



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D Kalotra

**Respondents:** (1) Cisilion Limited  
(2) Craige Winter-Nolan

**Heard on:** 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> March 2022 by CVP  
In chambers on 31<sup>st</sup> March 2022

**Before:** Employment Judge Pritchard  
**Members:** Mr R Shaw  
Mr R Singh

**Representation**  
Claimant: Mr A Rozycki, counsel  
Respondents: Mr J Frater, consultant

## RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Claimant's claim of pregnancy / maternity discrimination is dismissed.
2. The Claimant's claim of detriment on grounds of pregnancy / maternity is dismissed.
3. The Claimant's claim for unfair constructive dismissal is not-well founded and the claim is dismissed.
4. The Claimant's equal pay claim is dismissed.
5. The Claimant's claim for deductions from wages is dismissed upon withdrawal.

## REASONS

1. The Claimant claims constructive unfair dismissal, pregnancy and maternity discrimination, detriment because of pregnancy and maternity and equal pay. The Respondents resist the claims.

2. The Tribunal heard evidence from the Claimant and from Richard Heath (former employee of the First Respondent) on her behalf. On the Respondent's behalf the Tribunal heard evidence from: Rachel Ward-Miller (Head of Human Resources); Nicholas Paul (Sales Director); and Craige Winter-Nolan (Head of New Business and Second Respondent). The Tribunal was provided with four bundles of documents to which the parties variously referred. Further documents were added during the course of the hearing. At the conclusion of the hearing the parties orally amplified their written submissions.

## **Issues**

3. The Claimant's application to amend her claim to include further allegations in support of her constructive dismissal claim was granted. The parties thereafter provided the Tribunal with a list of issues which, following discussion with the parties and subsequent clarification during the course of the hearing, can be stated as follows:

### S18 EQA – Pregnancy/Maternity Discrimination

4. Did the Respondent(s) discriminate against the Claimant by treating her unfavourably because of her pregnancy in the protected period in relation to her pregnancy.
5. Alternatively, did the Respondent(s) discriminate against the Claimant because she either was exercising, sought to exercise or had exercised the right to ordinary or additional maternity leave?
6. The protected period was from May 2019 until 17 February 2020 (the Claimant returned to work on 18 February 2020).
7. The Claimant contends that the First Respondent discriminated by:
  - a) In May 2019, upon announcing her pregnancy, having her commission rate reduced by Nicholas Paul (sales manager) from 11% to 8.3%;
  - b) On 16<sup>th</sup> September 2019, being contacted by the Second Respondent and asked to 'justify her salary' and the other comments made, namely:
    - "I'm trying to constructively manage you back into the business"
    - "Back in January/February when you return to work from Maternity Leave, you expect all your accounts back"
    - "You expect the business to fall at their knees when you return to work"
    - You get £50k a year, what are you doing or going to do whilst at home?"
  - c) In September 2019, the Second Respondent attempting unilaterally to change her job role from Account Director to Business Development Manager;
  - d) Not being paid her commission ~~despite 50% YTD being achieved~~; (The deleted aspect of this allegation was withdrawn by the Claimant during the hearing).

- e) The Second Respondent taking steps to put her on a performance improvement plan;
  - f) Upon her returning to work on 18<sup>th</sup> February 2020, the Second Respondent refusing to return her accounts to her;
  - g) Being informed by the Second Respondent on 4<sup>th</sup> March 2020 that there was “no fucking way” she would be paid her commission;
  - h) Rachel Ward-Miller confirming that she would not be paid her commission.
8. The Claimant contends that the Second Respondent discriminated by reason of the matters set out in paragraph 7 (b), (c), (e), (f) and (g) above.
9. For each proven allegation set out above, does it constitute unfavourable treatment?
10. If the answer to the above is in the affirmative, did that treatment occur during the protected period?
11. If the answer to the above is in the affirmative, was it because of the Claimant’s pregnancy or maternity?
12. Alternatively, was it because the Claimant was exercising, sought to exercise or had exercised the right to ordinary or additional maternity leave?

S47 ERA

13. Did the First Respondent subject the Claimant to any detriment by any act, or failure to act, done for the prescribed reasons relating to pregnancy, childbirth or ordinary or additional maternity leave?
14. The Claimant relies on the allegations set out at paragraph 7 a) to h) above as detriments.
15. For each allegation above, does it constitute a detriment?
16. If yes, was it for a reason which relates to any of the prescribed reasons relied on?

Equal Pay

17. Was the Claimant paid less for ‘like work’ than her male comparators?
18. The Claimant relies upon Alex Bain, Jamie Hopkins, Abinash Bangar, Alex Paul and Richard Heath as comparators.
19. The First Respondent concedes that they are appropriate comparators except for Richard Heath. The Tribunal will be required to determine if Mr Heath is an appropriate comparator.

20. If the Claimant was paid less and the comparators relied on are appropriate comparators, can the First Respondent show that the difference in pay is because of a material factor?
21. The First Respondent contends they have a number of material factors, namely:
  - (a) The Claimant's salary was negotiable [Bundle 2 Page 91]
  - (b) The Claimant was given choices as to what sales/commission packages to select [C WS para 18]
  - (c) The Claimant's salary is dependent upon experience [Bundle 2 page 91] and thus standard market forces (which relates in any event to (b))
22. For any material factor set out above, was the difference in pay due to that reason?
23. The Claimant conceded that if the Tribunal were to accept the First Respondent's material factor defence, she would not contend that the factor relied on was either directly or indirectly discriminatory.

Constructive Unfair Dismissal S95 ERA

24. Did the Claimant terminate her contract of employment in circumstances in which she was entitled to terminate it without notice by reason of the First Respondent's conduct and thus was constructively unfairly dismissed contrary to ERA S95(1)(c)?
25. Did the First Respondent commit a fundamental breach of the Claimant's contract of employment? The Claimant relies on a breach of the implied term of trust and confidence.
26. Did the First Respondent breach the implied term of trust and confidence by reason of the conduct set out in paragraph 7 (a), (b), (c), (d) and (f) above?
27. If so, did the Claimant resign, at least in part, in response to that breach, or did she resign for some other reason?
28. If the Claimant did resign in response, did she affirm the contract?
29. If the Claimant was constructively dismissed, what was the reason for dismissal? The Claimant contends that it was because of pregnancy/maternity under section 99 of Employment Rights Act 1996.
30. If the dismissal was not automatically unfair under section 99, was that dismissal fair taking into account equity and all the circumstances? The First Respondent will rely on capability (the Claimant's performance), alternatively for some other substantial reason of a kind such as to justify dismissal of the Claimant holding the position she held.

Time Limits

31. Were the Claimant's claims under section 18 of the Equality Act 2010 and section 47C of the Employment Rights Act presented within the statutory time limits?

