THE INDUSTRIAL TRIBUNALS

CASE REF: 14487/20IT

CLAIMANT: **Gemma McCaughley**

RESPONDENT: **Footprints Women's Centre**

Certificate of Correction

Under the provisions of Rule 63, the Judgment issued to the parties on 17 May 2022 is corrected as set out below:

75. Interest at 8% is therefore awarded on the award for hurt feelings from 8 November 2019 to date:

Interest at 8% per annum £680.00 per year
8 November 2019 to date – 720/365 daily rate £1.86 x 911 days
= £1694.46

Employment Judge:

Date: 20 June 2022

Amendments recorded in Register and issued to the parties on:

Case Worker pp the Secretary to the Tribunals

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CLAIMANT: **Gemma McCaughley**

RESPONDENT: **Footprints Women's Centre**

JUDGMENT

The unanimous decision of the tribunal is that:-

(i) the claimant was directly discriminated against on grounds of sex; and

(ii) the claimant was directly discriminated against on grounds of age.

The claimant withdrew her claims of automatic unfair dismissal for assertion of a statutory right and breach of contract during the hearing and those claims are dismissed.

A declaration and recommendation is made as set out in this decision and the claimant is awarded the sum of £8,500 for hurt feelings together with interest as provided for in paragraph 75 of this decision.

Constitution of Tribunal:

Employment Judge: **Employment Judge Gamble**

Members: **Mr A Huston**
Mr T Wells

Appearances:

The claimant appeared in person and represented herself.

The respondent was represented by Mr O Friel, Barrister-at-law, instructed by Worthingtons Solicitors.

BACKGROUND

1. The claimant applied for the post of Support Services Manager with the respondent on 29 August 2019. Her application was not progressed at that time and was readvertised on 4 September 2019, due to what was described as a lack of diversity in the application process (the hearing was told that the claimant was the sole applicant at that time). The claimant was informed that she did not need to reapply for the position.

2. The claimant was interviewed for the position on 21 October 2019. She was telephoned following the interview by Ms Isobel Loughran, the Chief Executive Officer of the respondent and informed of her success.

3. The claimant received a written offer of employment on 30 October 2019, which was made subject to receipt of satisfactory references and Access NI checks. The claimant accepted the offer on 1 November 2019.

4. On 8 November 2019, the claimant received an email purporting to withdraw the offer of employment with immediate effect. The claimant attempted to contact Ms Loughran by telephone and text. She also wrote to the respondent seeking an explanation. Her attempts to make contact were unsuccessful.

5. On or about 22 January 2020, the claimant received a payment in the sum of £1,654.88 as "Pay in lieu of notice". The claimant's breach of contract claim, which was withdrawn at the hearing, related to whether the respondent had paid tax and national insurance contributions in respect of this payment, which appeared to have been made as a net payment.

6. Following Early Conciliation, and within the extended time period provided by Art. 249B of the Employment Rights (Northern Ireland) Order 1996, the claimant presented a claim to the Industrial Tribunal on 6 March 2020. She brought claims of automatic unfair dismissal (alleging that she had exercised a statutory right in asking for terms and conditions in relation to the employment offer) and breach of contract (which the claimant withdrew at the hearing) and claims of direct age discrimination and direct sex discrimination

7. The respondent presented a response to the industrial tribunal dated 1 September 2020 resisting those claims.

8. The claim was subject to Case Management at a Preliminary Hearing conducted on 7 January 2021. An agreed statement of legal and factual issues was provided to the tribunal, which was included in the trial bundle. In the closing submissions of the parties, those issues were further refined.

WITHDRAWAL OF CLAIMS

9. At the outset of the hearing, the tribunal raised the terms of Art.135 of the Employment Rights (Northern Ireland) Order 1996 and referred the parties to ***Mennell v Newell and Wright (transport Contractors) Ltd [1997] IRLR 519***. Following consideration, the claimant confirmed on the second day of the hearing that she was withdrawing her claim of automatic unfair dismissal.

10. On the second day of the hearing, the respondent's representative pursued an application to adduce additional documentary evidence, in particular a photograph of a payslip in relation to deductions made in respect of the claimant's payment made in lieu of notice. The tribunal did not determine the application to adduce the payslip until the original email from the respondent's accountant which attached the payslip had been produced. Following

consideration of that email, the respondent's representative's representations in support of admission, the claimant's representations opposing admission, the tribunal admitted the email and attachment on the third day of the hearing. Further discovery in relation to the issue of whether tax and national insurance contributions had been paid in respect of the claimant's breach of contract claim was provided, following which the claimant confirmed that she was withdrawing her breach of contract claim.

AMENDMENT OF CLAIM

11. During the cross examination of the claimant, it became apparent that she was relying on the witness statement evidence of Ms Loughran to support her assertion that she had been subject to direct age and sex discrimination on the basis that, as a woman with a young family, she needed flexibility. The respondent's representative clarified that the respondent's position was that the claimant required leave to advance this additional basis for her claim. To the extent that an application for leave to amend the claimant's claim would have been necessary, the respondent's representative confirmed that it would not be opposed, as it would be categorised as a category one amendment under the principles in ***Selkent***, as explained in ***Harvey on Industrial Relations and Employment Law***. The claimant was granted leave, insofar as this was necessary, to pursue her existing direct sex and age discrimination claims on the additional basis of Ms Loughran's evidence, as comprised in her witness statement.

12. Following the introduction of the payslip, which purported to show deductions for tax and national insurance contributions, the claimant denied ever having had sight of this document. She was informed of her right to seek leave to amend her claim to pursue a claim regarding failure to provide an itemised pay slip and given time to consider the issue. She did not pursue an amendment application in this respect.

SOURCES OF EVIDENCE

13. The claimant gave direct evidence by way of her witness statement and was cross examined.

14. Ms Loughran (the Chief Executive Officer), Ms Carberry (the Chair of the respondent Board) and Miss Bennett (the receptionist) gave direct evidence on behalf of the respondent by way of a witness statement and were cross examined. Ms Loughran was recalled in the circumstances set out at paragraph 16 below.

15. The tribunal was also provided with an agreed bundle of documents.

WAIVER OF LITIGATION PRIVILEGE

16. At paragraph 23 of her witness statement, Ms Loughran made reference to having sought advice before "the conditional offer of employment" was withdrawn. At paragraph 24 of her witness statement, Ms Loughran again

referred to having sought advice and stated that she was provided with a template letter for the withdrawal of conditional offer of employment and was advised not to have any further communication with the claimant other than by email. Ms Loughran repeated and amplified this evidence orally during cross examination, describing the advice as "instructions" to her. She clarified that the advice was provided by an employment adviser from the Federation of Small Businesses. The advice, and the template letter, were not included in the bundle of documents before the tribunal. The tribunal queried the reason for this omission and was informed by the respondent's representative that the documents were subject to "litigation privilege". He agreed to take instructions regarding the nature of the privilege which was claimed, the identity and qualifications of the adviser from the Federation of Small Businesses, the scope/identity of the documents in respect of which litigation privilege was asserted and to consider whether privilege had been waived by Ms Loughran. On the third day of the hearing, the respondent provided a copy of an email dated 6 November 2019 from the solicitor who had provided advice to Ms Loughran. The respondent's representative accepted that privilege had been waived and informed the tribunal that enquiries had been made with that solicitor to establish whether any further documentation existed and that, in particular, copies of recordings of telephone calls had been sought. These were provided to the claimant shortly before the hearing resumed on the final day of hearing and were admitted to the tribunal with the consent of both parties. Ms Loughran was recalled to allow further cross examination to take place in respect of the additional discovery.

