EMPLOYMENT TRIBUNALS

Claimant: Ms T Mellor

Respondent: The MFG Academies Trust

Heard at: Hull (a video hearing by CVP)

On: 12, 13 and 14 January 2022
and 28 January 2022 and 1 February 2022 in chambers

Before: Employment Judge Miller
Ms J Noble
Mr D Dorman-Smith

Representation
Claimant: Ms R Crasnow QC (counsel)
Respondent: Ms L Amartey (counsel)

RESERVED JUDGMENT

1. The claimant's claim of direct sex discrimination is unsuccessful and is dismissed

2. The claimant's claim of indirect sex discrimination is unsuccessful and is dismissed.

3. The claimant's claim of harassment related to sex is successful. There will be a separate hearing to determine remedy.

REASONS

Introduction

1. The claimant was employed by the respondent as a teacher of Citizenship. By a claim form dated 15 March 2021 following a period of early conciliation from 11 March 2021 to 15 March 2021 the claimant brought a claim of indirect sex discrimination and harassment. At a preliminary hearing on 19 July 2021, the claimant was given leave to amend her claim to include a claim of direct sex discrimination. Amended particulars of claim were subsequently

produced that included the claim of direct discrimination. Those are not dated but no issue is taken about that.

Issues

2. The claimant's claims concern her return from maternity leave in July 2020 and her requirement to express milk when working at the respondent's school, the Mirfield Free Grammar School (sometimes referred to as MFG). The particular issues identified at the preliminary hearing on 19 July 2021 and that we have addressed are as follows:

1. Indirect sex discrimination

1.1 Did the Claimant make the Respondent aware that she required suitable facilities to express milk.

1.2 Did the Respondent apply a practice of not providing suitable facilities for women to express milk?

1.3 Did the Respondent apply a practice of not providing facilities for the storage of breast milk?

1.4 If so, did either of these amount to a provision, criterion or practice?

1.5 If so, did either provision, criterion or practice place women at a particular disadvantage compared to men?

1.6 If so, was the Claimant put at that disadvantage?

1.7 If so, can the Respondent show the practice to be a proportionate means of achieving a legitimate aim?

1.8 If the Claimant's claim is successful should compensation be reduced by 25% to reflect a failure to follow ACAS Code.

2. Harassment

2.1 Did the Claimant make the Respondent aware that she required suitable facilities to express milk.

2.2 Did the Respondent subject the Claimant to unwanted conduct by forcing her to express milk in the toilet and/or car park?

2.3 Did this conduct have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

2.4 Was the conduct related to the Claimant's sex?

3. Less favourable treatment because the Claimant was breastfeeding (which is put as a direct discrimination claim under s 13 Equality Act 2010)

3.1 Should the Tribunal to read down section 13(7) of the Equality Act 2010 on the basis that it is contrary to retained EU law and in particular the case of *Otero Ramos* C-531/15 [2018] ICR 965.

3.2 If so, who is the comparator for the purposes of the claim? The Claimant relies upon a hypothetical male comparator requiring a private space such as for medication purposes at certain points in the course of the school day.

3.3 Did the Claimant suffer less favourable treatment compared to that comparator by

3.3.1 being forced to express milk in the carpark

3.3.2 being forced to express milk in the toilet

3.3.3 the Respondent‘s failure to provide suitable facilities for expressing

3.4 Was the reason for the less favourable the fact that the Claimant was breastfeeding?

3.5 Given the Claimant's baby's DOB, should s17(3) EqA be read down in order to provide an effective remedy for all of the sex discrimination experienced?

4. Time limit

4.1 Did any of the incidents complained of occur more than 3 months, less 1 day, from the date the claim form was submitted to the ET?

4.2 If so, was there a continuing sequence of events so that the time limit should be taken from the date of the last incident in the sequence?

4.3 If so, what was the date of that last incident? Was the claim submitted in time for this incident?

4.4 If not, would it be just and equitable for the tribunal to extend the time limit for the Claimant to have submitted her claims?

The hearing and preliminary issues

3. The hearing was conducted remotely by video. There were, at times, some connection issues and we are grateful to the parties, witnesses and advocates in for their assistance and patience in overcoming them. The tribunal tried to ensure that there was a short break every hour.

4. We were provided with a bundle of documents comprising of 208 numbered pages. At the end of the second day, the existence of two other potentially relevant documents came to light and one of them, the respondent’s Maternity Pack, was provided and admitted into evidence on the final day.

5. The claimant produced a witness statement and attended and gave evidence. The respondent produced a witness statement from each of Ms Sarah Berry, Principal at the Mirfield Free Grammar school; and Ms Alison Haldenby Director of HR at the Mirfield Free Grammar school and they both attended and gave evidence.

6. Shortly before the final hearing, on 6 January 2022, the claimant produced a supplementary witness statement dated 4 January 2022. We refused to admit that statement for reasons given at the time. We allowed Ms Crasnow to ask additional questions at the start of the claimant's evidence to clarify only the dates of certain incidents set out in her substantial witness statement. We have to record that this questioning at times strayed beyond the eliciting of that specific evidence despite the intervention of the tribunal. Where relevant, we have taken account of the way in which such new evidence was adduced in deciding what weight to give it and we address that where relevant in our findings of fact below.

Findings of fact

7. The claimant commenced a period of maternity leave in 2018. She returned to work in January 2019. At that time when she returned to work she was continuing to breastfeed her child. Her partner was permitted by the respondent to bring her new baby into the school for the claimant to breastfeed them. We will return to this period as relevant throughout our findings as it is not directly material to the matters we need to decide. However, there is some relevant evidence about that time which shows that the claimant sought authority from the respondent to use specified rooms at specified times to feed her baby. Latterly, in respect of that period, the claimant continued to use a room that she had been permitted to use for breastfeeding to express milk, rather than breastfeeding.

8. The claimant said, and we accept, that she informed the respondent in September 2019 that she was again pregnant.

First request for a room

9. On 16 March 2020, while still at work, the claimant sent a letter by email to the Chair of Governors and the Executive Principal, Lorraine Barker (pages 63/64). As far as is relevant, the respondent Trust has an executive principal with responsibility for all the schools in the Trust with a head teacher in post for each separate school in the Trust. We understand that Ms Barker spent some time at MFG (the school where the claimant worked) and some at other schools in the trust, there being 3 in total. That letter was ostensibly a request for flexible working when the claimant returned from her imminent maternity leave. It also said, however:

> "I am requesting a reduction from full time to 3 days a week (but could consider 4 if organisationally this was not possible.)
>
> I have taken account of what it was like returning to work from maternity leave midyear: Due to organisational factors I taught a forever changing timetable, teaching several different subjects, all over School. There wasn't a room for me to use to express despite giving notice that I would need this facility in writing several times before I returned, and due to this I developed mastitis and was forced to take time off.
>
> I am proposing returning in September this time to start a fresh with the students. It will mean a shorter maternity leave but I think it will make for an easier transition.

As well as the part time request, I will require access to a room to enable me to express regularly".

10. Ms Barker did not attend to give evidence. The respondent does not dispute receiving this correspondence. It is clear from this correspondence, and we find, that the claimant informed the respondent that on her return from maternity leave in September 2020 (as she planned it at that point) she required access to a room in which to be able to express milk while at school.

11. Ms Haldenby and Ms Berry both said that they did not see a copy of this letter until the bundle was prepared for this tribunal. The fact of the flexible working request was, however, communicated to Ms Haldenby. Ms Haldenby said in oral evidence that it was a conversation in passing between Ms Barker and her – there is no email trail forwarding the request. On 20 April 2020 Ms Haldenby sent an email to the claimant inviting her to complete a flexible working request form in accordance with the respondent's policy.

12. The claimant did then complete the flexible working request form, copying and pasting parts of her original letter as suggested by Ms Haldenby (even though Ms Haldenby said she had not seen what was in that letter). The relevant parts of the flexible working request form (page 70 – 72) state as follows:

"Being able to work part time would help me to maintain a bond with baby by working fewer days and being able to enjoy more of those first-year special moments. I plan to breastfeed again and have sought advice in an attempt to have a more successful time with introducing a bottle which previously, I was unsuccessful with. However, working less days would reduce the demand on having to express enough milk to feed my baby which would reduce the stress in balancing work and a young family. My baby is only a couple of days old and have already sought help from a breastfeeding practitioner who has helped me to cup feed her in the hope we will be able to feed her using alternative methods during my work hours".

13. The flexible working request form contains a great deal more information about the claimant's other family circumstances. It is not necessary to set out any of that detail. The claimant did, however, have a lot of additional family and caring responsibilities beyond caring for a newborn, which we recognise is almost always hard work of itself.

14. There is nothing else in the form relating to the need to express or breast feed during working hours. The claimant agreed in oral evidence that there is nothing in that form that specifies whether the claimant intended to, or was likely to need to, express milk during working hours. The claimant said that on union advice she tried to keep the request specific and, in any event, she had already told the respondent about that. We agree, the claimant had informed the respondent of her needs relating to expressing milk in her letter of 16 March 2020. Ms Haldenby said that if the claimant wanted a room in which to express, she would have expected her to put it in this form or speak to her about it.

15. In our view, that was not a reasonable expectation for Ms Haldenby to have. Having sent a general letter and then been directed to a flexible working

request form, we can see no reason at all why the claimant would expect to put a request for a room in which to express breast milk in an application for flexible working. As to the assertion that the claimant could have raised it with Ms Haldenby, we will return to that more generally below.

16. We note here that the claimant's child was born on 19 April 2020.

17. On 21 May 2020 the claimant's request to work three days a week was confirmed (although not which days) and the claimant was informed on 26 June 2020 that her working days would be Mondays, Wednesdays and Thursdays. The claimant said that her colleagues found out about the specific days she would be working on or around 21 June 2020, before she did. Although that would be, at the very least, poor practice if it were the case, nothing turns on it in respect of the issues we are required to decide and we make no findings about it.

The second request for a room

18. In the meantime, on 19 June 2020 the claimant wrote to the respondent confirming her return to work date and to arrange a Keeping in Touch (KIT) day. She says in that letter (page 78), as far as is relevant:

> "Please let this letter serve as notification that I will be returning to my position as a Teacher of Citizenship on 14th July 2020. As you know from my maternity leave letter, I began my leave on the 20th April 2020…
>
> I am unsure what Teaching will be like upon my return with the current changes due to Covid 19. I would therefore, like to use Monday 13th July as a KiT day. I know from last time, you said I would not need to use more than one KiT day so I am hoping this day will be enough to catch up on the curriculum changes and all other changes that have taken place during my maternity leave and sick leave…
>
> I know I am due to go part time but I would not like this to commence until September, as written in my initial request. Therefore, I plan to return full time until September when the new academic year begins.
>
> It is important to make you aware that I will still be breastfeeding when I return. I am unsure whether I will need to feed at lunchtime on my first week back but after the support I received to feed [my child] last time, I would like something in place in case I do need to feed [my baby].
>
> From Sep, I may need a room to express in but I do not plan to feed [my baby] on a lunchtime from September.
>
> Please contact me via email with any concerns or plans required for my return".

19. The following uncontroversial conclusions arise from this letter.

20. Firstly that the last day of the claimant's maternity leave period would be 13 July 2020, being a KIT day.

21. Secondly, that for the remainder of the summer term, the claimant intends to work full time and then part time from the start of the autumn term in September 2020.

22. Thirdly, that the claimant will continue to breastfeed her child on her return to work.

23. The claimant was hoping to be able to breastfeed her baby at lunchtime at school as she had done with her previous child. Ms Haldenby says that she passed that correspondence to the claimant's line manager at the time, Ms Nicola Horodczuk.

24. Ms Horodczuk did not attend to give evidence. She was absent from work through ill health from 9 October 2020 and her employment with the respondent ended on 21 December 2020. Unfortunately, the respondent's evidence was to a significant extent that a number of the matters about which the claimant complains were the responsibility of Ms Horodczuk. This has made it difficult to reach conclusions about what we think happened on some occasions.