32. The Claimant notified ACAS in respect of each Respondent on 20 May 2020. Therefore, any allegation before 21 February 2020 is prima facie out of time.
33. With regard to the claim under section 18 of the Equality Act 2010:
- 33.1. Did the Respondents' conduct, as alleged at paragraph 7 (a) to (h) above, amount to conduct extending over a period ending within the time limit?
- 33.2. To the extent that any matter upon which the Claimant relies is out of time, is it just and equitable to extend time?
34. With regard to the claim under section 47C of the Employment Rights Act 1996, was it presented:
- 34.1. before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them; or
- 34.2. ~~within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months?~~ (This deletion reflects the concession made by the Claimant in submissions that she would not be able to argue that it was not reasonably practicable for her to have presented her claim in time).

### Remedy

35. Is any award applicable and if so, how much?
36. Is any injury to feelings award applicable and if so, how much?
37. Is any uplift applicable to any award and if so, how much?
38. Is any reduction applicable to any award and if so, how much?
39. Is any interest applicable to any award and if so, how much?
40. The Tribunal determined that it would consider the question of liability only at the hearing (together with any issues relating to Polkey and/or contribution) and that should the Claimant succeed in all or any of her claims a further hearing would take place to consider remedy.

### **Findings of fact**

41. The First Respondent is a provider of IT services and solutions.
42. The Claimant's employment history involved sales roles from 2006 to 2014. In the period December 2014 to February 2016 the Claimant travelled across Asia and Europe.
43. Following referral by a recruitment agency, the Claimant was interviewed for employment with the First Respondent by the Second Respondent. The Claimant rejected an offer of a salary of £40,000 per annum and it was agreed that she should be offered a basic salary of £45,000 per annum plus the opportunity to receive commission of £45,000 per annum upon 100% of her targets being met (OTE). The applicable annual target was £420,000.

44. The offer of employment as Accounts Manager was communicated to the Claimant by letter dated 30 August 2016. It stated that she would work within the New Business sales team at the First Respondent's offices in Bishopsgate in the City of London. Details of the salary package, which also included fringe benefits, were included in the letter. The Claimant signed the letter to confirm acceptance.
45. The Claimant commenced employment with the First Respondent on 19 September 2016. The Second Respondent was the Claimant's immediate line manager.
46. The New Business sales team, headed up by the Second Respondent, had only recently been established. The Claimant was only the second salesperson recruited to work in the team.
47. There are two other sales teams within the First Respondent's business: Commercial and Enterprise. Notwithstanding their different names, salespersons in all sales teams carry out similar tasks.
48. The Claimant's job description included the following:

***Sales Account Manager – New Business***

...

*Salary                      Negotiable basic and commission (depending on experience)*

*The main aim of this role is to sell Cisilion services and solutions with a focus on multinational clients in the City of London. Once you have acquired new business you will farm the account, maximising revenues through selling the full portfolio of Cisilion services.*

*You will focus on delivering specific solutions around Unified Communications, Data Centre, Security, Borderless Networks and Managed Services. These are supported by our very successful implementation and 24/7 managed services.*

...

***Responsibilities:***

- *Generate and close new business through client acquisition*
- *Manage your own diary. Turn leads into client appointments*
- *Prepare monthly sales reports to demonstrate successful progress on sales pipeline*
- *Manage client accounts. Ensure all information is recorded in CRM and remain up to date*
- *Work with marketing and lead generation times to qualify opportunities. Assume responsibility to drive opportunities forward and ensure they are followed up appropriately*
- *Build strong rapport with new clients to understand their objectives and develop long lasting relationships*
- *Deliver professional client presentations*
- *Be an ambassador of Cisilion*

49. The First Respondent's Employee Handbook, which contains contractual terms and conditions, includes the following:

### *Sales Target / Commission Scheme*

*The Company reserves the right, at its absolute discretion, to vary the terms of the sales targets / commission schemes based on changes made throughout the financial year to your customer base.*

### *Working from Home*

*Please note that this section is non-contractual. The Company recognises that there may be circumstances where it would be more beneficial and/or flexible for employees to work from home. We recognise that it may in certain circumstances, working from home may be a way in which the company can accommodate a disability. However not all roles are suitable for homeworking. The company also reserves the right to terminate any home working arrangements, subject reasonable notice.*

*Employees may work from home with manager authorisation, giving at least 48 hours' notice. All work from home requests should be made via the HR portal giving full details of the reason, start date and duration....*

### **PAY**

#### *Commission/bonus Provision*

*The Company Reserves the right, in its absolute discretion, to vary the terms or level of Commission/bonus payable. You have no right to any bonus or Commission payments if you are no longer employed by the company or if you are working out a period of notice on the date any such payments fall due.*

50. Certain terms of the First Respondent's commission scheme were included a Quota Bearer Scheme, the relevant provisions stated as follows:

#### **CALCULATIONS AND ACCELERATORS**

- *The hurdle rate for accruing commission shall remain as 50% of an individual's year to date (YTD) target*
- *Performance above 50% means commission is calculated based on the cumulative to date performance against target on a linear basis*
- *Where an individual's cumulative performance drops from above 50% to below 50%, no claw back of commission will be made*
- *Once an individual achieves their full year target:*
  - *performance of 100% to 150% attracts a 50% uplift in commission over the standard calculation*
  - *performance above 150% attracts a 100% uplift in commission over the standard calculation*
- *Monthly commission statements showing the calculations and any deferred payments shall continue to be issued monthly*

...

#### **SPECIAL CONDITIONS**

- *Only orders where a customer purchase order is received in-month will be included in commission calculations*

...

- *Any employee ceasing employment with the Company shall lose entitlement to any further commission payment*
- *Any grievance relating to the scheme or any payment should be made to the employee's line manager in accordance with the Company's grievance policy*

51. The Claimant's annual sales target of £420,000 was adjusted pro rata to take account of the fact that she commenced employment part way through the First Respondent's financial year commencing 1 June. This target was further adjusted to allow for a "ramp up" period to allow the Claimant time for customer connections to be achieved. Thus, for October 2016, the monthly target was £10,000, for November 2016 it was £20,000, and for December 2016 it was £30,000. Thereafter, until the end of the financial year on 31 May 2017, it was the full £35,000 per month. The total target was therefore £235,000 for the remainder of the financial year. By the end of the financial year 2016/2017 the Claimant had achieved 16% of her target.
52. The Tribunal accepts that the Second Respondent held informal discussions with the Claimant in advance of, or about the time of, the commencement of the following two financial years to discuss salary and commission going forward. The Claimant was content that her basic salary and OTE on an annual sales target of £420,000 should continue to apply during the following two financial years.
53. In July 2017, the Claimant was paid commission despite the fact that she had failed to achieve 50% of target year to date and was not therefore contractually entitled to it.
54. By the end of the financial year 2017/2018, the Claimant had achieved 76% of her sales target. By the end of the financial year 2018/2019, the Claimant achieved 99.2% of her sales target.
55. In about April 2019, the Claimant felt she was in a position to press for a salary increase and she met with the Second Respondent to discuss it. The Claimant proposed that she should be paid a basic salary of £50,000 with OTE of £50,000 commission with an annual target of £510,000.
56. By this time, the New Business Team had expanded and the First Respondent sought to standardise its salary packages for sales persons. Such packages provided two grades for graduates, three grades for Account Managers, and two grades for Account Directors, this latter grade also providing for performance related accelerators together with "stretch" and "watch club" bonuses.
57. In all cases, the basic salary, the OTE, and the target (reduced to a monthly figure) were identical in respect of each grade. Thus, an Account Director with a salary of £50,000 per year, and OTE of £50,000 per year had a monthly target of £50,000 (£600,000 per year). An Account Director with a salary of £60,000, and OTE of £60,000 per year, had a monthly target of £60,000 (£720,000 per year).
58. Salespersons with basic salaries of £50,000 or £60,000 were named Accounts Directors. This was generally thought to be a promotion from Accounts Manager.