CREDIBILITY

17. The tribunal found the claimant to be an honest and reliable witness. Her account was fully supported by discovered messages and mobile telephone logs. Her account on other issues of dispute, for example that Ms Loughran had agreed to flexibility around school pickups (when Ms Loughran's evidence was that she would merely try to accommodate this, subject to discussion with other managers) was also supported by Ms Loughran's account of the meeting to her lawyer contained in the telephone recordings produced in the final day of hearing. The tribunal did not find Ms Loughran at all times to be a credible witness. The tribunal found both Ms Loughran and Ms Carberry's evidence, regarding the handling of the claimant's request for an uplift in starting salary, suggesting that the request was passed to the finance and personnel subgroup for consideration, to be implausible. The request was discussed between Ms Loughran and Ms Carberry in a telephone call, in which Ms Carberry merely agreed with Ms Loughran's decision refusing an uplift. Ms Loughran, as Chief Executive, was not a member of that subgroup of the respondent's board. It is not credible that the attendance of one member of the group would have been quorate. The tribunal found Ms Carberry's oral evidence regarding the proposal to withdraw the post contradictory and confusing. She stated that it "would have went to Finance and Personnel first", despite having said earlier in her evidence that the Finance and Personnel Board were not a decision making sub-committee, and that such matters would have been taken to the full board. She later gave evidence that the decision had been made between herself and Ms Loughran.

In light of these issues of credibility, where there has been a difference in the accounts provided by the claimant and the respondent's witnesses of meetings or telephone calls, which cannot be resolved by reference to the other evidence adduced in the case, the tribunal has preferred the claimant's account.

SUBMISSIONS

18. The tribunal received written submissions from both parties following the conclusion of the evidence. In light of the claimant' status as an unrepresented party, the respondent's representative agreed to provide the respondent's submission first. The tribunal is grateful to both the claimant and the respondent's representative for their submissions.

LAW REFERRED TO

19. **By the claimant:**

1. The Employment Rights (Northern Ireland) Order 1996 Art 3 and Art 130 (which was not relevant to the claims before the tribunal).

2. Sex Discrimination (Northern Ireland) Order 1976 Arts 2, 8 & 63A.

3. The Employment Equality (Age) Regulations (Northern Ireland) 2006 Regs 3, 7 & 42.

The Labour Relations Agency Code of Practice

By the respondent:

1. The Employment Rights (Northern Ireland) Order 1996 Arts 3 & 7.

2. Sex Discrimination (Northern Ireland) Order 1976 Arts 3, 8 & 63A.

3. The Employment Equality (Age) Regulations (Northern Ireland) 2006 Regs 3, 7 & 42.

The Labour Relations Agency Code of Practice

Cases

1. ***Koenig-v-The Mind Gym Ltd [2013] UKEAT 0201_12_0803.***

2. ***Sarker v South Tees Acute Hospitals NHS Trust [1997] ICR 673.***

3. ***Welton v Deluxe Retail t/a Madhouse (In Administration) [2013] ICR 428.***

4. ***Ochika Stella v The Regard Partnership UKEAT614/06.***

5. ***Nelson v Newry & Mourne District Council [2009] NICA 24.***

6. ***Igen v Wong [2005] 3 ALL ER 812.***

7. ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333.***

8. ***Madarassy v Nomura International PLC [2007] IRLR 247.***

9. ***The Law Society v Bahl [2003] IRLR 640; [2004] IRLR 799***

ISSUES

20. Following the withdrawal of some of the claimant's claims, the following legal issues remained for determination by the tribunal:

    i. Was the respondent's withdrawal of the conditional offer of employment to the claimant on 7/8 November 2019 discriminatory on grounds of either:

        a. Sex; and/or

        b. Age;

    ii. Was the claimant an employee of the respondent following her acceptance on 31 October 2019 of a conditional offer of employment? If so, was the claimant entitled to avail of the respondent's Grievance Procedures following the withdrawal of the conditional offer of employment on 7/8 November 2019? (This issue is relevant to the claimant seeking an uplift on any compensation awarded.)

    iii. Whether there was onus on the respondent to adhere the Grievance Procedures in the circumstances of the case? Is so, did the respondent fail to adhere to same?

    iv. Subject as above, what is the appropriate remedy?

RELEVANT LAW

21. **Sex Discrimination (Northern Ireland) Order 1976**

    Direct discrimination on the ground of sex

    3. In any circumstances relevant for the purposes of any provision of this Order, a person ("A") discriminates against another ("B") if, on the ground of sex, A treats B less favourably than A treats or would treat another person

Applicants and employees

8 — (1) It is unlawful for a person, in relation to employment by him at an establishment in Northern Ireland, to discriminate against a woman—

(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or

(b) in the terms on which he offers her that employment, or

(c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her—

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment.

…

Burden of proof: Industrial Tribunals

63A.—(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, …

…

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.

Remedies on complaint under Article 63

65.—(1) Where an industrial tribunal finds that a complaint presented to it under Article 63 is well-founded the tribunal shall make such of the following as it considers just and equitable—

(a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;

(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court to pay to the complainant if the complaint had fallen to be dealt with under Article 66;

(c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.

…

66. …

(4) For the avoidance of doubt it is hereby declared that damages in respect of an unlawful act of discrimination or harassment may include compensation for injury to feelings whether or not they include compensation under any other head.

…

22. **The Employment Equality (Age) Regulations (Northern Ireland) 2006**

Discrimination on grounds of age

3.—(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —

(a) on the grounds of B's age, A treats B less favourably than he treats or would treat other persons …

Applicants and employees

7.—(1) It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to discriminate against a person—

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;

(b) in the terms on which he offers that person employment; or

(c) by refusing to offer, or deliberately not offering, him employment.

(2) It is unlawful for an employer, in relation to a person whom he employs at an establishment in Northern Ireland, to discriminate against that person—

(a) in the terms of employment which he affords him;

(b) in the opportunities which he affords him for promotion, a transfer, training, or receiving any other benefit;

(c) by refusing to afford him, or deliberately not affording him, any such opportunity; or

(d) by dismissing him, or subjecting him to any other detriment.

Burden of proof: Industrial Tribunals

42.—(1) This regulation applies to any complaint presented under regulation 41 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent—

(a) has committed against the complainant an act to which regulation 41 (jurisdiction of industrial tribunals) applies; … the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

Remedies on complaints in industrial tribunals

43.—(1) Where an industrial tribunal finds that a complaint presented to it under regulation 41 (jurisdiction of industrial tribunals) is well-founded, the tribunal shall make such of the following as it considers just and equitable—

(a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;

(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court to pay to the complainant if the complaint had fallen to be dealt with under regulation 44 (jurisdiction of county courts);

(c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination or harassment to which the complaint relates.

…

Shifting the Burden of Proof

23. The operation of the burden of proof is the same in both sex and age discrimination. The proper approach for a tribunal to take when assessing whether discrimination has occurred and in applying the provisions relating to the shifting of the burden of proof was reviewed and restated by the Northern

Ireland Court of Appeal in the case of ***Nelson v Newry & Mourne District Council [2009] NICA***:-

> *"22 This provision and its English analogue have been considered in a number of authorities. The difficulties which Tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in* ***Igen v Wong [2005] 3 ALL ER 812*** *considered the equivalent English provision and pointed to the need for a Tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in* ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333****. It stated that in considering what inferences and conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In* ***McDonagh v Royal Hotel Dungannon [2007] NICA 3*** *the Court of Appeal in Northern Ireland commended adherence to the* ***Igen*** *guidance.*
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> *23 In the post-****Igen*** *decision in* ***Madarassy v Nomura International PLC [2007] IRLR 247*** *the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the* ***Igen*** *approach, the* ***Madarassy*** *decision is in fact an important gloss on* ***Igen****. The court stated:-*
>
> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations*

of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'

That decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.