Conversations before the claimant's return to work – 2 and 3 July 2020

25. In any event, Ms Horodczuk then had a conversation with the claimant on 2 July 2020 (there is an email that records aspects of this conversation (pages 80 – 83)). We find that in the course of this conversation, Ms Horodczuk told the claimant that she would not be able to have her baby brought into the school for the claimant to feed them. The claimant said, about this conversation,

    "When I spoke to Nicola, she said she couldn't deal with everything I had raised, and she would need to speak to Alison".

26. In oral evidence, the claimant said "Lots of things were discussed in the telephone call. I did express that I wanted to express on site as well as feed. The conversation was about the fact that had already had a conversation. Already requested in a letter about wanting to express. I had already been told that breastfeeding [on site] was not an option".

27. The clamant clarified that she had been told by Ms Horodczuk in the "first call" that breastfeeding on site was not an option. It is unclear to what telephone conversation the claimant is referring. The claimant said in oral evidence

    "In first call with Ms Horodczuk, I discussed fact that I was breastfeeding and the fact that I wanted to chase up about a Risk Assessment as I know one was done previously. I also raised concerns that I wanted a room to express in when I returned properly. She said she wouldn't be able to deal with everything at that call. Need to speak to Alison in HR and raise with her"

28. Ms Haldenby says in her witness statement:

    "Nicola informed me that she had had a conversation with Tara. Nicola had explained to Tara that it was not possible to allow her partner to come into the School with the baby in order for her to breastfeed due to Covid-19

restrictions but would discuss alternatives with her the next week. Nicola did not mention anything in relation to Tara mentioning that she would need a room to express. Nicola always discussed HR matters with HR. She was quite a nervous character and was not a confident line manager. She would always seek support and, given this, I am confident that Nicola would have raised the issue of Tara's alleged request for a room to express milk with me or another member of the HR team, if this had been raised with her".

29. The other evidence about this conversation is an email trail between the claimant, Ms Horodczuk, Ms Haldenby and Ms Berry. It starts, as far as we know, with the claimant emailing Ms Horodczuk soon after the conversation on 2 July 2020 (pages 83 – 84). That email which is substantial, is solely about wearing masks in school. The claimant sets out her concerns about her asthma, the fact that her family members have asthma and that she is a high risk person in respect of Covid. (This was in the early stages of the Covid-19 pandemic).

30. Ms Horodczuk forwarded that email to Ms Haldenby and Ms Berry. Ms Horodczuk did not mention breast feeding or expressing in the forwarding email but said "I'll tell you about the rest of the conversation when I see you".

31. It appears that Ms Horodczuk did not then see Ms Haldenby at that point because she sent Ms Haldenby a further email on 3 July (page 81) which said:

    "I came to see you today but were in meetings.

    Tara is coming in Monday (KIT Day), Weds (SDM) and Friday (staff training).

    I had a long conversation with her yesterday, sticking to our points. She knows that her days in school are fixed and appointments need to be taken on days off.

    She talked about breast feeding and face masks (see other e-mail - we need to get back to her - may need risk assessment)

    I'll catch up with you in person on Monday".

32. We refer also to a draft email (page 83) prepared by Ms Horodczuk on 3 July 2020 in response to the claimant's concerns. That referred to the claimant's concerns about covid and "the risk assessment and procedures in place to protect staff and students" and concluded "Lastly, you asked about feeding your daughter at lunchtime during the w/c 13th July. We are unable to have visitors on academy site due to Covid 19 restrictions. However, I will discuss other alternatives with you over the telephone next week". This was not sent to the claimant – Ms Haldenby said she subsequently did have the chance to discuss the issues with Ms Horodczuk in person who then discussed them with the claimant.

33. We find, on the balance of probabilities, that the claimant did not explicitly refer to a need for a room in which to express on her return to work in the conversation with Ms Horodczuk on 2 July 2002. We conclude from the context of the email sent by the claimant on 2 July, and the draft response prepared by Ms Horodczuk that the claimant's primary concern (and for very

understandable reasons) was the risk to her in returning to work from Covid-19. This is the sole content of her email. We think it more likely in that context that the reference to a risk assessment in the email trail is a reference to a Covid-19 risk assessment. This is consistent with the claimant's evidence that she quickly accepted that her partner would not be able to bring her baby on site to breastfeed and that she made her own arrangements when she returned (to which we will come shortly) to feed the baby in the car in July. We do not place any significant weight on Ms Haldenby's assessment of Ms Horodczuk's character – that she was a nervous person who would always seek support.

34. We also make the following findings about this period. Ms Horodczuk did not take any steps towards undertaking a risk assessment (whether in relation to Covid -19 or for pregnancy).

35. We also return to the letter of 19 June 2020 mentioned above in which the claimant said she may require a room in which to express in September. The respondent placed a great weight on the use of the word may. They said, effectively, that matters were still uncertain.

36. We do not place any weight on the use of "may". Anything could have happened in the intervening months. It is still the case that in that letter the claimant had put the school on notice as of June 2020 that there was a possible need for her to have space to express milk in school from September 2020.

Conversations before the claimant's return to work – 6 July 2020

37. There was then a telephone conversation on or around 6 July 2020 between Ms Haldenby and the claimant. Ms Haldenby says that that conversation was about the respondent's decision not to allow the claimant's partner onto the site in July for the claimant to feed her baby. She said:

"The only issue I discussed during this conversation with Tara was in relation to her partner not being allowed to come into the School with their baby so that she could breastfeed. At no point during this conversation did we discuss expressing milk on site nor did Tara request a room so that she could express milk. I also informed Tara that she could pop in and see me to discuss any issues in relation to any concerns she had. Tara did not come and see me to discuss this further on 13 July 2020. This was the date Tara would be coming in for her KIT day"

38. The claimant's account is set out in her witness statement:

"We mainly discussed my KIT days, but one of the points I made on the phone to Alison was that I wanted to be able to express milk on site at the school. I was not going to be able to breastfeed my daughter as my partner had not taken shared parental leave this time and so could not bring the baby in during the school day. I made it clear that I would appreciate time and space to do this. I also made it clear that this was expressing as opposed to breastfeeding.

She said that she appreciated they had accommodated me last time, but they wouldn't do it this time. She didn't give me a reason why. She said I had the

right to leave the school grounds if I wanted. By that time Attendance officer appointed so I couldn't use their room anymore.

Leaving the premises wasn't an option for me as it would take me too long to get home and back again during my lunch break. I didn't push it with Alison as I don't really like confrontation"

39. On the balance of probabilities, we prefer the evidence of Ms Haldenby about this conversation. The claimant's concerns at that point were about her returning to work in July. She was understandably concerned about the Covid -19 risk and was thinking about her imminent return to work. September was still a way off at that point. It seems much more likely that the discussion was about the claimant's imminent return. The claimant does not suggest that she needed expressing facilities at that point and makes no complaint about feeding her baby in the car at lunch time in July.

40. We find that Ms Haldenby did not, on 6 July 2020, refuse the claimant permission to express milk in the school. We think it more likely that the conversation was about whether or not the claimant could breastfeed her baby at school at lunch time.

KIT day and return to work in July 2020

41. On 13 July 2020 the claimant came to work for her KIT day. The claimant says that she had a one to one meeting with Ms Horodczuk and she said in her witness statement

"I again explained I would need a room to express when I returned in September. I told her that my breasts would feel really uncomfortable if I wasn't able to express and need a room to do that in. She said to leave it with her, and she would speak to the Exec Principal, Lorraine, or Sarah Berry, or HR".

42. We have no evidence from Ms Horodczuk about this. It is possible that the claimant did raise explicitly with Ms Horodczuk at this meeting that she would need a room in September in which to express. However, as we have found above, the claimant's concerns at that time remained focused on breastfeeding her baby, and the impact of Covid-19. We think it unlikely that the claimant would have raised the issue of needing a room in which to express in September with Ms Horodczuk. Even if she did, however, we find that Ms Horodczuk dd not raise this with Ms Berry or Ms Haldenby.

43. The claimant had a meeting with Ms Berry on 16 July 2020 shortly afterwards and there are some contemporaneous notes or that meeting – both brief hand written notes and a typed up fuller version prepared for this hearing (pages 90 – 97 and 88 – 89 respectively).

44. There is nothing in those notes about the claimant stating that she will need a room in which to express when she returns in the September. We accept that these notes were produced in good faith by Ms Berry, although they expand substantially on the very brief handwritten notes. The claimant does not mention this call in her witness statement. Again, we conclude from these notes that the claimant's main focus was her entirely reasonable concerns about Covid-19 and the impact of returning to work on her family.

45. There are two references to risk assessments in the hand written record of that phone call.

46. There is also a reference to the claimant's baby but no reference to feeding or expressing or anything similar, although there are references to challenges the claimant was having in respect of some of her other children. We consider that, as Ms Berry said in oral evidence, had expressing or breastfeeding been mentioned in that meeting, Ms Berry would have written a reference to it somewhere. She did not. We conclude therefore that it was not mentioned in that conversation. We rely on this as further evidence that it is unlikely that the claimant explicitly raised with Ms Horodczuk her need for a room in which to express from September. We think that, had this in fact been raised on the occasions and in the way the claimant said, it is likely she would have checked with Ms Berry as to whether Ms Horodczuk had raised this with her (on the basis that the claimant said that Ms Horodczuk said that she would speak to Ms Barker or Ms Berry about it).

47. We prefer the evidence of Ms Berry to the effect that the reference to risk assessments was a reference to a Covid risk assessment, rather than a pregnancy or maternity risk assessment. We also find that the reference to a request, at the end of term, for a risk assessment in the claimant's witness statement was a further reference to a Covid risk assessment. The risks from Covid formed the focus of the claimant's written communications with the respondent and we concluded, therefore, that it is more likely than not that this would also have been the basis of any verbal requests for risk assessments.

48. After 16 July 2020, the claimant was away from work as she was shielding and she did not return until the autumn term in September 2020.

Return to work in September 2020

49. Term started on 7 September 2020. The first two days were "inset" or training days. At those training days, Ms Berry said that she provided information about the arrangements for teaching in the context of the pandemic. She said, effectively, that the arrangements were that students would remain in classrooms and the teachers would move around to limit the number of people moving around the school. She said that teachers were free to go where they liked as the corridors would be free of students except at lunch times and breaks. Ms Berry said that rooms had been measured, signs put up and there were a lot of free rooms.

50. The respondent sought to rely on this as evidence that there were many rooms out of use which the claimant could use to express milk at her discretion. We reject this assertion. The claimant said she did not actually know at any point which rooms were available and it seems more likely that such arrangements would result in a stricter room allocation practice than a more flexible one. It would not be reasonable to expect the claimant to just wander into rooms at random to use for expressing milk and even more so in the context of a pandemic where there was a high profile focus on maintaining hygiene and cleaning rooms.

51. The claimant's evidence was that she did not know of all the changes that had taken place. Ms Berry referred to a carousel on the inset days – meaning that teachers and staff attended different training sessions in different rooms. It is obvious that there was a lot of information to be imparted and the claimant was also trying to prepare for the start of a new term. There was no documentary evidence in the bundle of any presentation given at the inset days or information about room arrangements circulated to staff. We prefer the claimant's evidence about this and find that she was unaware of all the changes that were taking place at that time and, specifically, that she was unaware that the "well-being centre" was available and not being used by students.

52. The first day of teaching for the claimant was 9 September 2020. The claimant was at this point working three day weeks – Monday, Wednesday and Thursdays. In her witness statement, the claimant said

> "I had several general conversations with Nicola during those first few weeks in September as you would expect to have with your line manager. During those conversations I would say to her I was in need of somewhere to express and that I was pain (sic) not being able to express during the day but all she said was that she would speak to someone else to see what they could do".