59. Notwithstanding this standardised approach, the Tribunal finds, on the balance of probabilities, that the Second Respondent did tell the Claimant that he had included her salary package proposal in his budget for consideration by senior management.

60. On 30 May 2019, the Claimant informed the Respondents that she was pregnant.

61. On 4 June 2019, the Second Respondent emailed Nicholas Paul:

*My finalised FY20 budget is attached for your approval, thanks for bearing with me. No major changes since previous version was shared with CRM*

*Whilst Dee and Georgia's maternity leave at mid-year presents risk to the number, in my agenda for discussion below I have listed the couple of contingencies which need approval. I'm "planning for return, preparing for departure" post maternity.*

62. The Tribunal accepts the Second Respondent's evidence that in planning for departure he was preparing for the risk that either of the pregnant employees might not wish to return to work following their maternity leave.

63. By email dated 5 June 2019, Nicholas Paul informed the Second Respondent:

*With Dee and Georgia they really should now be at £50k per month as per the rest of the sales team who are AMs and have stretches*

64. The Second Respondent accordingly informed the Claimant that it would not be possible for a target of £510,000 to apply if she were to be awarded an increase in basic pay to £50,000 with the OTE of £50,000. The target applicable to such a salary package would have to be £600,000.

65. Claimant then met with Nicholas Paul, at her request, to discuss the proposed package. The Tribunal prefers the Respondents' evidence that Mr Paul offered the Claimant three options:

- £60,000 basic salary, OTE £60,000, annual target £720,000
- £50,000 basic salary, OTE £50,000, annual target £600,000
- Remain on her existing salary package

66. On 18 June 2019, the Second Respondent sent a text message to the Claimant which included the following:

*I can't help but feel the right thing is to take the 50/50 package and go full steam for the half year stretch. For me in the worst case and the best case this is where you'll make the most money*

*PS - you should take great comfort in the fact that it will be my personal discretion over what happens when u return - unequivocally I want u to come back and smash it as a working mum, I've (nearly) always had your back and I want you to trust me that I'll do what's right when the time comes*

*let me know your thoughts, let's go for it!!!*

67. By letter dated 19 June 2019, Ms Ward-Miller informed the Claimant of her increased salary of £50,000 with OTE of £50,000 upon achieving an annual

target of £600,000. Commission was said to be governed by the Quota Bearer Scheme, a copy of which was enclosed. In accordance with the First Respondent's policy for salespersons with salaries of £50,000 or more, accelerators and additional bonuses would become available and the Claimant was to be promoted to Account Director.

68. Before acceptance, the Claimant asked the Second Respondent if the 50% commission threshold could be disapplied in her case.
69. By email dated 24 June 2019, the Second Respondent reported to Ms Ward-Miller:

*In terms of maternity details, we have ironed out most issues since I met with Nick and Roger before Sandown. The (only) promises that have been made are that:*

- *Both ladies will have their Account Director positions open to them upon their return*
- *Commissions will be paid on orders closed prior to maternity leave*
- *Maternity Leave/Benefits/Pay will be in line with the Cisilion maternity policy*

*For the duration of their maternity leave, the ladies have been informed that Cisilion accounts which they currently manage will be allocated to an "Account Sitter" who will be responsible for managing these customers for the duration of their leave.*

*Upon the ladies' return, I have stated that the business will decide which accounts would/would not go back to being managed by them vs being retained by the "Account Sitter". It has been made clear that these decisions will be based on what is right for our customers (and therefore our business). Also made clear is that these decisions will be at Cisilion's discretion.*

*In terms of deals which land during maternity leave, the ladies are aware that as a general rule, no commissions will be owed to them. I have stated that the business will be pragmatic if deals which have been documented in CRM, worked on at length prior to maternity leave, close shortly after maternity leave starts and that the "Account Sitter" hasn't been involved in, we would take a view on whether Commission is owed to the ladies or not. Again, the general rule is that deals falling during maternity will not be paid.*

*The final outstanding question is that Dee has requested that the 50% Commission threshold be waived for her. Nick is aware of the request and will be speaking with Roger about it in due course.*

70. The Claimant's request that the 50% threshold should not apply in her case was put forward for consideration by Roger Paul, the company Chairman. The Claimant's request was refused, Nicholas Paul emailing the Second Respondent and Ms Ward-Miller on 24 June 2019:

*I've spoken with Roger and the 50% threshold cannot be waived for Dee. If Dee feels she cannot achieve 50% of her target she should not request a higher package and target*

71. By signing Ms Ward-Miller's letter on 26 June 2019, the Claimant accepted the changes to her terms and conditions and targets for the year ending 2020.

72. The Claimant's expected week of childbirth was the week commencing 10 November 2019. On or about 22 August 2019, the Claimant asked if she could be permitted to work from home from 16 September 2019 until 3 November 2019 then take annual leave until the commencement of her maternity leave. The First Respondent granted the Claimant's request.
73. On 12 September 2018, the Second Respondent met with the Claimant to discuss actions to be taken before she started working from home and in advance of maternity leave.
74. The Second Respondent followed up the meeting by emailing the Claimant the following day. The email includes the following:

*Naturally it will be difficult for you to attend many client meetings while WFH so I'd like to see your hunting ability used to the maximum while WFH. Using LinkedIn, calling and other means to set up new meetings which I (or other team members) will attend will be fruitful. While you are WFH, you have agreed to dial into the Monday sales meetings and I would like to see twice weekly updates ...*

*As discussed, you are significantly behind target at this time and will need strong results in September and October in order to release Commission and incentives before maternity leave starts. I am here to support you and need as much visibility of activity as possible to ensure you reach an acceptable level of performance before you stop work to care for and raise your new daughter.*

*Please do not hesitate to contact me if you have any questions on the above or at any point while you are on leave.*

75. The Claimant alleges that she received an aggressive telephone call from the Second Respondent on 16 September 2019 making the alleged comments. The Tribunal is satisfied that a telephone call took place. The Tribunal reaches its conclusions as to what was said during this telephone conversation below.
76. On 25 October 2019, the Claimant emailed the Second Respondent listing four clients in respect of whom she thought it had been agreed she would receive commission.
77. In late September 2019, it came to the Second Respondent's attention that the Claimant had missed a business opportunity with Arriva. The Claimant informed the Second Respondent that she would like to retain the account.
78. The Second Respondent emailed the Claimant on 29 October 2019:

*Hey, you really need to switch off now Dee*

*Re Arriva, there has been no activity on this account and I don't recall it ever being discussed by us. The following press release hit us today and the question is – why weren't Cisilion involved? As the AM you're accountable for not developing the account unfortunately so on this occasion my hands are tied and I will be allocating to Simon the follow up.*

*You have over 100 accounts on CRM and as a business we cannot allow our AM's to ring fence customers in the way you are suggesting especially*

*factoring leave, performance to date and missed opportunities like the one above*

79. On 25 October 2019, the Claimant emailed the Second Respondent with regard to four quoted opportunities stating:

*As discussed and agreed, commission to be paid on the below quoted opportunities*

80. The Claimant gave birth on 1 November 2019 and her maternity leave commenced on 2 November 2019.

81. The Claimant's monthly targets did not apply during her maternity leave (and her annual target was adjusted accordingly).