24 This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. In ***Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8****, Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

24. In ***S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279***, (which, although not cited to the tribunal by the respondent's representative in his closing submission, will be familiar to him) the Court of Appeal in England and Wales considered the shifting of the burden of proof in a discrimination case. It referred to ***Madarassy*** and the statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. At Paragraph 19, Lord Justice Sedley stated:-

"We agree with both counsel that the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be forwarded by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

25. The respondent's representative referred to paragraph 51 in the decision in ***Igen*****,** in which the Court of Appeal in England and Wales warned tribunals against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground. The tribunal has set out paragraph 51 of the judgment in full:

> *"We recognise, as Mr White properly acknowledged, that the ET has reached conclusions on the conduct of the appellants which other ETs may well not have reached. But it is the tribunal of fact, entitled to use its industrial expertise to guide it in reaching its conclusions, and it has not been suggested that in doing so it was perverse. It has directed itself on the law impeccably. We do not accept Miss Slade's criticisms that it failed to make the necessary findings of primary facts from which inferences could be drawn. It is apparent that it is the finding of unexplained unreasonable conduct from which it has drawn the inferences satisfying the requirements of the first stage. Whilst we would caution ETs against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground, we cannot say that the ET was wrong in law to draw that inference, and we repeat that there is no perversity challenge. At the second stage it did consider whether the appellants had discharged the onus on them by their explanations, but it found those explanations inadequate for the reasons which it gave. It did expressly refer to the conduct of Ms Wong and Mr Dawes. The fact that one finding favourable to Ms Parsons has been made does not preclude another finding unfavourable to her. No error of law has been disclosed."* (Tribunal's emphasis.)

26. The respondent's representative relied on ***Law Society v Bahl [2003] IRLR 640*** in his submissions in particular paragraphs 94 and 101. The tribunal has set out the EAT's judgment more fully below:

> *"93. There is clear authority for the proposition that a tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably. This is the important decision of the House of Lords in Glasgow City Council v Zafar [1998] IRLR 36. … I cannot improve on the reasoning of Lord Morison, delivering the opinion of the court, who expressed the position as follows, 1997 SLT 281, 284:*
>
> > *"The requirement necessary to establish less favourable treatment which is laid down by s.1(1) of the Act of 1976 is not one of less favourable treatment than that which would have been accorded by a reasonable employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the same employer in the same circumstances. It cannot be inferred, let alone presumed, only from the fact than an employer has acted*

unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances.'"

94. It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman that it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does no more than raise the possibility that the employer could have been influenced by unlawful discriminatory consideration. Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made. …

96. … Mr de Mello says that these comments demonstrate that it is open to a tribunal to infer discrimination from unreasonable treatment, at least if the employer does not show that equally unreasonable treatment would have been meted out to a white person or man, as the case may be. We recognise that read broadly the passage could indeed justify such an interpretation, not least because the tribunal's comments in Anya which Sedley LJ referred to as 'arguably' incorrect seem to us, with respect, faithfully to reflect the principle established by the House of Lords in the Zafar case. However, we do not think that they could have been intended to be read in that manner. We do, however, respectfully accept that Sedley LJ was right to say that racial bias may be inferred if there is no explanation for the unreasonable behaviour. But it is not then the mere fact of unreasonable behaviour which entitles the tribunal to infer discrimination; it is not, to use the tribunal's language, unreasonable conduct 'without more', but rather the fact that there is no reason advanced for it. … (Tribunal's emphasis.)

97. …The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified, albeit genuine, reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason. We return to this point below. (Tribunal's emphasis.)

99. That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable, then the reason is likely to be non-discriminatory. In general, a person has good non-discriminatory reasons for doing what is reasonable. This is not inevitably so since sometimes there is a choice between a range of reasonable conduct, and it is of course logically possible the discriminator might take the less favourable option for someone who is, say, black or a female and the more favourable for someone who is white or male. But the tribunal would need to have very cogent evidence before inferring that someone who has acted in a reasonable way is guilty of unlawful discrimination.

100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.

101. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself." (Tribunal's emphasis.)

27. In ***Bahl v Law Society [2004] IRLR 799*** the Court of Appeal in England and Wales approved the EAT decision, describing it as "*a judgment which is a model of lucidity*" and "*a masterly analysis of the law in a way which has only been challenged on one point on this appeal (relating to an obiter remark of Sedley LJ in Anya*)". The Court of Appeal went on to cite with approval the comments of Sedley LJ at paragraph 101:

"It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it."

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

> *"It is self-evident the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedence. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anxiety, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise."*
>
> *"Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The Court and Tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available on the calculation of financial loss or compensation for bodily injury".*

29. ***Vento*** also established that regard was to be had to equivalent awards under the JSB guidance, as well as establishing the bandings to be used for assessment of injury to feelings. The top band for a claim brought at the relevant time was normally within £27,400 and £45,600 and is restricted to the most serious cases, for example where there has been a lengthy period of discriminatory harassment. The middle band at the relevant time was generally £9,100 to £27,400 and is appropriate for less serious cases and the lowest band, at the relevant time was between £900 and £9,100 is for even less serious cases including where an act of discrimination is an isolated or one off occurrence.

THE CLAIMANT'S CASE.

30. The claimant alleged that the withdrawal of her employment, after she had accepted the conditional offer, was an act of direct age discrimination and direct sex discrimination. She alleged that she was dismissed from the post of Support Services Manager because she was a woman of childbearing age, with dependent children, who would consequently need some flexibility. The claimant relied on a hypothetical comparator who was an older female or was male.

31. The claimant relied on a conversation which she said occurred between her and Ms Loughran on 22 October 2019, when the claimant alleged that she informed Ms Loughran of her childcare responsibilities for school drop-off and

pickup at certain times. When she met later that same day with Ms Loughran, Ms Loughran provided her with a draft template of main terms and conditions. The claimant alleged that Ms Loughran immediately focussed on the maternity terms and conditions, describing them as "not great", before proceeding to recount a story where support had been provided to a woman who had had a stillbirth.

32. The claimant also relied on the evidence of Ms Loughran contained at paragraph 12 of her witness statement, when Ms Loughran gave evidence that when the request for flexibility around school drop-offs and pickups was made, that she had been *"concerned at this request …"* and had *"felt very concerned at this request …"*

33. The claimant also asserted that the respondent ought to have adhered to the statutory grievance procedure or the code of practice on disciplinary and grievance procedures published by the Labour Relations Agency, as it was her case that she was an employee of the respondent organisation, following her acceptance of the offer of employment.

THE RESPONDENT'S CASE

34. The respondent, in its ET3 response, resisted the claimant's claims and asserted that the claimant had arrived "unannounced" at its premises on 22 October 2019, requesting to meet with Ms Loughran. The respondent asserted that at that meeting Ms Loughran had advised that flexibility to accommodate school pickups could be accommodated. The respondent asserted that the claimant had *"unrealistic expectations"* and that the respondent *"considered the claimant to be inflexible and controlling … As such, the respondent withdrew the conditional employment offer. At the time of the withdrawal, vetting information had not been processed and references not sought as per the claimant's request. Therefore, the conditions of the employment offer were not technically satisfied at the time of the withdrawal."* The respondent made reference to the following:

    (i) the claimant, on 22 October 2019, having asked, in writing, for an uplift on the salary offered to her;

    (ii) the claimant, on 31 October 2019 having asked the respondent to not seek a reference until she had had the opportunity to discuss her resignation and notice period with a current employer;

    (iii) the claimant wishing to defer her start date; and

    (iv) the claimant wishing to commence employment on 2 January 2020, rather than 6 January 2020.

    The respondent did not raise any issue regarding the construction of the hypothetical comparator at hearing.