53. In oral evidence the claimant said, in respect of those alleged conversations that there was one she could definitely remember. She said (of Ms Horodczuk)

> "Just her checking in - how I was settling in, it was the first term back during covid and the first day back teaching students in that September. Teachers were moving from classroom to classroom, someone moved my resources. She was monitoring, could see I was flustered. End of day came to check and see how day went. Said it felt a bit stressful but experienced changeover".

54. We conclude, therefore, that the claimant's evidence is that on the first day of teaching – namely 9 September 2020 – she told Ms Horodczuk that she had not been able to express during the day and she needed somewhere to do so. The difference, in our view, between September and July is that in July the claimant had made arrangements to feed her baby at lunchtime. There were no arrangements in place in September. It was therefore more likely that she was, when she was not able to feed her baby at lunchtime, in discomfort and would need somewhere to express.

55. The claimant's evidence, which we accept, is that she left as soon as she could on that day to express at home rather than trying to find somewhere at work to express. The claimant was not provided with access to a room by Ms Horodczuk or anyone else at that time. Ms Haldenby confirmed in oral evidence that Ms Horodczuk did not at any point tell her that the claimant had asked for or needed facilities to express.

56. As referenced above, it was the respondent's case that the claimant could find and use a room herself. Effectively, that the claimant did not require anyone else to arrange a room for her.

57. We refer at this point to the period after the claimant's return from her previous maternity leave in early 2019. She was still breastfeeding her child at that point and the respondent agreed that the claimant's partner could bring the baby to the school for the claimant to feed them at lunch time. A room was made available for the claimant to do this. Specifically, on 9 January 2029 the claimant wrote to the respondent to request a room to breastfeed her child. She said that a colleague had offered her her room and, consequently, the claimant requested a key for that room. The response (page 48) was as follows:

    "Further to your email below apologies but I don't appear to have received an email requesting a room on your return from maternity leave. However, now that I am aware, I can assure you that this isn't a problem and we have located a suitable room for you to use but we just need Lorraine to authorise this. The room we are proposing is the office at the top of the stairs in reception opposite Rebecca Asquith's office and close to the ladies toilets. There are blinds at all the windows in this office and no glass in the door. It may be Friday morning before we can speak to Lorraine about this due to the current Ofsted inspection but I will confirm this with you as soon as I can Tara.

    You will require a maternity leave return to work risk assessment with Ron Ely, Estates and Facilities Manager and wondered if you would have any availability on Friday when you come in for your final keep in touch day? Ron is in meetings from 1 to 3 pm on Friday but should be available at some point the rest of the day. Would you mind emailing him direct with your availability".

58. Ron Ely was the facilities manager at the time and the person who was responsible for undertaking the pregnancy risk assessments. He had left by the time of the claimant's return from the latter period of maternity leave. The response was from a Nicola Carter (an HR Officer) who had also left by that time. We were taken through a number of emails about this first period. What is clear and we find is that the claimant was NOT able to just use any room that she considered appropriate. She had to agree it with someone from the respondent.

59. We recognise that the first situation was different – the claimant needed a room in which to feed her baby and this is a different proposition from expressing milk. It was said that sometimes the claimant's partner might need to come into the school (past reception) with the baby and, in any event, there was another person in the school (the claimant's baby) and there were obvious safeguarding and health and safety issues arising from that.

60. In March 2019 there was correspondence between the claimant and Ms Haldenby. On 7 March 2019 Ms Haldenby told that claimant that her usual room was not available anymore but the claimant could use Ms Haldenby's office until something permanent was sorted out. We conclude that this would have been private as Ms Haldenby refers to giving the claimant a key. The claimant's response (page 50) is as follows:

    "We are trying to see if she can go without feeding today and tomorrow and Dad is trying to persevere with cup/bottle. He is also taking her swimming tomorrow as a distraction. My main concern is ending up with a blocked duct but I don't feel the need to express just now and if I do need to, I will just go

to the toilet after School if I get a bit full and will see how I go tomorrow. I will keep you posted next week if I still need somewhere to feed. I am hoping to drop the lunch time feeds as I don't really get a proper break with having to dash away to feed and then go back to lesson".

61. Ms Haldenby's response is "Ok, thank you. Just keep me posted if you need any further help/support".

62. It was put to Ms Haldenby that on that occasion the claimant had no choice but to use the toilet. We disagree – the exchange was clearly in the context of the claimant having already been offered a private room which she appeared to reject. We also asked Ms Haldenby if there was any inconsistency in her response to that email and her professed disgust at discovering the claimant had had to express and eat her lunch in the toilet. Her response was that if someone was just expressing she would not necessarily see that as a negative (using the toilet) but it was really a combination of sitting on the toilet floor, expressing and eating lunch that was unacceptable.

63. We draw the following conclusions from those exchanges.

64. In all the circumstances, it was reasonable for the claimant to conclude, on the basis of what happened in 2019, that she needed authorisation to use a particular room to express. While there may be a difference between bringing a baby in and feeding, the overall impression was that rooms come in and out of use and someone needs, at the very least, to co-ordinate their use.

65. We find, therefore, that the claimant genuinely and reasonably believed in the Autumn term of 2020 that she was not able to just pick a room to use for expressing. A number of potentially available rooms were put to the claimant and her response was that she was either unaware of them or they were not suitable for some reason. However, in the event that is not material because of the claimant's reasonable belief about the need for authorisation.

66. The other conclusion we draw from the evidence relating to 2019 is that the claimant did offer to use the toilet to express after school before parents evening and neither she nor Ms Haldenby saw anything wrong with that at the time. We agree that this is not *necessarily* inappropriate – at that time the claimant needed to express a small amount to avoid a blocked duct in circumstances where her baby was at some stage of weaning. This appears to us conceptually different from expressing a substantial amount of milk at lunch time with the purpose of both avoiding problems and providing milk for the claimant's baby.

67. We also note that the respondent recognised at that time an obligation to undertake a pregnancy risk assessment and one was undertaken by Ron Ely on 11 January 2019. That records matters relating to breastfeeding and says "A privacy room for Tara has been made available to breast feed during school hours. This has been discussed and agreed with Tara".

68. We pause here to note that the claimant sought to introduce substantial evidence about the failure of the respondent to produce a pregnancy risk assessment in respect of the 2020 return from maternity leave. This is not a significantly relevant feature of this case but we do find that had a pregnancy

risk assessment been undertaken, the question about whether a room was available for the claimant in which to express would, in all likelihood and on the basis of the content of the 2019 pregnancy risk assessment, have been addressed. We find that no pregnancy risk assessment has been done.

69. This is because firstly, none written one was provided to us and no witness was able to confirm that one had been done. Secondly, the respondent has a significant HR department and a recording system so that if there had been a pregnancy risk assessment done, it is more likely that not that there *would* have been a written copy. Thirdly, the respondent was not at all clear whose responsibility it was at that point to undertake the pregnancy risk assessment. Ms Haldenby said it would be "picked up" by the executive principal but as far as we can tell the actual assessment would not be done by the executive principal. Ms Haldenby also said that it would be combined with the covid risk assessment.

70. Whoever ought to have done it, however, we find that it was not done.

The claimant's sickness absence and telephone conversation with Kate Timson

71. The claimant remained at work until 16 September 2020 (having done 3 days teaching on 9, 10 and 14 September) when she went off sick with debility. The claimant's evidence was that this was in fact mastitis because she was not expressing as regularly as she needed to in the week from 9 September 2020 when teaching started until she went off on 16 September 2020. We do not make any findings that the claimant was off with mastitis and, if so, that it was caused by difficulties in expressing at school. We note the claimant appears to have had mastitis prior to March 2019 and we heard no medical evidence that debility (which was what was on the fit note) equates in this instance to mastitis or about any correlation between expressing and mastitis so it would not be safe for us to make that finding.

72. On 23 September, while the claimant was off sick, she had a telephone conversation with Ms Kate Timson, another HR adviser. There are notes of that call (page 100) which are brief. They say

"23.09 - KT called TM. Fit notes states debility but Tara said that this was linked to her mastitis as she is in significant pain and the duct is still blocked. She says she is prone to this and has been hospitalised for it before. She has now been prescribed a 7 day course of different antibiotics which will take her to the end of the fit note. When asked about triggers or awareness, she said that she had felt the pressure building up but had not had the opportunity to express due to the 'chaos' of the school day and that she doesn't think that this has helped. TM said that she would keep in touch regarding her state of health".

73. The claimant's evidence of this conversation is that "I explained I had developed mastitis because I hadn't been expressing regularly and that therefore I needed a place to express during the day at school. I just couldn't keep putting it off during the day till I got home as I would get sick again. She said that she would speak to Allison [Haldenby] about it, but she did not get back to me".

74. We prefer the claimant's evidence of this account. It is consistent with the brief notes and represents what were likely to be her main concerns at that time, which were that having had difficulties expressing at school she had, from her perspective, consequently gone off sick.

75. Regardless, therefore, of whether there is any medical evidence that the claimant had mastitis or if it was caused by her problems expressing at school we find that the respondent was made aware that the claimant believed she had mastitis and that this had been contributed to by not being able to express during the school day.

76. There was no evidence from either Ms Haldenby or Ms Berry that Ms Timson had spoken to Ms Haldenby or anyone else about facilities for the claimant to express on her return, or in fact that she had made any further enquiries or taken any further steps to address the problems the claimant had mentioned. The respondent had not in the course of preparing for this hearing made any enquiries of Ms Timson about what was said or what she then did.

77. We therefore find that Ms Timson did not take any further steps in response to her telephone conversation with the claimant.

Return to work

78. The claimant returned to work on 30 September 2020. The claimant had conversations with Ms Horodczuk as her line manager and the claimant said that she told Ms Horodczuk that she needed a place to express and that Ms Horodczuk's response was they would discuss it soon in a formal return to work meeting. We find that there was no such meeting – again we reiterate that Ms Horodczuk did not come to give evidence and there was no documentary evidence showing that a return to work meeting took place. Neither Ms Berry nor Ms Haldenby were able to provide any evidence as to what had happened. We therefore accept the claimant's evidence and find that she did tell Ms Horodczuk that she needed somewhere to express; Ms Horodczuk said they would address it in the return to work meeting; there was no such meeting and it was, consequently, never addressed.

79. The claimant's evidence was that it was in this period – following her return to work on 30 September 2020 – that she started using the toilets or her car at lunch time to express. She said this was daily and we accept her evidence of this. The claimant's lunch break was 25 minutes and it took her 20 minutes to express. We therefore also find that when the claimant had to express in the toilet or car, she realistically had no choice but to eat her lunch at the same time.

80. The claimant said that she more often used a toilet than the car. Either she did not have the car at school or it was too cold. The claimant described one occasion when she had got stuck between the front seats as she had been in the back but could not get out the back because of child locks.

81. The claimant's concern about expressing in the car was that she could be seen, including by students. We heard oral evidence in cross examination about whether one carpark was more private than another. In our view, this is irrelevant. The fact remains that the claimant could be seen by someone

walking past and it would only ever be a matter of chance as to whether anyone walked past or not.

82. The claimant said "I found it unhygienic and disgusting to have to express in the toilets. Further, as I wasn't allocated any time to express, I had to do it at lunch time and eat my lunch at the same time. I found it disgusting to have to eat my lunch in toilets, which were often dirty".

83. We also heard evidence that some toilets were less pleasant than others. Again, this somewhat misses the point. Ms Haldenby expressed horror that the claimant had had to sit on a toilet floor to express milk and eat her lunch, a sentiment with which we agree, and we think that whether the toilet was pristine or filthy is merely a matter of degrees of inappropriateness.

84. We refer also to an incident on 19 October 2020. This is recorded in a series of emails between the claimant and her colleague (page 101 – 106). It is apparent that on this occasion the claimant had not had time to express at lunch time and she was concerned about leaking during lessons. Again, we have no hesitation in accepting the claimant's evidence that this would be embarrassing in front of pupils. We also accept the claimant's evidence that this happened about 5 times.

85. In the period from 30 September until the claimant stopped going into work and started shielding on 6 November 2020, there were no more than 17 working days for the claimant (although this might have included a period for half term about which we heard no evidence).

86. We find, on the balance of probabilities, that the claimant either expressed in the toilets or car while eating her lunch or was unable to express and thereby experienced embarrassing leakage on all of these days.

87. We note that the claimant's line manager was off sick from 9 October 2020 (and did not return after that) so there were in fact only 4 working days in this period when the claimant was in with her manager.

88. We find, during this period, that the claimant genuinely and reasonably believed she had no option but to use the toilets or her car to express milk. The claimant had asked on a number of occasions starting in March 2020 for a room in which to express and had been left with the impression it would be picked up. The most recent occasion was when she asked her line manager who had said it would be dealt with in a return to work meeting which did not happen before she went off sick.

89. The claimant had also told HR (in the person of Ms Timson) about the problems she was having expressing at school and that she believed it had contributed to mastitis.

90. The respondent did not undertake a pregnancy risk assessment in which this issue could, and quite probably would, have been identified. The claimant was criticised, implicitly, for not raising this with Ms Haldenby or Ms Berry and we are surprised that she did not raise a complaint, after having to express in the toilets for a number of weeks. However, we have had a glimpse into the hectic nature of the claimant's work in the email exchange on 19 October (above) and we think that the claimant was just trying to get on with her work.

91. We also heard evidence that the claimant had not been satisfied with how she felt she had been treated in respect of some aspects of her maternity leave previously – she said she believed that the respondent had a negative attitude to pregnancy and maternity because they had classed a previous period as maternity leave rather than sickness.

92. We think that Ms Haldenby, particularly, was supportive in the first period. The claimant did not have any good reason not to approach Ms Haldenby about the problems she was having. However, the fact remains that she did not do so, but had spoken to her line manager who had said she would sort it out. It was reasonable for the claimant to rely on this assurance from her line manager and take her own steps in the interim. This meant, for the claimant, that she felt she had no choice but to use the toilets or her car and, to that extent, we find that she was forced to do so – she believed she had taken all the steps necessary to find somewhere suitable to express, nothing had been forthcoming so she was left to her make her own arrangements. We have already set out why this could not reasonably include using random offices or classrooms. Toilets are both readily available and private so offered a workable, if not ideal, solution.

16 December 2020 onwards

93. The claimant was due to return to work when shielding was lifted on 2 December 2021. However, she remained away for work through a combination of sickness and family issues until 16 December 2020. The claimant says that she was contacted again by Ms Timson in the week before 16 December 2020 about her not being paid for some days in December. The claimant says that in that call she reiterated her request for a room to express in on her return to work and said that Ms Timson said she would raise it with Ms Haldenby. Ms Haldenby said that it would not have been up to her to allocate rooms but she was not in a position to deny that the clamant had had a conversation with Ms Timson. Ms Haldenby also confirmed that it is unlikely that there would have been a record of any such conversation between Ms Timson and the claimant on the respondent's system.

94. The respondent did not speak to Ms Timson prior to the hearing or produce any evidence from her. We therefore prefer the evidence of the claimant and find that she did, again, in the conversation with Ms Timson say that she needed somewhere to express on her return to work.

95. The claimant said that when she returned to work in December she was again required to express in the toilet at lunch time. We accept the claimant's evidence of this. No alternative arrangements were made between the claimant leaving work on 6 November and her return on 16 December 2020.

96. On 16 December 2020, the claimant was required to attend a meeting with Ms Berry. The purpose of the meeting was to discuss the claimant's leave of absence forms. There are no notes of this meeting – not even hand written notes – and we are very surprised by that: particularly in light of Ms Berry's evidence that she is known for taking notes when talking. Ms Berry says that the meeting was a result of

"there being a concern in relation to the number of Tara's absences from the School and also a concern that students were not receiving continuity of learning which they deserved. At this meeting, I discussed the concerns that were being raised by Tara's close colleagues namely that they were having to cover for her which was causing them stress and did not think it was fair".

97. To us, this sounds like a quasi-disciplinary meeting – or very early stages of raising concerns with the claimant. We would have expected notes at least, and, although probably not mandatory at this stage, we would not have been surprised by the presence of an HR officer and an explanation to the claimant that she could have taken a representative with her. There was none of this, however. Ms Berry said that she did not take notes because she intended it to be a short, focused meeting. However, she then went on to describe that she discussed specific absences, maternity leave, the claimant's children's illnesses, that her absences had had an impact on the claimant's colleagues and addressed rumors that the claimant had posted certain things on Facebook.

98. The claimant says that in that meeting she made it clear that

"I had still not been provided with a place to express despite repeated requests. I made it clear that this was the reason I had developed mastitis, as well as explaining how unhygienic and disgusting I found it having to use the toilets. I also complained that I didn't feel like I was getting a proper lunch break because I had to spend the time expressing. I explained that my health was deteriorating, and my doctor was getting concerned".

99. We think that on the balance of probabilities, the claimant did raise these issues. However, we think it likely that she might not have been as explicit as she now recalls and potentially did not place as much emphasis at the time on the impact of the lack of expressing facilities as she now does. The focus of the meeting was about the claimant's absences and it is likely that the claimant was concerned about that.

100. Similarly, we think that Ms Berry's recollection of this conversation, in the absence of any notes, is focused on what she intended to discuss rather than what the claimant actually said. It seems very unlikely that the claimant would not have mentioned the problems she was undoubtedly having with expressing when the topic of the conversation was her absences. The claimant believed, rightly or wrongly, that the failure to provide adequate expressing facilities contributed to mastitis and her absence. It is almost inconceivable that in those circumstances the claimant would not have mentioned the difficulties with having somewhere to express.

101. We also take account of the fact that Ms Berry was in charge of a large school with about 200 staff in the middle of a global pandemic. In the absence of any notes of the meeting, it is unlikely that she will recall in detail this one meeting. We therefore find that, on the balance of probabilities, the claimant did tell Ms Berry at that meeting on 16 December 2020 that she had not been provided with a place to express in school.

December and January

102. The next day the claimant was not at work as she attended a hospital appointment, and after that the Christmas holidays started. From January 2021 the claimant was shielding and working at home.

103. On 3 January 2021, the claimant sent a letter to the respondent setting out health and safety concerns in relation to Covid. The respondent relies on this as evidence that the claimant was perfectly content to raise grievances when required and, by implication, if she had had a real issue with a place to express as she now says, she would have raised a grievance at the time.

104. This letter is clearly a template prepared by the claimant's trade union. The respondent says the claimant was the only person to send one, the claimant said she thought other people had also sent them. In our view, this letter is not material. The claimant did consider that she was part of a campaign, she had the backing of the union and she thought that she was one of a number of people. This is not the same as raising an individual grievance and we do not place any weight on this letter as evidence that the claimant did not have any concerns at the time about having somewhere at school to express.

Other matters

Fridge

105. The respondent did not provide any storage facilities for the claimant to keep her breast milk. The claimant said that she had been advised by her health visitor that it was safe to store it in a bag for the period she was at school. It was also the claimant's evidence that in the previous period she had used a departmental fridge. She said that she could have used that but it was difficult to get to as she was teaching in different places around the school. We accept the claimant's evidence of this.

Comparators

106. The claimant relies on a hypothetical comparator of a diabetic man who requires to take insulin and store it. Ms Haldenby's evidence, which we accept, was that those needs would be accommodated. She described the respondent as like a family in that they would accommodate any help or support someone needed around a medical issue.

107. The claimant also referred to another employee – Amy – who had gone off sick with mastitis. The claimant's unchallenged evidence was that she had thought she could go all day without expressing or feeding but ended up with mastitis and going off sick in October 2020. We do not have any further evidence of the Amy's circumstance so that we cannot make any findings about why Amy did not express.

The law and submissions

Prohibition against discrimination at work

108. Section 39 Equality Act 2010 says (as far as is relevant)

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…

109. Section 40 says

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

110. Section 212 Equality Act 2010 says, again as far as is relevant,

(1) In this Act—

…

"detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

(2) A reference (however expressed) to an act includes a reference to an omission.

(3) A reference (however expressed) to an omission includes (unless there is express provision to the contrary) a reference to—

(a) a deliberate omission to do something;

(b) a refusal to do it;

(c) a failure to do it.

(4) A reference (however expressed) to providing or affording access to a benefit, facility or service includes a reference to facilitating access to the benefit, facility or service.

(5) Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic.

111. In our judgement, this means that where a claimant is relying on an alleged detriment as the basis for a claim of both direct sex discrimination and harassment, it cannot be both. If it is found to amount to an act of harassment, it cannot also be a detriment amounting to direct discrimination. If the conduct

is found to fall short of harassment, however, it is still possible that it could amount to an act of direct discrimination based on allegedly detrimental treatment. (*Unite the Union v Nailard* UKEAT/0300/15/BA).

Direct sex discrimination

112. Section 13 of the Equality Act 2010 says (as far as is relevant to these proceedings):

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

…

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

113. Section 11 Equality Act 2010 provides that sex is a protected characteristic and says that a reference to a person who has the protected characteristic is a reference to a man or a woman. It is not explicit in the list of issues that the claimant is relying on the protected characteristic of sex. The summary of the claims refers to a claim of "less favourable treatment because the claimant was breastfeeding" and cites s 13(6). The issues (as set out above) also refer to the reason for the allegedly less favourable treatment as being "because the Claimant was breastfeeding".

114. Section 11 sets out an exhaustive list of protected characteristics. It does not include breastfeeding. Section 13(6) and (7) (to which we will come) are not easy to understand and it is therefore, in our view, important to be accurate in defining the claims and the relevant legal provisions. To this extent, and as explored further below, the issue at 3.4 of the list of issues must properly be read (having regard to paragraph 33 of the claimant's amended claim) as

"Was the reason for the less favourable [treatment] the fact that the Claimant was a woman, by reason of the fact that the claimant was breastfeeding"

115. Section 17 Equality Act 2010 says, again as far as is relevant:

(1) This section has effect for the purposes of the application to the protected characteristic of pregnancy and maternity of—

(a) Part 3 (services and public functions);

(b) Part 4 (premises);

(c) Part 6 (education);

(d) Part 7 (associations).

(2) A person (A) discriminates against a woman if A treats her unfavourably because of a pregnancy of hers.

(3) A person (A) discriminates against a woman if, in the period of 26 weeks beginning with the day on which she gives birth, A treats her unfavourably because she has given birth.

(4) The reference in subsection (3) to treating a woman unfavourably because she has given birth includes, in particular, a reference to treating her unfavourably because she is breast-feeding.

(5) For the purposes of this section, the day on which a woman gives birth is the day on which—

(a) she gives birth to a living child, or

(b) she gives birth to a dead child (more than 24 weeks of the pregnancy having passed).

(6) Section 13, so far as relating to sex discrimination, does not apply to anything done in relation to a woman in so far as—

(a) it is for the reason mentioned in subsection (2), or

(b) it is in the period, and for the reason, mentioned in subsection (3).

116. It was agreed, and is obvious, that this claim was brought under part 5 of the Equality Act 2010. We were invited to disapply this section in the event that Ms Crasnow's submissions inviting us to "read down" section 13(7) (above) were successful. Ms Amartey's position was that she was unclear why this submission was being made as section 17 on its face does not apply to cases brought under part 5. Ms Crasnow was unable to expand further on why section 17 might *need* to be disapplied in circumstances where it already appears not to apply. As we understand, Ms Crasnow made this particular submission in her skeleton argument in case the respondent sought to rely on section 17 (6) and (3) to defeat any claims of direct sex discrimination under s 13 alleged to have happened within the first 26 weeks after the claimant gave birth.

117. In the absence of any argument from either party as to how or why section 17 might be said to apply to a claim brought under part 5, we find that on the clear wording of section 17(1), it does not apply to a case brought under part 5 (such as this one). This means, in our judgement, that in the event that we do read down section 13(7) section 17(6) does not have any relevance to the application of s 13 in a work case under part 5.

118. Section 18 says, as far as is relevant:

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

…

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

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

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

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

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).

119. The claimant does not make any claims under s18. We raised with Ms Crasnow, however, the particular impact of section 18 (7) read with section 18(5). We suggested to Ms Crasnow that, if we found as a fact that the respondent made a decision before the claimant returned to work from maternity leave not to provide facilities to express or store breast milk, it might be an effect of section 18(7) that the claimant was prevented from bringing a claim about any resulting alleged treatment under section 13.

120. Ms Crasnow appeared to concede that if it was the case that the relevant decisions were as a matter of fact made in the protected period (from the beginning of pregnancy to the end of maternity leave), the tribunal would not have jurisdiction to hear the claimant's complaint under section 13. However, Ms Crasnow said that, effectively as we understand it, each time the claimant was said to have been denied adequate facilities to express breast milk, there was a new instance of direct discrimination.

121. We address the relevant elements of section 13 in so far as they are disputed.

The comparator

122. For the purposes of s 13(1) the claimant must identify an actual comparator who she says she was treated less favourably than, or a hypothetical comparator. A hypothetical comparator refers to the circumstances referred to in section 13 when a respondent *would* treat a woman less favourably than they would treat a man. The claimant relies only on a hypothetical comparator and she refers to a man who requires a private space such as for medication purposes at certain points in the school day.

123. In cross examination, Ms Crasnow asked about facilities that would be provided for a man with diabetes who needed to inject insulin. Ms Amartey said this is not an appropriate comparator as injecting insulin takes

significantly less time than expressing breast milk and there is not the same need for privacy. Ms Crasnow said the comparison was entirely apt, as injecting insulin may require the need to remove clothing, it takes different amounts of time for different people to administer the insulin and in both cases, neither person would want to be seen doing the activity and particularly not by children at the school where they teach.

124. We did not hear any evidence about the practicalities of injecting insulin.

125. The starting point for identifying a comparator (whether actual or hypothetical) is section 23 (1) Equality Act 2010. This says:

    On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

126. No circumstances in which a biological male would need to express milk at work were identified to us in evidence or submissions by either party and we proceed on the basis that breastfeeding and producing breast milk is as far as is relevant for our purposes an exclusively biologically female function.

127. In determining the appropriate comparator, the *relevant* circumstances of the claimant and the comparator must not be materially different. In our view, in order to identify the relevant circumstances of a comparator, it is informative to identify the reason for the comparison – what less favourable treatment is trying to be shown?

128. In this case, the claimant seeks to argue, effectively, that the denial of facilities for expressing milk is the less favourable treatment. (We recognise that the issues record the less favourable treatment as positive acts but they are said to be a result of the negative act of denying the provision of relevant facilities). The reason that the claimant needed facilities for expressing and storing milk are because it is unacceptable to the claimant to undertake the function of expressing milk in public in view of other people and, particularly although not solely, in front of the students at the school. The reason she needed facilities to store the breast milk is because hygiene requires that the breast milk is kept safely. We think that these are both reasonable propositions.

129. In identifying an appropriate comparator, therefore, the exercise becomes identifying a man who has a reasonable need for privacy to undertake an intimate bodily function and a reasonable need for hygiene reasons to store fragile substances in a refrigerator.

130. We agree, therefore, on this analysis that a male teacher who reasonably required privacy to administer insulin by injection and required facilities to safely store that insulin during the school day is an appropriate hypothetical comparator.

131. We did raise a question as to whether a comparator is in fact needed where the circumstances giving rise to the identified need arise solely from the fact of the claimant's pregnancy and pregnancy cannot apply to biological men. We referred to *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] IRLR 645. Ms Crasnow was clear, however, that she considered that that case had no

application and, in any event, the need for a comparator in the claimant's circumstances was not disputed. The respondent only disputed the suitability of the asserted hypothetical comparator.

Subsections 6 and 7

132. We are aware that the main legal issue in dispute in this case is the effect of subsections 6 and 7 of section 13.

133. Subsection (6) (a) says:

> If the protected characteristic is sex—
>
> (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

134. Subsection (7) says:

> Subsection (6)(a) does not apply for the purposes of Part 5 (work).

135. It is uncontroversial that part 5 applies to cases such as this one where a claimant brings a claim of discrimination against their employer, so that subsection (7) is applicable in this case.

136. The parties were both of the view that the effect of these two provisions was to prohibit the bringing of what they refer to as a "breastfeeding" discrimination case under the Equality Act 2010. Although, only in fact a direct breastfeeding discrimination case.

137. We did not hear, however, any detailed submissions about what subsection (6) (before the application of subsection (7)) actually means.

138. In her written submissions, Ms Crasnow said, of s 13(6):

> "This simply establishes that breast-feeding discrimination falls within s13 direct sex discrimination".

139. Ms Amartey's written submissions said:

> "Section 13(6)(a) provides that if the protected characteristic is sex, less favourable treatment includes less favourable treatment because she is breastfeeding".

140. We agree with both of these statements, but, unfortunately, we do not think they take the interpretation of the subsection any further. In our view, the effect of this provision is actually, when read with subsection (7) difficult to understand. Why would there be a provision in the Equality Act 2010, potentially permitting direct discrimination against a woman at work on the grounds of breastfeeding?

141. In our view, the parties have misread the meaning of these provisions and in fact the effect of subsection 6 (a) is very much narrower than the parties suggest.

142. The key to the meaning of subsection (6) (a) can be found from a careful reading of the words of the subsection itself, taken with a consideration of the other parts of the Equality Act 2010 in respect of which claims of direct discrimination can be brought. Those other parts are:

143. **Services and public functions (part 3).**

144. Section 29 says

> (1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service

145. Section 31 defines services as including a reference to the provision of goods and facilities and the provision of services as the exercise of a public function

146. It is readily apparent that this would include such things as shops, restaurants, libraries, the provision of utilities, public transport – the list is endless.

147. **Premises (Part 4)**

148. Section 35 says

> (1) A person (A) who manages premises must not discriminate against a person (B) who occupies the premises—
>
> (a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;
>
> (b) by evicting B (or taking steps for the purpose of securing B's eviction);
>
> (c) by subjecting B to any other detriment.

149. Again, it is readily apparent that this could apply to a landlord or managing agent of rented property or even, potentially, the owner of a hotel (see section 38 which provides that a reference to disposing of premises includes a reference to granting a right to occupy them)

150. **Education (Part 6)**

151. Sections 85 and 91 prohibit discrimination against pupils (at school) and students (in further and higher education) respectively, in the way it provides education; in the way it affords access to a benefit, facility or service; by not providing education; by not affording access to a benefit, facility or service; by excluding the pupil or student; or by subjecting the pupil or student to any other detriment.

152. **Associations (Part 7)**

153. Section 101 says,

> (2) An association (A) must not discriminate against a member (B)—

(a) in the way A affords B access, or by not affording B access, to a benefit, facility or service;

(b) by depriving B of membership;

(c) by varying B's terms of membership;

(d) by subjecting B to any other detriment.

154. Similarly, under s 102,

(2) An association (A) must not discriminate against a guest (B) invited by A or with A's permission (whether express or implied)—

(a) in the way A affords B access, or by not affording B access, to a benefit, facility or service;

(b) by subjecting B to any other detriment.

155. An association is likely to include sports and social clubs which are broadly analogous, in some cases, to the provision of services.

156. These parts of the Equality Act 2010 (other than part 5) all include circumstances where a woman who has recently given birth might reasonably be expected to take her new baby to access services or even, in the case of part 4 (premises) might refer to the place the woman lives. These are all, with the potential exception of education to which we will come, substantially different from a work environment.

157. Education in school is mandatory for children up to the age of 16 (or 18 in some circumstances) and alternative provision is often made for young women or girls who have given birth under the Education Acts.

158. Education at 18 or above is, in many ways analogous to a service. There is, to our knowledge, no statutory provision for maternity leave or anything similar in respect of attendance at higher or further education.

159. Now, considering the words of section 13 (6)(a). It says:

"less favourable treatment of a woman includes less favourable treatment of her because she **is** breast-feeding" (our emphasis)

160. This must mean, in our view, that this subsection applies only to the physical act of breastfeeding a child at any particular moment. Contrast this with the words at paragraph 60 in the case of *Otero Ramos v Servicio Galego de Saúde and another* (Case C-531/15) (below) which refers to "less favourable treatment of a female worker due to her being a breastfeeding woman". Section 13 does NOT refer to a breastfeeding woman, or a woman who does, has or proposes to breastfeed. It very specifically says "she is breastfeeding".

161. This interpretation also makes sense of subsection (7). It is simply not credible to consider that Parliament would wish to specifically allow directly discriminatory behaviour in the workplace against a woman because she is a breastfeeding woman, generally, while prohibiting it in other circumstances.

However, it is credible, and perfectly understandable, that Parliament would wish to allow employers to prevent the act of breastfeeding in the workplace, while preventing landlords, universities and shop owners from interfering with women breastfeeding in those establishments.

162. While in this case, the claimant's work environment happens to be a school which would, in the case of a pupil, fall in part 6, not all such work places are appropriate for young children. The prohibition of direct discrimination on the grounds that a woman is undertaking the act of breastfeeding would cause very significant problems if the woman's workplace was less suitable for children such as a factory, or other industrial environment.

163. We therefore find that sections 13 (6) (a) and (7) read together mean that if the less favourable characteristic is sex, less favourable treatment of a woman does not include less favourable treatment of her because she is at that time undertaking the physical act of breastfeeding.

164. This does not exclude from the ambit of direct sex discrimination less favourable treatment of a woman that is otherwise connected with the fact that she is a breastfeeding woman, has recently given birth or similar such situations.

165. In this particular case, for example (and as we will come to) where the less favourable treatment is said to arise from or at least be associated with the biological process of lactation, this is not *necessarily* the same as the act of breastfeeding (although of course it might be on occasions).

166. For these reasons we consider that both parties' assumptions about the meaning and effect of subsections (6) (a) and (7) are mistaken.

167. The issues in this case as recorded at the preliminary hearing relate solely to the need of the claimant to express breastmilk at work and to store that milk. The alleged less favourable treatment for the purposes of the claim of direct sex discrimination is:

    a. Being forced to express milk in the carpark

    b. Being forced to express milk in the toilet

    c. The respondent's failure to provide suitable facilities for expressing

168. Nowhere is it alleged that any of these allegations are in any way connected to an occasion on which the claimant undertook the act of breastfeeding. Less favourable treatment of a woman because she <u>is</u> breastfeeding under part 5 might include things like, for example, an employer telling a woman who was feeding her child to leave the place where she was feeding the child because she was breastfeeding while not telling men to leave; or subjecting a woman to a disciplinary process for breastfeeding her child in work.

169. The claimant's case, as we understand it (and in broad terms), is that she needed a private space and storage facilities because she was a breastfeeding woman, she was refused those facilities in circumstances where a man who needed similar facilities to manage his (for example)

diabetes would not have been refused them, and the reason for that was because she was a breastfeeding woman.

170. None of the alleged decisions to refuse facilities are said to have been made because the claimant was undertaking the act of breastfeeding on any particular occasion at work or in circumstances with a sufficient causal nexus with work. It has never been alleged, for example, that the alleged refusal was in reprisal for or related in any way to the circumstances the year before when the claimant *was* breastfeeding at work.

171. In our view, therefore, subsections 13 (6) (a) and (7) are simply irrelevant to the matters we have to decide in this case.

172. In the event that we are wrong about our interpretation of these provision, we do address the arguments made under EU law.