82. On 5 November 2019, the Second Respondent replied to the Claimant's email of 25 October 2019:

*I want to set some clear expectations as your email below isn't quite "as agreed" as you put it, nor is the process in your attached email in line with our business process, nor am I cutting you out of emails as you have claimed to HR and others within the team.*

*Of course, if the deals you called out did land during October, these would have contributed towards your YTD figures. Re YTD, I have summarised your performance this calendar and financial year below and as a reminder of the Quota Bearers Scheme, commissions are paid to Account Managers upon achievement of 50% against YTD targets - You are currently below this threshold.*

*In your absence, I have been endeavouring to manage the Conduit, White Clarke and CLC deals to a close nevertheless, these accounts (and others) may require input from other members of the team which would present a challenge on how the margin is recognised. Outside of these accounts, in-flight projects, non-spending customers, escalations and other BAU tasks will need to be managed by the rest of the team.*

*Re your attached email, as Simon had identified an opportunity with Arriva (a client Cisilion has not dealt with in the past) and followed the correct process by reaching out to you, it's fair and justifiable that Simon follows up. Again to set expectations, notes made on CRM stating that an AM would "like to retain" an account without that AM making any effort to contact that client does not constitute a business reason for everyone else in the business not contacting the client...*

*With the above in mind, when you return from leave, my plan is to dedicate time to your professional development. As highlighted above your performance levels this calendar and financial years need to be improved and I'm keen to support you get back on track.*

*Re keeping you on copy, we can endeavour to do this nevertheless, all here are super keen for you to enjoy your time with Aurora so please don't feel you have to stay on top of all emails. Upon your return, should any Cisilion customers be reallocated to you then of course a thorough re-handover will take place. ...*

83. On 14 November 2019, the Second Respondent reported to Ms Ward-Miller:

*Wanted to give HR visibility into some challenges which have materialised within Dee's customer base since she's been away;*

- 1) Quantica – Customer had their Webex subscription turned off last week. Dee had reported that client “didn't want to renew” yet the client's VP of Tech said this wasn't true.*
- 2) Alvarez and Marshall – Client is midway through a Cisco ISE project and Alex Hooper met them this week. Client had recently refurbished whole HQ (in Cisco's building) spending significant sums on tech. When Alex asked why Cisilion were not involved in the refurb, the client stated that “we didn't know Cisilion sold kit”*
- 3) Conduit/118 – Dee's main client. Customer recently purchased some Cisco equipment from another partner and have asked Cisilion to support it. The issue here is that we're clearly missing opportunities in this account*

84. By email dated 29 November 2019, the Claimant emailed Ms Ward-Miller:

*Discussed, please see attached:*

- 1 Email from Craige requesting I support him and the new business team with booking meetings for them to attend – 13/09/2019*
- 2 Email summarising what was agreed with Craige verbally in terms of opportunities that I would be paid on – 25/10/2019. I asked Craige to send me an email to summarise what was agreed where Craige then said “you f\*cking send me an email ha ha”*
- 3 Email from Craige on 05/11/2019 countering what was agreed when we had a discussion on the 25/10/19 to confirm what opportunities I would be paid on.*
- 4 Email from Craige asking for Campbell to resend the Webex renewal quotes with White Clarke even though I had already quoted these in both June and October – The Purchase Order came through on 22/11/2019 and the margin was added to my number in CRM for it then to be removed and added to Campbell's number.*

*In addition to the above:*

*I had a conversation with Craige on the 16/09/2019 where the below comments were made:*

*“I'm trying to constructively manage you back into the business”*

*“Back in January/February and you expect all your accounts back”*

*“You expect the business to fall at their knees when you return to work”*

*“You get £50k a year, what are you doing or going to do whilst at home”*

*Craige has also mentioned on more than one occasion based on the calendar year, my performance has not been great ... I have told Craige that my target is not based on the calendar year but based on the financial year and last financial year, I achieved my target.*

*Craige also sent me a screenshot on the 16/09/2019 (my first WFH day) Where my messages on Jabber did not go through - he also said that he had been checking throughout the day and hadn't seen me online even*

*though I had been online. I found this really strange and felt as though Craige was micromanaging me with me now WFH due to being pregnant.*

...

*As mentioned, my main concern is not achieving my 50% year to date target which is why I had a discussion with Craige on the 25/10/2019. it was agreed with Craige that I would be recognised and paid on all opportunities I had worked and quoted on. Since this conversation, the goal posts have been moved by Craige with him now saying "deals closing in October".*

*I would really appreciate clarity/confirmation on the above as YTD I have closed £88k and require an extra £62k to be on track and have my comms released. (All dependent on Conduit Global).*

85. By email dated 5 December 2019, Ms Ward-Miller made enquiries of the Second Respondent about the issues the Claimant had raised. In her email Ms Ward-Miller states:

*I'm responding to Dee on something (nothing to worry about she's just blowing hot air).*

86. The Second Respondent replied stating categorically that he had not agreed that the Claimant would be paid on any opportunities she had quoted on, rather that he would take a view on a deal by deal basis dependent upon the level of effort, whether anyone else was involved (post maternity leave) and other factors. Also, that payment would depend on year to date performance reaching the 50% threshold. The Second Respondent also explained the situation with White Clarke
87. In light of this information, Ms Ward-Miller emailed the Claimant on 5 December 2019 in which she hoped she had "answered your queries below but please do let me know if you need any further clarification".
88. On 13 December 2019, the Claimant gave eight weeks' notice of her intention to return to work on 7 or 10 February 2020. She asked if she could work remotely for three months while her daughter settled in.
89. The Second Respondent expressed his thoughts to Ms Ward-Miller:
- *Dee has a customer facing sales role so we'd need to discuss logistics of remotely working for three months*
  - *Staff welfare is high on our priority list and I'm concerned that Dee appears to be rushing back to work despite her daughter not being "settled"*
  - *Dee can use her KIT day next week (Tuesdays better) and I suggest a meeting with her in the morning to ensure she is focusing on the right things*
  - *Re Conduit, there are no actions for Dee to undertake at this time*
  - *Dan Hobson is not "stepping in" or directly involved with the Conduit renewal*
90. By letter dated 16 December 2019, Ms Ward-Miller informed the Claimant, among other things, at her request to work from home from 10 February to 9 May 2020 had been granted.

91. Following a meeting between the Claimant and the Second Respondent on 17 December 2019 to discuss customer contact during her KIT days prior to her return to work in February 2020, the Second Respondent emailed the Claimant the following day to summarise the discussion. The Second Respondent assured the Claimant that there was no need for her to rush back from maternity leave during which time her sales target was suspended.
92. The Second Respondent also told the Claimant that commission adjustments would have to be made to sales upon which other team members had worked, including Conduit. With regards to White Clarke and Quanticate, the Second Respondent stood by his decision that these customers would be handled by other team members: the Claimant had given instructions for provision of subscription to Quanticate to be cancelled which was not what the had customer requested; the White Clarke subscription was going the same way and another team member dealt with it.
93. On 22 January 2020, the Claimant sought approval to contact a number of customers during her KIT days. The Second Respondent replied that the Claimant should avoid contact with Alvarez, Petrofac, Patheon and 118 Money for now. His explanation was that these accounts had ongoing discussions with other members of the team which had developed since the Claimant had been on maternity leave. He stated in his email:

*To be clear I am not stating that these accounts will or will not be reallocated to you in due course*

94. By email dated 27 January 2020, the Second Respondent enquired of Ms Ward-Miller as follows:

- 1) *Accounts that were previously managed by maternity leavers*
  - a. *Are we absolutely obliged to return the accounts when the ladies return?*
  - b. *If the returner has requested work from home upon return from leave (when previously office based) does that affect the answer to a. above?*
  - c. *If Account-sitters (people who have managed the account in the leavers absence) have forged a stronger relationship than the leaver had with a particular client, does that change the answer to a.?*
- 2) *Targets*
  - a. *Upon return, target will continue where the leaver left off - Both monthly target and YTD achieved against target prior to departure. effectively, maternity leave is a 'pause' of the accruing annual target - is this approach legally correct?*
  - b. *If maternity leavers want to be recognised for deals which have closed during maternity leave, how should (above) target be adjusted?*
- 3) *Performance improvement*
  - a. *If the leaver was behind target when they left and the business have concerns around performance upon return, how soon after return can we instigate a performance improvement plan?*

95. Ms Ward-Miller replied accordingly. In particular, Ms Ward-Miller advised that customer accounts should be returned to the maternity leavers upon their return from maternity leave.

96. Following a meeting with the Claimant on 18 February 2020, the Second Respondent sent her an email setting out arrangements for her to work from home and attending the office for sales and training meetings. The Claimant was informed that all transacting accounts would be returned to her, with the exception of Gately which had generated little in the way of sales; this customer had cancelled some of its business although other team members had discovered a business opportunity with this customer which the Claimant had not identified. Petrofac, a prospect which had generated no sales and had no sales history with the First Respondent, would be retained as a prospect by another member of the team.
97. On 2 March 2020 the Claimant resigned giving one month's notice to expire on 1 April 2020. In her resignation letter addressed to the Second Respondent she stated:
- Please be assured that this hasn't been an easy decision to make and was purely based on career progression.*
- I would also like discussed the release of my commission as I understand this is down to the discretion of the company.*
- I want to express my gratitude for the support and opportunities Cisilion (and you) have provided over the last 3 1/2 years and it's been a pleasure to work as part of the New Business Team.*
- Once again, thank you so much for the opportunity to be part of the New Biz team, I've learned so much along the way which is priceless.*
98. The Claimant also asked the Second Respondent if she could be paid her notice pay in lieu and end her employment immediately so that she could start with her new employer.
99. Because the Claimant had not achieved her 50% target threshold, the First Respondent did not make a commission payment to the Claimant. However, the First Respondent agreed that the Claimant could be paid in lieu of notice and leave immediately. The Claimant's employment ended on 2 March 2020.
100. 10 March 2020, Ms Ward-Miller carried out an 'offboarding interview" with the Claimant. Ms Ward-Miller's notes record the Claimant saying she left for several reasons:
- It was the right time to move on. It was mainly the people within her team and the money she was making that led her to stay with the first Respondent for such a long time.
  - Her Commission rate had been reduced from 11% to 8.3% in line with her package increase and the increase of her target by £180,000 made it impossible for her to reach her accelerators.

### Comparators

101. Alex Bain.

- 101.1. With effect from the financial year commencing 1 June 2019, Alex Bain was employed on a salary of £50,000, OTE £50,000, monthly target £50,000. This was the same salary package which the Claimant enjoyed in the same financial year.



102. Jamie Hopkins.

- 102.1. By letter and email dated 24 May 2019, Jamie Hopkins was offered employment on a salary of £60,000 per annum, OTE £60,000 per annum, and monthly target (following a ramp up period) of £60,000.

103. Abinash Bangar.

- 103.1. In the financial year 2016/2017, Abinash Bangar was employed on a salary of £60,000, OTE £60,000, monthly target £50,000.
- 103.2. In the financial year 2020/2021, Abinash Bangar was employed with OTE of £60,000, monthly target £60,000. It appears that his basic salary was £60,000 per annum.

104. Alex Paul.

- 104.1. In the financial year 2015/2016, Alex Paul was employed on a salary of £60,000, OTE £60,000, monthly target £60,000.

105. Richard Heath.

106. Richard Heath commenced employment with the First Respondent on 30 July 2018 and his employment ended on 1 June 2019. He was employed on a salary of £65,000 per annum. The Tribunal accepts the First Respondents' evidence that Richard Heath was entitled to commission of £65,000 per annum with a guaranteed commission pay during the first month of his employment, not guaranteed commission for the first six months as contended for by Mr Heath. This finding is supported by the email dated 31 August 2018 which refers to "one commission guarantee" which was produced as an additional document during the course of the hearing.

### **Applicable law**

#### Pregnancy and maternity discrimination

107. Pregnancy and maternity are protected characteristics under the Equality Act 2010. Under section 39 an employer must not discriminate against an employee by, among other things, subjecting her to any other detriment. Detriment means putting the employee under a disadvantage.

108. Section 18 provides insofar as relevant:

- (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –
- (a) because of the pregnancy, or
  - (b) because of illness suffered by her as a result of it.
- (3) ...
- (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

- (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
- (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends –
  - (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period, or (if earlier) when she returns to work after the pregnancy;
  - (b) ...

109. The Tribunal is required to consider two questions of fact:

- (a) What was the relevant treatment?
- (b) Was it unfavourable to the Claimant?

110. Unfavourable treatment means the employee must have been put at a disadvantage, such as being denied a work opportunity or being dismissed. However, treatment that is advantageous will not be unfavourable merely because it might have been more advantageous; see Williams v Trustees of Swansea University Pension and Assurance Scheme 2019 IRLR 306. Unfavourable treatment requires no comparison with others or how others would be treated. Rather, the treatment must be measured against an objective sense of that which is adverse compared with that which is beneficial.

