# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Ms Arwa Kassim** | **v** | **UAE Embassy Military Attaché Office** |

**Heard at**: London Central
**On**: 30 November – 6 December 2021

**Before:** EJ G Hodgson
Mr J Carroll
Mr D Kendall

**Representation**
**For the claimant:** Ms L Mankau, counsel
**For the respondent:** Mr L Davis, solicitor

# JUDGMENT

**The allegation that the claimant's dismissal was an act of discrimination contrary to section 18(4) Equality Act 2010 fails and is dismissed.**

# REASONS

## Introduction

1.1 On 27 January 2020, the claimant filed a claim, which included allegations of maternity discrimination and unfair. She filed an amended particulars of claim on 26 April 2021 which has been treated as the particulars of claim.

1.2 The claimant filed two further applications to amend, the first on 2 August 2021, and the second on 22 October 2021.

1.3 The respondent did not initially concede jurisdiction. However, the matter was resolved by consent prior to the hearing. All claims, other than the

claim of maternity discrimination were withdrawn. The respondent has conceded there is jurisdiction to hear the discrimination claim.

## The Issues

2.1 It was agreed the only claim before the tribunal was discrimination. Specifically, the claimant alleges that her dismissal was unfavourable treatment because she had exercised, or sought to exercise, the right to ordinary or additional maternity leave. She relied only on section 18 (4) Equality Act 2010.

## Evidence

3.1 The claimant filed a statement and gave oral evidence.

3.2 The respondent submitted statements from two witnesses: Ms Maryam Alsaroori, who was an employee who took maternity leave shortly after the claimant did; second, Colonel Abdulrahman Alharmoodi, who was the head of the military attaché office at the embassy in London from around June 2017 until July 2021. Neither gave oral evidence.

3.3 We received an agreed bundle of documents.

3.4 The respondent gave an opening note.

3.5 Both parties relied on written closing submissions.

## Applications

4.1 Both applications to amend were withdrawn.

4.2 We admitted a further document into evidence as page 230.

## The Facts

5.1 The respondent is The Embassy of United Arab Emirates Military Attaché Office. The military attaché office is based at the embassy in London.

5.2 The claimant was employed from December 2006 until her dismissal, allegedly for the reason of redundancy, on 30 September 2019. During her employment she held various posts. In April 2015, she received a new contract when she ceased to be responsible for own tax and became subject to PAYE. This led to a severance payment. On 2 January 2017, the claimant signed a new contract, and this led to a further severance payment.

5.3 From September 2017, until her dismissal, the claimant worked in logistics as a relations administrator. We do not have a job description. The claimant explains that she was managing and overseeing operations and logistics of the UAE technical training building on a campus based in

Hastings, as well as associated residential property. This included keeping accounts of income generated from rentals and maintaining the upkeep of rental properties. The claimant also undertook various tasks, including general workplace operations of sites in South Kensington, troubleshooting office issues such as IT, building faults, maintenance, supplies, parking, and monitoring insurance policies and maintenance contracts. Occasionally, she would cover other areas such as public relations, in which she had previously worked.

5.4 The claimant's evidence is that there were two people in the logistics department being the claimant and Mr Reda Bader, who was also described as an administrator. His appraisal forms indicates that he "does all maintenance work logistic." It is the respondent's position that there were two other individuals in the department, Mr Mohammed Saleh Mohammed and Mr Yassir Khaled, both of whom were accountants.

5.5 Prior to 2017, the respondent permitted maternity leave of 45 days. In 2017, a new contract provided for one year's maternity leave. We should summarise the relevant contractual clauses.

5.6 Clause 17 states pay increases are at the discretion of the employer, but would normally be given to those achieving a rating of good or above in "the performance efficiency report" which is defined as "the appraisal." The contract does not specify whether there will be any appraisal meeting.

5.7 Working hours are dealt with at clause 19; it is accepted her working hours were 09:00 to 16:00.

5.8 Clause 29 provides employees must notify any sick leave by telephone between 09:00 and 10:00.

5.9 Clause 45 gives a contractual entitlement to maternity leave of 12 months. The maternity pay reflects the current statutory entitlement.