The European arguments

173. We start by referring to the European Union (Withdrawal) Act 2018. Prior to the UK leaving the European Union, certain provisions of European Union law were given effect in the UK by virtue of the European Communities Act 1972. This was repealed with effect from 11pm on 31 January 2020 ("exit day") in accordance with section 1 of the European Union (Withdrawal) Act 2018. We were referred to sections 2 and 5 of the European Union (Withdrawal) Act 2018. They say:

2 Saving for EU-derived domestic legislation

(1) EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day.

(2) . . .

(3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) and section 5A (savings and incorporation: supplementary).

5 Exceptions to savings and incorporation

(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day.

(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day.

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after IP completion day of any enactment or rule of law passed or made before IP completion day if the application of the principle is consistent with the intention of the modification.

(4) The Charter of Fundamental Rights is not part of domestic law on or after IP completion day.

(5) Subsection (4) does not affect the retention in domestic law on or after IP completion day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

(6) Schedule 1 (which makes further provision about exceptions to savings and incorporation) has effect.

(7) Subsections (1) to (6) and Schedule 1 are subject to relevant separation agreement law (for which see section 7C).

174. IP completion day is defined in section 39 of the European Union (Withdrawal Agreement) Act 2020 as 31 December 2020.

175. It was not disputed that the effect of these provisions is that certain established principles of European Law continue to apply after Exit Day and IP completion day. Although the relevant provisions refer only to EU derived law, we heard no submissions about that and no dispute that the relevant provisions of the Equality Act 2010 we are concerned with are EU derived law. Relevantly, section 5(2) provides specifically that "the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day"

176. We note that these provisions are subject to schedule 1 of the European Union (Withdrawal) Act 2018. This says, as far as is relevant

General principles of EU law

2 No general principle of EU law is part of domestic law on or after IP completion day if it was not recognised as a general principle of EU law by the European Court in a case decided before IP completion day (whether or not as an essential part of the decision in the case).

3 (1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after IP completion day—

(a) disapply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law.

…

Interpretation

5 (1) References in section 5 and this Schedule to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in Francovich are to be read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after [IP completion day] [by virtue of section 2, 3, 4 or 6(3) or (6) and otherwise in accordance with this Act].

(2) Accordingly (among other things) the references to the principle of the supremacy of EU law in section 5(2) and (3) do not include anything which would bring into domestic law any modification of EU law which is adopted or notified, comes into force or only applies on or after IP completion day.

177. We have referred to the Explanatory Notes to the European Union (Withdrawal) Act 2018 prepared by the department for Exiting the European Union and note that they say

The general principles of EU law

59 The general principles are the fundamental legal principles governing the way in which the EU operates. They are a part of EU law which the EU institutions and member states must comply with. The general principles are applied by the CJEU and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and they are also an aid to interpretation of EU law. Examples of the general principles include proportionality, non-retroactivity (i.e. that the retroactive effect of EU law is, in principle, prohibited), fundamental rights, equivalence and effectiveness.

60 UK laws that are within the scope of EU law and EU legislation (such as directives) that do not comply with the general principles can be challenged and disapplied. Administrative actions within the scope of EU law must also comply with the general principles.

178. It appears, therefore, that in so far as the claimant seeks to rely on any General Principles of EU Law the Tribunal is not permitted to quash or disapply any principle of UK law on the basis that it is incompatible with any of the general principles of UK Law.

179. However, to the extent that there is a specific piece of EU law that was passed before 31 December 2020 that applies to this issue, the supremacy of that law over domestic legislation continues. Similarly, any interpretation of that specific law that was promulgated before 31 December 2020 also continues to have effect in the UK.

The Equal Treatment Directive (2006/54/EC) and the Pregnant Workers Directive (92/85/EC)

180. We refer to relevant provisions of DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (The Equal Treatment Directive) and COUNCIL DIRECTIVE 92 /85 /EEC of 19 October

1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (the Pregnant Workers Directive).

181. The relevant provisions of the Equal Treatment Directive are as follows.

182. Article 2 says (as far as is relevant):

> 1. For the purposes of this Directive, the following definitions shall apply:
>
> (a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;
>
> …
>
> 2. For the purposes of this Directive, discrimination includes:
>
> …
>
> (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC

183. Article 14 says (as far as is relevant):

> 1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:
>
> …
>
> (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;

184. In respect of the Pregnant Workers Directive, Article 1 says:

> For the purposes of this Directive:
>
> (a) pregnant worker shall mean a pregnant worker who informs her employer of her condition , in accordance with national legislation and / or national practice;
>
> (b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and / or national practice and who informs her employer of her condition , in accordance with that legislation and / or practice ;
>
> (c) worker who is breastfeeding shall mean a worker who is breastfeeding within the meaning of national legislation and / or national practice and who informs her employer of her condition , in accordance with that legislation and / or practice.

185. The primary case on which the claimant was relying is *Otero Ramos v Servicio Galego de Saúde and another* (Case C-531/15)

186. This case concerned a claim by Ms Otero Ramos who was a nurse employed in the accident and emergency unit of a Spanish hospital. She had recently given birth and was breastfeeding her child. It was Ms Otero Ramos' case that her employment presented a risk to her and/or her child in the context of her being a breastfeeding mother. She requested an adjustment to her duties or a payment in lieu of her job but this was refused by her employer on the grounds that her job was risk-free. Ms Otero Ramos produced evidence to the contrary.

187. The case in the CJEU concerned, as far as is relevant to this case, consideration of whether "the rules on the burden of proof laid down in article 19 of [Directive 2006/54] applicable to the situation of risk during breastfeeding referred to in article 26(4), read in conjunction with article 26(3) [of Law 31/1995], that provision of Spanish law having been adopted to transpose article 5(3) of [Directive 92/85]"

188. Law 31/1995 is the Spanish law under consideration by the CJEU, Directive 92/85 is the Pregnant Workers Directive.

189. The relevant provisions of the Pregnant Workers' Directive under consideration by the CJEU related to the provision of risk assessments. That is not directly relevant to the matters we have to decide.

190. The relevance is, however, the CJEU's decision on whether a failure to undertake a risk assessment under the Pregnant Workers Directive amounted to sex discrimination within the Equal Treatment Directive so that the reversal of the burden of proof provisions in the Equal Treatment Directive would apply to questions before the court about the requirement to undertake risk assessments under the Pregnant Workers Directive.

191. The court said:

> 54 It must therefore be determined whether a situation such as that in the main proceedings constitutes discrimination on grounds of sex within the meaning of Directive 2006/54.
>
> 55 In that regard, the point must be made that, for the purposes of article 2(2)(c) of Directive 2006/54, discrimination includes, inter alia, "any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive [92/85]".
>
> 56 As is expressly provided for in article 1 of Directive 92/85, the purpose of that Directive is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.
>
> 57 As the court has already held, the objective pursued by the rules of EU law governing equality between men and women is, with regard to the rights of pregnant women and women who have given birth and breastfeeding mothers, to protect those women before and after they give birth: *Danosa v LKB Lizings SIA* (Case C-232/09) [2010] ECR I-11405, para 68 and the case law cited.
>
> 58 Furthermore, it is clear from recital (14) and article 8 of Directive 92/85that:

> "the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement".

Thus maternity leave is intended to protect pregnant workers, workers who have recently given birth or who are breastfeeding.

59 It follows that, the condition of a breastfeeding woman being intimately related to maternity, and in particular "to pregnancy or maternity leave", workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth.

60 Accordingly, any less favourable treatment of a female worker due to her being a breastfeeding woman must be regarded as falling within the scope of article 2(2)(c) of Directive 2006/54and therefore constitutes direct discrimination on grounds of sex".

192. There are two clear propositions arising from this analysis which are set out in paragraphs 59 and 60 of the judgment which are, taking paragraph 60 first, that less favourable treatment of a woman due to her being a breastfeeding woman amounts to direct sex discrimination and that workers who are breastfeeding must be protected on the same basis as those who are pregnant and have recently given birth.

193. However, at paragraphs 62 and 63, the Court goes on to say:

62 As Advocate General Sharpston stated in point 57 of her opinion, where the risks posed by the work of a breastfeeding worker have not been assessed in conformity with the requirements of article 4(1) of Directive 92/85, the worker concerned and her child are deprived of the protection they should receive under that Directive, since they are likely to be exposed to the potential risks the existence of which was not correctly established in the course of the risk assessment of the work of the worker in question. In that regard, a breastfeeding worker may not be treated in the same way as any other worker, since her specific situation necessarily requires special treatment on the part of the employer.

63 Accordingly, failure to assess the risk posed by the work of a breastfeeding worker in accordance with the requirements of article 4(1) of Directive 92/85 must be regarded as less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of that Directive and constitutes, as appears from para 60 above, direct discrimination on grounds of sex within the meaning of article 2(2)(c) of Directive 2006/54.

194. In our view, this indicates that the reference to protection of breastfeeding workers in paragraph 59 is a specific reference to the protections afforded under the Pregnant Worker Directive in respect of risk assessments (and any adjustments flowing from them).

195. Ms Amartey's submissions were that to the extent that *Otero Ramos* imposed any obligations on the UK, it was to ensure that breastfeeding workers had

the same protections as pregnant workers and those on maternity leave and this is adequately provided for by section 18 Equality Act 2010 (which is not the basis of the claimant's claim in this case). She said that member states were free to define pregnancy and maternity leave themselves and, accordingly, s 18(6) limits that protection to the protected period. Ms Amartey says "even if section 13(6) were incompatible with Article 2(2)(c) of Directive 2006/54, C's complaints would still fail since the protected afforded to C is legitimately limited to the protected period and the discrimination C complains of occurred outside that period".

196. We do not agree. At paragraph 56 of *Otero Ramos,* the court said "the purpose of [the Pregnant Workers] Directive is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding".

197. "The same basis" referred to in paragraph 59 must, in our view, refer to the wider principles of taking steps to ensure the health and safety of workers who are pregnant or have recently given birth. The very fact that the Pregnant Workers Directive provides for risk assessments and adjustments anticipates that some of those protections must be available while the worker is actually working. If protections were limited to periods of maternity leave, there would never be any need for a risk assessment on return to work.

198. This interpretation is further reinforced by reading the pre-amble to the Pregnant Workers Directive. Although this case does not relate *directly* to that directive, the principles set out in *Otero Ramos* must be considered in the context of that case. It is clear, in our view, that the decision of the CJEU is to the effect that discrimination because of breastfeeding amounts to discrimination because of sex and that that discrimination can happen once the woman has returned to work – necessarily outside the Maternity Leave period.

199. The words of the CJEU in paragraph 59 do not, therefore, detract from the wider principle stated in paragraph 60 that any less favourable treatment of a female worker due to her being a breastfeeding woman constitutes direct sex discrimination within the meaning of Article 2(2)(c) of the Equal Treatment Directive.

200. We were also referred to *González Castro v Mutua Umivale* (C-41/17). This case also concerned the refusal of the employer and relevant insurance company of Ms González Castro, a security guard, to suspend her contract of employment and pay her an allowance while she was breastfeeding because of the alleged risks to her health and safety at work while breastfeeding. In our view, it dealt very specifically with the need to undertake individual risk assessments. The claimant relies on this case together with O*tero Ramos* as authority for the propositions that section 13(7) of the Equality Act 2010 should be "read down".

201. As we understand the argument, the claimant says that these cases both say that less favourable treatment of a breastfeeding woman (presumably than a man, although a comparator is never referred to) is inherently linked to the woman's sex and therefore amounts to sex discrimination. The fact that both of these cases concerned an alleged failure to undertake mandatory risk

assessments provides the context for the principles, but does not undermine the principle that under the Equal Treatment Directive the prohibition against direct sex discrimination necessarily includes a prohibition against direct discrimination against a woman because she is breastfeeding.