RELEVANT FINDINGS OF FACT

35. The respondent organisation, which Ms Loughran repeatedly described as "a small charity", was described in the Candidate Information Booklet as the largest community employer in the Colin area of West Belfast (page 91 of the bundle). It employs 31 employees. It provides support to women and children through services including day-care, support services, crisis intervention, well-being programmes, training and education, volunteering opportunities, food initiatives (including health workshops), garden allotments and a community food store. Its services are delivered through an empowerment model that promotes self-help and personal autonomy (page 93 of the bundle). Its mission statement is *"To enable women and children to grow to ensure their voices are heard and that they take their rightful place in a just and equal society."*

36. The post of Support Services Manager was advertised with a "work pattern" of 35 hours per week (page 85 of the bundle) and "35 hours per week (flexible to include evening/weekend work as required)" (page 93 of the bundle). The salary of £26,000 was described as "competitive" (page 85 of the bundle). The staff reward statement referred to "Flexible working", "Family friendly policies" and "people friendly policies" (page 99 of the bundle).

37. When interviewed on 21 October 2019, the claimant was the highest scoring candidate. She performed very strongly, scoring 90% across all competencies. Ms Loughran, who was one of the panel of interviewees, agreed during cross examination that the claimant was "confident and assertive" at interview.

38. The claimant was telephoned by Ms Loughran on 21 October 2019 to congratulate the claimant on her success at interview. The tribunal accepts the claimant's account that she stated to Ms Loughran in this conversation that she would like to discuss some details regarding terms and conditions and was told that they could discuss all of this tomorrow and that they would speak soon.

39. On 22 October 2019, the claimant sent a text to Ms Loughran stating:

> *"Hi Isobel, it's Gemma would I be able to call in or give you a call. Just have a few questions about T and C etc. thanks :)"*

Ms Loughran replied – no problems – I am in the centre from 2 to 5pm. Ms Loughran attempted to contact the claimant by telephone at 13:15 and the claimant returned her call at 13:18, when she was invited to call into the centre to meet that afternoon. The respondent's ET3 response asserted that the claimant had arrived at the respondent's premises "unannounced". The tribunal finds, as accepted by Ms Loughran in cross examination, that this was incorrect and that there had been an arrangement for the claimant to call.

40. The claimant met with Ms Loughran at the respondent's premises on 22 October 2019. The claimant was provided with a blank template of terms and conditions. The tribunal accepts that the claimant stated to Ms Loughran

that she wondered whether there was flexibility for the claimant to do school drop-offs and pick-ups at certain times of the month. The tribunal finds, as accepted by Ms Loughran during cross examination that the claimant's presentation at this meeting was "confident and assertive", the same description as she had accepted as a description of the claimant's successful performance at interview. The tribunal accepts the claimant's evidence that Ms Loughran agreed to give her flexibility, as requested, at the meeting. The claimant's account is supported by what Ms Loughran told her lawyer when she was seeking advice on 6 November 2019. During the recording of the call dated 6 November 2019 Ms Loughran can be heard confirming that the claimant had asked for flexible working conditions regarding childcare and that Ms Loughran had agreed to these. The tribunal therefore rejects Ms Loughran's evidence that she stated to the claimant *"that the organisation would try to accommodate the request*" or that this was dependent on the outcome of discussions with other managers.

41. The tribunal found Ms Loughran's evidence regarding the organisational hours of work to be confusing and contradictory. At paragraph 12 of her witness statement she described the respondent's opening hours as 9am to 5pm. However, she also referred to "a rota for support provision", which she accepted was not referred to at all in the candidate information booklet. Despite the reference in the candidate information booklet to the working hours including evening and weekend work, Ms Loughran stated during cross examination that the rota of support provision was only in place from when the centre opened to when it closed. Ms Loughran's evidence in chief advanced the claimant's request for flexibility as one of a number of matters of concern to her. However during cross examination she accepted that it was normal practice for discussions to take place regarding terms and conditions including agreed working hours and start date and time. The tribunal therefore finds that this was not an issue of concern to her, given that she readily agreed to it, without expressing any concern at the time or recounting any concern to her lawyer.

42. The tribunal prefers and accepts the claimant's account that at this meeting Ms Loughran, when referring to the template terms and conditions document, made immediate and particular reference to the maternity leave provisions, describing them as "not great". Ms Loughran in her witness statement accepted that she had made reference to the organisation providing support to an employee who had suffered a stillbirth. The tribunal does not accept Ms Loughran's account that this conversation was in the context of sick leave. During cross examination, when asked had she spoken about another policy, she gave a lengthy and evasive answer which did not address the question she had been asked. On being asked to clarify her response to the question, she confirmed that she had indeed made reference to the maternity leave policy.

43. The tribunal finds that the claimant asked Ms Loughran at this meeting whether there would be any scope for an uplift in her salary given that she would be taking a pay cut in accepting the new job. The tribunal accepts the claimant's evidence at paragraph 4 of her witness statement that her existing

post was coming to an end by reason of redundancy at the end of December 2019, as this was not challenged by the respondent. Ms Loughran asked the claimant to put her request regarding the salary uplift in writing for consideration by the finance and personnel subgroup. The tribunal prefers and accepts the evidence of the claimant that Ms Loughran commented to the claimant "*if you don't ask you won't get*". The tribunal rejects Ms Loughran's evidence at paragraph 13 of her witness statement that she was "taken aback" by the request and at paragraph 16 of her witness statement that the claimant was coming "*hard sell uplift to salary*" because this view of the claimant's approach was not reflected in the contemporaneous history given by Ms Loughran to her lawyer on 6 November 2019.

44. The tribunal finds that discussion took place around the issues of start date for the claimant and the giving of notice by the claimant at this meeting on 22 October 2019, as during cross examination, Ms Loughran accepted that the start date of January 2020 had been touched upon without objection from her, and that the meeting ended without a start date and time being agreed.

45. The claimant, as suggested by Ms Loughran, sent an email to Ms Loughran on 22 October 2019 stating:

> *"Dear Isobel,*
>
> *I would like to thank you for the offer of employment for Footprints Women's Centre, for the position of Support Services Manager. I am delighted to be considered for this position and am carefully considering the offer.*
>
> *There are two things impacting my decision, one is the increase in pension contributions combined with the drop to my current salary. The two things together would make a considerable difference to take my current take home pay and could have significant implications for my family finances.*
>
> *My current salary is £28,192.00 and the employer's contribution to pension is 6%, I pay 2%. As the total is 8% min. contribution and the new employer contribution is 3%, I would need to pay 5% of my gross salary of £26,000. I have estimated that the total loss would amount to around £3,000 from my take home pay per year, and potentially £250-300 per month.*
>
> *I would therefore like to ask, at this stage, if Footprints would consider an uplift to the current salary so my take home finances are not too negatively impacted by taking up the new post.*
>
> *I am open to discussing this further with you.*
>
> *Thank you for your consideration on this matter and I look forward to hearing from you soon.*

Kind regards,

Gemma"

46. The claimant did not receive a response to this letter and so she sent a text to Ms Loughran on Monday 28 of October 2019 in the following terms:-

> *"Hi Isabel just wondering if you know when I would hear back about my request please. Keen to hand in my notice :) Thanks Gemma"*

Ms Loughran responded in the following terms:-

> *"I understand Gemma I'm in Portugal at the moment and will meet our F and P board on Wednesday and get back to you then."*

47. The tribunal finds that the matter was not considered at any meeting of the Finance and Personnel subgroup of the respondent's board. Instead, Ms Loughran had a telephone conversation with Ms Carberry on Wednesday 30 October 2019 to discuss the request. Ms Loughran represented this telephone conversation as "a special meeting with the chair". Ms Loughran brought her recommendation that the request should be refused to the chair, who agreed with her suggestion. The tribunal makes this finding as Ms Loughran accepted during cross examination that the members of the relevant subgroup were not invited to meet and that the outcome of her conversation with Ms Carberry was not reported to them. No formal record of this "meeting" was included in the Hearing Bundle.