5.10 Clauses 52 and 53 deal with unauthorised absences and state they must be notified by telephone as soon as the employee becomes aware; such absences may be considered to be gross misconduct.

5.11 We have been given details of eight performance management reports (appraisals) covering 2017 and 2018. We have no reason to doubt these are genuine documents reflecting scores given at the material times.

5.12 The reports in 2017 were undertaken by the then deputy military attaché, Lt Col Hamad Alremeithi.

5.13 Around June 2018, Colonel Alharmoodi become the head of the military attaché office. He completed the 2018 apaisals.

5.14 Each performance report is split into seven sections which include maintaining working hours, awareness and knowledge of the work, cooperation with staff, motivation, and integrity.

5.15 In January 2017, Mr Mohammed Saleh Mohammed, achieved an overall rating of very good, being 81.86%. His attendance was very good with a score of 89. In 2018, he received an overall rating of very good with 89.86%. His attendance increased to 91.

5.16 In 2017, Mr Yassir Khaled achieved an overall rating of very good being 87.14%. His attendance was 91. In 2018, his overall rating was very good at 86.71% and his attendance was 92.

5.17 In 2017 Mr Reda Bader achieved an overall rating of excellent, being 94.43% with attendance of 92. In 2018 his rating was excellent at 95% with attendance of 93.

5.18 In 2017, the claimant achieved an overall rating of good , being 79.71%, with attendance at 70. In 2018, her overall assessment had dropped a fair at 68.57% with an attendance of 60.

5.19 There is no evidence that any employee was interviewed prior to any appraisal report.

5.20 The claimant does not take issue with the scoring. She does not disagree with the scoring of the two accountants. As for Mr Bader, she rated him as an excellent employee and accepts that it was fair for him to receive a higher score based on his ability, performance and timekeeping. It follows she does not dispute the accuracy of the appraisals.

5.21 The claimant received four written warnings during her employment, all of which she signed, none of which she disputed or appealed.

5.22 On 16 June 2008, she received a warning concerning lateness and absence, about which she been previously warned verbally.

5.23 On 20 November 2009, she received a further warning for being absent without reason and there is reference to repeated morning delays.

5.24 On 26 October 2010, she received a further final warning concerning absence from work and repeated requests to leave early.

5.25 On 8 March 2018, she received a further written warning which states "It has been noticed recently that you have used many sick leaves, which is considered negligence from your side and in violation of the regulations of the military attaché office." The claimant accepted this warning. It is not clear what is meant by "used many sick leaves." In her statement, at paragraph 12 she states

> **12. … I had recently been unwell with morning sickness [page 203] and at the time told Major Fares Mohammed Hamad Al-Mazrouei of the reason for my absence. I explained that my absence had been pregnancy related and there was nothing I could do about it. He told me that if I didn't sign the letter, there would be serious implications. I signed the warning but was not given a copy.**

5.26 During her evidence, the claimant referred both to having a choice about whether to sign and also to being put under duress. The nature of the duress was never explained. There is no basis for finding the claimant was put under duress. We find that she had a choice.

5.27 We have received direct evidence, in the form of attendance records, of the claimant's late attendance during a period of approximately six months leading up to the warning. From 12 October 2017, she was a late on at least 18 occasions. Many of which were for periods of more than 30 minutes and some several hours.

5.28 The claimant's evidence does not deal with any of these absences. We were taken to her medical notes, it was noted there were two occasions in February 2018 when lateness arose out of medical appointments, it being the claimant's case that these were fully approved. As to the remainder, the claimant says that she always kept the respondent informed and they occurred largely because of difficulties on the Piccadilly line. It follows that there were a significant number of late attendances in that period leading up to the warning. It is not possible for us to resolve whether the wording of the warning in 2018 encompassed the late attendance. However, there is clear evidence of poor attendance which could explain the attendance score in the appraisal, and the claimant does not dispute that the appraisal accurately reflected her actual attendance.