111. The Code of Practice on Employment 2011 prepared by the Equality and Human Rights Commission provides a detailed explanation of the provisions of the Act. Tribunals are required to take into account any part of the Code that appears to them relevant to any questions arising in proceedings. Chapter 8 of the Code deals specifically with pregnancy and maternity discrimination.

112. The Tribunal will need to be satisfied that there is a causal connection between the treatment complained of and the pregnancy/maternity Johal v Commission for Equality and Human Rights [2010] All ER (D) 23. It is necessary to look at why the employer treated the employee unfavourably. The focus must be on the mental processes of the putative discriminator; Amnesty International v Ahmed [2009] ICR 1450. The Tribunal must consider what consciously or unconsciously was his or her reason. The pregnancy/maternity must be the "effective and predominant cause" of the treatment; O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372. These principles were discussed insofar as they relate to pregnancy and maternity discrimination in Indigo Design Build and Management Limited v Martinez EAT 0020/14.

### **Time limits under the Equality Act 2010**

113. Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable.

114. Under section 123(3)

(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.

115. Under section 123(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.

116. Time limits are adjusted in accordance with ACAS Early Conciliation procedure.

117. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA. At a preliminary hearing when a Claimant, otherwise out of time, seeks to show an act extending over period, he must show a prima facie case; see Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548 CA.

118. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

119. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA;

Southwark London Borough Council v Afolabi 2003 ICR 800 CA. It was said in Aberawe Bro Morgannwg v Morgan [2018] EWCA Civ 640 CA that factors which are almost always relevant are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing it or inhibiting it from investigating the claim while matters were fresh).

120. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.
121. If a Claimant advances no case to support an extension of time, he is not entitled to one. However, even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

#### Equal pay

122. Section 64 of the Equality Act 2010 provides:

- (1) Sections 66 to 70 apply where –
- (a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;
  - (b) ...
- (2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.

123. Section 65 provides

- (1) ... A's work is equal to that of B if it is –
- (a) Like B's work
  - (b) ...
  - (c) ...
- (2) A's work is like B's work if –
- (a) A's work and B's work are the same or broadly similar, and
  - (b) Such differences as there are between their work are not of practical importance in relation to the terms of their work.
- (3) So on a comparison of one person's work with another person's for the purposes of subsection (2), it is necessary to have regard to –
- (a) the frequency with which differences between their work occur in practice, and
  - (b) the nature and extent of the differences.

124. Section 66 provides:

- (1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as having one.
- (2) A sex equality clause is a provision that has the following effect –
  - (a) if a term of A's is less favourable to A than a corresponding term of B's is to A, A's term is modified so as not to be less favourable;
  - (b) if A does not have a term which corresponds to a term of B's benefits B, A's terms are modified so as to include such a term.

125. Section 69 provides:

- (1) The sex equality clause in A's terms and conditions has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –
  - (a) does not involve treating A less favourably because of A's sex than the responsible person treats B and
  - (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

126. In their respective submissions, the parties referred to a wealth of legal authority.

127. The Claimant referred to the following:

127.1. *It is now established principle that the correct approach to determining the question of whether the Claimant's terms were less favourable than those of her comparators is a term-by-term approach rather than a holistic one (most recently re-stated by Simler J in McNeil v HMRC [2018] IRLR 398, EAT). The High Court (Morgan J), in Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank plc [2018] EWHC 2839 (Ch) has provided the following guidance (re-stated in Harvey, Division K, Para [170.01]):*

- a) *The Court must adopt a term-by-term approach when carrying out a comparison in an equal pay case;*
- b) *The terms to be compared should be identified on what it is natural to compare for the statutory purpose of an equal pay comparison;*
- c) *The choice as to what is to be compared is a common sense question;*
- d) *It may be necessary to carry out a careful analysis of the relevant provisions to assist in answering the question as to what is to be compared;*
- e) *The classification of the relevant provisions should be realistic; it may sometimes be appropriate to ask whether a provision is an element of a distinct part of the contract rather than itself being a distinct part;*

- f) *Just as it is wrong to lump together or engage in an overall comparison of different terms, it is also wrong to subdivide a single term into two or more parts in order to complain about one part only.*
- 127.2. *It is on the above basis that the Claimant must show less favourable terms than her male comparators. If she does so, she is entitled to have the relevant terms modified so that they are not less favourable.*
- 127.3. *It is for R1 to identify the material factor which it says justifies the difference in pay. In particular, R1 must show the following:*
- a) *That it is causative of the difference in pay;*
  - b) *That it is material;*
  - c) *That it does not involve direct or indirect discrimination.*
- 127.4. *To this end, the Tribunal is reminded that the question of direct and/or indirect discrimination (in the ‘non-equal pay’ conventional sense) only arises at this second stage of the analysis.<sup>1</sup> Furthermore, in *Ainsworth v Glass Tubes & Components Ltd* [1977] IRLR 74, the EAT held that the ET was wrong to compare a claimant’s case to a man who was not her comparator but who the ET deemed to have been more appropriate than her chosen comparator. On this basis, the Tribunal is invited not to conduct any comparative analysis between the Claimant and male employees who are not her chosen comparators, or to conduct a discrimination-based analysis of any sort prior to considering the Respondents’ material factor defence.*
- 127.5. *In fact, in this case, it does not arise at all, as, if the Tribunal accepts that R1’s material factor defence applies, the Claimant does not contend that the factor relied on was either directly or indirectly discriminatory.*
128. The Respondents referred to the following:
- 128.1. *Forex Neptune (Overseas) Ltd v Miller* [1987] ICR 170, stands for the proposition that is permissible for a Tribunal to consider the material factor defence before determining any equal value.
- 128.2. *In TYLDESLEY (appellant) v. TML PLASTICS LTD (respondents)* [1996] IRLR 395 it was made clear, by the EAT, that experience was a suitable material factor defence.
- 128.3. *In Glasgow City Council v Marshall* [2000] ICR 196 (HL) Lord Nicholls set out the relevant test for Material Factor, namely that it must be:
- (a) *Genuine and not a sham*
  - (b) *The factor is the cause of the disparity*
  - (c) *The reason is not “difference of sex”*

128.4. *It is notable that the Material Factor defence must be the cause of any pay differential. It need not be justification for the same.*

128.5. The factor must also be material. In *Rainey v Greater Glasgow Health Board [1987] ICR 129 (HL)*, Lord Keith at paragraph 13 noted that:

*“Consideration of a person's case must necessarily involve consideration of all circumstances of that case. These may well go beyond what is not very happily described as ‘the personal equation’, i.e. the personal qualities by way of skill, experience or training which the individual brings to the job”*

*And*

*“In particular, where there is no question of intentional sex discrimination whether direct or indirect (and there is none here) a difference which is connected with economic factors affecting the efficient carrying on of the employer's business or other activity may well be relevant.”*

128.6. *In Bury Metropolitan Borough Council v Hamilton and other cases [2011] IRLR 358 (EAT) of “genuineness”. He noted that all an employer needs to show is simply “at a factual level how the state of affairs complained of comes about”.*

128.7. *Underhill P, further noted that a sham would mean that a material factor:*

*“has been deliberately fabricated in order to present things otherwise than as they are”*

129. Tribunals considering an equal pay claim are obliged to take into account any part of the Code of Practice on Equal Pay 2011 issued by the Equality and Human Rights Commission that appears relevant to the proceedings.