48. On 30 October 2019, Ms Carberry wrote to the claimant in the following terms:

> *"Dear Gemma*
>
> *I acknowledge receipt of your letter dated 22nd October and appreciate your consideration for the post of Support Services Manager that we are offering you, subject to the receipt of positive references and vetting confirmation.*
>
> *The salary in terms of the post you have been offered are as advertised and supplied in your applicant information pack.*
>
> *We would appreciate acceptance of your conditional offer of employment by 5.00pm on 1/11/19.*
>
> *Yours sincerely,"*

49. On 31 October 2019 the claimant replied to Ms Carberry in the following terms:

> *"Hi Ursula,*

Thank you for your correspondence in relation to my request relating to the employment offer for the position of Support Services Manager for Footprints Women's Centre.

I would like to confirm, that I would be accepting the current offer of employment as per the information pack details. As previously stated, I am delighted to be offered this position with Footprints and I look forward to agreeing start date and times with Isabel over the coming days and completing the requirements for checks and references.

I would ask that references are not immediately sought from organisation until after I have agreed start dates and times with Isabel as I would like to have the courtesy of notifying my management in person that I am leaving and agree on notice and leaving dates for them also.

Also as I am employed in the local community organisation, I would ask my acceptance is kept confidential at this stage as I have a large number of local groups and volunteers who receive my support, at different levels and would want to inform them directly and at a suitable time to them so as not to disturb dynamics of the both individuals and groups that I am working with.

Kind regards,"

50. On Monday, 4 November 2019, the claimant, who had been waiting to firm up a start date, contacted Ms Loughran by telephone. Ms Loughran confirmed that she had received the claimant's letter accepting the offer of employment and that her start date would be January 2020. The claimant informed Ms Loughran that her manager was off and stated that she would ring her manager to her home [to give notice] and that this would allow Ms Loughran then to seek the reference from her current employer. The tribunal finds, as accepted by Ms Loughran during cross examination, that Ms Loughran told the claimant not to contact her manager as she would not be starting until January. Ms Loughran accepted in cross examination that it was possible that she told the claimant not to come to the office to complete Access NI forms until the following Monday. Ms Loughran also accepted in cross examination that there was an onus on her in respect of the arrangements for completion of the Access NI checks. The tribunal accepts the claimant's account that she was put off coming to Footprints to complete the application.

51. On 4 November 2019, the Board of Directors of the respondent organisation met and the minutes record that the claimant had asked if references could be postponed until she handed in her resignation. The action recorded was cryptic: "Isobel to follow up on a discussion."

52. On 6 November 2019, (the same day that Ms Loughran sought advice about withdrawing the post), the claimant was sent a formal letter of offer (page 66 of the bundle) by Ms Loughran, stating:

"Dear Gemma,

RE: Support Services Manager

Thank you for attending for interview for the above position. I am pleased to inform you that we are offering you the post of ***Support Services Manager,*** *subject to receipt of positive references and vetting confirmation.*

Please confirm in writing, whether or not you wish to accept the post and do not hesitate to contact me if you have any further queries.

Yours sincerely,"

53. On 6 November 2019, Ms Loughran also issued a letter (page 276 of the bundle) and an email (page 73 of the bundle) to the claimant stating:

"I am writing to confirm your start date for the above post is Monday, 6 January 2019 (sic).

I look forward to working with you.

Yours sincerely,"

54. The claimant replied to Ms Loughran on 6 November 2019 at 09:54 in the following terms:

"Hi Isobel,

Thank you for your emails. I am looking forward to starting my new post with footprints in January! :)

I was wondering if you give me a call to discuss the start date please. As I am paid monthly I was expecting to start on Thursday 2nd Jan 2020.

If you can call me or can I arrange to take those days as holidays rather than have a reduced wage in the month of January.

Thanks lots

Gemma"

55. The claimant did not receive a response to this email and texted Ms Loughran at 17:21 on Thursday, 7 November 2019 in the following terms:-

"Hi Isabel it's Gemma I was wondering could we have a quick chat about start date and pick a time to meet nx week pls"

56. On 8 November 2019, Ms Carberry emailed the claimant at 09:08 in the following terms:-

> *"Dear Gemma*
>
> ***RE: conditional offer of appointment dated 21/10/2019***
>
> *We refer to the conditional offer of appointment made to you on 21st October 2019 for the post of Support Services Manager.*
>
> *We now regret to inform you have not met all the requirements for confirmation of your appointment.*
>
> *As a result, we are no longer in a position to proceed with your appointment and our offer of employment is hereby withdrawn with immediate effect.*
>
> *You will be paid the following amounts:*
>
> *(a) Notice pay (you are to be paid in lieu of your four week notice period)*
>
> *Kind regards,"*

57. The claimant sent a text to Ms Loughran at 09:15 stating:

> *"Isabel can you phone me ASAP pls as I have just had my offer withdrawn and I don't understand what is happening"*

58. The claimant replied to Ms Carberry by email on 8 November 2019 at 09:24, stating:-

> *"Hi Ursula*
>
> *I would be very grateful if you can contact me to discuss this I am very upset to hear this I have accepted the offer, I have been in discussion with Isabel and handed in my notice at work.*
>
> *I do not understand what has happened to retract my offer of employment and I would be very grateful if someone could contact me*
>
> *Yours*
>
> *Gemma"*

59. The claimant sent a further email to Ms Carberry at 09:41, stating:-

> *"Ursula please can you explain this to me I have done everything including leasing [liaising?] With Isabel in relation to a start date and*

seeking references. I was to go to Footprints on Monday to complete the Access NI forms. I have met all the conditions set.

I have handed in my notice to work and I will face unemployment as a result of these actions

I would be very grateful if you yourself or Isabel can discuss this with me at your earliest convenience.

Gemma"

60. The claimant sent a further text to Ms Loughran at 14:22, stating:

> *"Isabel was that letter mistake or has something happened. Please can you let me know today as this was totally a shock to me and I don't know what has happened. Did I do something wrong or was it a misunderstanding?"*

61. No further explanation for the withdrawal of the post of Support Services Manager was provided to the claimant by the respondent prior to the presentation of the respondent's ET3 response. The claimant made a Subject Access Request to the respondent organisation on 15 November 2019. In her letter, the claimant stated:

> *"To date I have not received any response in relation to my request for an explanation into the reasons for the withdrawal of a confirmed acceptance of the position of Support Services Manager with Footprints Women's Centre, nor have I received any return of the many calls, texts and emails sent to yourself and Ursula Carberry.*
>
> *I would like to request again for clarification in relation to the email on Friday, 8 November 2019 at 9.08am from Ursula Carberry which withdraws my offer of employment stating that I have not met the conditions for the acceptance of the post, however no explanation is given to* ***how*** *I have not met the conditions for acceptance.*
>
> *I have replied to this email and outlined how I did meet the conditions, however to date, I have not been provided with a response.*
>
> *I do not believe that fair and ethical procedures have been followed in relation to the withdrawal of the offer of employment for this position and subsequent unresponsiveness to my request for communication in relation to this matter. I would therefore like to raise a grievance through the organisation's grievance procedures and I would therefore be grateful if you could send me through the organisations grievance procedures and relevant documentation in relation to this."*

62. On 29 November 2019, Ms Loughran replied to the claimant stating:

> *"Dear Gemma*

Please find enclosed information in response to your Subject Access Request.

I have taken advice in relation to you raising a grievance through the organisation's grievance procedures and unfortunately footprint procedures relate only to employees of the organisation.

As you have never been in employment in Footprints you have no right to access the organisations grievance procedures.