5.29 In June 2016, the claimant's first child was born and she took 45 days maternity leave. This was followed by two weeks' sick leave, as she was recovering from surgery.

5.30 In February 2018, the claimant learned that she was pregnant. She notified Major Fares Mohammed Hamad Al-Mazrouei, the department head at the time. The claimant describes a difficult pregnancy and the need to attend regular antenatal appointments. There is no suggestion that the claimant was warned in relation to any maternity absence post the March warning. The claimant alleges that a number of diplomats had a "changing attitude" towards her. She refers to this at paragraph 14 of the statement but gives no details. She mentioned one individual Mr. Salem Alkaabi whom she says appeared unhappy at the amount of time she needed to take off to attend appointments. She refers to his manner and tone having become awkward. There is no evidence to suggest that he was part of any decision-making process relevant to the material redundancy.

5.31 The claimant commenced her maternity leave on 10 September 2018, when her daughter was delivered prematurely. Her daughter was born

with multiple health problems, and the claimant confirmed that she would take a full 12 months' maternity leave, but confirmed she would return earlier if circumstances allowed. Her daughter, tragically, died in July 2019. The claimant requested an extra week's leave, to avoid returning on what would have been her child's birthday. She returned to work on 16 September 2019.

5.32 During her maternity leave, no maternity cover was provided, and her work was covered largely by Mr Khaled.

5.33 We have received a witness statement from Colonel Alharmoodi who was the head of the military office in September 2019. He has not attended to give evidence. We were told he has retired. The claimant believed he had returned to the UAE. We have no reason to believe that he resides in this country.

5.34 It is the claimant's case that little weight should be given to his evidence, and we have considered carefully to what extent we can find facts based on his statement. We have a statement from him which is signed and contains a statement of truth. We have various documents which potentially support his evidence.

5.35 We have enquired whether it would have been feasible for him to give evidence by video, but neither party had checked the relevant legality.

5.36 It does not follow that evidence given in a witness statement by a witness who does not attend must be rejected. All the circumstances must be taken into account.

5.37 Colonel Alharmoodi confirms his reasoning for selecting the claimant at paragraph 11 to 22 of his statement.

5.38 We accept that he was given orders to cut staff with immediate effect. It is not clear when, or how the order was given. It may have been helpful to see any written order, or for his statement to make it clear that the order was oral. Nevertheless, we have concluded that we accept that he was given an order. When finding this fact, we had regard to all the relevant surrounding circumstances, and we set out below those matters we consider particularly material.

5.39 We accept the military attaché office had been subject to cuts from 2017 onwards. There has been a reduction from 18 to 10 diplomats by July 2021. We accept this led, in general, to a reduced need for support staff, and the process continues. In 2018, to effect cuts, he had made MrShukri Mohamed, a maintenance man, redundant. Colonel Alharmoodi states that he selected him as the weakest candidate on paper, which would appear to be a consideration of the appraisal reports.

5.40 In 2019, Ms Maryam Alsaroori had taken maternity leave. She returned in or around October 2019 to the PR department.

5.41 In 2020, Colonel Alharmoodi was required to consider further reductions in staff. He identified the PR team as one from which cuts could be made, Ms Alsaroori, who had taken maternity leave the previous year, was considered alongside two others. Colonel Alharmoodi states that he undertook the same paper consideration and noted that the two weakest candidates were Mr Yousef Bilal and Mr Shukri Sharif, both of whom he made redundant. Ms Alsaroori was not made redundant.

5.42 It follows that Colonel Alharmoodi was involved in redundancies on three occasions. On each occasion he says he was given orders.

5.43 There is no evidence at all to suggest that his accounts of those redundancies were inaccurate. The surrounding circumstances demonstrate a consistency of approach to a continuing reduction in capacity.

5.44 In the circumstances, we have no reason to reject his evidence that he was given orders to make cuts. We find he was given the relevant orders and he acted on them on 30 September by dismissing the claimant.

