The Respondent has not paid the Claimant from the 12th January 2014 and relies on the provisions of its Career Break Policy.

23. The Respondent has not terminated the Claimant's contract and relies on the provisions of its Career Break Policy.

24. The Claimant is a qualified lawyer. She clearly had been provided with multiple copies of the policy. She accepts she had read the policy at all material times. It is clearly accepted and certainly not contested that the Claimant had no automatic right to return to her old post.

25. Section 9.1 states: *"In accordance with the Commission's recruitment and selection procedure, given the duration involved (i.e. more than twelve months), vacancies that arise when staff take career breaks will normally be filled on a permanent basis by external competition."* It is inconceivable on any reasonable reading of this clause that the Claimant could have been unaware of at least the possibility, and perhaps after five years, the likelihood, that the vacancy left by her career break had been filled on a permanent basis. The tribunal is also entitled to consider the validity of the assertion of the Claimant that she was unaware until 2013 that the vacancy had been filled. She was certainly aware from May 2010 that the Respondent was seeking expressions of interest from employees including interest in voluntary redundancy and voluntary early retirement (See Bundle pages 183 -185) given the potential

financial pressures on staff budgets and costs for the coming period.

That said, she continued to apply for extensions to her career break and

addressed this amounts to an "injunction" to conduct a restructuring or reorganisation when there is no vacancy is to strain the words beyond of this.

any logical or reasonable definition in the circumstances.

26. It is also in

Brown to
assertion t
Responder
sector fina

29. Section 10.2 states: *"If there is a delay in placing staff at the end of a career break staff may take up alternative salaried/wage earning employment in Northern Ireland until a vacancy is identified."*

27. The referee
submission
Officer who
replicated :

30. It is submitted that far from being implied terms of the policy (and the Claimant's contract) these terms are express and clear.

28. Section 10
*assign staff
situation o
arise in th
department
arrangeme*

31. The Claimant accepted her career break and/or extensions to her career break on these terms, not once but six times.

bear other
reinforced l
they arise"
break there
break can b
the sentence
they arise i
department
arrangemer
must be rea
makes clear
clear: when
assigned to
reorganisati
department

32. In these circumstances, the Claimant accepted her career break subject to certain conditions. She did not query these even though she had raised a particular enquiry prior to her first career break, demonstrating a familiarity with the policy and her right to raise any issue in relation thereto.

33. It is the Respondent's case that this was a clear term/condition of the policy (that is the basis of the agreement between the parties), that it was entered into voluntarily by the Claimant who wished to make use of the benefit provided and who did make use of it to its maximum extent. She raised no issue until late 2013. It should be noted she met with Mr McAlorum, not in December 2010 as referred to at paragraph 3 of the Claimant's submission but in December 2013.

34. The Claimant suggests that the NICS career break policy does not contain any indication a person can be placed "in employment limbo". However, it is clear that there are remarkable similarities. Paragraph 17.26 of the NICS policy makes clear that where a suitable post is not available an employee may take up alternative salaried or wage earning employment within Northern Ireland on a temporary basis "until a suitable post becomes available ..." This clearly envisages such a situation where there may be an unspecified deferral of return to duty. The circumstances of the NICS which employs many thousands of employees over many different departments also affords more flexibility

to the NICS than is available to the Respondent in this case. Despite that, the NICS retains the same or a broadly similar provision as that challenged in this case.

35. This expression “employment limbo” is a somewhat emotive term. It is accepted that there was a “deferred” or “delayed” return which is provided for in the Career Break Policy and indeed in the NICS policy.

36. The Claimant contended (albeit during the course of the hearing) that the PCP is “the Respondent’s interpretation of the career break policy”. This is repeated at various stages in the Claimant’s submission. The emphasis is on interpretation. This is not the PCP. The impugned PCP is that clearly contained in the policy. It is not simply a question of interpretation. This new approach is also inconsistent with the case originally made by the Claimant in her ET1 where she stated her belief that “the Respondent’s career break policy, the application of same and the refusal to apply the Respondent’s redundancy provisions” were “indirectly discriminatory”. This is repeated at paragraph 2 of the Claimant’s Replies. (Bundle page 45) It is suggested that the Claimant is (a) attempting to resile from the original proposition because that original contention exposes the fact that she was well aware of that part of the policy (and its clear meaning) which she now seeks to challenge and that that was not some mere afterthought or “interpretation” or “pragmatic response” or “only ... conceived or thought up ... after 2008” as now advanced on the part of the Claimant and (b) rather than defining the PCP and then selecting the appropriate pool of comparison, the Claimant is ex post facto selecting a PCP which best fits her preferred pool. The tribunal is invited to consider, and prefer, the evidence of Mr Brown who set out the thinking behind the policy and its terms, including the challenged terms.

37. Neither is it correct to contend that the Respondent failed to consider the implications of making permanent appointments. In the course of his evidence Mr Brown did set out alternative measures which were taken from time to time. He referred specifically to various management actions taken including “gapping” posts and a number of other measures set out at the bottom of page 65 and the top of page 66 of the Bundle.

The Respondent also provided evidence as to its considerations as set out at the top of page 65. It also provided its rationale in respect of permanent appointments in its justification argument (specifically at page 67 of the Bundle) and in the evidence of Mr Brown.

38. The alternative strategies advanced by the Claimant are set out at paragraph 16 of her submission. It appears to be suggested that the Respondent in such circumstances should pay the relevant employee his/her salary even though no service is being rendered. It is submitted that this is not a practical alternative and may engender resentment among staff who have not availed of a career break. Mr Brown outlined the Respondent's desire, in common with the staff union, to avoid, where possible, compulsory redundancies. Although it is suggested that some employee is likely to feel resentment in a redundancy situation the Respondent is entitled to consider the ramifications for staff and industrial relations if it is required to create a pool for selection for compulsory redundancy on every occasion when a person wishes to return from career break and no vacancy is available, particularly when the career breaker knew of such a potential scenario before going on career break and with potentially the same staff being compelled to undergo such an exercise on each occasion, perhaps even undermining confidence in the career break scheme. Finally, the suggestion of termination of the person wishing to return in such circumstances might expose the Respondent to a complaint of unfair dismissal or indeed to a claim of unlawful discrimination on grounds of sex. The suggested alternatives set out by the Claimant at paragraph 8 of its submission potentially represent greater detriments to an employee who wishes to avail of a career break. The proffered "cure" may be worse than the alleged "ailment" circumscribing access to a liberal and progressive career break scheme.

39. As Mr Brown made clear the situation which has prevailed since 2010 has made it difficult to fill any vacancies, whether on a temporary or permanent basis with the exception of a small number of specialist Research Officer posts. The option of filling a vacancy created by a career break is not simply about how to fill a particular post but involves

the need to balance meeting requests for career breaks and maintaining service delivery across all of the career breaks taking place and not just in relation to one vacancy. The Respondent has set out its position in its argument on justification and in its evidence.

40. The tribunal has already heard submissions in respect of the pool. The Claimant relies on the case of **ex parte Schaffter [1987] IRLR 53**. The case concerned the provision of hardship grants to students. Students (with children) who had once been married but whose spouse had died received a hardship allowance, whereas those who had never married did not. In that case the Secretary of State had argued that since the proportion of lone parents that had never married was 20% for both men and women there was no discrimination. The High Court held that the correct pool of comparison was not single lone parents but all students claiming grants. (It was not all students.) (Counsel's emphasis). The only people who *could* be subject to a meaningful consideration regarding whether a return from career break could be facilitated are those who availed of a career break and are thus eligible to return at the end of the agreed period. It is not the case that everyone who availed of a career break was unable to return. The pool of those *actually* subject to a decision as to whether their imminent return from career break could be facilitated are those approaching the end of their approved career break who have confirmed their intention to return on the agreed date (i.e. did not resign nor apply for an extension to the agreed career break).

41. This case is not about access to the career break. The Claimant availed of the benefit on the terms provided, as did others, some of whom returned to work and some who did not.

42. The Claimant contends (paragraph 25 of her submission) that the Respondent's policy does not address the issue that "uncertainty over her employment future would be unattractive to an alternative prospective employer". It cites (apparently with approval) the NICS policy which refers to temporary work only. This is, of course, a specious contention. First, the Respondent's policy speaks of alternative employment "until a vacancy is identified". Secondly, it is an argument

unlikely to assist a complainant who makes absolutely no effort to test the proposition by conducting any investigation into alternative work of

any nature

43. The Claimant's terms and conditions of employment, Respondent's application of the Career Break Policy, and the Respondent's terms of employment, are all in breach of the first requirement of the Policy, and that the Respondent's advance notice of the proposed change in policy is meaningless.

44. The Respondent's proportionate response to the alleged breach of the Respondent's question is that the Respondent's aim to protect the Respondent's interests is not a legitimate aim that the Respondent has urged upon the Respondent. The Respondent's alleged breach of the Respondent's objective is that the Respondent's aim is not a legitimate aim that the Respondent has urged upon the Respondent.

45. This is a case in which, contrary to the Claimant's current contentions, there was a clear agreement between employer and employee. Notwithstanding that any agreement can be made even clearer that does not diminish the strength of the point.

46. There was no disparate impact and if there was, which is denied, this was justified in the circumstances having regard to the facts of this case and the applicable principles of law.

47. The Policy (or its operation) is neither "aberrant", "defective" nor "irrational", nor is it "hallmarked by a lack of transparency". As stated at the outside there is no law governing career breaks per se. It is a matter for agreement by the parties.

48. The suggestion that there was some "pragmatic" change in policy after 2008 so that the Respondent began making permanent appointments when people were on career breaks is without evidence and unsustainable. It is clear that from the inception of the policy the Respondent reserved the right to fill vacancies on a permanent basis and that it did so before 2008. Connell McBride was the last filling of a vacancy following a career break.

49. There was no breach, whether fundamental or otherwise, of any principle of employment law and none of the cases relied on by the Claimant are on point and can all be distinguished. This is to some extent a novel situation. It is provided for by the terms of the agreement reached between the parties. It is more favourable than other career break policies which might, as now advocated by the Claimant, grant more limited access to career breaks, remove the prospect of a return to one's job or to make a person compulsorily redundant, even in circumstances where that is against the wishes of the person concerned.

50. There was no redundancy situation and no dismissal. Nor should there have been under the agreement between the parties which governed this situation. Notwithstanding this however, contrary to the suggestion at paragraph 6 of the Claimant's submission that the Career Break Policy breaches the Claimant's contractual and statutory rights to benefit from the redundancy policy, the Claimant benefits from that policy (together

with those on career break and others) in the sense that they are not subjected to compulsory redundancy where that can be avoided and are able to avail of the benefits of the voluntary exit scheme which enables employees to depart with compensation, a scheme in which the Claimant has expressed an interest but has not, so far, pursued further (as is her right). In short, since 2010 the potential for voluntary severance/exit has been available to the Claimant on the same terms as other employees.

51.If, as is suggested by the Claimant (Paragraph 26 of the Claimant's submission), that paragraph 10.2 of the Policy does not make clear ("expressly or impliedly") "that persons will not be paid if there is no job or work on their return". If that assertion is correct then what meaning can be attributed to paragraph 10.2? If it is envisaged that the person in such circumstances would be paid, 10.2 is otiose or at least without meaning. On the contrary, the plain and ordinary meaning of these provisions is that it was clear that in such circumstances it was agreed the person would not be paid but would remain an employee of the Respondent (with the right to work elsewhere in Northern Ireland until a vacancy had been found). The person is not "forfeiting the right to return" but accepting that in circumstances the return may be deferred, while continuing to retain other rights such as the right to remain an employee and to voluntary severance/exit on the same terms as other employees when that arises. The fact that alternative employment is explicitly referred to is an express recognition that any "delay" may not just be a matter of very short duration.

52.The Claimant entered this agreement with open eyes. She accepted the policy. She obtained the benefit of the policy on the basis of the terms agreed. Those terms provided for the circumstances which might arise if there was no vacancy at the time when she proposed to return. She may not now like those terms but those were the terms she agreed and under which she obtained the benefit.

53.There is no unlawful deduction of wages. She agreed the terms of her career break. She now seeks to resile from that. Some employees under different agreements accept that it is provision of their having a career

break that they resign from their employment. The Claimant was not required to do that. Central to the issue of unlawful deductions is whether the wages referred to were “properly payable”. This involves an examination of the contract, including any implied terms. The Employment Rights Order permits “deductions” to be made without limit where the employer has some statutory or contractual authority to make it. In this case the Respondent had that contractual right (in the sense of no obligation to pay wages in these circumstances) and the Claimant was fully aware of and had multiples copies of the agreement.

54. The Claimant also mounts an argument for redundancy. It would appear that this argument is now the subsidiary or alternative position. It was not always so. The Claimant is not entitled to claim redundancy in the circumstances. Dismissal has a statutory meaning. The Claimant has not been dismissed by her employer and she has not claimed constructive dismissal. She has not been laid off or placed on short time working as defined. An employee will not be entitled to a redundancy payment by virtue of being laid off or kept on short time unless he or she terminates the contract by giving such period of notice as is required under the provisions of the Employment Rights Order before the end of the relevant period.

55. The Respondent contends that the Claimant is not entitled to the remedies claimed. Further, and in any event, the Claimant has made no attempt to mitigate her loss. She failed to pursue her grievance to appeal. The option of voluntary exit remains open to her. In any potential award of compensation the tribunal is entitled to have regard to what is “just and equitable” and it must also have regard to the normal principles applicable in respect of civil tort. For example, a claimant cannot recover twice for the same loss and has a duty to take reasonable steps to mitigate loss.

56. The Respondent has submitted and submits that in the event of a finding of indirect discrimination any award of compensation in respect of injury to feelings should be limited, if appropriate at all, given that this is not a case of intentional discrimination against the Claimant. The Claimant has

conceded that any such award should be “measured and proportionate”.

57. The main thrust of the Claimant’s case, on its facts, both in terms of her meeting with Mr McAlorum and in terms of her correspondence with him, was to the effect that she was redundant, that the contract was compulsorily “severed”. Her pleaded case was premised on the point that she should in the circumstances have been made redundant. Without prejudice to the Respondent’s contention that it is not liable in respect of any of the Claimant’s complaints, if the tribunal accepts this view, whether, under the discrimination claim or under the employment claim, then that is the limit of the Claimant’s financial loss. In the alternative, any award in respect of unlawful deductions should take into consideration the fact that it was likely had the Claimant returned to work she would have wanted to work further reduced hours, namely three days per week. That would reduce that element of the claim, before any consideration of a failure to mitigate loss, to £12,063.

G. Grainger
Bar Library
11 December 2014