Yours sincerely"

63. The claimant emailed the respondent on 16 December 2019 to provide them with her bank details and asking if they intended to make the payment in respect of pay in lieu of notice. Ms Loughran replied on 19 December 2019 to confirm the payment would be made. Payment of £1,654.88 was received by the claimant.

APPLICATION OF THE LAW

OPERATION OF THE BURDEN OF PROOF

64. Contrary to the submission of the respondent's representative, that the claimant falls woefully short of shifting the burden of proof, the tribunal finds that the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of her sex and age. The claimant has been subjected to unreasonable behaviour in the withdrawal of the post. The tribunal is satisfied that the "something more" than a mere difference in treatment and a difference in status referred to in ***Madarassy*** and ***Deman*** (see paragraphs 23 and 24 above) has been shown by the claimant.

65. In this case, the "something more" is provided by:

    a. the provision of inaccurate reasons for the withdrawal of the post advanced by the respondent at the time it was withdrawn. Ms Loughran accepted during cross examination that the reasons provided in the letter sent on 8 November 2019, namely that the claimant had not met all of the requirements of the job, were not the real reasons why the claimant was not appointed;

    b. Ms Loughran advancing in her evidence in chief an inaccurate account of her meeting with the claimant on 22 October 2019, and in particular maintaining that the discussion regarding terms and conditions had been in the context of sickness pay entitlement, rather than maternity leave;

    c. the respondent in its ET3 response putting forward an inaccurate account which suggested that the claimant had attended the

respondent's premises on 22 October 2019 "unannounced", when she was clearly there at Ms Loughran's invitation; and

d. Ms Loughran's evidence in chief, expressing her "concern" regarding the claimant's request for flexibility for school pickups, when she did not communicate this concern to the claimant or recount it to her lawyer on 6 November 2019.

66. Accordingly, the claimant has discharged the burden on her under Art 63A and 42 (see paragraphs 20 and 21 above) to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. The consequence of this is that, per the legislation and **Nelson** (see paragraph 23 above), the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex.

CONSIDERATION OF THE RESPONDENT'S EXPLANATION

67. The following reasons have been advanced by the respondent as non-discriminatory explanations for its treatment of the claimant and the tribunal has set out its findings in respect of those reasons below:

a. **Reason 1: the claimant had not met all the requirements for confirmation of your appointment. (The reason put forward in the letter of 8 November 2019)**

The tribunal rejects this reason because:

(i) the claimant had met all of the requirements which were assessed at the interview;

(ii) the respondent had not requested the references or the Access NI checks and the tribunal finds there was an implied obligation on the respondent to act in good faith and do its part in seeking to fulfil these conditions;

(iii) formal letters of offer had only issued to the claimant on 30 October 2019 (see paragraph 48 above) and 6 November 2019 (see paragraph 52 above), two days before the respondent purported to retract the offer which had been accepted;

(iv) Ms Loughran had deferred the obtaining of the references on 4 November 2019 (see paragraph 50 above), a step which in the overall circumstances of this case, appears to have been in bad faith and contrary to the implied obligations on the respondent arising on the acceptance of the offer by the claimant;

(v) in the telephone discussion with the lawyer funded through the Federation of Small Businesses on 6 November 2019 Ms

Loughran and the lawyer agreed that the offer was not being retracted because of references;

(vi) the pro forma draft letter withdrawing the conditional offer of employment provided to Ms Loughran by the lawyer funded through the Federation of Small Businesses, sent at 17:40 on 6 November 2019, required the respondent to set out the details of the conditions which had not been fulfilled and neither Ms Loughran nor Ms Carberry provided this detail in the letter; and

(vii) during cross examination Ms Loughran accepted that this reason was not the real reason.

b. **Reason 2: the claimant had unrealistic expectations in respect of the financial terms and conditions the respondent was able to offer. (A reason put forward in the ET3 response dated 1 September 2020.)**

The tribunal rejects this reason because:

(i) the post was advertised as having a competitive salary – the tribunal, acting as an industrial jury, finds that there was nothing untoward in the claimant seeking a modest uplift to meet her current salary in a comparable community organisation;

(ii) Ms Loughran had asked the claimant to put forward the request in writing and had told the claimant that she would take it forward for consideration. If the request was unreasonable, the tribunal finds it improbable that Ms Loughran would not have communicated this to the claimant at the time, rather than request that she put it in writing for further consideration; and

(iii) the claimant had accepted the post with the salary offered by email dated 31 October 2019 (see paragraph 49 above) and this issue had been settled. This could not reasonably have been a reason for the respondent withdrawing the offer on 6 November 2019.

c. **Reason 3: the respondent considered the claimant to be inflexible and controlling. (A reason put forward in the ET3 response dated 1 September 2020.)**

The tribunal rejects this reason because:

(i) Ms Loughran in her witness statement described being shocked by the claimant's approach at the first meeting [22 October 2019] describing it as "extremely controlling, demanding and pushy". However, Ms Loughran accepted during cross examination that the claimant had been "confident and assertive" when they met on 22 October 2019. Ms Loughran accepted that this same

description was appropriate for her successful interview performance. Ms Loughran further accepted during cross examination that it was normal practice following a recruitment and selection process to discuss particulars, for example working hours and a start time and date. Accordingly, the claimant's behaviour could not reasonably have been viewed as "inflexible and controlling". Even if Ms Loughran held this view, at the 22 October 2019, she did not act to rescind the offer before it was accepted. In all of the circumstances, the tribunal does not accept that the respondent genuinely held this view;

(ii) the claimant promptly accepted the job offer on receiving confirmation of the refusal of the uplift on her salary. When this decision was communicated to her, she accepted the offer without demur. This could not reasonably be described as inflexibility;

(iii) Ms Carberry's evidence in her witness statement at page 18 stated that in responding to her email of 30 October 2019 (see paragraphs 48 and 49 above) *"the claimant failed to acknowledge the authority of the Chair on the decision to stick to the agreed role as advertised and supplied to the claimant by stating she would discuss this with the CEO".* During cross examination, Ms Carberry conceded that there was nothing wrong with what the claimant had written in her email at paragraph 48 in stating that she would speak to Ms Loughran and that it "wasn't bold or wrong or something which warranted dismissal". Thereafter her evidence in cross examination was confusing in that she seemed to maintain a criticism of the claimant for having raised matters with her as Chair, which were matters for Ms Loughran, as CEO. The tribunal therefore rejects Ms Carberry's evidence in this regard as it is unsupported by the content and tenor of the email at paragraph 49 and in light of the concessions made by her in cross examination;

(iv) Ms Loughran at paragraph 19 of her witness statement described finding the claimant's email to Ms Carberry dated 31 October 2019 (see paragraph 49 above) *as "extremely disrespectful that a potential employee would attempt to dictate terms of her employment to the Chairperson of the organisation".* The tribunal found Ms Loughran's evidence in this respect to be unconvincing. Ms Carberry had written to the claimant in the apparent absence of Ms Loughran and had requested a response (see paragraph 48 above). This was not a case of the claimant sending unsolicited correspondence to the Chair of the Board. Moreover, the terms of the letter could not reasonably be viewed as in any way "disrespectful". It commenced by thanking Ms Carberry for her letter. It communicated the claimant's delight at being offered the post and that she was looking forward to starting work. The latter two paragraphs of the letter stated:

"I would ask that references are not immediately sought from organisation until after I have agreed start dates and times with Isabel as I would like to have the courtesy of notifying my management in person that I am leaving and agree on notice and leaving dates for them also.

Also as I am employed in the local community organisation, I would ask my acceptance is kept confidential at this stage as I have a large number of local groups and volunteers who receive my support, at different levels and would want to inform them directly and at a suitable time to them so as not to disturb dynamics of the both individuals and groups that I am working with." (Tribunal's emphasis.)