5.45 We accept that he identified the logistics department as a department where staff could be cut. The claimant's position had not been covered during maternity leave. There is no evidence to suggest that it was filled later. Her role had been covered by Mr Khaled.

5.46 The claimant advances a submission that cuts from other departments would have been more logical. However, that is not backed by any evidence, whilst it is possible that others, such as drivers and maintenance staff, could have been considered, there is no evidence which would demonstrate that Colonel Alharmoodi did not consider the logistics department as being one from which capacity could be reduced.

5.47 Colonel Alharmoodi states he referred to the written warning of 8 March 2018, and the claimant's acceptance of it. He understood it to be related to sickness absence, but did not understand the sickness absence be related to the pregnancy. We accept his evidence that he did not consider the two were connected. There was no evidence before him to the contrary. The claimant had not protested the warning. Colonel Alharmoodi considered that the absences must have been serious because most underperforming staff would respond well to verbal warnings, and written warnings were unusual.

5.48 We have no reason to doubt his evidence that he looked at the performance reviews. We have set them out above. He concluded that the claimant was the weakest candidate on paper. There is no reason to doubt that evidence. The claimant accepts that she was the weakest candidate on paper, albeit she seeks to argue that she could have received better ratings in various areas. She does not dispute the overall conclusions of the appraisals.

5.49 Colonel Alharmoodi states that after he had reached his decision in principle he spoke to Capt Saeed, the claimant's direct line manager, who supported his view that the claimant was the weakest performer.

5.50 The claimant has alleged that there were inappropriate comments from two colleagues, Mr Naddour and Mr Khaled al Kindi. Colonel Alharmoodi states that he was unaware of any allegation of inappropriate comments, and there is no basis to doubt his evidence on this. There is no suggestion in the claimant's evidence that she brought to anyone's attention any concerns she had about any comments made to her.

5.51 On 30 September 2019, Colonel Alharmoodi met with the claimant and made her redundant. As to the nature of the meeting, his evidence is supported by the claimant.

5.52 He says this at paragraphs 32 and 33.

> **32. The only difference between the redundancy meetings was that at the outset of *my* meeting with the Claimant I expressed *my* sincere condolences to the Claimant for the loss of her daughter. I felt very sorry for her loss**
>
> **33. I then returned to the same standard format used for the redundancy effected in 2018 and those effected in 2020. I confirmed that the UAE had ordered me to make budget cuts through the reduction of staff. I said I had reviewed the Claimant's files and based on the diminished need for her role, her performance and her disciplinary record I had made the decision that role was redundant. I said that other staff were to be made redundant as well in the future and that it was an ongoing process to cut the budget (with the downsizing of the diplomatic staff).**

## The law

6.1 Section 18 of the Equality Act 2010 provides, in so far as it is applicable.

> **(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
> **…**
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**

6.2 As this is an allegation of unfavourable treatment, there is no need for a comparator.

6.3 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**

**(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

**(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
**…**
**(6) A reference to the court includes a reference to--**

**(a) an employment tribunal;**
**(b) …**

6.4 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

**Appendix**

**(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**

**(2) If the claimant does not prove such facts he or she will fail.**

**(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.**

**(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.**

**(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.**

**(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.**

**(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA**

**from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.**

**(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.**

**(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.**

**(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.**

**(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.**

**(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.**

**(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.**

6.5 **Wisniewski (a minor) v Central Manchester Health Authority** [1998] EWCA 596 is often cited as authority for the proposition that an adverse inference may be drawn from the absence of a witness. In that case, Brooke LJ considered the relevant authorities and derived the following principles

**(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.**

**(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.**

**(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.**

**(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.**

6.6 This case was decided in the context of medical negligence, and it follows that the reverse burden was not relevant; caution may be needed when applying it in the context of the reverse burden.