202. We agree. There is a clear principle set out in Article 14(1)(c) of the Equal Treatment Directive, as clarified by *Otero Ramos*, that member states must ensure that there shall be no direct or indirect discrimination in the public or private sectors including public bodies in relation to employment and working conditions.

203. We return to section 13(6)(a) of the Equality Act 2010. In the absence of subsection (7), section 13(6)(a) could be read as incorporating this principle into UK law. It almost reflects the clarification made in *Otero Ramos* that sex discrimination includes discrimination due to the woman in question being a breastfeeding woman.

204. We have made our findings, above, as to our interpretation of subsection (6)(a). However, it could alternatively be read as referring to treatment of a woman because she is a breastfeeding woman. In that case, subsection (6)(a) would be no more than a clarification provision, by virtue of the word "includes" in subsection (6).

205. The parties were agreed that the effect of subsection (7) is to negate that proposition. It is not clear to us that this is correct. Subsection (7) says

"Subsection (6)(a) does not apply for the purposes of part 5 (work)".

206. It is not obvious that this means "[it is not the case that] less favourable treatment of a woman includes less favourable treatment of her because she is breastfeeding" (or, as it might be read "because she is a breastfeeding woman") rather than disapplying the clarification altogether – in other words having the effect of removing all of the words of subsection (6)(a) from section 13 altogether. I.e., the clarification does not apply in work cases.

207. In our view, this provision is at best ambiguous. In truth, we can see little or no reason to have this clarifying provision or to negate or disapply it in the case of a claim under part 5, and this further persuades us that the interpretation set out above is correct.

208. However, we are invited to "read down" subsection 7 on the basis that it is incompatible with *Otero Ramos*. We were not referred to any cases that explicitly permit us to read down a statute. We conclude that in fact we are being asked to interpret section 13 (6)(a) and (7) in a way that means it is consistent with the principles of EU law that we have set out above. We were not invited to find that the Equal Treatment Directive had direct effect.

209. We must therefore consider whether the words of s 13 (6)(a) and (7) can be interpreted in a way that is consistent with the Equal Treatment Directive as interpreted in *Otero Ramos*. We have a wide discretion to interpret the provisions if we can subject to the restriction that our interpretation must not be directly inconsistent with the legislation so as to amount to an amendment.

210. Our primary view, as set out above, is that the subsections in question have no application to this case. However, the alternative position, if we are wrong, is that subsection (6)(a) is no more than a clarification provision with the same meaning as the dicta in *Otero Ramos*. Subsection (7) is ambiguous in its meaning. In order, therefore, for section 13 to be consistent with the Equal Treatment Directive and *Otero Ramos,* we interpret subsection (7) as meaning that, effectively, in a part 5 work case, the disapplication of subsection 6 (a) is to have the effect that it is not there at all. Subsection (7) does not mean that in a work case "less favourable treatment of a woman does not include less favourable treatment because she is [a breast feeding woman]", rather it has the effect that subsection (6)(a) is disapplied in the sense of ignored altogether, or deleted.

211. Then, in considering just the words of section 13(1) without subsection (6) at all and in light of paragraph 60 of *Otero Ramos*, the legal position is that any less favourable treatment of a female worker due to her being a breastfeeding woman [….] constitutes direct discrimination on grounds of sex.

Effectiveness

212. We were also referred to the case of *O'Brien v MOJ* CJEU 2012 ICR 955 in relation to the principle of effectiveness. We have not considered it necessary to address that in light of our decision on the law above, but observe that reliance on general principles of EU law is likely in any event to be prohibited by schedule 1 of the European Union (Withdrawal) Act 2018.

Causal link and burden of proof

213. This means that the tribunal is not prohibited from hearing the claimant's claims by reason of sections 13 (6) (a) and (7) of the Equality Act 2010. However the claimant still needs to show that any less favourable treatment is because she is a woman or because she is a breastfeeding woman.

214. Section 136 provides

> (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.

215. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.

216. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her sex.

217. In *Madarassy v Nomura International* [2007] IRLR 246, the court of appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (in this case, sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

218. This means that there must be something more than just unfavourable treatment and a difference in status to reverse the burden of proof.

Indirect discrimination

219. Section 19 Equality Act 2010 says

> (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.
>
> (3) The relevant protected characteristics are—
>
> sex;

220. A provision, criterion or practice (PCP) is something that the employer does, or would do. It must have an element of repetition about it, or at least the potential to be repeated. It cannot be a one off act applied solely to the claimant and must at least be the way in which things generally are or will be done.

221. Ms Amartey submitted, and it we heard no argument from Ms Crasnow to the contrary, that for the purposes of section 19, the PCP must be capable of being applied to people who do and do not share the claimant's protected characteristic. Namely, it must be sensibly capable of being applied to men and women. In *Rutherford v Secretary of State for Trade and Industry (No.2)* [2006] UKHL 19 at para 82, Baroness Hale said *"Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question".*

222. The question we are required to ask, therefore, in respect of the claimant's claim of indirect discrimination is whether the pleaded PCPs were capable of meaningfully being applied to men and/or whether men, generally, could have any actual interest in the application of the PCPs to them.

223. If the claimant shows that the PCPs are capable of being applied to men and women, it is then for the claimant to show that both women generally are put to a disadvantage by the PCP and that the claimant actually was put to that disadvantage. Once that has been demonstrated, then the respondent would be required to justify the PCP under s 136 (see above). (*Dziedziak v Future Electronics Ltd* EAT 0271/11).

Harassment

224. Section 26 of the Equality Act 2010 provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.…

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

sex;…

225. The question of whether conduct is unwanted is to be assessed subjectively (*Thomas Sanderson Blinds Ltd v English* EAT 0316/10).

226. As to whether the conduct had the *effect* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, there is a two part test. This is explained in *Pemberton v Inwood* [2018] EWCA Civ 564, citing *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 – the conduct must actually have had the effect on

the claimant (a subjective test) and it must, having regard to all the relevant circumstances, have been reasonable for the conduct to have had that effect. This is a matter of factual assessment for the tribunal.

227. As Ms Amartey says, consideration of whether the alleged acts had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant requires consideration and analysis of the alleged discriminator's motivation. We heard no submissions about this from the claimant and the claimant's case – that circumstances created by the respondent's inactions amounted to harassment – does not lend itself easily to a claim that the respondent acted with the proscribed purpose.

228. In so far as is relevant, the provisions relating to the burden of proof set out above in relation to direct discrimination also apply to harassment.

229. Ms Amartey said, and we agree, that it was a question of fact for the tribunal as to whether the acts constituting the alleged harassment were related to the claimant's sex. "Related to" is a broader test than "because of" or "on the grounds of" and requires a consideration of all the circumstances and context to determine whether any such conduct is, in this case, related to the claimant's sex.

230. Finally, a failure to act can amount to conduct if that failure has the effect of causing the proscribed circumstances.

Time points

231. In respect of claims under the equality Act, s 123 (1) provides that

> proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.

232. Subsections (3) and (4) say

> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

233. Although the Tribunal has a wide discretion, the burden is still on the claimant to satisfy the Tribunal that it is just and equitable to extend time.

234. The claimant's argument is that the alleged acts of discrimination and harassment amount to conduct extending over a period. Ms Crasnow said

that each time the claimant asked for somewhere to express there was a new decision not to provide the facilities – whether by way of a refusal or by way of a failure to provide an answer to the claimant's request and, relying on the case of *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574, this amounted to a practice of failure which altogether amounted to a continuing act.

235. At paragraph 21 and 22, the EAT said

"The position is that an act does not extend over a period because it has continuing consequences. A specific decision not to upgrade [promote] may be a specific act with continuing consequences. The continuing consequences do not make it a continuing act. On the other hand, an act does extend over a period of time if it takes the form of some policy, rule or practice, in accordance with which decisions are taken from time to time. What is continuing is alleged in this case to be a practice which results in consistent decisions discriminatory of Mr Owusu.

We emphasise that, even if it was established that there was some practice built up of denying Mr Owusu upgrading or the opportunity to act up, it would still have to be proved that it was a discriminatory practice It may be that the respondents can satisfy the tribunal, when they hear the case on its merits, that there are alternative explanations for the treatment of which Mr Owusu makes complaint".

236. The question for us, in respect of any complaints that occurred more than three months (plus time allowed for early conciliation) before the claimant submitted the ET1, is whether any such allegedly discriminatory acts (or alleged acts of harassment) were the consequence of a discriminatory practice of the respondent ending within the three month period.

Conclusions

237. We return, finally, to the issues identified at the start of this judgment and address them in light of our findings of fact and on the law.

Indirect sex discrimination

238. Did the Claimant make the Respondent aware that she required suitable facilities to express milk?

239. We have found that the claimant did make the respondent aware that she needed suitable facilities to express milk on a number of occasions. Firstly in the letter of 16 March 2020; then again in a letter dated 19 June 2020 in which the claims said she may need a room in which to express from her return in September; and again in a conversation with Ms Horodczuk on 9 September 2020. We have also found that the claimant informed Ms Timson on 23 September 2002 in a telephone conversation that she required somewhere to express milk and that the claimant believed that the inability to do so during the day had contributed to her developing mastitis. The claimant again told Ms Horodczuk on her return to work on 30 September 2020 that she needed somewhere to express; and finally in the meeting with Ms Berry, albeit that we have found that the claimant was probably not as explicit about it as she now recalls.

240. Did the Respondent apply a practice of not providing suitable facilities for women to express milk?

241. On balance, we find that from September 2020, the respondent did have this practice. We have found that the respondent did not provide the claimant with suitable facilities for expressing milk. There was a dispute about the reason for this but we have found that no facilities were provided. The claimant had made clear her need for a room in which to express milk on at least 6 occasions and no room was made available. The claimant also made the issues clear to her colleagues on 19 October 2020 in a different context.

242. We also refer to the claimant's evidence about a colleague of the claimant, Amy. We have not made any findings about why Amy did not express but we have similarly not heard any evidence from the respondent about facilities that were provided to Amy.

243. We note the absence from the tribunal of a number of key witnesses who might have been able to shed further light on the fact that the claimant was not given access to a room despite her requests. Namely, Ms Horodczuk and Ms Timson. The respondent's answer was that these people do not work for the respondent anymore, but that is not a bar to giving evidence in the Tribunal and it is certainly not a bar to the respondent asking these people what they can remember about the Claimant's requests.

244. It is not adequate for the respondent to say that the claimant could just have gone and used a room – we have made findings about why the claimant acted reasonably in not doing this and we agree with the claimant that having raised the issue with her manager(s) on a number of occasions she was entitled to rely on them to identify somewhere suitable for her to go.

245. Having regard to the claimant's repeated requests for a room. her identification of the problem and the absence of an explanation for the failure to provide a room, we conclude that the respondent, as of September 2020, did have a practice of not providing suitable facilities for women to express milk. This was not a one off event, the respondent consistently failed to provide a room, or failed to agree to provide a room, from July 2020 through to December 2020. In our judgment, this was as a consequence of a number of decisions or failures to take action by the respondent – either Ms Horodczuk or Ms Timson if they did not, as the respondent says, pass the message on, or the people to whom they passed the message if they did in fact pass the requirement on. Someone must have made a decision (or failed to make a decision) on each occasion the claimant raised the issue. We find that each time the claimant raised the issue, there was a consequent further decision, or consequent repeated failure to make a decision after each occasion.

246. We find, therefore, there was a sufficient degree of repetition for this to amount to a practice.

247. Did the Respondent apply a practice of not providing facilities for the storage of breast milk?

248. This issue was not pursued vigorously by the claimant. She agreed in evidence that she could have used a departmental fridge as previously, but

in fact chose to transport the milk around the school as it was convenient for her and she had been advised that it was safe to do so.

249. In reality, therefore, the question of whether the respondent had this alleged practice does not arise. We find that the claimant has not shown that the respondent did have this practice as she did not demonstrate that she had requested a fridge and that one was subsequently not provided.