Acting as an industrial jury, the tribunal finds that there was nothing inherently unreasonable in the claimant asking for the opportunity to speak to her manager before references were sought or that her acceptance was kept confidential so as not to impact on her current work.

(v) Ms Loughran at paragraphs 21 and 22 of her witness statement made reference to the claimant seeking to take anticipated holidays for the period 2 to 6 January 2020 saying that this was *"becoming too much. I felt that I could not have a positive working relationship with any employee who, I felt, had demonstrated unrealistic demands and expectations of Footprints as an employer."* However, in the recording of Ms Loughran's conversation with the lawyer provided by the Federation of Small Businesses on 6 November 2019, Ms Loughran recounted that she and the claimant had agreed for a start date in January, because Footprints closed for two weeks at Christmas and to allow the claimant the opportunity to "tidy up" her current work. Given that a January date had been consensually agreed, but no specific date had been provided, the claimant's query was neither unforeseeable nor unreasonable. Ms Loughran in this call told the lawyer that she had been unhappy with the initial relationship "at the start", which contradicted her evidence that it only became too much when the claimant asked to start on 2 January 2020. In light of this and the fact that the parties had reached a consensus way forward on all issues to date, the tribunal rejects Ms Loughran's evidence.

(vi) Ms Carberry's witness statement stated that the claimant in her email of 31 October 2019 had "instructed" her not to seek references immediately. This email (see paragraph 49 above) contained a request – the claimant used the word "ask" – not an instruction. Ms Carberry also stated in her witness statement: *"I find it astounding and remiss of the claimant, who has worked in the voluntary and community sector for 14 years, to instruct the Organisation on how to carry out our business".* The claimant's

communications with the respondent could not reasonably have been characterised as the claimant instructing the respondent on how to carry out its business. There was simply no basis in the evidence to support this exaggerated and misleading claim, which the tribunal rejects.

d. **Reason 4: the claimant had not demonstrated any regard for the organisation, its services, and/or the impact of her demands on either (Ms Loughran's witness statement at paragraph 22) / the claimant failed to recognise the importance of the role she applied for and the service to the women and families in the community who would be impacted by any delay in services (Ms Carberry's witness statement at page 18). (These reasons were advanced by the respondent in its evidence to the tribunal, but not pleaded in the ET3 response or replies.)**

   The tribunal rejects these reasons because:

   (i) the claimant's suitability for the post was assessed in the merit based interview at which she scored exceptionally well;

   (ii) the claimant's communicated commitment to her existing community sector role, in wanting to finish up her work, was a good demonstration of her likely commitment to the new role;

   (iii) no particulars or evidence were given to support this generalised criticism of the claimant; and

   (iv) Ms Carberry, during cross examination, confirmed that following the failure to appoint the claimant, (other than for a short period when a consultant was brought in) the role has remained vacant and covered by other senior staff in addition to their existing workloads. In these circumstances, the tribunal is inclined to the view that the withdrawal of the post was likely to have a greater impact on service users.

e. **Reason 5: the claimant would not be a good fit for the role of a professional Support Services Manager (Ms Carberry's witness statement at page 19). (This reason was advanced by Ms Carberry in her witness statement and by Ms Loughran during cross examination, but not pleaded in the ET3 response or replies.)**

   The tribunal rejects this reason because the claimant's suitability for the post was assessed at interview, when she demonstrated her suitability for appointment. The tribunal understands that this reason was based on the claimant having requested flexibility, an uplift to salary, a delay to seeking references and the discussion around start date. The tribunal does not view the respondent's criticisms of the claimant's interactions as capable of supporting the view advanced by the respondent in its evidence that the claimant was not a good fit. The

tribunal is not persuaded that this view was genuinely held by the respondent, at the time the offer was withdrawn, as it is not set out in its pleadings and the reasons put forward to support it have not withstood scrutiny. Therefore the tribunal does not accept this as an adequate explanation.

f. **Reason 6: she simply made too many requests before even commencing work for the Respondent and it was decided that it was in the best interests of the organisation to the withdraw 'the offer'. Whilst the Respondent may not have set this out in detail in the letter withdrawing 'the offer', this does not mean it was discriminatory. (This reason was advanced by the respondent's representative in his closing written submissions.)**

The tribunal rejects this reason which was not disclosed by the pleadings or expressly put forward in those terms by any of the respondent's witnesses. The tribunal notes that Ms Loughran stated at paragraph 21 and 22 of her witness statement made reference to the claimant seeking to take anticipated holidays for the period 2 to 6 January 2020 saying that this was *"becoming too much. I felt that I could not have a positive working relationship with any employee who, I felt, had demonstrated unrealistic demands and expectations of Footprints as an employer."* The tribunal has considered the interactions of the claimant and the respondent before the withdrawal of the post and has found nothing objectively unreasonable about the tenor and content of the claimant's communications or, for the avoidance of doubt, about the number of the claimant's communications. The individual matters relied on were scrutinised, and in a number of important respects the respondent's witnesses conceded that the communications were reasonable. By way of example:

(i) Ms Loughran conceded that the claimant's first visit to discuss terms and conditions was by prior arrangement and not unannounced (see paragraph 39 above);

(ii) Ms Loughran accepted that it was normal practice for discussions to take place regarding terms and conditions including agreed working hours and start date and time (see paragraph 41 above);

(iii) Ms Loughran accepted that the start date of January 2020 had been touched upon at their first meeting without objection from her, and that the meeting ended without a start date and time being agreed (see paragraph 44 above); and

(iv) Ms Carberry conceded that there was nothing wrong with what the claimant had wrote in her email at paragraph 49 in stating that she would speak to Ms Loughran and that it "wasn't bold or wrong or something which warranted dismissal" (see paragraph 67c(iv) above)

CONCLUSIONS

68. Given the rejection of the respondent's reasons by the tribunal, the claimant, on the operation of the statutory burden of proof provisions, succeeds in her claims of both direct sex and direct age discrimination. The respondent has failed to prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex and age per ***Nelson*** (see paragraph 23 above). The tribunal has carefully considered the decisions in ***Bahl***, at both EAT and Court of Appeal, at paragraphs 26 and 27 above. The tribunal finds itself in a position where it is satisfied that the claimant has been treated unreasonably by the respondent in the withdrawal of the post, in a context where both the maternity leave conditions had been described in a manner which would potentially have discouraging for a female of child bearing years and where a request for flexibility for childcare reasons was a cause for concern. The tribunal has found the claimant has discharged the burden of proof in the case, requiring an explanation by the respondent. The tribunal has also not accepted the explanation proffered by the respondent for the unreasonable treatment. The tribunal therefore infers discrimination in this case, not from the unreasonable treatment itself but (having found the respondent's explanations inadequate as set out above) from the absence of any satisfactory explanation for it.

69. The tribunal notes that the respondent's representative's submission is in effect inviting the tribunal to find a reason for the respondent's treatment of the claimant. However, the tribunal has not been able to find "*an obvious reason for the treatment in issue"* (see paragraph 97 of ***Bahl*** at paragraph 26 above). The respondent's representative, in his closing submissions, suggests that the telephone recordings of the legal advice received by the respondent *"clearly confirms that the respondent's concerns related to the number of requests the Claimant had made before starting work"* and that this *"didn't' bode well"* and Ms Loughran was *"not happy with the initial relationship".* The tribunal respectfully disagrees with the respondent's representative's submission in this regard. The tribunal listened carefully to the recordings. Ms Loughran provided a history of her dealings with the claimant in the call on 6 November 2019. Ms Loughran did not relate any specific concern related to the number of requests made by the claimant. After providing a factual background to the adviser, Ms Loughran said "*Now at the minute … I'm getting … I'm not happy with the initial relationship at the start and it doesn't bode well".* Later in that same call, Ms Loughran agreed with the adviser that the reason for the withdrawal was "*the relationship so far".* That telephone call did not disclose any obvious reason for the treatment afforded to the claimant and records the adviser putting forward potential reasons for consideration. Rather than being fatal to the claimant's claim, as the respondent's representative suggests, this contemporaneous evidence points the tribunal back to "the start". "The start" comprises the dealings between the claimant and Ms Loughran from her successful performance at interview to that point. This included the discussion around maternity terms and conditions and the history provided to the adviser of the claimant having asked for flexibility around school pickups, a request which

Ms Loughran in her own evidence stated caused her "concern". A careful scrutiny of those dealings has not led to the emergence of an obvious reason for the respondent's treatment of the claimant, and the tribunal is left with a series of explanations advanced, none of which are adequate. The tribunal consequently concludes, in the absence of an adequate explanation, that the claimant's case is well founded.