### The burden of proof

130. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in proceedings relating to a contravention of the Act.

131. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

132. The Tribunal should consider whether the Claimant has proven facts from which the Tribunal could properly conclude, from all the evidence before it, in the absence of any other explanation, that the Respondents have committed an unlawful act or acts of discrimination; Madarassy v Nomura International plc [2007] IRLR 246. If so, the burden passes to the Respondents to establish that the treatment was in no sense whatsoever due to the protected characteristic (here pregnancy/maternity).

133. In conducting the above exercise, the Tribunal is free to draw, or to decline to draw, inferences from the facts of the case before it: Efobi v Royal Mail Group Ltd [2021] UKSC 33). In this regard, following Efobi, relevant considerations are as follows:

- a) Whether a witness was available to give evidence;
- b) What relevant evidence it is reasonable to expect that the witness would have been able to give;
- c) What other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence;
- d) The significance of those points in the context of the case as a whole.

134. It is incumbent on a Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford [2001] IRLR 377.

#### Detriment – leave for family and domestic reasons

135. Section 47C of the Employment Rights Act 1996 provides:

- (1) An employee has the right not to be subjected to any detriment by any act, or by any deliberate failure to act, by his employer done for a prescribed reason.
- (2) A prescribed reason is 1 which is prescribed by regulations made by the Secretary of State and which relates to –
  - (a) Pregnancy, childbirth or maternity.
  - (b) ...
  - (c) ...
  - (d) Ordinary, compulsory or additional maternity leave.

136. Regulation 19 of the Maternity & Parental Leave etc Regulations 1999 provides:

- (1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).
- (2) The reasons referred to in paragraph (1) are that the employee –
  - (a) Is pregnant;
  - (b) ...
  - (c) ...
  - (d) Took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave

137. The Tribunal will need to be satisfied that the acts complained of were done 'on the ground' of pregnancy, childbirth or maternity leave. The Tribunal does not, for these purposes, need to consider the Respondents' motive or whether there was any intent to discriminate against the Claimant; Birmingham City Council v Equal Opportunities Commission [1989] IRLR 173.



138. The burden of proof is set out in section 48(2) of the Act which provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

Time limits relating to claims under section 47C of the Employment Rights Act 1996

139. Section 48 of the 1996 Act provides:

(3) An employment tribunal shall not consider a complaint under this section unless it is presented –

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3) –

(a) where an act extends over a period the “date of the act” means the last day of that, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he is done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

140. Time limits are adjusted in accordance with the ACAS Early Conciliation Procedure.

Constructive dismissal

141. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.

142. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

142.1. that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer’s part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to

the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

- 142.2. that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); and
- 142.3. that the employee did not affirm the contract thus losing the right to claim constructive dismissal.
143. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.
144. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

“Automatic” unfair dismissal – leave for family reasons

145. Section 99 of the Employment Rights Act 1996 provides:

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –
- (a) The reason or principal reason for the dismissal is of a prescribed kind, or
  - (b) The dismissal takes place in prescribed circumstances.

146. Regulation 20 of the Maternity and Parental Leave etc Regulations provides

–

- (1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X or that act as unfairly dismissed if –
- (a) The reason or principal reason for dismissal is of a kind specified in paragraph (3)
- (2) ...

- (3) The kinds of reason referred to in paragraphs (1) ... are reasons connected with –
- (a) The pregnancy of the employee
  - (b) ...
  - (c) ...
  - (d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave.

“Ordinary” unfair dismissal

147. If not automatically unfair, it is open for an employer to argue that, despite a constructive dismissal being established by the employee, the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee’s contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably.

**Conclusion and further findings of fact**

Time limits/discrimination

148. The allegations under paragraph (d), (g) and (h) are in respect of claims falling within the statutory time limit.
149. The allegations under paragraph (a), (b), (c), (e) and (f) fall to be considered as having been presented outside the primary statutory time limit.
150. With regard to the allegations against the Second Respondent under paragraph (b), (c), (e) and (f), the Tribunal concludes that they could properly constitute a continuing state of affairs, rather than unconnected specific acts, ending with the allegation under (g) which together fall to be considered as a claim brought in time. In essence, they allege a pattern of discrimination for which one person is said to be responsible and the allegations can thus be considered conduct extending over a period done at the end of the period in March 2020.
151. With regard to allegation (a), the Claimant’s claim is about 9 months outside the time limit. Although she gave no credible explanation as to why she presented this claim outside the time limit, there was no evidence to suggest the Claimant took legal advice at the time. Given that First Respondent was able to present cogent evidence in defence of the claim, it cannot be said they would suffer prejudice, other than the obvious prejudice of losing a limitation defence. The Tribunal finds it would be just and equitable for this aspect of the Claimant’s claim to also be considered.

Pregnancy/maternity discrimination

*Having commission rate reduced from 11% to 8.3%*

152. For the purposes of her allegation, the Claimant has chosen to take a point in time when this percentage would apply, namely the point at which the Claimant might achieve her full target. It does not take account of the variable way in which the commission system worked which was dependent upon both the achievement of targets, the 50% threshold and the no-

clawback provision. (It also ignores the fact that commission at this rate was accompanied by an increase in basic salary of 11%).

153. The First Respondent standardised its salary and commission structure to be consistent at different levels within the sales teams. The First Respondent put this salary and commission structure in place, in the Claimant's case, because she chose it. Indeed, she acknowledged that she would have to accept an increased target to be entitled to a higher basic salary and titular promotion.
154. To the extent that there was any reduction to the commission rate, the Tribunal is satisfied that it was not put in place because of the Claimant's pregnancy.

*Second Respondent's comments on 16 September 2019*

155. The Tribunal finds the Claimant tended to exaggerate her evidence in order to support her claims. One example is her firm contention that she had been entitled to be paid commission upon departure even though it was clear that she had not achieved 50% of her target (indeed, the Claimant felt obliged to abandon this line of argument during the course of the hearing). A second example was the Claimant's allegation (see below) that the Second Respondent had attempted to demote her to Business Development Manager which was clearly not the case.
156. The alleged comment "I am trying to constructively manage you back into the business" would make no sense since the Claimant had not left the business.
157. The Tribunal finds it unlikely that the Claimant would have remembered the precise words used during the conversation, as she purported in her complaint of 29 November 2019, over two months later.
158. The Tribunal is unable to reach the conclusion that the Second Respondent made the comments alleged or that he was aggressive. It is more likely that this was a reasonable discussion between a line manager and member of the sales team who had been granted permission to work from home.
159. To the extent that the Second Respondent might have discussed the nature of the work the Claimant would be undertaking while working from home, this would not have been because of her pregnancy but, rather, his wish to both support the Claimant and ensure acceptable performance.

*Unilaterally attempting to change her job role to Business Development Manager*

160. The Second Respondent's email of 13 September 2019 would not lead a reasonable person to think that the Second Respondent was seeking to demote the Claimant to Business Development Manager as she alleges. The evidence before the Tribunal suggested that other members of the team or technical experts would routinely attend customer meetings which would be arranged by the Claimant. The Claimant's salary was not reduced to that of a Business Development Manager and there was no suggestion that it would be. The Tribunal finds nothing untoward about the Second Respondent's instructions set out in the email relied on by the Claimant. The Second Respondent did not instruct the Claimant as he did in his email because of her pregnancy.

*Not paying commission*

161. Having abandoned the contention that she was contractually entitled to commission upon her departure, the Claimant's case evolved into an argument that the First Respondent failed to exercise a discretion to make a commission payment, notwithstanding her failure to achieve the 50% threshold. The Claimant relies on a commission payment made to her in July 2017 as an example of the First Respondent exercising a discretion. The First Respondent was unable to explain why commission was paid on this occasion, suggesting it must have been a mistake. Although it would have been open to the First Respondent to make a discretionary payment to the Claimant, notwithstanding the fact that she had not achieved 50% of her target, there was no credible evidence to suggest that the First Respondent had a policy or practice that such discretionary payments might be made.
162. The reason the First Respondent did not pay commission to the Claimant was because she was not contractually entitled to it. The First Respondent did not decline to exercise its discretion to pay commission to the Claimant because she had exercised her right to ordinary or additional maternity leave.

*Taking steps to put the Claimant on a performance improvement plan*

163. The Second Respondent did not go so far as taking steps to put the Claimant on a performance improvement plan. In light of the Claimant's underperformance, he not unreasonably made enquiries of HR as to when it might be appropriate to commence such a plan, and it is likely that he wished to put the Claimant on one. However, he never implemented it.
164. The Second Respondent made enquiries of HR about the implementation of a performance improvement plan because he had genuine concerns that the Claimant was underperforming at the time and shortcomings had been identified in her dealing with customers. He did not do so because the Claimant was pregnant or sought to exercise her right to ordinary or additional maternity leave.

*Refusing to return accounts upon her returning to work on 18 February 2020*

165. The Claimant complains that three customers were not returned to her: Quanticate, Gateley and Petrofac. The customer account of Quanticate was not returned to the Claimant. There was a conflict of evidence as to whether Gateley was returned to the Claimant: the Claimant was unable to show on the balance of probabilities that this customer was not returned to her. Petrofac was not a customer account.
166. The Tribunal accepts the Second Respondent's evidence that the reason Quanticate was not returned to the Claimant because of her mismanagement of the customer account as documented at the time. As to Gateley, even if that customer had not been returned to the Claimant, the Tribunal would nevertheless find that the customer was unhappy with the way the Claimant handled the account and that was the reason for the Respondents' actions. Petrofac was not a customer but a prospect being approached by a member of the team. In each case, the Tribunal is satisfied that the reason these customers/prospects were not returned to the Claimant had nothing whatsoever to do with the fact that the Claimant had exercised her right to maternity leave.

*On 4 March 2020 the Second Respondent said that there was "no fucking way" she would be paid her commission*

167. In an email dated 2 March 2020, the Second Respondent notified HR of the Claimant's request that she be paid commission stating "... will be more difficult as Dee had not met her 50% threshold for comms to be paid at the point of resigning". This email is inconsistent with the words alleged to have been used. Further, for the reasons set out above about the Claimant's tendency to exaggerate, the Tribunal prefers the Second Respondent's evidence and concludes that he did not use the words alleged.

*Rachel Ward confirming that the Claimant would not be paid commission*

168. Rachel Ward did confirm that the Claimant would not be paid commission. It was a statement of fact. Rachel Ward's confirmation that the Claimant would not be paid commission was nothing whatsoever to do with the fact that the Claimant had exercised her right to maternity leave.

169. The Claimant was not discriminated against on grounds of sex or maternity.

#### Detriment claims

##### Time limit

170. For the same reasons as the discrimination claim, the Tribunal finds that the allegations against Second Respondent could be considered conduct extending over a period. The Tribunal concludes that they form part of a series of similar acts or failures ending in March 2020. The Tribunal has jurisdiction to consider these aspects of the Claimant's discrimination claim

171. With regard to allegation (a), it was a discrete act and it cannot be considered to form part of a series of similar acts or failures. In submissions, the Claimant conceded that the reasonably practicable extension would not apply. This aspect of the Claimant's detriment claim was presented outside the statutory time limit and the Tribunal does not have jurisdiction to consider it.

##### Detriments

172. With regard to the claims presented in time, for the same reasons that the Tribunal reaches its conclusions as to pregnancy and maternity discrimination, the Tribunal finds that the First Respondent did not subject the Claimant to the alleged detriment on the grounds that she was pregnant or that she took, sought to take or availed herself of the benefits of, additional maternity leave or additional maternity leave. In reaching this conclusion, the Tribunal has applied the differing burden of proof applicable to discrimination claims and detriment claims.

##### Constructive dismissal

173. Given the Tribunal's findings above, the Tribunal concludes that the Claimant has failed to show a fundamental breach of the contract on the part of the First Respondent which entitled her to resign. She was not constructively dismissed.

##### Equal pay

174. In submissions, it was made clear that Claimant wished to compare her salary package applicable during the last financial year of her employment, namely her basic salary of £50,000, OTE of £50,000 and monthly target of £50,000, with the salary packages of her comparators.

175. The first point to note is that Alex Bain had exactly the same package as the Claimant.
176. Jamie Hopkins, Abinash Banger, and Alex Paul enjoyed the £60,000/£60,000/£60,000 packages.
177. As permitted by Forex Neptune, the Tribunal considers whether the Respondent has shown a material factor for the differences in the Claimant's pay and that of her comparators.
178. The Tribunal accepts the Respondents' evidence that salary packages were individually discussed, negotiated and agreed with salespersons having regard to their sales experience and previous sales success, either in previous employment or during employment with the First Respondent. That evidence supports the Respondents' contention that salary packages are dictated by market forces and personal sales success. The First Respondent had genuine reasons, which were both significant and relevant reasons, for the difference in pay. The finding that market forces were the reasons for any pay differential is further supported by the evidence that some female salespersons were paid more than the Claimant and some males paid less than her.
179. As for Mr Heath, he was recruited as what might be described as a "big hitter" to grow the First Respondent's global presence. He had a significant sales history with former employers: he told the Tribunal he had previously signed a contract worth £39 million. Again, market forces were responsible for the difference in his pay compared to that of the Claimant.

Note

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Employment Judge Pritchard

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Date: 13<sup>th</sup> April 2022