250. If so, did either of these amount to a provision. criterion or practice?

251. The failure to provide expressing facilities does amount to a practice, and so a PCP, as set out above. The failure to provide a fridge does not do so.

252. If so, did either provision. criterion or practice place women at a particular disadvantage compared to men?

253. We refer to *Rutherford v Secretary of State for Trade and Industry (No.2)* [2006] UKHL 19 as above where Baroness Hale said *"Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question".*

254. Biological men can have no interest in any practice related to the provision or otherwise of facilities for expressing breastmilk. This is a sex specific practice and although on a literal reading the practice does put women at a disadvantage compared to men the case law is clear that the practice must be capable of being meaningfully applied to both women and men (in this case) for a comparative disadvantage to arise. Denying a biological man the facilities to express milk is, as it applies to section 19, effectively meaningless so that no comparative disadvantage can arise.

255. To the extent that there is also a practice of failing to provide breastmilk storage facilities, the same issues arise.

256. It is not therefore necessary, or in fact possible, to consider the remaining elements of the indirect discrimination claim and for this reason, the claimant's claims of indirect discrimination are unsuccessful.

Harassment

257. Did the Claimant make the Respondent aware that she required suitable facilities to express milk.

258. We refer to and repeat our decision above under indirect discrimination. (see paragraph 239 above)

259. Did the Respondent subject the Claimant to unwanted conduct by forcing her to express milk in the toilet and/or car park?

260. We have found that the claimant genuinely and reasonably had no choice but to use the toilets or her car to express. This is because she had made the respondent aware on a number of occasions that she needed somewhere to go to express. Nowhere was provided. The alternative was that the claimant would experience an embarrassing leakage in the afternoon and that in fact happened on at least one occasion. It is obvious that this is unacceptable.

261. The claimant also clearly believed – whether correctly or not – that failing to express milk during the day would cause or exacerbate mastitis. Having been ill with this before, it is obvious that the claimant would want to avoid the risk of contracting mastitis again and would therefore want to take steps to do so.

262. Having regard to section 212 ((2) and (3) we conclude that the respondent, by failing to respond to the claimant's requests for somewhere to express milk, and particularly in the context of the arrangements made in 2019 as explained above, conducted itself in a way that amounted to requiring the claimant to express milk in the toilets or her car on the occasions set out in our findings of fact.

263. The difficult part of this issue as defined is the use of the word "forcing". However, forcing means, we think, leaving someone with no realistic choice but to take a particular course of action and must be read in conjunction with "unwanted". We find that the conduct (expressing milk in the toilets while eating lunch and /or in the claimant's car with the risk of being seen by pupils and others) was unwanted. The claimant's evidence that it was objectionable was not really disputed by any of the respondent's witnesses.

264. As the claimant reasonably and genuinely felt compelled to act in a way that she did not want to, she was we find forced to do so.

265. We conclude, therefore, that the respondent did subject the claimant to unwanted conduct by forcing her to express milk in the toilet and/or car park.

266. <u>Did this conduct have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?</u>

267. This comprises of two questions: did the conduct actually have the proscribed purpose or effect and, if so, (in the case of effect) was it reasonable for it to do so.

268. We find that conduct was not for the proscribed purpose. Firstly, we have no evidence of any harassing intent from any individual; and secondly the evidence of the respondent's witnesses, which we accept, is that they were horrified by the idea of the claimant having to sit on the toilet floor to express milk and eat her lunch.

269. We find that the conduct of the respondent had the effect of creating an degrading and/or humiliating environment for the claimant. The claimant's evidence was that she found it unhygienic and disgusting. Ms Haldenby described it as mortifying (in respect of the toilets).

270. The evidence in relation to the carpark was that people might walk past. This is potentially humiliating for the claimant.

271. Was it reasonable for the conduct to have this effect? In our view it obviously was.

272. The respondent sought to argue that the fact that the claimant did not raise this in the form of a grievance or complaint suggested it was not that bad, or that it was the claimant's choice. We do not agree. The claimant had a very short lunch break of only 25 minutes. The uncontested evidence was that

expressing took about 20 minutes. We have also referred to the busy nature of the claimant's working day, and the claimant had raised the issue very many times through her line manager.

273. The fact that the claimant chose to express in an unacceptable environment rather than run the risk of leaking in the afternoon or, as far as she believed, develop mastitis does not diminish the impact of the environment in which she was required to express milk and eat her lunch.

274. Consequently, in our judgment, the conduct did have the effect of creating a degrading or humiliating environment for the claimant. We are aware of the seriousness of these words, but in our view a woman who has recently given birth should not be subjected to these circumstances solely because she has done so.

275. Was the conduct related to the Claimant's sex?

276. In our view it was. The question is one of fact for the tribunal. The need for privacy arises from the intimate nature of the activity and because the claimant is a woman. Not only the need for the facilities which could, we acknowledge, arise in other circumstances, but the particular aspects that make the use of a toilet or car unacceptable – the risk of exposure of intimate body parts in public and the length of time taken – are inherently related to the claimant being a woman.

277. For these reasons, therefore, the claimant's claim of harassment is successful.

Less favourable treatment because the Claimant was breastfeeding (which is put as a direct discrimination claim under s 13 Equality Act 2010)

278. Should the Tribunal to read down section 13(7) of the Equality Act 2010 on the basis that it is contrary to retained EU law and in particular the case of *Otero Ramos* C-531/15 [2018] ICR 965?

279. We have set out our interpretation of the legal position at some length above. The answer to this question is "no", because it is not relevant to this claim and consequently it is not necessary to read down the provisions.

280. It was never argued that the claimant was subjected to any less favourable treatment at work because of an occasion on which she was undertaking the activity of breastfeeding.

281. It is clear, however, that this claim is brought as a claim of sex discrimination under section 13 Equality Act 2010. As discussed, the relevant protected characteristic is sex so that the question for the tribunal to ask is was the claimant subject to the identified less favourable treatment and, if so, was that because she is a woman?

    3.2 If so, who is the comparator for the purposes of the claim? The Claimant relies upon a hypothetical male comparator requiring a private space such as for medication purposes at certain points in the course of the school day.

282. In our view, this is an appropriate comparator for the reasons set out under the section on law and submissions.

283. Did the Claimant suffer less favourable treatment compared to that comparator by

    a. being forced to express milk in the carpark

    b. being forced to express milk in the toilet

    c. the Respondent's failure to provide suitable facilities for expressing

284. We have found, as set out under harassment above, that the respondent did force the claimant to express milk in the toilet and in the car. This was daily, on the days the claimant was at work, from her return to work on 30 September 2020 until 16 December 2020 which was her last day in work.

285. We have also found that the respondent failed to provide suitable facilities for expressing.

286. In our judgment, and on the basis of the respondent's evidence, this is less favourable treatment than would have been afforded to the male comparator. The respondent was clear that facilities would have been made available for a diabetic man to inject insulin. Facilities for the claimant to express were not made available to her.

287. Was the reason for the less favourable the fact that the Claimant was breastfeeding?

288. This is the wrong question, as discussed above. Under s 13, the relevant protected characteristic is sex. Breastfeeding is not a protected characteristic so it is not possible to bring a claim of "breastfeeding discrimination" under section 13. The claimant's claim clearly identifies a claim of direct sex discrimination.

289. However, applying the dicta of *Otero Ramos,* the question could properly be put as "was the reason for the less favourable treatment the fact that the claimant was a breastfeeding woman?".

290. For the reasons outlined above, this is a different legal test than that set out in section 13(6) and (7) and is within the jurisdiction of the tribunal.

291. For reasons that have been set out extensively, the actual act of the respondent under consideration is their failure to provide a room for the claimant to express in. This is the alleged less favourable treatment. The claimant being forced to use the toilet or her car is a consequence of the respondent's decision (or lack of decision) about the provision of a room.

292. We refer to the provisions of s 136 Equality Act 2010. The claimant must show some facts – whether from her evidence, or the respondent's or both – from which we could conclude that the reason for the claimant not being given a room in which to express was because she was a woman or, more specifically, a breast feeding woman. This requires more than just a

difference in protected characteristic and unfavourable treatment – there must be something showing a link.

293. We have heard about the failure of the respondent to undertaken a pregnancy risk assessment in 2020, but we also conclude that they did not undertake a covid risk assessment. We heard that the claimant told her manager about her problems on many occasions and HR on some occasion and nothing was done. However, we have also seen evidence of the lengths the respondent went to in 2019; and heard evidence from the respondent's witnesses that they were shocked and horrified by the circumstances of the claimant and that she should have said something to them.

294. On balance, we must conclude in the absence of any evidence to the contrary that the reason the claimant was not provided with a room in which to express was administrative incompetence, rather than because of the claimant's sex.

295. We have had regard to the absence of Ms Horodczuk who would have been able to give evidence about the reason for failing to do anything about the claimant's requests. While this could be seen as suspicious, it is not of itself sufficient, in our view, to form the sole basis of a conclusion, in the absence of any explanation, that the reason for the respondent's failure to provide a room was due to the claimant's sex, or that she was a breastfeeding woman.

296. For these reasons, the claimant's claim of direct discrimination is unsuccessful and is dismissed.

297. Although it is not necessary to address it, even if the reason for the less favourable treatment was sex, the claimant's claim of direct discrimination would fail in any event as the detriments relied on as direct discrimination are also conduct amounting to harassment so that the claimant's claim would fail by reason of s 212 (1) Equality Act 2010.

298. Given the Claimant's baby's DOB, should s17(3) EqA be read down in order to provide an effective remedy for all of the sex discrimination experienced?

299. As discussed above this is not relevant to the matters for us to decide.

Time limit

300. Did any of the incidents complained of occur more than 3 months, less 1 day, from the date the claim form was submitted to the ET?

301. The only part of the claimant's claim that is successful is her claim of harassment. This happened on each occasion when the claimant expressed in the toilet or her car which, we have found happened on the days the claimant was at work from 30 September 2020 up to 16 December 2020.

302. The claimant undertook early conciliation from 11 March 2021 until 15 March 2021. Her claim was submitted on 15 March 2021. Therefore any act before 12 December 2020 is potentially out of time.

303. The claimant worked Mondays, Wednesdays and Fridays. She was absent from work for some of the period from 30 September for various reasons. We have found that the claimant worked for up to 17 of those days until she

started shielding on 6 November 2020. The claimant did not return to work until the meeting with Ms Berry on16 December 2020.

304. All of the occasions when the claimant expressed milk in the toilet or her car occurred before 12 December 2020 except for the occasion on 16 December 2020 on the day of the meeting.

305. If so, was there a continuing sequence of events so that the time limit should be taken from the date of the last incident in the sequence?

306. If so, what was the date of that last incident? Was the claim submitted in time for this incident?

307. Having regard to *Owusu* and our findings about the claim of indirect discrimination, we find that there was a practice of failing to provide a room for the claimant to express in. This practice was not directly discriminatory, under section 13, but we do think that the practice was *related to* the claimant's sex for the reasons set out under harassment. In our view, the reference in *Owusu* to the need for the practice to be discriminatory must be considered in the context of the type of discrimination to which the claim relates. The practice was related to the claimant's sex and, in our view, this is sufficient to make the practice leading to harassment discriminatory within the meaning in *Owusu*.

308. Consequently, the incident of harassment on 16 December arising from the practice of the respondent of not providing space for the claimant to express milk was the last incident in a course of conduct starting on 30 September and therefore all the incidents of harassment are in time within the meaning of s 123 Equality Act 2020.

309. If not, would it be just and equitable for the tribunal to extend the time limit for the Claimant to have submitted her claims?

310. It is not necessary to address the last issue.

311. For the reasons set out above, the claimant's claim of harassment related to sex is successful. The claimant's claims of direct and indirect sex discrimination are unsuccessful and are dismissed.

Employment Judge Miller

Dated: 8 March 2022