6.7 In **Efobi v Royal Mail Group Ltd [2021] UKSC 33**, Lord Leggatt said:

> **The question of whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in [Wisniewski] is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules." (paragraph 41)**

## Discussion and conclusions

7.1 The claimant submits that she has shown a prima facie case of discrimination within the meaning of **Igen** such that the burden shifts to the respondent to provide an explanation. She relies on a number of matters in support of her contention that there is a prima facie case and we should summarise them.

7.2 She alleges she was the only employee dismissed at that time.

7.3 She alleges she was dismissed within two weeks following her return to work from maternity.

7.4 She alleges the respondent has failed to produce evidence of an instruction to effect an immediate budget cut in September 2019.

7.5 She states there is no evidence of an identical process involving Mr Shukri Mohamed in September 2018 or why the process took place a month later in 2019, than in 2018.

7.6 She alleges there is no documentary evidence concerning the decision to select redundancies from the logistics department and further that there was no adequate reason why logistics was the appropriate department. She makes several assertions in support: reduction in diplomats would not necessitate a reduction in the logistics department; reduction in staffing of

other departments, including public relations and drivers were more logical.

7.7 She disputes there were four employees in logistics.

7.8 She relies on the fact she had been required to join the department in 2017.

7.9 She alleges that Mr Khaled was in a different department, and the fact that he covered her absence meant that the accounts department had a diminished need for employees.

7.10 In addition, she says the tribunal should draw an adverse inference from the non-attendance of Colonel Alharmoodi.

7.11 As to the explanation, the claimant's submissions are brief. The claimant alleges that adverse inferences should be drawn to "nullify any non-discriminatory reason."

7.12 We do not need to consider at this stage the respondent's submissions on these points. The respondent does not accept the claimant's case.

7.13 We remind ourselves that we are applying the reverse burden of proof as set out in section 136 Equality Act 2010. We must ask whether there are facts from which we could decide (in the absence of any other explanation) that the relevant provision was contravened.

7.14 There may be occasions when this first stage can be ignored safely, and we can consider whether the explanation is made out. However, in this case, it is the respondent's position that there are no facts from which we could decide there was discrimination, and we must engage with the first stage.

7.15 The respondent's submissions acknowledged that no comparator is required in this case, then suggest that one may be appropriate, but go no further. The introduction of the concept of a comparator into a section 18 claim, when no comparator is needed, would not be helpful.

7.16 We are concerned with the mental processes of the person who made the decision, and the claimant does not allege the decision was made by anyone other than Colonel Alharmoodi. It is his mental processes that we must consider.

7.17 The respondent has referred to the case of **Reynolds**.[1] The claimant has not. Mr Davies explained that he was concerned that it was part of the claimant's case that there had been negative attitudes shown by other individuals to the claimant because of her pregnancy. The main sources appear to be the allegations that two individuals made inappropriate

[1] *CFLIS (UK) Ltd v Reynolds [2015] EWCA Civ 439*

comments. There may also be a suggestion that the warning, which Colonel Alharmoodi took into account, may have been tainted by some form of discrimination because it concerned maternity sickness. It follows that the respondent advanced the defence, in part, on the basis that the discriminatory motivation of individuals acting toward the claimant and in giving a warning could not be taken into account when considering the motivation, conscious, or subconscious, of Colonel Alharmoodi.

7.18 We explored this during submissions. Ms Mankau confirmed that in no sense whatsoever was the claimant's case based on that argument. It is not suggested that there had been some form of discriminatory act of another which was expressly or inadvertently taken into account by Colonel Alharmoodi when it reaching his decision. It is not alleged that the attitude of others, who were not directly involved in the decision, should turn the burden.

7.19 We should add, we noted the case of **Jhuti**[2] which was concerned with how far the motivation of a person who did not dismiss, but who contributed to the information relied on when dismissing could be considered as par of the reason for dismissal. We noted that **Jhuti** may cause **Reynolds** to be doubted. However, it was agreed that we need consider this no further because the claimant was not alleging that anything taken into account by Colonel Alharmoodi was occasioned by a discriminatory act. It follows that we explored this carefully and it remained clear that the claimant was not inviting us to form the view that there had been previous discrimination which affected the decision of Colonel Alharmoodi.

7.20 Part of the evidence had dealt with the alleged unfairness of the redundancy process: the claimant disputed the pool; she criticised the lack of appraisal interviews; and she was criticised the lack of consultation. We were concerned to understand whether this was relevant to the matters we need to decide.

7.21 The parties agreed that unfair dismissal arises from domestic legislation. The respondent is not subject to the unfair dismissal legislation. This was relevant because there may be an argument that unreasonable conduct can cause the burden to shift, not by reason of the unreasonable conduct, but by the reasonable lack of explanation for it.[3] This was not a matter advanced by either party directly in submissions, but given the nature of the evidence, it was a potential finding of the tribunal, and one about which we sought specific submissions.

7.22 Both parties accepted when considering reasonableness, and any potential lack of explanation, there was no basis to import the standards

[2] *Jhuti v Royal Mail Ltd [2019] UKSC55*

[3] See the judgment of Peter Gibson LJ in *Bahl v Law Society [2004] IRLR 799,* paras 100-101, if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn.

required in relation to unfair dismissal, as the respondent was not subject to such legislation.

7.23 We will consider these matters further later, but we now consider the point specifically relied on by the claimant.

7.24 We accept that the claimant was the only person dismissed in September 2019. However, that dismissal occurred in the context of a reduction of staff which spanned a period of several years. She was one of four individuals made redundant by Colonel Alharmoodi between 2018 and 2020.

7.25 We accept that she was dismissed less than two weeks following her return from maternity in less than one week following her return from annual leave.

7.26 Despite the lack of documentary evidence, we have found, as a fact, that Colonel Alharmoodi was given orders in or around September 2019 to make an immediate budget cut.

7.27 We have found that in September 2018, the process involved in dismissing Mr Shukri Mohamed was in all relevant material respects the same as that used when dismissing the claimant.

7.28 We do not accept the respondent has failed to adduce evidence for selecting the logistics department; there is clear written evidence from Colonel Alharmoodi. We have no reason to doubt his evidence. The claimant asks us to doubt that he identified the logistics department. She submits it would have been more logical to consider other departments. Whilst this may be evidence of the claimant's logic, there is no material evidence before us which would demonstrate why other departments should have been preferred. It is for the employer to identify which is the appropriate department which can most easily bear budget cuts. It was clear there is nothing which would suggest that Colonel Alharmoodi's view was irrational or illogical. This is demonstrated by the fact that the claimant was not replaced.

7.29 We reject the assertion that the two accountants should be seen as a separate department. This appears to be based on the assumption that Mr Khaled ceased his role as an accountant whilst covering for the claimant. There is no evidence for that. There is no evidence to suggest that Colonel Alharmoodi did not see the four individuals as one department. The fact that there are two accountants is not conclusive. The logistics department appear to be largely administrative. It is not surprising that part of that function was accounting.

7.30 It follows that there are only two relevant facts, as relied on, that are established. First, she was the only employee made redundant in September 2019. Second, the redundancy was shortly after her return from maternity leave.

7.31 Whether those are enough to turn the burden must be considered having regards to all the facts. She was not the only employee dismissed redundancy. The date of the instruction is not inconsistent with that given in 2018. She was not replaced. She was the poorest performer. There is nothing illogical about choosing logistics. We accept Colonel Alharmoodi was given instructions. We do not accept that there is clear evidence that another department would be more suitable, or that he should have another department in mind. We do not accept that the four people in logistics should be arbitrarily split between administration and accountancy.

7.32 In addition to considering those facts, we have considered whether there is any failure of explanation for unreasonable conduct. However, we cannot find there is any unreasonable conduct in this case. No doubt had there been a claim for unfair dismissal, there would have been a strong argument that the failure of consultation should lead to finding of unfair dismissal. However, we do not consider it appropriate to import into our consideration legal principles which do not bind the respondent. We therefore find there is no unreasonable conduct to explain and therefore no basis for drawing inferences arising out of the lack explanation for unreasonable conduct.

7.33 The final point relied on is the failure of Colonel Alharmoodi to give oral evidence. We need to consider this carefully. The claimant relies **Wisniewski** . This was considered by the Supreme Court in **Efobi**, as we have set out above.

7.34 We are entitled to draw an adverse inference which could turn the burden. **Wisniewski** suggests that we may do this in the absence or silence of a witness. We accept that this may extend to a witness who has given a statement, but who does not give oral evidence at the hearing.

7.35 **Efobi** cautions us not to view **Wisniewski** in an overly legal or technical manner. We do not think it helpful in this case to seek to apply the approach suggested by **Wisniewski**. It is difficult to apply directly, in any event, in the context of section 136. We must consider the whole context. We have regard to the relevant considerations as identified by Lord Leggatt.

7.36 As regards the relevant evidence that could have been given orally, the main challenge revolves around the likelihood of his evidence being maintained under cross-examination. Under cross-examination, the claimant may have established there were other relevant documents. The general challenge to his evidence predominantly revolves around two matters: whether he received instructions to make cuts, and whether other departments could have been considered. We accept these matters could have been explored in cross examination. However, we have found that there is sufficient evidence that he received instructions. Moreover, even if he accepted, he could have considered other departments, it may not

undermine the rationality for choosing logistics. It follows that the most important material challenges may not have been significant in this case.

7.37 It is possible the cross-examination could have led us to conclude that Colonel Alharmoodi could not be believed, but beyond that which we have identified, there is no clear path to such a finding. The reality is that his evidence is consistent with the available documents and undisputed events.

7.38 It is necessary to stand back from this when considering whether we can draw an adverse inference from his failure to attend.

7.39 There is a rational reason of his non-attendance. He appears to be in a different country and is now retired. There is clear evidence that there was a reduction in the diplomatic staff. There is clear evidence that there was a requirement to reduce the administrative staff. There is evidence of at least four redundancies. There is no evidence to support the contention that he adopted a different process for the three redundancy exercises. There is clear evidence that there was one other woman who took maternity at a similar time to the claimant. There is clear evidence she was involved in a redundancy process the following year and that she was seen as a strong performer, leading to two men being made redundant, rather than her.

7.40 Whether we should draw an adverse inference from his non-attendance is a matter of ordinary rationality having regard to all the relevant circumstances. In this case, we do not accept that any adverse inference should be drawn from his non-attendance.

7.41 We also note that Miss Alsarooori has not attended. The reason given was that she is pregnant again and she is in a late stage of pregnancy, her child being due in February. We do not find that explanation compelling. However, the evidence she gives, to the extent it is relevant, is limited and not disputed. She took maternity leave. She was not dismissed. She was not involved in any decision-making process. Failure to call her, is not something from which we can draw an adverse inference.

7.42 There are only two facts found from which we could potentially find discrimination. In brief they are, first that she was the claimant was the only person made redundant in September 2019, and second, this occurred shortly after the claimant returned from maternity leave.

7.43 We have to consider all of the facts. When considering whether we could decide whether the contravention occurred, we have to consider those facts in the context. The concept of “could” means we could properly find the burden shifts. These facts are not enough; number and proximity in this case are not enough. We find that the burden does not shift.

7.44 If we were wrong and the burden does shift, we would need to consider whether the explanation has been established. Here the explanation is

that Colonel Alharmoodi received instructions to make budget cuts. He identified logistics as a department from which cuts could be made. He had regard to operational need. He used the objective appraisals. He considered the warning given to the claimant. He found the claimant to be the poorest performer in the logistics department.

7.45 We are satisfied that that the respondent has established this explanation on the balance of probability. We are satisfied on the balance of possibilty that taking maternity leave was, in no sense whatsoever, the reason for the dismissal.

7.46 It follows that the claim fails and is be dismissed.

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Employment Judge Hodgson

Dated: 7 December 2021

Sent to the parties on:

07/12/2021

For the Tribunal Office