70. The tribunal notes that the respondent did not respond to the claimant's request for information and an explanation after the post was withdrawn. The tribunal is satisfied that this course was adopted on advice from the lawyer. The tribunal finds that the respondent would similarly not have replied to correspondence from a hypothetical comparator following receipt of that advice, and therefore it is not an act of discrimination.

REMEDIES

71. By way of remedy, the tribunal makes a declaration that the claimant has been subject to unlawful direct sex and direct age discrimination in the withdrawal of the post of Support Services Manager, contrary to Articles 3 and 8 the Sex Discrimination (Northern Ireland) Order 1976 and Regulations 3 and 7 of the Employment Equality (Age) Regulations (Northern Ireland) 2006.

72. The tribunal also awards compensation for hurt feelings. The tribunal accepts the claimant's evidence that the actions of the respondent had a substantial impact upon the claimant personally and in her interactions with her family. She felt humiliated and traumatised by the experience, and was left nervous, anxious and suffering from bouts of low mood and low self-esteem. The claimant did not receive formal treatment from her GP. Notwithstanding this, the tribunal has had the benefit of observing the claimant as she gave her evidence about the impact of the treatment upon her and the tribunal accepts her evidence regarding relying on alternative treatments to manage her significant distress and upset.

73. The tribunal finds that the act of direct discrimination falls towards the top end of the lowest Vento banding and accordingly awards the claimant the sum of £8,500 for hurt feelings.

74. The tribunal awards interest in accordance with the Industrial Tribunals (Interest on Award in Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 and The Industrial Tribunals (Interest on Awards in Age Discrimination Cases) Regulations (Northern Ireland) 2006. There is no indication that serious injustice would be caused by calculating interest over this period.

75. Interest at 8% is therefore awarded on the award for hurt feelings from 8 November 2019 to date:

Interest at 8% per annum	£720.00 per year
8 November 2019 to date – 720/365 daily rate	£1.97 x x days

UPLIFT?

76. The claimant sought confirmation of whether the respondent ought to have complied with the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004. The element of these which related to grievances were repealed by the Employment Act (Northern Ireland) 2016, which inserted a new Art 90AA into the Industrial Relations (Northern Ireland) Order 1992.

77. Art. 90AA provides:

Effect of failure to comply with Code: adjustment of awards
90AA—(1) This Article applies to proceedings before—

(a) an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 4A;

(b) the Fair Employment Tribunal relating to a claim by an employee under Article 38 of the Fair Employment (Northern Ireland) Order 1998; and references in this Article to "the tribunal" are to be read accordingly.

(2) If, in the case of proceedings to which this Article applies, it appears to the tribunal that—

(a) the claim to which the proceedings relate concerns a matter—

(i) to which a relevant Code of Practice applies, and

(ii) to which a statutory dispute resolution procedure does not apply;

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable, the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 50%.

…

78. The LRA Code of Practice at page 5 states:

"Status of Code

This Code of Practice provides for the repeal of the existing statutory workplace grievance procedures under the Employment (Northern Ireland) Order 2003. The requirements of this Code in relation to workplace grievances are similar to the previous statutory obligations, whilst the statutory requirements regarding dismissal and discipline remain unchanged by this Code…

A failure to follow any part of this Code does not, in itself, make a person or organisation liable to proceedings. However, industrial tribunals shall take this Code into account when considering relevant

cases. Similarly, arbitrators appointed by the LRA to determine relevant cases under the LRA Arbitration Scheme shall take this Code into account.

*Employers and employees should be aware that failure to follow any aspect of the **statutory** dismissal and disciplinary procedure will result in any industrial tribunal award being adjusted to reflect this failure.*

*With reference to grievances, an industrial tribunal can take into account any **unreasonable** failure to follow the grievance aspects of this Code and **may** financially penalise the employer or the employee.* [Tribunal's emphasis]

…

74. A failure to follow the grievance procedure in those cases which a tribunal can hear may mean that the tribunal adjusts any award by a percentage of up to, or down by, 50 per cent to reflect that the provisions of this Code have not been reasonably followed. Examples of this may be where the employer does not offer a meeting to discuss the grievance or the employee does not invoke an appeal."

79. The 1992 Order does not define what is meant by "an employee". However, the Employment Rights (Northern Ireland) Order 1996 does provide a definition:

Employees, Workers

3.—(1) In this Order "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Order "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

…

80. In the EAT decision of **Koenig-v-The Mind Gym Ltd [2013] UKEAT 0201_12_0803** Mr Justice Langstaff (President) stated:-

"4. These days most employees will have entered into a contract with their employer before they start work under it. It is now trite law that although they do not work under it at the time, during the period between their entering into the contract and first working under it they are under a contract of employment. The definition of "employee" is in section 230 of the Act. It is in these terms:

> *"(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment ceased, worked under) a contract of employment."*

That section draws a distinction between entering into and working under the contract of employment. They may be, and frequently are, two separate things. It was recognised in ***Sarker v South Tees Acute Hospitals NHS Trust [1997] ICR 673*** *by the Appeal Tribunal that a contract entered into between an employee and employer which anticipated work would begin at a later date was a contract of employment and not merely a contract for employment. This case has been followed without a contrary authority since, most recently before this Tribunal in* **Welton v Deluxe Retail t/a Madhouse (In Administration) [2013] ICR 428***…."*

…

81. The issue for the tribunal is whether the claimant meets the definition of "an employee" and whether a contract had been formed. The tribunal agrees with the submission of the respondent that the contractual conditions necessary for the formation of the contract (Access NI checks and satisfactory references) had not been fulfilled. The tribunal views these as conditions precedent to the formation of the contract. However, the payment of the four weeks' pay in lieu of notice was the payment of liquidated damages by the respondent assessed under the contract. The tribunal therefore finds that, in these circumstances, those conditions had been waived by the respondent and a contract of employment had been formed. There was sufficient agreement and certainty to be enforceable.

82. The tribunal is not aware of any authority as to the applicability of the provisions in Art 90AA where an employee has not commenced work. Analysing the requirements of Art 90AA and applying them to the facts, the tribunal finds that the claimant's claims of direct sex and direct age discrimination are claims to which a Code of Practice applies, as they fall within schedule 4A of the 1992 Order. The tribunal finds that the respondent failed to adhere to the code. However, the failure to grant the claimant access to a grievance process was not unreasonable, because as at 15 November 2019, when the claimant raised her grievance, she had not commenced working for the respondent. The tribunal therefore finds the final condition for consideration of an uplift in Art 90AA (that refusal was unreasonable) is not met. Even if the tribunal was in error in this finding, the tribunal would, in any event, have declined to exercise their discretion to award an uplift in these circumstances, as the claimant's request to raise a grievance did not disclose any complaint of discrimination.

Employment Judge:

Date and place of hearing: 8–11 March 2022, Belfast.

Date decision recorded in register and issued to parties: