EMPLOYMENT TRIBUNALS

Claimant: Miss C Logan

Respondent: Innovation First International (UK) Limited

Heard at: Manchester (by CVP) **On:** 20-21 June 2022
27 February to 3 March 2023,
and (in chambers) 26 July 2023

Before: Employment Judge Phil Allen
Ms K Fulton
Mr P Dobson

REPRESENTATION:

Claimant: Mr M Hamer (the claimant's partner)
Respondent: Mr J Searle (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed. She was dismissed for a fair reason (redundancy) following a fair procedure. Her claim for unfair dismissal is dismissed.

2. The respondent did not unreasonably fail to comply with the ACAS code of practice on disciplinary and grievance procedures, as the code of practice did not apply in circumstances where the claimant was genuinely dismissed by reason of redundancy.

3. The claimant did not contribute to her dismissal by blameworthy conduct.

4. The claimant was not treated unfavourably because of pregnancy or pregnancy related illness. The claims for direct discrimination because of pregnancy and maternity under section 18 of the Equality Act 2010 are dismissed.

5. The claimant was not treated less favourably because of her sex. The claims for direct sex discrimination under section 13 of the Equality Act 2010 are dismissed.

6. As pregnancy is not a relevant protected characteristic under section 26 of the Equality Act 2010, the claimant's claims for harassment related to pregnancy did not succeed and are dismissed.

7. The respondent did not unlawfully harass the claimant related to sex. The claims for harassment related to sex under section 26 of the Equality Act 2010 are dismissed.

8. The respondent did not believe that the claimant may do a protected act and, in any event, the claimant was not subjected to a detriment because the respondent believed that she may do so. The claims for victimisation under section 27 of the Equality Act 2010 are dismissed.

9. The respondent made an unauthorised deduction from the claimant's wages when it did not pay the claimant the bonus of **£800** to which she was entitled in July or August 2020 for Q2.

10. The respondent did not make unauthorised deductions from the claimant's wages in the other ways alleged. The other claims for unauthorised deduction from wages (other than that specifically found at (9)) under part II of the Employment Rights Act 1996 are dismissed.

11. The respondent failed to provide the claimant with a statement containing particulars of the changes to the claimant's terms and conditions regarding remuneration, contrary to section 4 of the Employment Rights Act 1996. In accordance with section 38 of the Employment Act 2002, the award made under paragraph 9 is increased by an amount equal to two weeks' pay.

REASONS

Introduction

1. The claimant was employed by the respondent from 6 June 2014 until 10 September 2020, initially as an Accounts Administrator. The claimant says that later in her employment, her role was described as Finance. The claimant was dismissed with notice on 28 July 2020 (with the notice effective on 10 September 2020).

2. The claimant alleged that: she was unfairly dismissed; she was unlawfully directly discriminated against because of sex and/or pregnancy; she was unlawfully harassed related to sex and/or pregnancy; she suffered victimisation; and/or unauthorised deductions were made from her wages. The respondent denied all of the claimant's claims and contended that she was fairly dismissed by reason of redundancy.

3. The case had a lengthy and contentious procedural history. Preliminary hearings (case management) were conducted on 22 January 2021, 5 August 2021 and 28 January 2022. The Case Management Order following the hearing on 5 August 2021 appended a List of Issues drafted by Employment Judge Housego, the Employment Judge who conducted that hearing. When Employment Judge Housego first prepared the List of Issues and appended it to the Case Management Order

made following the hearing on 5 August 2021, he recorded that the factual allegations (which were drawn from the further and better particulars prepared by the claimant) were not those which would usually be included in a List of Issues. He stated that the draft list was a roadmap to the issues that needed to be determined.

4. The parties were required to agree a List of Issues prior to the final hearing. The parties failed to do so. On the second day of hearing the Employment Tribunal identified and outlined to the parties the proposed issues to be determined, it being necessary for the Tribunal to take that approach in the absence of agreement between the parties. The list identified was based upon that prepared following the hearing on 5 August 2021, but was added to in the light of the Lists of Issues as prepared by each of the parties. Following the adjournment of the hearing part-heard on 21 June 2022, that List of Issues was sent appended to a Case Management Order and the parties were given 21 days in which to object or identify any errors (it was made clear that they did not need to agree it).

5. Following the version of the list of issues appended to the case management order sent following the first two days of hearing, the claimant requested that certain amendments should be made to the List of Issues. At the start of the third day of the hearing (when the case re-started), the proposed amendments which arose to the List of Issues from the claimant's proposals were identified and the respondent confirmed that it had no objections to those amendments being made.

6. The List of Issues as amended and agreed is appended to this Judgment. That list identifies the issues that the Tribunal needed to determine. It was unfortunate that the parties were unable to agree a single list, as the attached is more complicated than it otherwise would have needed to have been.

Procedure

7. The claimant was represented by her partner, Mr Hamer (albeit that, on occasion, the claimant also spoke for herself). Mr Hamer emphasised that he was not qualified and did not have experience in Tribunal proceedings. Throughout the hearing the Tribunal endeavoured to ensure that the claimant was treated in a way consistent with the overriding objective. The respondent was represented by Mr Searle, counsel.

8. The hearing was conducted by CVP remote video technology. On the first day of hearing, 20 June 2022, following the claimant not receiving a letter from the Tribunal, the claimant and her representative attended the Tribunal building. For that day only, the claimant and her representative conducted the hearing from a room in the Employment Tribunal building using a screen, being a different room from the one in which the Employment Judge and one of the members was present. Following that first day, all witnesses and all parties attended remotely using CVP.

9. Prior to the hearing, the claimant had applied for the hearing to be postponed, but that application had been refused. On the first day of the hearing the claimant's representative made two applications: an application for the response to be struck out as a result of the respondent's conduct of proceedings; and an application for the hearing to be postponed (the latter having been raised as a potential application, based upon a change in circumstances, by the Tribunal). After adjournment to provide the claimant's representative with more time to prepare his submissions, he

was given the opportunity to make submissions at approximately 2.55pm on the first day. At the start of those submissions the claimant's representative explained that he did not wish to pursue a postponement application at that time. The application to strike out was made. The respondent's representative responded. After an adjournment towards the end of the first day, the Employment Tribunal informed the parties of the decision in the strike out application and provided brief reasons for it. The strike out application was refused. That Judgment and the reasons for it were sent to the parties shortly after the adjournment of the hearing in June 2022.

10. Following that decision, the Tribunal adjourned to read the witness statements and relevant documents in the proceedings. The parties returned to the reconvened hearing on the afternoon of the second day. The List of Issues was clarified. Some procedural matters were addressed. The claimant's representative made a further application for the hearing to be postponed. The respondent's position initially was that it was neutral in respect of the application. The Tribunal considered the parties' positions and proposed the alternative approach of the case being adjourned part-heard with the hearing recommencing (with the same panel) over five days on 27 February to 3 March 2023. The parties (ultimately) agreed to that approach and the hearing did not proceed on 22-24 June 2022 as had been proposed. Amongst other things, the postponement allowed time for the claimant to prepare for cross examination of the respondent's witnesses (statements having only been sent by each party to the other very shortly prior to the start of the hearing), and for the respondent to provide the statement of law which it had previously been ordered to provide, so that it could be considered by the claimant ahead of the hearing.

11. The parties had not been able to agree a single bundle of documents for the hearing. At the start of the hearing the respondent provided a bundle of documents which ran to 794 pages. The claimant provided a bundle of documents which ran to 667 pages and ultimately consisted of 701 pages. The respondent's witness statements referred to pages in the respondent's bundle. The claimant's witness statements referred to pages in the claimant's bundle. Whilst unfortunate and less than ideal, the Tribunal took the pragmatic approach of accepting both bundles and referring to the relevant pages in the bundle to which reference was made. In practice, the two bundles largely duplicated each other (although they did not entirely do so). They also included a very large number of documents to which the Tribunal were never referred. The Tribunal read only the pages to which they were referred either by a witness in their witness statement, or which were referred to during the hearing. Where a page number is referred to in this Judgment it will be referred to as a number in brackets, with the prefix "C" for the claimant's bundle and the prefix "R" for the respondent's bundle (only one reference will be provided albeit it may be that documents referred to were present in both bundles).

12. Prior to the hearing re-starting, the claimant provided some additional pages for her bundle (as she had been ordered to do) and also requested to add some further pages to her bundle. The respondent produced a very limited number of additional pages which it contended should be read, if the claimant's additional pages were submitted. At the start of the third day of hearing, the respondent confirmed that it had no objection to the additional pages being added to the bundle, and the claimant confirmed she had no objection to the additional pages from the respondent also being added.

13. Witness statements had been prepared for each of the witnesses, and the Tribunal read those witness statements during the first day of hearing. In between the second and third days of hearing, the claimant also produced a short supplemental witness statement. The respondent initially objected to that statement being admitted, but at the start of the third day of hearing (pragmatically and sensibly) it confirmed that it had no objection to the supplemental statement being admitted. It was read alongside the claimant's main witness statement.

14. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. Mr Hamer, the claimant's partner, also gave evidence, was cross examined, and asked questions.

15. The respondent called the following witnesses, who were also cross examined and asked questions: Ms Jessica Lomax, the respondent's Managing Director; Mr Warren Weeks, a former director of the respondent and (prior to his retirement) the Chief Financial Officer for Innovation First International Inc; and Primrose Carney, a former employee of the respondent. Mr Weeks gave evidence from Texas, the relevant permissions having been obtained and it having been confirmed that he was able to do so. Based upon the times when he was available to give evidence, Mr Weeks gave evidence in two tranches, starting his evidence on the afternoon of the fourth day and concluding it on the afternoon of the sixth day. Ms Lomax was subject to very lengthy cross-examination, giving evidence throughout all of the fifth day, the morning of the sixth day, the end of the afternoon on day six, and most of the morning of the seventh day.

16. As part of the Case Management Orders made by Employment Judge Butler at the preliminary hearing on 28 January 2022, the respondent had been required to provide the claimant with a document setting out the legal arguments upon which it relied in advance of the hearing. The respondent had initially not done so. On the second day of hearing, the respondent was ordered to do so before the hearing re-started. The relevant order was complied with before the hearing re-started and the legal argument document was provided to the Tribunal prior to the respondent's oral submissions and is referred to in the legal section below.

17. At the end of the hearing, each of the parties was given the opportunity to make submissions. The respondent provided a document which supplemented the list of issues by showing the respondent's case on each of the issues to be determined. The respondent's representative also made oral submissions. The claimant and her representative stated that they wanted to provide written submissions (and did not wish to also make oral submissions). On the afternoon of the final day (and after a small amount of additional time had been allowed to prepare to make submissions), the claimant's position was that they needed more time. The respondent's representative did not object to more time being given. What was proposed by the Tribunal and agreed by the parties, was that after the oral submissions were heard from the respondent, the claimant would have a month to provide her submissions in writing. The respondent would also have three weeks to respond to the written submissions if it wished to do so. The Tribunal would then convene in chambers to reach its decision, only after the submission documents had been provided. The claimant's representative subsequently provided a very lengthy 45 page document which contained the claimant's submissions. The respondent responded to that document within the time which the Tribunal said that it had to do

so. Unfortunately, for exceptional reasons unrelated to this case, the first day when the Tribunal had intended to be in chambers had to be postponed and re-arranged for a later date.

18. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below. Judgment is provided on the liability issues only, it having been agreed that remedy issues would be left to be determined later and only if the claimant succeeded in any of her claims. Within the List of Issues, a few specific issues which related to remedy were identified as those which would be determined alongside the liability issues, and it was identified that the unauthorised deduction from wages claim would be determined in its entirety as there was not the same distinction between liability and remedy for that claim.

Facts

19. The claimant's evidence covered a significant number of matters which predated the issues which the Tribunal needed to determine. This Judgment will address only those matters relevant to the issues to be determined.

20. The respondent's group of companies employs over three hundred people globally. The respondent itself employed nine people in the UK, as at 6 June 2022. It had employed thirteen at the time of the relevant events, prior to the pandemic. The redundancies which the respondent undertook bout which the Tribunal heard evidence, were the first that the respondent had ever undertaken.

21. The claimant was employed by the respondent as an Accounts Administrator from 6 June 2014. The parties did not agree whether her role remained the same or changed during her employment. The respondent's position was that her role and job title remained unchanged, albeit Ms Lomax accepted in evidence that the role evolved. The claimant's position was that her role changed significantly. She highlighted that the job title which she used in her emails later in her employment was "*Finance*" (C304 and C397). The respondent denied that the footers to emails used by the claimant reflected a change in job title by the respondent. In cross-examination the claimant accepted it was not a promotion, she said it was just a change in job title.

22. The Tribunal was provided with a copy of the claimant's terms and conditions which had been issued at the start of her employment on 19 June 2014 (C259). Those terms and conditions recorded the claimant's salary at the time she was recruited. They did not record anything regarding bonus.

23. The Tribunal was provided with a job description for the claimant's role as issued at the start of her employment (C282). That included, as a role summary, that the claimant was required to perform a wide range of accounts and administrative duties. The claimant provided an email dated 29 January 2015 from Ms Lomax attaching an updated job description (C291). Other updated job descriptions were also provided (C292 and C293). There was no dispute that the claimant's role was unique and that she effectively constituted the finance or accounts function within the UK company.

24. On recruitment, the claimant reported to Mr Laugher, who was at the time the Managing Director of the respondent. Mr Laugher retired in December 2015 and,

shortly after, Ms Lomax was promoted to be Managing Director. Prior to that appointment, Ms Lomax had been Finance Manager, but her evidence was that her role as Manging Director still encompassed her duties as Finance Manager after she stepped up. Ms Lomax's evidence was that she was familiar with the claimant's work because, before the claimant joined, Ms Lomax herself had been responsible for carrying out all the work involved in that role.

25. The Tribunal heard evidence about employees of the respondent who had been pregnant prior to late 2019. The Tribunal heard evidence from Ms Carney, a previous employee, who had taken maternity leave and left prior to her return from that leave. Ms Carney was complimentary about Ms Lomax and the way in which she supported her during pregnancy and pregnancy-related issues. In cross-examination, Ms Carney accepted that she had attended a hen night arranged for Ms Lomax, but her evidence was that it was a social event for (mainly) work colleagues and she had not socialised with her outside work or since she had left. The Tribunal accepted Ms Carney's evidence as being accurate and truthful about her own experience. It found it of little relevance (if any) to the issues which it needed to determine regarding the claimant's experience.

26. The claimant's terms and conditions recorded that company sick pay was at the discretion of the company and that the only entitlement was to statutory sick pay. What it recorded (C259) was:

> *"The company offers sick pay to its employees, this payment is not a contractual right other than payment of Statutory Sick Pay (SSP). Company Sick Pay (CSP) is paid to employees as an act of benevolence to avoid hardship and is paid at the sole discretion of the Director of the company. CSP is offered on an individual basis and will always be subject to review by your director."*

27. The claimant's evidence was that it was generally expected that everyone would have any time off sick paid in full and that was the norm. The claimant contended that this ceased sometime in 2018 when she was informed by Ms Lomax that she was only going to allow company sick pay as a given for the first five days of absence in any leave year. Ms Lomax's evidence, supported by the evidence of Mr Weeks, was that sick pay was generally limited to five days' absence in any given year. The Tribunal did not need to determine what had happened historically (and there was evidence heard about one exceptional case where an exception was made), but it accepted that the respondent's practice by 2019 was to pay full pay for only the first five days of any sickness absence in any year, with statutory sick pay paid thereafter. In 2019 (prior to the events material to the claims) the claimant exceeded five days of sickness absence and she was not paid full pay for the days of absence which exceeded the first five.

28. There was a dispute in the evidence about the claimant's entitlement to bonus. Bonus was addressed in the respondent's company handbook (but not in the claimant's own terms and conditions). The company handbook said that the rules within it formed part of an employee's contract of employment (C267). With respect to bonus at 2.6 (C269) under the heading "Bonus Schemes" it said:

> *"If you are entitled to receive any bonus payments, details will be written into your individual terms and conditions of employment and appropriate*

> *measurable targets will be agreed with you manager. Any additional bonuses will be paid at the discretion of the Company. There is no contractual entitlement to any other bonus."*

29. The claimant's evidence was that her wish for a higher salary had been discussed in a meeting with Ms Lomax in October 2014. The claimant in her witness statement recorded that Ms Lomax explained at that meeting that while bonus was normally discretionary it would be different for the claimant, and she would get a set value designed to increase her salary that would be paid quarterly. The claimant stated that the date when the bonus would be paid could sometimes vary and, according to the claimant, she was told to keep it to herself.

30. Ms Lomax's evidence was that the claimant's salary when she had joined the company had been signed off by the directors and there was no scope for increasing that salary. It was her evidence that the company offered discretionary bonuses to staff, subject to company performance. Her evidence was that the respondent could not justify giving the claimant a pay rise at the time and *"so it was considered that if any discretionary bonuses were paid out to staff, the company could exercise its discretion further by awarding Clare a slightly higher bonus"*. Ms Lomax's evidence was that: the claimant knew that the bonus was always discretionary; and the commitment did not confer any contractual entitlement on the claimant to a bonus.

31. On 30 October 2014 Ms Lomax sent the claimant an email headed *"Just to be clear"* (C311). It said:

> *"When I was talking about bonus what I meant when I said it was different for you because Ian will scale your bonus payments in terms of getting you where you wanted to be salary wise by using the bonus scheme. As we discussed, your position was signed off at the salary it was and there was no room for movement, however Ian does have room for maneuver by using the bonus scheme so as much as you would like it you've not lost out when you were thinking you could have a higher salary and bonus! If anything you'll be getting bigger bonuses than anyone else."*

32. The email was ended with a smiley face emoji. Notably, the email made no reference to any bonus payment being at the company's discretion, nor did it make any reference to there being any requirements for the bonus to be payable, whether individual or in terms of company performance. Ms Lomax's witness statement recorded that the email *"perhaps did not explain the proposal as clearly as I could have done"*.

33. In evidence, Ms Lomax agreed that the amount of bonus payable was an agreed value (but that it was always subject to the company's discretion on payment). From late 2015, it was agreed that the bonus would be £800 for each of Q1, Q2 and Q3, and £1,200 for Q4. The respondent's quarters corresponded with the calendar year. From 30 November 2015 until the end of 2019, the claimant was invariably always paid these amounts (albeit the month in which the payment was made varied). The payments were recorded in a table prepared by the claimant and not disputed (C380). The Q2 payment was expected in July each year, the Q3 payment in October and the Q4 payment was expected in January the following year (albeit in practice more commonly paid in February, as it was in 2020 for Q4 2019).

34. The claimant perceived herself to be in a unique position regarding bonus and it was her understanding that she had been asked not to discuss her bonus entitlement with other employees. Ms Lomax when answering questions during the hearing, gave evidence that all employees had a projected bonus schedule for the year and the claimant's position was no different to that of others. That evidence was not in accordance with how the claimant's bonus entitlement was described in the 30 October 2014 email, which certainly held out that the bonus position was different for the claimant to others, and therefore was not accepted as being accurate by the Tribunal.

35. Ms Lomax's evidence was that no employees were provided with written notification/confirmation of any changes in pay. Her evidence was that she understood that there was no requirement to do that. Her evidence was also that bonus agreements were also not recorded in writing. The claimant's salary changed during her employment without the changes being recorded in writing, including in 2015 when there was an agreed change to both salary and the amount of bonus payments.

36. Ms Lomax's evidence was that there were conversations in the open plan office about matters which were personal to employees, from which she knew that the claimant suffered from endometriosis.

37. The Tribunal was provided with a note of a meeting made by the claimant about a meeting with Mr Weeks (C353), which she said took place in early 2019. Mr Weeks could not recall the specific conversation at all. The claimant's note referred to raising issues as specific concerns including "*Jess' errors*" and "*Jess creating false invoices*". The note also referred to the claimant raising what she perceived to be an excessive workload. The note showed that the claimant had issues with Ms Lomax which pre-dated her pregnancy and the conversations about her pregnancy.

38. In 2019 the claimant found out that she was pregnant. On 3 November 2019 the claimant sent Ms Lomax a message about her sister having a baby (which the claimant and Ms Lomax had previously talked about) to which Ms Lomax responded by saying that the claimant did not need to call her the following morning as she was not expected to be in (R265).

39. On 4 November the claimant had an appointment with her GP who advised her to rest and signed her off work for a week. The fit note (C387) recorded the claimant as being off for eight days with abdominal pain.

40. Unfortunately, later that week, the claimant suffered physical symptoms which resulted in her being rushed to hospital, a likely ectopic pregnancy was identified, and she was told of the risk of miscarriage. The claimant was recorded in a fit note as being off work due to hospital admission from 8-11 November (C387). The claimant was an outpatient and needed to attend the hospital for monitoring, blood tests, and scans.

41. On the morning of Monday 11 November, the claimant telephoned Ms Lomax. The claimant's evidence was that she was nervous about the phone call as it was such a sensitive subject, and it was not easy to say out loud. There was no dispute that during the telephone conversation in broad terms the claimant informed Ms

Lomax that she thought she was miscarrying and that she would be absent from work. What exactly was said was the subject of dispute.

42. The claimant's evidence was that she told Ms Lomax that she was pregnant but, as she continued to talk, she was interrupted with a gasp. She was asked words to the effect of *"were you trying/did you know?".* The claimant contended that what was said did not come across in a friendly way but more of a shocked way. The claimant felt awkward and embarrassed and froze. On the claimant's account, those questions were asked before she had had the opportunity to explain that she was miscarrying. She continued to say that she had not been well, it was a likely ectopic, she was starting to miscarry, and needed more tests. Ms Lomax did not say very much in response, the claimant's description being she just kind of said *"no worries"*. The call ended and the claimant felt uncomfortable and spoke to her partner about how uncomfortable she had felt.

43. Ms Lomax's evidence was that the claimant told her that she had suffered a miscarriage. That was the first that Ms Lomax had heard of this, and she was shocked and taken aback and was very upset for the claimant. In cross examination Ms Lomax referred to her knowledge of the claimant's endometriosis as partly explaining her surprise. Ms Lomax did not quite know what to say at the time, as the news had come out of the blue and she had a variety of different emptions including shock and sympathy. She said she could perhaps have handled the telephone call a bit better in terms of being able to have had more of a conversation. She said she was just shocked and very upset for the claimant and did not really know what to say on the spur of the moment. Ms Lomax's evidence was that she did not believe that she gasped at all, and she said she certainly did not ask whether the claimant had been trying to get pregnant or whether she knew she was pregnant, nor did she say any other words to that effect. In cross-examination Ms Lomax said that it was hard to recall the conversation which happened that long ago, but she knew it was not in her personality to say what was alleged.

44. The claimant sent Ms Lomax a statement of fitness for work which recorded the reason for absence as hospital admission (R270). Ms Lomax sent the claimant a text message (R267) which said the following:

> *"I'm really sorry for your news Clare and I'm sorry if I sounded at all awkward on the phone. Sending you my wishes x"*

45. The claimant responded to Ms Lomax's message shortly after it has been sent and said:

> "*It's ok thanks. Obviously when I'm back in work people are going to ask questions as to what's been wrong. I'd rather avoid those conversations as it's not something I'll want to discuss details of. So if you wanna let people know that's fine xx"*

46. Ms Lomax Responded:

> "*Yes of course, I understand xx"*

47. Where Ms Lomax's and the claimant's evidence about what was said in the call on 11 November 2019 differed, the Tribunal preferred the claimant's evidence.

The call was clearly an event which was of the utmost importance to the claimant and therefore she was more likely to recall exactly what was said. Ms Lomax acknowledged in her email following the call, that the call had clearly not gone well. The Tribunal did not find that Ms Lomax's evidence about the call was entirely reliable where she herself acknowledged that it was hard to recall what had been said. That was why the Tribunal accepted the claimant's account of what was said on the call. The Tribunal did not consider that Ms Lomax recalled the conversation as clearly as the claimant did; the Tribunal did not find that Ms Lomax was deliberately dishonest. It note that Ms Lomax's view at the time was that the call had been "*awkward*" as she stated in her follow up text, not that it had been particularly bad. In considering the impact of the call on the claimant at the time, the Tribunal also noted the claimant's response which had been sent shortly after the call and said that it was ok, and addressed practical matters, before it was ended with two kisses.

48. The claimant's evidence was that on 19 November the hospital ceased undertaking tests and informed the claimant that they were confident that the pregnancy would end naturally, which they estimated would occur in around two to three weeks. The claimant's evidence was that her pregnancy was confirmed as officially having ended on 10 December by a negative pregnancy test. The claimant's evidence was supported by the hospital letter of 19 November 2019 (C668) which, whilst heavily redacted, confirmed that at the time her HCG levels were still being monitored and the plan was to perform a pregnancy test in three weeks time.

49. In submissions the respondent's representative relied upon 11 November as being the date upon which the claimant's pregnancy ended (it being necessary to identify the date when the pregnancy ended to identify the protected period, which ends two weeks after). The claimant contended that the date was 10 December. The Tribunal was very aware that identifying such a date in this case was extremely difficult and appreciated the sensitivity of doing so, the claimant herself not being aware of exactly when it is that her pregnancy ended. Based upon the evidence available, the Tribunal agreed with the claimant's submission and identified the 10 December 2019 as being the date when the pregnancy had ended, as confirmed by the relevant test. The Tribunal noted the absence of any definitive information about exactly when the pregnancy ended and, in those circumstances, made its finding based upon the test undertaken at the hospital.

50. On 25 November the claimant returned to work. A return to work interview was held. There was a record of that meeting (R272). The claimant disputed that everything recorded had been said. Her evidence was that the content of the document was not certainly not brought to her attention at the time, and, she just signed it and was not given a copy so she would not have recalled what it said. Ms Lomax note recorded that payments for a particular client needed to be posted. The claimant's evidence was that she was told in this meeting that she would not receive any company sick pay as she had already had over five days of absence that year and she would only receive statutory sick pay.

51. There was a dispute between the parties about whether the claimant raised an issue with her chair. There was no dispute that the claimant, along with others in the company, had been provided with a new chair about a year earlier. She did not find the chair comfortable and referred to back issues. The claimant's evidence was that she raised the chair during the return to work meeting and Ms Lomax just smiled

at her and said, *"why don't you see how you get on?"*. Ms Lomax's evidence was that the chair was raised after the meeting had ended and as the two left the room. Ms Lomax suggested that the claimant saw how she got on following her return, and her evidence was that if the issue had been raised again, she would have tried to do something about it. The claimant contended that she needed to sit on her padded coat after her return due to discomfort from the chair. There was no evidence that the claimant had raised the chair following the conversation.

52. The Tribunal heard evidence about the ongoing working relationship between the claimant and Ms Lomax. The claimant's evidence was that, after she informed Ms Lomax about her pregnancy, they never interacted in the same way as they had before, albeit her evidence was that Ms Lomax could be her normal friendly self sometimes but on other occasions would be what was described as "completely off" and/or would blatantly ignore the claimant. The claimant described her as being Jekyll and Hyde. Ms Lomax denied any change to the relationship and referred to a number of emails and other communications using the respondent's messaging system, which the Tribunal was shown. Those messages included friendly exchanges and the frequent inclusion of emojis. The claimant accepted that the messages and emails in the bundle showed a friendly and appropriate relationship.

53. The claimant's partner posted a supportive message, regarding the claimant and the miscarriage, on Facebook on 12 December 2019 (C391). The claimant's evidence was that, shortly after it had been posted, she discovered that Ms Lomax had deleted her as a friend on Facebook because Ms Lomax popped up on the "people you may know" list. The conclusion that the claimant drew was that she was being ostracised as a result. Ms Lomax's evidence was that in fact she had deleted the claimant as a friend on Facebook much earlier, on 18 April 2019. In the Tribunal hearing the claimant accepted that she had in fact been deleted as a friend at the earlier date (albeit she had not known that at the time).

54. Another employee of the respondent had a child on 18 December 2019. There was no collection made for that employee, albeit it was the usual practice at the respondent for collections to be made (at least for the birth of a first child). The claimant appeared to suggest that the lack of a collection reflected a change in Ms Lomax's approach to pregnancies and births. In evidence Ms Lomax explained that: the collections were a decision made by the employees; this was very close to Christmas when many employees had stopped working for Christmas; it was the employee's second child; and everyone was very busy prior to Christmas.

55. There was a dispute about whether a message was sent to employees telling them about the birth of the other employee's child. The Tribunal was not provided with any document which recorded employees being informed. Ms Lomax's evidence was that no email had been sent and the respondent asserted that it had asked its IT team to search for the email and one had not been identified. Unsurprisingly, the claimant could not provide a copy, but it was her evidence that she had certainly received an email from Ms Lomax informing all employees about the birth. Her evidence was that she had been upset by the message. The claimant's evidence was that she felt it was wrong of Ms Lomax not to have forewarned the claimant that the email would be being sent out, or even to have asked her if she wanted to be excluded from it, as Ms Lomax would have known that the claimant would be upset by it. In her witness statement, Ms Lomax said she had no recollection of the email being sent. In his evidence, Mr Hamer recounted having received a telephone call

from the claimant whilst at work, when she was in the toilet really upset due to the content of such an email.

56. The Tribunal found, on balance, that such an email was sent and received by the claimant (and others). The Tribunal accepted the claimant's evidence as they did not believe that she had made up what she alleged about receiving the email. The Tribunal accepted Mr Hamer's evidence which corroborated the claimant's account. Taking account of the limited size of the respondent, the Tribunal would have expected Ms Lomax to have recalled whether such an email had been sent and it was noted that one being sent would have been in accordance with the respondent's practice.

57. The Tribunal heard a considerable amount of evidence about some payments which had not been fully allocated on the system against a relevant client. There was a disagreement between the claimant and Ms Lomax about the extent to which Ms Lomax had covered the claimant's work during her absence in November 2019 and how effectively she had covered the work. Ms Lomax's evidence was that she had covered most of the work but had left a small number of tasks outstanding to be completed by the claimant following her return (as recorded on the return to work form). The claimant clearly perceived that a substantial part of her work had not been undertaken. There was no dispute that the allocation of the specific payments in question had not been done by Ms Lomax. Ms Lomax believed she had told the claimant about the need to allocate the payments at the return to work meeting. The claimant's belief was that she did not know about the fact they needed to be allocated until the contact from Mr Weeks.

58. There was also a dispute between the parties about the claimant's workload, and whether she would have been able to allocate the payments in the three month period between her return to work and Mr Weeks flagging the issue. The claimant believed that she was very busy and did not have the time to do so within her working hours. Ms Lomax accepted that the claimant's role was busy and that it was not in dispute that she was busy, but she said that she was not over-burdened. She contended that the work could have been undertaken in the time available. Ms Lomax in part relied upon the fact that when she had ultimately allocated the payments, it had taken less than an hour for her to do so. The claimant strongly disputed that it had only taken that long and stated that it would have taken much longer (although she could not give a precise time estimate as it depended upon the payments and what needed to be done). On this issue the Tribunal accepted Ms Lomax's evidence that the work could have been undertaken in the time available.

59. In the claimant's closing submission document, the following was said: "*The claimant would have done the work during working hours if she had not suffered pregnancy complications and been absent. It is very relevant that she received no CSP during her pregnancy absence, as she was not paid to do work from during those 3 weeks, so the respondent expecting her to then do the work in her own time, and without pay, was unreasonable*". It was clear to the Tribunal (both from the submissions and the claimant's evidence) that at the heart of her complaints about doing this work was her view that she should not have to undertake it without additional pay, because she perceived it to be work from the time when the company had refused to pay her full company sick pay. The Tribunal found that the reason why the claimant did not undertake the work was because of her view that she should not have to do it. Whilst workload may have contributed to her not doing so

(at least initially), where she was not over-burdened, the Tribunal found that she could have prioritised and undertaken the tasks had she chosen to do, by the time it became an issue.

60. In cross-examination, Mr Weeks explained that the outstanding payments had come to his attention because they were becoming an issue for the respondent. They had been raised with him by the CEO. He was concerned about them as they were felt to affect the group's financial credibility with the banks. He wanted the issue addressed and considered it to be important for reasons he clearly evidenced. It was clear from Mr Weeks' evidence that, as the CFO based in the US, he had little day to day knowledge about the operation of the UK office. He raised the issue because of his financial concerns. His uncontradicted evidence was that, when he raised the issue, he was unaware of the claimant's absence from work or her pregnancy. It was also clear that, as the global CFO, Mr Weeks fully expected employees to act upon what he asked.

61. On 10 March 2020 Mr Weeks emailed Ms Lomax and the claimant attaching the weekly sales report (C398). The email was entirely neutral and asked about the financial discrepancies. On 11 March, Ms Lomax responded. She stated that it was caused by the unallocated payments for the particular client. She stated: "*We will work on getting these allocated to clear as far as possible*". The claimant responded to say that she had allocated all the relevant client payments which she had entered. Mr Weeks' evidence was that he initially read the email as stating that the claimant had allocated all the outstanding payments, it was only later that he read it that she was stating that she had allocated only the payments which she had personally received.

62. On 24 March 2020 Mr Weeks emailed Ms Lomax and the claimant following receipt of a further weekly sales report and said (C410):

> "*While we are working from home and sales continue to decline I do want to take the time to clean-up the AR. Looking at the spreadsheet* [for the particular client] *still has a ton of credits that have not been taken against invoices. What information do you still need to clean-up?"*

63. In evidence Mr Weeks explained that he knew that accounts reconciliation was part of the claimant's duties, and he sent this email to both Ms Lomax and the claimant because he would not normally e-mail someone in a country without informing their line manager. The claimant responded with a list of outstanding claims and Mr Weeks responded seeking clarification. The claimant provided a further response, which included the following:

> "*I'm not sure about any negatives, I believe there were some aged payments on account from November that Jess was applying (they relate to when I was off and Jess was covering some of my work) but I'm not sure where those are up to?"*

64. Mr Weeks responded (C408) asking the claimant to get the matter cleared up before the end of the week, explaining that it was drawing a lot of attention, as it was causing huge negative numbers on the aging reports. He went on to say that:

> "*Now that you are back at work and things are slow you should be able to catch-up on the items that Jess didn't cover for you while you were off. I would think you have more tribal knowledge than Jess on this account and can reconcile quicker"*

65. The claimant sent a lengthier response to Mr Weeks later on 25 March (C407). She explained that things weren't yet slow in her department. She said she was still trying to catch up on her own workload after she had completed other work from the same period when she had been off. She then explained:

> "*Please be aware that I received no pay in November for the 3 weeks I was in hospital, as I was told these items were covered? If/when things slow down for me then of course I will then be free to tidy up any outstanding issues. However if you would prefer for me to work paid overtime to do this as a priority, I would be willing to do so, please let me know and I can look to arrange some time?"*

66. Mr Weeks' evidence was that when he received these emails about this work on 25 March 2020 it was the first time that he had been aware that the claimant had had time off from work. As the Chief Financial Officer for the Group based in the US, he was not aware of absences in the UK or UK-specific matters. The emails prompted Mr Weeks to have a conversation with Ms Lomax in which, on 25 March 2020, Mr Weeks was informed of the reason for the claimant's previous absence. In his evidence Mr Weeks was keen to emphasise that the reason for the absence had no bearing whatsoever on his email communications with the claimant.

67. Mr Weeks was questioned at some length on these emails and his response to them. It was clear that he was not happy with the last response from the claimant. It was clearly his view that if the CFO informed someone that something was a priority, he would expect it to be treated as a priority. He was also clearly unimpressed with the suggestion that the work would only be undertaken if the claimant was paid overtime for doing so. He explained that it was his expectation that salaried employees should be willing to undertake the additional time required to undertake work such as this without being paid overtime (whilst emphasising that his view was based upon the position in the US and not the UK). He emphasised that the work he had requested may not have been a priority task for Ms Lomax during the claimant's absence, but four months later it was something that needed to be done.

68. On 31 March 2020 Mr Weeks sent the claimant an email which was one of particular importance to the claims being brought (C406). The claimant emphasised that the email was not copied to Ms Lomax as previous emails had been. Mr Weeks dd not know why that was the case, but suggested it would quite possibly have been because he had simply pressed reply rather than reply to all, when responding. That email said:

> *"I understand that you were in hospital back in November of last year and I hope that everything is going well for you now. We followed the same rules during your medical incident as we do with other employees. Everyone in the UK receives a week of sick pay if needed. You had already used well over that by November. Every employee can use days from their paid time off if sick to maintain full pay. You had already used all your paid days off and had*

> *none left. Therefore statutory pay was all that was left. Then we still paid a full 4th quarter discretionary bonus to you even with the 3 weeks off in the 4th quarter.*
>
> *However, I have had discussions with Jess and it is my understanding that although you are a salaried employee you have not worked a single hour of casual overtime trying to catch-up. Also, the majority of your day-to-day job was accomplished in your absence leaving only certain things for you to handle upon your return. I appreciate that your position in the company has a lot of activity. However, there is also an expectation that from time to time circumstances may arise that would require more than 37 hours in one week and it seems you refuse to work anymore than that. This is not the behaviour I expect from a salaried employee."*

69. When pushed in questioning, Mr Weeks accepted that he was a little miffed in this email, but emphasised that if anything he was trying to get the response of doing the job required. The claimant's evidence was that she had not worked overtime because Ms Lomax had told her not to do so. Nothing further was done by the respondent following that email being sent. The claimant was not the subject of any formal reprimand or action. Ms Lomax emphasised in her evidence that she was focussed on resolving the issue, not taking any action, and it was her evidence that she made the offer to the claimant that she would deal with half of the outstanding reconciliations herself. Ultimately, following the claimant commencing furlough, Ms Lomax completed all the reconciliations herself.

70. The claimant responded to Mr Weeks with a lengthy email of 31 March 2020 (C405). That email was sent to Mr Weeks only and not Ms Lomax. In her email the claimant said a number of things, addressing why she had not reconciled the relevant account and referring back to her conversation with Mr Weeks at the beginning of 2019 when she had raised her workload. Regarding the bonus the claimant said:

> *"I appreciate this was paid however the bonus figure I receive was agreed as part of my compensation package a few years ago now."*

Regarding the work she said:

> *"The majority of my job was not accomplished in my absence, only minimal tasks were completed. And some of those duties that were covered were also covered poorly..."*

71. Mr Weeks never responded to the claimant's email. The claimant contended that he should have done so. Mr Weeks' evidence was that he did not have the time to be dealing with small issues such as this and, in any event, he considered that they were issues that should have been dealt with by Ms Lomax (albeit the claimant's email was not in fact addressed to Ms Lomax nor was there any evidence that it was forwarded to her). Ms Lomax's evidence to the Tribunal was that the email from the claimant was one which was not necessarily the right tone.

72. Mr Weeks' evidence was that he played no part in deciding who ought to be placed on furlough leave nor did he have any part in deciding who might be placed at risk of redundancy or who was ultimately made redundant. His evidence was that the

respondent's net revenues dropped by over 30% across the world as a result of the coronavirus pandemic.

73. As with all businesses during the pandemic, the respondent faced challenges in March and April 2020. Two employees of the respondent were placed on furlough from 27 March 2020. With agreement, three other employees were placed on furlough from 6 April 2020. An email was sent to staff informing them of this (R301).

74. The claimant worked from home from 17 March 2020. In her evidence she explained that she asked to work from home as soon as that became a possibility, because she considered herself to be high risk as someone who was trying to become pregnant. Her evidence was that she informed Ms Lomax that she was high risk, and Ms Lomax did not ask her why. From the lack of any questioning, the claimant assumed that Ms Lomax knew that she was trying to get pregnant again (as she felt otherwise she would have asked, and it followed from the conversation in the telephone call in November 2019). Ms Lomax denied that she gave any thought to the request, at a time of global uncertainty, being due to pregnancy or any attempt to become pregnant.

75. There was a dispute in the evidence about how busy the claimant was while she was working from home prior to being placed on furlough. Ms Lomax accepted that it was not in dispute that the claimant's role was a busy role and varied. The claimant's evidence was that her workload had not reduced in the same way as it had for some others at the start of the pandemic. She emphasised that the part of her role which followed directly from a sale was limited, and she also emphasised that there was usually a four week or so delay before other matters impacted upon her as the person in accounts. The respondent contended that her workload had reduced, particularly relying upon what the claimant said in messages which she exchanged with a colleague. The claimant was the last of those furloughed at the respondent, to be placed on furlough.

76. On 17 April 2020 the claimant was informed that she would be furloughed from 20 April (C442). The email said that the respondent was moving more employees to furlough (albeit that in fact only the claimant was being moved to furlough at that date). A furlough agreement was attached to the email (R331). The email explained the circumstances and went on to say:

> *"Therefore we will be furloughing your position from Monday 20th April. Please see letter attached with all the details. In lieu of being able to sign the letter and send back, please respond to this email as your confirmation."*

77. The claimant responded to the email (C447) by saying that she understood and she thanked Ms Lomax for letting her know.

78. In the notification provided it was explained that furlough was not something which could be imposed and that it operated on the basis of a joint agreement. It went on to say:

> *"However, the theoretical consequence of not agreeing is that we would have had no option but to consider layoffs and job losses."*

79. Ms Lomax's evidence was that the decision to offer furlough to certain employees was based upon the specific job roles of the employees and the reduction of the work. Ms Lomax's evidence was that the claimant was a prime candidate for furlough because her work was directly related to sales and because of everything that was happening in the world at that time sales had reduced significantly. Ms Lomax also emphasised that because she personally had previously undertaken the claimant's duties, she felt able to take on any duties personally. No documentation was provided which recorded any discussion about, or decision making in relation to, which employees were placed on furlough. Ms Lomax's evidence was that six out of the respondent's 13 employees (in the UK) were placed on furlough.

80. The claimant contended that being placed on furlough was not in reality actually agreed by her, but she confirmed that she did not object at the time to being placed on furlough. She said that she was not keen to be furloughed. In one message sent to her colleague, Ms Littler (with whom she exchanged a number of friendly messages), the claimant said (C437):

> "*it is what it is really, I knew it was coming. Lockdown aint ending anytime soon is it, they will be protecting the cash flow"*

81. Later in the same message exchange (R319) they also exchanged messages about bonus in which the following was said:

> "[claimant] *bonus is due end of April*
>
> [colleague] *…do you really think we'll get the bonus?? I'll be proper surprised if we do hahaha*
>
> [claimant] *well it covers jan-march so there's no reason why we shouldn't*
>
> *?*
>
> [colleague] *be nice if we do get it!!*
>
> [claimant] *but then even if we do, will it be on time?*"

82. The Tribunal was shown some emails from Ms Lomax to her IT team regarding the way in which they could stop staff undertaking work whilst on furlough. When the claimant was placed on furlough, she was asked to return her computer equipment to the respondent by leaving it outside her front door for it to be collected by Ms Lomax. Ms Lomax's explanation was that this was to make sure that the claimant was not working remotely from home whilst on furlough. The claimant was not happy about this and did not in fact return the equipment as requested. The claimant explained in an email (C447) that she did not think it was suitable to leave the equipment outside and did not want unnecessary visitors to the house. Ms Lomax accepted the response and neither collected the equipment at the time, nor did she pursue collection. The claimant asked how she was to be contacted and was asked to provide a personal email address, which she did. The claimant's access to the systems was closed down on 17 April at the end of the working day (which was 4.30 on a Friday).

83. The claimant and her colleague, Ms Littler, exchanged messages about the request to return the equipment, which were provided to the Tribunal. The claimant explained that her partner had said that if the respondent was "*scheming*" it was best to hang onto the equipment anyway (C452). Ms Littler expressed the view that it "*sounds dodgy as hell. Bet u could have a good case against ur work*" (albeit the messages did not explain why she thought that to be the case). In fact, in July 2020 when the claimant was preparing to move house, she asked the respondent to collect the laptop and monitor from her house, and the laptop and monitor were collected. The claimant's evidence was that she did not want to move house with the additional box that the equipment required.

84. The claimant did not receive her payslip and, as she had been denied access to the respondent's systems, could not access it. She raised this with Ms Lomax by message on 29 April (C461). Ms Lomax used an incorrect email address when she requested that payslips be sent (R333). On 29 April Ms Lomax identified her error and informed the payroll provider of the appropriate email address. The payslips were then sent to the claimant immediately afterwards. The claimant complained that Ms Lomax did not further respond to the claimant about this. Ms Lomax's evidence was that she did not believe she needed to do so because the address had been corrected and the payslips provided. The claimant did not raise any formal issue about a breach of data protection obligations at the time, albeit it was raised in questioning during the Tribunal hearing. Ms Lomax confirmed that the payslips were password protected with a password only the claimant knew.

85. There was an exchange of messages regarding bonus on 6 May 2020 (C461). Ms Lomax informed the claimant that, due to the company downturn, it was unlikely that there would be any bonus sign off. In a later message she said "*as you know bonus is discretionary based on company performance and COVID-19 has clearly impacted therefore bonus for Q1 is still to be determined for all offices in the group. As soon as I have any news, I will share*". The claimant pointed out that the bonus was for a period when she said the company had been performing as normal and went on to say "*Also bonus was adjusted as part of my salary for increased workload so is part of my remuneration package*". Ms Lomax responded by again stating that the bonus was discretionary, which she reiterated when asked for the written terms and conditions of bonus. Later, on the same day, the claimant emailed Ms Lomax asking her to investigate the wage discrepancy as she hadn't received the Q1 bonus, to which Ms Lomax responded by saying there was no discrepancy as the Q1 bonus was not yet signed off (C467).

86. The respondent paid employees 90% of salary during furlough rather than 80%. In May 2020, in error, the employees were paid 100%. The respondent did not seek to recover the overpayment.

87. The claimant's evidence was that the whole situation had affected her significantly and she clearly found the first half of 2020 to be extremely difficult. Her partner obtained some work in the Orkney Islands to be undertaken during July 2020 and the claimant travelled with him. On 15 July 2020 emails and text messages were exchanged between Ms Lomax and the claimant. On 16 July 2020 Ms Lomax telephoned the claimant. As the claimant was in a van alongside her partner, the call was heard on loudspeaker by both of them. The claimant's account was that Ms Lomax told her that the claimant was up for redundancy risk and the pools were admin, warehousing, and support. Ms Lomax then went on to tell the claimant how

difficult it was for Ms Lomax. The claimant did not say much in response but accepted the news and thanked Ms Lomax for letting her know.

88. Ms Lomax's evidence was that she had never previously made anyone redundant and was personally very upset that the respondent had needed to consider redundancy a possibility. She said she explained to the claimant that the company was making up to five employees redundant, and that the positions at risk were across administration, warehousing, and support. She also explained that a consultation process would be undertaken.

89. Following the conversation, Ms Lomax sent the claimant a letter by email on 16 July (C477). That letter confirmed that the company was considering redundancies of up to five employees due to the impact of Covid-19 and the subsequent reduced turnover, reduced workload, and unknown trading conditions. The positions were across administration, warehousing, and support. The claimant's post was one of those at risk of redundancy. The consultation process and its purpose were set out. It was stated that no decisions had yet been taken, and all suggestions would be considered.

90. The Tribunal was provided with no documentation that recorded any discussions, or decisions, undertaken within the respondent about who should be made redundant and/or how anyone should be selected. Ms Lomax's evidence was that five people were placed at risk of redundancy and three were ultimately made redundant. Selection was undertaken from a pool of two warehouse operatives, with one made redundant. For the other roles at risk, each role was a pool of one. The claimant, the only accounts administrator and the only person working in finance (other than Ms Lomax herself when she helped out), was one of the roles identified as potentially being redundant. Ms Lomax's evidence was that the goal of the proposed redundancies was to protect the business as best as she could. She emphasised that the company dealt with non-essential retail and education, so it was particularly impacted by the pandemic. The proposed redundancies arose at a time when the furlough scheme was changing so that there was additional cost for a company (albeit in practice limited) and there was the potential of the furlough scheme ending in the future. In answer to a question about whether the redundancies were about making a certain amount of people redundant or saving a certain amount of money, Ms Lomax said that they went hand in hand, and she emphasised the nature of the respondent company in that it is a cost company who passes costs onto the parent company to generate income, it is not a sales company.

91. Ms Lomax's evidence was that, after the claimant had been placed on furlough, Ms Lomax had carried out all her roles and responsibilities in addition to her own and that she has continued to do so since. Ms Lomax's evidence was that the claimant was considered as a pool of one. Ms Lomax considered it "*absurd*" for the claimant to suggest that all office staff should have been pooled for selection. Ms Lomax's evidence was that each of the office based jobs were very different and required specific skills and/or knowledge, which the claimant (in Ms Lomax's view) did not have.

92. Ms Lomax specifically denied that the basis for selection was that those placed on furlough were made redundant. She acknowledged that there had been a correlation between those placed on furlough and those for whom it was identified

that they were in roles for which there was a diminished requirement for the work to be carried out. All of the roles placed at risk were on furlough at the time that redundancy consultation commenced, except for one warehouse operative who was not on furlough at the time.

93. On 20 July 2020 the claimant sought a reference from Ms Lomax, but Ms Lomax declined to provide one because the claimant had not handed her notice in and the respondent was not at the end of the redundancy consultation process.

94. On 21 July 2020 Ms Lomax sent the claimant a letter inviting her to a redundancy consultation meeting on 23 July 2020 (R361). The letter outlined the purpose of the meeting and listed what could be discussed, including ways of avoiding redundancies and to consider possible suitable alternative employment.

95. A redundancy consultation meeting over the telephone took place between Ms Lomax and the claimant on 23 July 2020. The Tribunal was provided with two sets of notes: the respondent's note (C483); and Mr Hamer's (C485). The claimant disputed that what was recorded in Ms Lomax's notes was actually said. According to her note, Ms Lomax: explained the background to the redundancy consultation process; detailed the selection process, which was that it was the claimant's role selected and Ms Lomax was taking care of what needed to be done; said there was to be consideration of possible suitable alternative employment, but explained the lean operation which meant there was no opportunity to provide suitable alternative employment, and it stated that the claimant's feedback was that she was not interested in another role with the company; said there was a discussion about avoiding redundancies; stated that when given the opportunity to make suggestions and raise questions, the claimant did not have any suggestions or comments and said she would not be interested in another role as she felt finance was where she was best suited; and recorded that the claimant wanted to know when the decision would be made. The claimant's note recorded a somewhat briefer meeting noted as questions and answers including Ms Lomax: telling the claimant she could not tell her who else was at risk of redundancy; explaining that the claimant's work now fell to her; and confirming the claimant was not up against anyone. The note recorded the claimant as saying: she didn't feel like it was a consultation; the respondent may as well just crack on with it (being a phrase she used during the Tribunal hearing); and asking Ms Lomax to tell her the decision so she could move on. Neither note recorded the claimant raising bumping or identifying any alternatives to redundancy, including either alternative employment or being pooled with other employees (as she believed she could or would undertake their duties).

96. Ms Lomax's evidence was that the meeting was *"quite strange"* and different to the consultation meetings she had with other employees. It lasted only around five minutes, and everyone else's was much longer. Her perception was that the claimant was not bothered, and her evidence was that the claimant said things such as *"I don't get the point of this call"* and *"I've got nothing to say"*.

97. The claimant's evidence was that Ms Lomax said she could not tell her specifically who it was who had been placed at risk of redundancy. Ms Lomax informed the claimant that she was taking on the claimant's work. The claimant said that she believed that this was not being placed at risk it was clearly a redundancy. Her account was that she said, *"you may as well just crack on with it"*. She said that in the absence of information, it was impossible to discuss any potential suggestions

and it appeared the decision had already been made. The claimant did not feel that the call constituted fair and valid consultation. The claimant's view was that she did not want to lose her job, but after the conversation she had no hope left and considered the process to be a sham.

98. It was Ms Lomax's evidence that she said she would arrange a further consultation meeting, to which the claimant replied that she did not see the point of a further meeting. The claimant disputed that she had said so, although the claimant's own note of the meeting clearly recorded her as saying that Ms Lomax needed to tell her the decisions made so that she could move on, instead of dragging it out. It was the claimant's evidence to the Tribunal that she was not saying that she didn't see the point of a consultation meeting, she said that there was no point to that meeting as she believed that it was clear what the outcome would be.

99. Ms Lomax's evidence was that, in the light of the claimant stating that she did not see the point of a further consultation meeting and did not want to engage in one, no further consultation meeting took place.

100. Ms Lomax exchanged text messages with the claimant on 28 July 2020 (C487). The messages were followed by a brief telephone call on 28 July (C488) in which Ms Lomax said that as she knew that the claimant wanted an answer quickly, so she had done that for the claimant and, unfortunately, they did need to make the claimant redundant with her last day to be 9 September. It was agreed that a reference would now be provided to the claimant.

101. A letter was sent by email on 29 July (C489). The letter said (C490):

> *"Further to our telephone meeting of 23rd July 2020 we are extremely sorry to have to tell you that, following a subsequent period of consultation, the Company has decided to make the post of Accounts Administrator redundant. As Innovation First International UK Ltd, is unable to offer you any suitable alternative employment, we are hereby giving you notice that your employment with the Company will terminate on Thursday 10th September 2020. This is due to your position having to be made redundant, and in no way reflects your performance in your job, which has been entirely satisfactory."*

102. The letter went on to outline in broad terms what payments would be made to the claimant, and confirmed that the claimant had a right of appeal, if she wished to do so, which needed to be exercised within seven days. The claimant did not appeal. Her evidence was that she did not see the point in the light of the size of the respondent and as Ms Lomax had made the decision and (in her view) Mr Weeks had sided with Ms Lomax in the previous correspondence.

103. Following notice being given, the claimant raised her bonus and contended that she was entitled to be paid bonuses due in 2020. Ms Lomax's evidence was that in 2020 no bonuses were paid to any staff because of the impact of the pandemic on the group's business and the consequential decrease in turnover. The claimant was in fact paid a bonus of £800 in the final payment made to her in August 2020 (R394). Ms Lomax in her evidence described this as an *"ex gratia bonus"* which was paid. It was her evidence that it was the Q1 bonus. The claimant contended that she was also due the bonus for Q2, and she should have been paid a sum to reflect the entire

year's bonuses calculated pro rata for the portion of the year for which she had worked. The emails exchanged between the claimant and Ms Lomax were provided to the Tribunal. In an email of 5 August 2020 Ms Lomax explained to the claimant that:

> "*The bonus scheme is not applied differently to you than anyone else. It is payable at the discretion of the company and as it stands, there is nobody in the entire company who has received any bonus and will not be this year. Bonus is certainly not owed for the whole of 2020…I am trying to be helpful and reasonable as it is a difficult situation as it is"*

104. Shortly before her employment terminated, the claimant also raised the issue of payments to the Chartered Institute of Management Accountants (CIMA). The claimant had undertaken a CIMA qualification. She had then been due to take the next stage, but issues had arisen with the work she undertook and the requirement for experience of VAT returns. The respondent had continued to pay for the extension of the CIMA course. The CIMA payments ceased on termination and no additional payments were made.

105. Of the five employees placed at risk of redundancy, three were made redundant. Of the two who worked in the warehouse, one was selected for redundancy and the other remained employed. One other person at risk was not made redundant following consultation. Ms Lomax's evidence was that the respondent did not replace any of the employees who were made redundant in 2020. Ms Lomax was challenged about the Facebook entries of one of the employees made redundant, as they showed on 15 July 2020 him advertising decorating work he had undertaken. Ms Lomax confirmed that he had been informed that he was at risk of redundancy on that day, that some employees also had other work while employed by the respondent, and that he was made redundant. The claimant also relied upon a Linked In page which recorded another employee made redundant as still being with the respondent. Ms Lomax confirmed that she was made redundant at the same time as the claimant and suggested that the individual had simply not updated her Linked In profile. The Tribunal accepted that both other employees were made redundant. The claimant identified a finance employee recruited in the US in early 2020. The respondent had also recruited a replacement for one of the employees retained, after she chose to resign later in 2020 having not been made redundant.

106. Ms Lomax's evidence was that she has undertaken the duties which the claimant had previously undertaken, since the claimant left the respondent's employment. Those duties reduced with the pandemic and have reduced subsequently (including because the group has disposed of one of its three lines of business). The Tribunal accepted her evidence that there had been no intention to replace the claimant, as corroborated by the fact that the respondent has not done so. The Tribunal also accepted the evidence that the other people made redundant were not replaced. For the US recruitment, the Tribunal did not find that any decision to recruit to the US office had any material impact on the genuineness of redundancies in the UK or the fairness of the process followed.

107. In her witness statement, the claimant referred to a document which she had found prepared by the CAB when she had considered her rights after receiving Mr

Weeks' email in March 2020. That email (erroneously) recorded that there is a time limit of six months less one day to claim for discrimination (C598).

108. Ms Lomax denied that she had treated the claimant detrimentally or dismissed her because she had been pregnant, because she was a woman, or because she thought she might raise a formal complaint or make a discrimination claim.

109. The claimant accepted in cross-examination that she did not do a protected act. She asserted that she thought that the respondent thought that she would make a formal complaint to the company or might make a claim to the Tribunal. The claimant did not make any such complaint, nor did she raise any issue formally with the respondent, save only for the email regarding bonus addressed above. There was no evidence that either Mr Weeks or Ms Lomax thought that the claimant would raise a discrimination complaint under the respondent's procedures, or that they thought she would bring a Tribunal claim. When giving evidence about the claim, it was clear that Ms Lomax was surprised and upset by the fact that the claimant had alleged discrimination in her claim. The claimant did not raise a formal complaint under the respondent's grievance procedure about any of the matters (albeit she did email about bonus entitlement). Had she done so, her argument that Mr Weeks and Ms Lomax believed she would raise a discrimination complaint might have had greater weight, but in the absence of the claimant raising any matter formally, the Tribunal did not find that either of them believed that she would do a protected act.

110. The claimant and her partner moved house to Bolton. That was further away from the respondent's premises. They did so prior to the claimant being made redundant. In summary, the claimant explained this as being a decision made in the context of the pandemic, with concerns about her employment and with the knowledge that she could travel to work if she needed to do so from the new location. The respondent asserted that the claimant never intended to return to work with the respondent after she re-located. The Tribunal did not find that the move evidenced that the claimant was not intending to return to work, as she was perfectly able to commute if she needed to do so.

111. In cross-examination, the claimant and her representative placed considerable emphasis upon some figures which suggested that the respondent's sales of one line of their business had in fact increased in early 2020. Mr Weeks' evidence was that this reflected a sale of a particular line at a reduced price, which did not reflect increased profitability. The Tribunal found Mr Weeks to be a clear, genuine and credible witness, and accepted his evidence. In any event, and as explained below, it was not for the Tribunal to make determinations about whether the business decisions which led to the redundancies were correct. The Tribunal accepted that the general downturn in business and the uncertainty which existed at the time, were the real and genuine reasons for the redundancies and, in particular, the decision to make the claimant's role redundant. During the hearing the Tribunal found that the claimant did not understand the respondent's need to make significant business decisions. An example was the fact that she did not understand the importance and value given by Mr Weeks to the outstanding invoices and the need to ensure that the group of companies was able to present financial competence and health. She did not appear to understand the importance of the Pandemic and the potential impact which it might have on the respondent's business, as the respondent considered it at the time. The Tribunal found that Mr Weeks and his

position in the business, meant that he had limited interest in the details of decisions made at a local level.

112. The Tribunal heard evidence from Mr Hamer, the claimant's partner. As already recorded, the Tribunal accepted his evidence about a telephone call which he had with the claimant in December 2019. The evidence which he gave was that of a supportive partner and it was (largely) based upon what he was told by the claimant. He had no particular knowledge or understanding of the respondent or what happened in the workplace.

The Law

Unfair dismissal

113. For the claim for unfair dismissal the starting point is section 98 of the Employment Rights Act 1996.

> *"***In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) The reason (or if more than one, the principal reason) for the dismissal."**
>
> **"A reason falls within this subsection if it…is that the employee was redundant."**
>
> **"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.**"

114. Section 139 of the Employment Rights Act 1996 defines redundancy:

> **"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to – … the fact that the requirements of that business – for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."**

115. It is generally not open to an employee to claim that her dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The Tribunal is not to sit in judgment on the business decision to make redundancies. In his legal argument, the respondent's representative relied upon **Moon v Homeworthy Furniture** [1976] IRLR 298 when stating that the Tribunal should not question the reasonableness of the respondent's initial business decision.

116. In determining whether a redundancy situation exists, a Tribunal must decide:

a. Was the employee dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

117. The question is whether there has been a diminution or cessation in the requirement for employees to carry out work of a particular kind. This is not a test which requires the respondent to cease doing that work, it is focussed on whether there is a reduced requirement for employees to carry out the particular kind of work.

118. Many cases have set out the key components of a fair redundancy procedure. In his legal argument, the respondent's representative relied upon **Polkey v Dayton** [1987] IRLR 503. The claimant's representative relied upon **Williams v Compair Maxam Ltd** [1982] IRLR 83, which is an important authority. The key stages are: warning and consultation; fair basis for selection; consideration of alternative employment; and the opportunity to appeal. The claimant's representative highlighted the importance of establishing a criteria for selection which, so far as possible, does not depend solely on the opinion of the person making the selection but can be objectively checked. He also emphasised from that case that an employer is not able to cherry pick the employees which it wants to keep on.

119. On pools for selection, in **Capita Hartshead Ltd v Byard** [2012] IRLR 814 (an authority raised by the respondent's representative), Silber J at para 31 gave this summary of the position:

> *"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:*
>
> *(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited);*
>
> *(b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);*
>
> *(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where*

the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan EAT/663/94);

(d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

120. In his legal argument, the respondent's representative drew from the **Capita Hartshead** Judgment that it is not the function of the Employment Tribunal to decide whether it thought that it would have been fairer to act in some other way; the question is whether the claimant's dismissal lay within the range of conduct which a reasonable employer could have adopted. On pools, he also relied upon **Halpin v Sandpiper Books** UKEAT/0171/11 as supporting that there may be a pool of one for selection and **Wrexham Golf Co Ltd v Ingham** UKEAT/0190/12 which addressed the required question as being, given the nature of the claimant's role, was it reasonable for the respondent not to consider developing a wider pool of employees?

121. On pools, the claimant's representative relied upon **Mogane v Bradford Teaching Hospitals NHS Trust** [2022] UKEAT 139 as a case in which it was held that whilst a pool of one can be fair in appropriate circumstances, it should not be considered without prior consultation, where there is more than one employee. That Judgment emphasised that consultation must take place at a stage when an employee can still, potentially, influence the outcome (something which had not occurred in that case, with the timing of the consultation having been after the decision to dismiss had in effect been made because of the pool of one used in that case).

122. For fair consultation it must occur when proposals are still at a formative stage, adequate information must be given, and adequate time must be allowed in which to respond. It is a question of fact and degree for the Employment Tribunal to consider whether consultation was so inadequate as to render the dismissal unfair. A lack of consultation, in any particular respect, will not automatically lead to that result. The overall picture must be viewed by the Tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

123. In his submissions, the claimant's representative referred to a first instance Employment Tribunal decision in the case of **Mhindurwa v Lovingangels Care Limited** 3311636/2020. Watford Employment Tribunal found in that case that in July 2020 a reasonable employer would have given consideration to whether that claimant should have been furloughed to avoid being dismissed on grounds of redundancy and the failure to do so, rendered that dismissal unfair. That is not binding on us, but it is indicative of what another Tribunal thought in a different set of circumstances. Since submissions that decision has been upheld by the Employment Appeal Tribunal [2023] EAT 65.

124. Section 98(4)(a) of the Employment Rights Act 1996 makes clear that the size and administrative resources of the employer's undertaking are factors which should be taken into account when considering whether the dismissal is fair or unfair in all the circumstances of the case.

Uplift/reduction for failure to follow the ACAS code

125. Section 207A (2) and (3) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> **"If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that –**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the Employment 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 25%"**

126. The questions which the Tribunal should ask when considering an ACAS uplift are:

a. Is the claim one which raises a matter to which the ACAS code applies?

b. Has there been a failure to comply with the ACAS Code in relation to that matter?

c. Was the failure to comply with the ACAS code unreasonable?

d. Is it just and equitable to award an uplift or reduction because of the failure to comply with the ACAS code and, if so, by what percentage, up to 25%?

127. Amongst other things, the ACAS Code of Practice on Disciplinary and Grievance Procedures says the following

> "*The code does not apply to redundancy dismissals*"

128. However, the applicability of the code is a matter of substance rather than form. The claimant's representative contended in this case that the dismissal was not a genuine redundancy and therefore the ACAS code of practice applied, relying upon **Rentplus UK Ltd v Coulson** [2022] EAT 81 (a case in which the EAT found that an employer cannot sidestep the application of the code by dressing up a dismissal that results from concerns that an employee is guilty of misconduct, or is rendering poor performance, by pretending that it is for some other reason such as redundancy). He also referenced **Kuehne and Nagel Ltd v Cosgrove**

UKEAT/0165/13 regarding whether a failure to comply was unreasonable (which is required for an uplift to be awarded).

Contributory fault

129. Section 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced where the conduct of the employee before dismissal was such that it would be just and equitable to do so. It is important to note that a key part of the test is determining if it is just and equitable to do so.

130. Section 123(6) of the Employment Rights Act 1996 provides that if the Tribunal finds that the claimant has, by any action, to any extent caused or contributed to his dismissal, it shall reduce the amount of the compensatory award by such amount as it considers just and equitable having regard to that finding. This test differs from the test which applies to the basic award. The deduction for contributory fault can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss.

Direct discrimination

131. The claim relies on section 13 of the Equality Act 2010 which provides that:

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

132. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include sex and pregnancy and maternity.

133. Under Section 23(1) of the Equality Act 2010, when a comparison is made (for sex discrimination), there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

134. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

135. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that she has been

treated less favourably than her comparator (or unfavourably for pregnancy and maternity) and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

136. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

137. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (or unfavourable treatment for the pregnancy and maternity discrimination) and then, second, whether the treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

138. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his or her motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of? As the claimant emphasised with reference to **IPC Media Ltd v Millar** [2013] IRLR 707 the Tribunal must consider the conscious and subconscious mental processes which led to the course of action and consider whether a protected characteristic played a significant part in the treatment.

139. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves (as the claimant emphasised with reference to **Nagarajan v London Regional Transport** [1999] IRLR 572).

140. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment.

Pregnancy and maternity discrimination

141. The claimant claimed that she had been discriminated against because of pregnancy and because of the belief that she would become pregnant again and take maternity leave. The law as it applies to circumstances comparable to the claimant's, is complex (and arguably far more complicated than it should be or needs to be). The relevant subsections of section 18 of the Equality Act 2010 provide that:

> "**(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.**
>
> **(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 an 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 …(b) [in cases where she does not have the right to maternity leave] at the end of the period of 2 weeks beginning with the end of the of the pregnancy.**
>
> **(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman so far as – (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or (b) it is for a reason mentioned in subsection (3) or (4)."**

142. Subsection 18(2) makes unfavourable treatment because of the pregnancy (or a pregnancy-related illness) unlawful. That subsection, however, only applies during the protected period. The protected period is the period during the pregnancy and ending two weeks after the pregnancy ends. Subsection 18(5) extends that protection to also include decisions made during the protected period.

143. Subsection 18(4) provides that unfavourable treatment is unlawful if it is because the person has exercised or sought to exercise the right to maternity leave. The period of protection is not limited. However, in a case such as the present one, that protection does not assist a claimant. The provision does not extend to protect someone where unfavourable treatment is because of the possibility of future maternity leave.

144. Unfavourable treatment due to pregnancy outside the protected period is not protected by section 18 at all (unless 18(5) applies).

145. The respondent's representative emphasised section 18(7). He cited **Commissioner of City of London Police v Geldart** UKEAT/0032/19. Section 18(7)

excludes section 13 from applying and therefore would stop an argument that unfavourable or less favourable treatment was because of sex where section 18 applies. In practice, however, because of the way that section 18(7) is drafted, it means that the exclusion from claiming direct sex discrimination only applies where the treatment is covered by the provisions of section 18. As unfavourable treatment due to pregnancy is not covered by section 18 where it occurs outside the protected period (where section 18(5) also does not apply), that does not preclude section 13 from applying to enable it to be considered as a claim for direct sex discrimination.

146. Unfavourable treatment due to pregnancy can be considered under section 13 as potentially being direct sex discrimination. The claimant placed considerable emphasis upon **Webb v EMO Air Cargo (UK)** [1994] IRLR 482. That was a decision in which the European Court found that the dismissal of a female worker on account of pregnancy constituted direct discrimination on the grounds of sex (under EU law). Following that decision, section 18 was drafted to give that required protection in some circumstances, but the possibility that unfavourable treatment due to pregnancy can be found to be sex discrimination (in summary because of the fact that pregnancy is unique to women) clearly exists following **Webb**. That also follows from another case relied upon by the claimant's representative, **Iske v P&O European Ferries (Dover) Ltd** [1997] IRLR 401 in which the Employment Appeal Tribunal said that no comparison for a sex discrimination claim was necessary between a pregnant woman and a man, because pregnancy is a female-only condition. Following the claimant's argument, any unfavourable treatment because of pregnancy which was found, would be direct sex discrimination unless it was covered by the provisions of section 18.

147. In his legal argument document, the respondent's representative stated that the respondent did not consider that the claimant's case was one of the rare cases where the **Webb** principle applies.

148. In practice the Tribunal took the approach of considering the claimant's claims on the facts based upon the assumption that the claimant was protected against unfavourable treatment on grounds of pregnancy under either section 18 or section 13 irrespective of when the treatment occurred. The findings are explained below. The Tribunal also considered the facts based upon the presumption that the claimant was also protected against unfavourable treatment on the grounds that it was believed that she may become pregnant again and take maternity leave in the future. As a result of the findings on the facts as they were considered, the Tribunal did not need to resolve the legal argument about whether technically all of the claimant's complaints which did not fall within section 18 could instead succeed as findings of direct discrimination on grounds of sex. In practice, for all of the claims which fell outside the protected period, the Tribunal could not see why they could not also be valid claims for direct sex discrimination following **Webb** and **Iske** and could not see why the **Webb** principle did not apply to what was alleged, but nonetheless as the claims were determined on the facts it was not strictly necessary for the Tribunal to determine (for each claim) the dispute upon the application of the law.

149. As explained, there is no requirement for a comparison in cases of pregnancy discrimination as the requirement is only for unfavourable treatment.

150. In deciding what was the cause of the detriment/dismissal, the Tribunal must ask itself what was the effective and predominant cause, or the real and efficient

cause, of the act complained of? It is the motivation of the decision maker which is the issue to be determined, in considering the cause. The burden of proof operates for pregnancy discrimination, as explained above (but without the requirement for a comparison).

151. When considering the question of whether conduct is on the grounds of or related to a relevant protected characteristic, the Tribunal must have regard to the context. Words spoken must be seen in context (an example of this in the context of pregnancy and maternity can be found in the case of **Warby v Wunda Group plc** UKEAT/0434/11).

152. In relation to pay, in his legal argument document, the respondent's representative referred to **North Western Health Board v McKenna** [2005] IRLR 895. In that case the European Court of Justice decided that the level of pay made to a woman absent due to pregnancy-related illness (prior to maternity leave) could be compared to a male employee taking sick leave and, provided the woman had been treated in the same way, it would not be unlawful discrimination.

Harassment

153. Section 26 of the Equality Act 2010 says:

> **"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**
>
> **"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."**

154. Of considerable importance for this case, the list of relevant protected characteristics to which this provision applies in section 26(5) includes sex but does not include pregnancy and maternity. That means that conduct which satisfies the relevant test for harassment and is related to pregnancy, is not unlawful harassment (unless it also relates to one of the other protected characteristics). The claimant in her submissions contended that **Webb v EMO Cargo** and **City of London Police v Geldart** meant that harassment on grounds of pregnancy is automatically harassment on the grounds of sex. Those authorities do not establish that proposition. Harassment on grounds of pregnancy might in any given case also be harassment related to sex, but it does not follow that it always will be.

155. The EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** (a case referred to in the respondent's representative's legal argument document), stated that harassment is defined in a way that focuses on three elements: unwanted conduct; having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the Employment Appeal Tribunal held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are

made on each of them. The respondent's representative referred to the same case as holding that the claimant must have felt or perceived her dignity to have been violated; the fact that a claimant is slightly upset or mildly offended is not enough.

156. Purpose or effect are separate considerations. A respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect.

157. If the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element. The respondent's representative in the legal argument document highlighted **Pemberton v Inwood** [2018] EWCA Civ 564 on this issue.

Victimisation

158. Section 27 of the Equality Act 2010 says:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act – (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act"**

159. The first question is whether the claimant did perform a protected act, or whether the respondent believed that the claimant had done or may do so. The next question for the Tribunal is whether the respondent subjected the claimant to a detriment. The third question is whether that detriment was because the claimant had performed the protected act or the respondent believed that the claimant had done or may do so. For the third question, what must be considered is whether the protected act (or the relevant belief) had a material or significant influence on the detrimental treatment.

160. That exercise has to be approached in accordance with the burden of proof. If the claimant proves facts from which the Tribunal could reasonably conclude that her protected act (or the respondent's belief about it) had a material influence on subsequent detrimental treatment, her case would succeed unless the respondent could establish a non-discriminatory reason for that treatment. In his case law summary the respondent's representative referred to **Royal Mail Group Ltd v Efobi** [2021] UKSC 33 (which had been referred to in the case management order of 5 August 2021 in this claim).

161. If the Tribunal concludes that the protected act played no part in the treatment of the claimant, the victimisation complaint fails even if that treatment was otherwise unreasonable, harsh or inappropriate. Unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment.

162. The word detriment in section 27 is to be interpreted widely. The key test is for the Tribunal to ask itself: is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance would not pass this test (**Shamoon v Chief Constable RUC** [2003] IRLR 285), but the test is framed by reference to a reasonable worker, so it would be enough if a reasonable worker would or might take such a view (in the legal argument document, the respondent's representative also referred to **MOD v Jeremiah** [1979] IRLR 436).

Time limits/jurisdiction

163. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it. The Tribunal heard submissions on behalf of both parties about issues arising from and relating to time limits and the question of a just and equitable extension of time. A number of cases were relied upon. As the Tribunal has determined the issues based upon the substantive issues and has not needed to address the questions of time and jurisdiction, it is not necessary to record in this Judgment the law as it applied and the law cited, which would have been considered if the Tribunal had needed to determine the time and jurisdiction issues.

Unauthorised deduction from wages

164. Part of the claim was one for unauthorised deductions from wages under section 23 of the Employment Rights Act 1996, relying upon the right under section 13 of the Employment Rights Act 1996 which provides that:

> "*An employer shall not make a deduction from the wages of a worker employed by him unless:*
>
> *(a) The action is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or*
>
> (b) *The worker has previously signified in writing his agreement or consent to the making of the deduction*."

165. Under section 27 "wages" includes any bonus or commission.

166. In order for an amount to be properly payable, the claimant must have a legal entitlement to receive the sum. It must be a claim for a specific sum of money or sum capable of quantification. The sum claimed must be properly payable. Both parties referred to the key case of **New Century Cleaning v Church** [2000] IRLR 27. In his legal argument document, the respondent's representative also referred to **Davies v Droylsden Academy** UKEAT/44/416 (a helpful case on the issues which needed to be considered) and the relevant extract referring to that case from Harvey on Industrial Relations and Employment Law, and **Hellewell v AXA Services** UKEAT/0084/11. The claimant's representative included in his submissions reference to **Kingston Upon Hull City Council v Scofield** UKEAT/0616/11,

Bleazard v Manchester Central Hospitals and Community Care NHS Trust UKEAT/278/93, **Park Cakes Limited v Shumba** [2013] EWCA Civ 934 and **Farrell Matthews & Weir v Hansen** [2005] ICR 509, the latter case providing that once an employer confirms to the employee the amount of a discretionary bonus, that bonus becomes part of the employee's wages which she is legally entitled to receive.

167. In practice the Tribunal therefore needed to determine: whether the claimant was contractually due, or otherwise legally entitled to, an amount or amounts which were not paid to her; whether the claimant was paid the same (or more than) she was entitled to in each payment of wages; and, if not, whether any deduction made from the payment of any wages, was otherwise authorised in one of the ways described and/or was reimbursement of an overpayment of wages.

Statement of changes to terms and conditions of employment

168. An issue to be determined was also whether under section 38 of the Employment Act 2002 there should be an uplift in any award made. That provision states that the Tribunal must make an award of the minimum amount provided (and can if it considers it just and equitable in the circumstances award the maximum amount), where it finds in favour of the worker and when the proceedings were begun the employer was in breach of section 4 of the Employment Rights Act 1996. The minimum award is two weeks' pay and the maximum is four weeks' pay. The claims to which the uplift applies include a claim under section 23 of the Employment Rights Act 1996.

169. Section 1 of the Employment Rights Act 1996 provides that a statement of terms and conditions of employment must include the scale or rate of remuneration or the method of calculating remuneration. Section 4(1) provides that if, after the date to which the statement relates, there is any change in any of the matters particulars of which are required by section 1, the employer shall give to the worker a written statement containing particulars of the change. That statement is to be given at the earliest opportunity and, in any event, one month after the change in question. Whilst reference was made during the hearing to there being no requirement on an employer to give written notification of a change in pay, that is not what is provided for in sections 1 and 4 of the Employment Rights Act 1996 which does place a legal obligation on an employer to give a worker a written statement of any changes to the rate of remuneration.

170. In his response to the claimant's written submissions, the respondent's representative stated that this was never a part of the claimant's claim and it was not set out in the list of issues. The Tribunal did not understand this submission in the light of paragraph 37 of the list of issues (see the list appended). The question asked in the list of issues was specific to the obligation to provide a written statement of any changes. Ms Lomax was clearly asked questions about the absence of any written confirmation of the claimant's salary during cross-examination.

Findings, applying the law to the facts

171. The first three issues in the list of issues all related to time limits. The Tribunal did not consider those issues at the start of the deliberations, leaving them instead to be considered after decisions were reached on the substantive issues (if it was required).

Unfair dismissal

172. Issues 4.1.1-4.1.3 and 4.2 required the Tribunal to determine what was the reason for the claimant's dismissal. The respondent contended that the reason was redundancy. The claimant contended that was not the real reason, that she was not genuinely redundant at all, and the real reason was the claimant's pregnancy. The person who made the decision to dismiss was Ms Lomax. The Tribunal accepted her evidence that the reason why she dismissed the claimant was because the decision had been made to make her role redundant at the time. The decision was made long after the claimant's pregnancy had ended and Ms Lomax's discussion with the claimant about it. The Tribunal heard no evidence which genuinely supported the claimant's allegation, save for the assertion which she made. The Tribunal did not find that the fact that the claimant had been pregnant (or might be pregnant again) was the reason why Ms Lomax dismissed the claimant. The context of the decision to dismiss was the Covid pandemic and the Tribunal fully understood and accepted the needs of a business to save costs at that time. That decision led to the redundancies which the respondent made, of the claimant and others. The Tribunal found that the reason for dismissal was redundancy.

173. It was not for the Tribunal to determine or assess the business rationale for the respondent's decision to make redundancies. As already recorded in considering the law, an employee is not able to assert that the employer acted unreasonably in choosing to make employees redundant. The Tribunal should not question the reasonableness of the decision to make redundancies. The rationale and whether it was supported by a reduction in sales, was something which the respondent's representative addressed at some length in his submissions. The Tribunal did accept that the respondent believed that it needed to save costs at the time and that it approached that aim by reducing the workforce.

174. The Tribunal found that the reason for dismissal was redundancy and not pregnancy. The Tribunal did not find that the redundancy was a pretext for the dismissal, as alleged, nor did it find that it was a sham.

175. The fact that the work which the claimant undertook (or at least some of it) remained to be done after the claimant was made redundant, did not mean that redundancy was not the genuine reason for dismissal. The claimant fulfilled a specialised and unique role for the respondent. That role was identified by Ms Lomax as being one which could cease in the context of needing to save costs. She personally, as the Managing Director, decided that she could take on what continued of the duties Ms Lomax had undertaken. She has done so. Nobody has been recruited to undertake the duties which the claimant previously undertook. The Tribunal found that the dismissal of the claimant was attributable to the fact that the requirements of the respondent for employees to carry out the work which the claimant undertook in the UK were expected to cease or diminish. The Tribunal found that was why the claimant was dismissed.

176. Issues 4.1.4 and 4.3 addressed the fairness of the dismissal. Issues 4.3.1-4.3.3 reflect matters which usually need to be addressed in all cases as set out in *Compair Maxam* and 4.3.4 -4.3.7 raise other issues more particular to this case.

177. The Tribunal found that the dismissal of the claimant by reason of redundancy in this case was fair. The claimant was engaged in a unique role which was identified as a role which was placed at risk of redundancy. The respondent identified a pool of one. Given the nature of the claimant's role and the other roles in the company, it was reasonable for the respondent to have restricted the pool to only her role and not to have developed a wider pool. There was consultation with the claimant. The respondent did not, perhaps, undertake consultation with the claimant as fully and thoroughly as it could have done, but nonetheless consultation was undertaken. At the time that consultation was undertaken it was at a stage where the employee could still, potentially, influence the outcome. The limited consultation, in part, reflected the fact that the respondent was a small company, with someone who had no previous experience of redundancy consultation undertaking it in the circumstances of the Covid pandemic. The consultation undertaken also, in part, reflected the claimant's response to it, which was to urge the respondent to get on with it. Her response and lack of engagement, contributed to the limited dialogue about it. In practice, the claimant's role had been identified as being at risk. There was in reality no suitable alternative employment available. In practice the other roles retained by the respondent differed significantly from the claimant's and she could not have fulfilled those other roles (or, in the case of one role, it was reasonable for the respondent not to dismiss that role-holder instead). The consultation with the claimant was certainly brief and could have been longer and more detailed, but the Tribunal finds it to have been reasonable in all the circumstances of the case.

178. The claimant argued that it was unfair to dismiss those who had been furloughed. Both notes of the meeting at which the claimant was told that she was at risk of redundancy, record that she was told that it was because she was on furlough. The Tribunal accepted that there was likely to be some consistency between those placed on furlough and those made redundant, because the respondent had identified that the respondent could continue to operate without those roles temporarily (which meant they were more likely to be roles which might not be required permanently if reductions in employees were to be made). Considering the claimant's own unique position within the respondent and the decision ultimately made that her role was redundant, the Tribunal did not find that the dismissal was rendered unfair because either the claimant had been placed on furlough first or because the fact that she had been on furlough was a factor in the identification of her role as potentially being redundant. The Tribunal also did not find it to be unfair for the claimant to have been made redundant at the time that she was, even though the possibility of remaining on furlough existed, in circumstances where there was to be some cost to retaining employees on furlough and the business had identified a need to reduce costs in the longer term.

179. The Tribunal heard evidence about the other roles made redundant. The claimant was cross-examined about which of the roles retained she could have fulfilled. The claimant did not have the skills and experience to have fulfilled the majority of the roles retained, albeit she said in evidence that she could also have fulfilled the sales administration role. Considering those roles, the claimant's role, and the fact that Ms Lomax had previously undertaken the claimant's duties and she believed she could undertake them again (and has done so), the Tribunal did not find that the respondent's approach to either selection or to alternative employment was unfair. The Tribunal did not find that someone else should have been made redundant and the claimant moved to their role, considering the role which the

claimant had fulfilled and the other roles retained. The Tribunal found that Ms Lomax applied her mind to the question of pools and, given the nature of the claimant's role, it was reasonable for the respondent not to consider developing a wider pool of employees beyond that of just the claimant.

180. Issues 5-9 addressed remedy in circumstances where the claimant had succeeded in her unfair dismissal claim. As she has not done so, the Tribunal did not need to address the issues which it had been confirmed would be considered alongside the liability issues. Having found the dismissal to have been fair, the Tribunal could not consider issues 9.6 and 9.7 regarding *Polkey* (that is whether the claimant could have been fairly dismissed in any event).

181. The claimant's representative was quite correct in his submission that if the Tribunal had not found redundancy to have been the true reason for the claimant's dismissal, it might have been that the respondent could have been found to have unreasonably failed to comply with the ACAS code on disciplinary and grievance procedures if the true reason had been performance or conduct. However, as the Tribunal has found that the reason why the respondent dismissed the claimant was redundancy, the code did not apply to the dismissal at all. The respondent did not unreasonably fail to follow it.

182. The respondent's argument (issue 9.9) that the claimant contributed to her own dismissal, had no merit whatsoever.

Pregnancy discrimination

183. Issue 11 asked what was the protected period? This has already been addressed in the section on the facts at paragraphs 48 and 49. The protected period expired fourteen days after the claimant's pregnancy ended, and therefore based upon what the Tribunal has found, that period expired on 24 December 2020 (being fourteen days after 10 December when the hospital confirmed that the pregnancy was confirmed as officially having ended).

184. Issue 10A was the allegation made by the claimant about what Ms Lomax said in the telephone call in November 2019. This occurred in the protected period. The first question which the Tribunal needed to ask was whether it found that Ms Lomax had treated the claimant unfavourably in what she said during that call? The Tribunal has not found that Ms Lomax did treat the claimant unfavourably. What Ms Lomax said was a response to being told something in a call which was a surprise to her. The Tribunal found that what Ms Lomax said was undoubtedly a human response to being told something for which was completely unprepared. She might have handled the call better with hindsight, as she herself effectively acknowledged in the email which she sent immediately following the call when she said the call had ben awkward. The Tribunal also noted the claimant's own response to the email from Ms Lomax, in which she included two kisses and said that it was ok. In those circumstances the Tribunal did not find that what was said was unfavourable treatment.

185. The Tribunal also needed to decide whether the treatment was because of the pregnancy or because of illness suffered as a result of the pregnancy. The Tribunal did not find that was why Ms Lomax reacted as she did. She reacted as she did because she was surprised and unprepared. The Tribunal did not find that Ms

Lomax's response was because of any dislike or negative response to the claimant's pregnancy itself or negative reaction to the claimant being pregnant. What was said occurred in the context of a conversation about pregnancy and pregnancy related illness. The pregnancy and/or the illness, was not the reason why Ms Lomax said what we have found was said.

186. Allegation 10B was that the claimant's work was not covered during her pregnancy absence and that was not communicated to the claimant. What was said in the allegation was that, upon return to work, the claimant was told the majority of her work had been done so she didn't need to worry about catching up. This occurred during the protected period. The Tribunal found that the majority of the claimant's work was covered while she was off. There was some work left to do. That was regarding the reconciliations which were left to undertake. The Tribunal accepted the respondent's evidence that the actual work required took a limited time to resolve. The Tribunal also accepted that, in her role, the claimant was not over-burdened and that during her absence the majority of her work was covered. As a result, the Tribunal did not find that it was unfavourable treatment of the claimant for there to be a limited amount of work outstanding which she was expected to undertake during the extended period after her return to work. In any event, when she did not do so, there was no action taken as a result (save for the limited exchange of emails). The Tribunal did not find that the expectation to undertake or prioritise some work which was outstanding was not unfavourable treatment. The Tribunal also did not find that the expectation that she would carry out the work at some time as part of her duties following her return to work, was because of her pregnancy (or pregnancy related illness).

187. Allegation 10C was that the claimant's pregnancy illness was treated as an excessive sickness absence and was held against her. As part of the same allegation it was also alleged that company sick pay was available as an uncapped benefit, but discretion was exercised to deny that for the absence arising from the claimant's pregnancy. What was alleged would have occurred during the protected period (or at least commenced during the protected period). The Tribunal did not find that the claimant's illness was treated as excessive or was held against her, as alleged. With regard to the company's approach to sick pay, the Tribunal accepted the respondent's evidence that the decision had previously been taken to limit company sick pay to five days and to pay statutory sick pay thereafter. There may have been one other exceptional circumstance when a longer period of company sick pay was made, but the claimant was treated in a way consistent with other employees. That was evidenced by the fact that the claimant had already been paid statutory sick pay for a period of absence in the same year, before the period of ill health absence arising from pregnancy. Not receiving full pay was, looked at in comparison to being paid full pay when absence, unfavourable treatment of the claimant. However the Tribunal did not find it was because of the claimant's pregnancy or because the illness was pregnancy-related. The respondent would have treated all others absent in the same way (save for the one particular exception evidenced).

188. Allegation 10D related to the fact that the claimant was told to see how she got on when she raised issues with her chair on her return from absence. This occurred in the protected period. For this allegation, the Tribunal preferred Ms Lomax's evidence to that of the claimant in the account that she gave about when

and how the chair was raised following the meeting. The Tribunal noted that the claimant did not raise issues with the chair formally nor did she raise them again after the first conversation when the chair was raised. Ms Lomax's evidence was consistent with what was written at the time and her evidence was felt by the Tribunal to be more reliable on this issue. On that basis, the Tribunal did not find that the respondent's response to the claimant mentioning issues with her chair was unfavourable, where the claimant did not raise any issues again. The Tribunal also did not find that any response was because of the claimant's pregnancy (or illness related to her pregnancy).

189. What was alleged as issue 10E was that there was an insensitive email communication sent to the claimant regarding a warehouse colleague's new baby in December 2019. It was not entirely clear whether this email had been sent in the protected period, but the Tribunal accepted that on balance it was likely that it had been. The facts and findings in relation to what was sent have been addressed at paragraphs 55-56 above. The Tribunal found that an email was sent. The Tribunal accepted that, based upon the evidence of both the claimant and Mr Hamer, it was unfavourable treatment for the claimant to receive the email. However, the Tribunal did not find that the reason why the email was sent to the claimant was because of the pregnancy (that is her pregnancy). It was about a colleague having a baby and that was the context in which it was sent. It was sent to everyone. It was not sent to the claimant because of the pregnancy or pregnancy-related illness. The Tribunal also did not find that there was any adverse or malicious intent from Ms Lomax in sending the email to the claimant as well as the other employees.

190. Only allegations A to E occurred in the protected period. The other matters alleged to have been discrimination on the grounds of pregnancy occurred after the protected period had ended. What was alleged could still have potentially been unlawful discrimination if it was sex discrimination (as explained above when this complex area was addressed in the section on the law). For all the allegations made at 10F to 10U the Tribunal did not find that what occurred was because the claimant had been pregnant or had a pregnancy-related illness. The Tribunal also did not find that any of the respondent's actions were because the claimant might become pregnant again or might have a further period of absence. The Tribunal accepted the evidence of Ms Lomax and Mr Weeks that neither the claimant's pregnancy nor whether the claimant might become pregnant again, formed any part of their decision making. Within this Judgment the Tribunal has addressed each of the allegations and explained its findings, but as a result of the finding recorded in this paragraph, in practice the claimant's claims could not have succeeded, whether considered under sections 13 or 18 of the Equality Act 2010.

191. For allegation 10F, there were some discussions about work that was outstanding and needed to be undertaken. The discussions and emails were, in the opinion of the Tribunal, normal workload discussions between a manager (or managers) and members of staff. Those discussions were not unfavourable treatment of the claimant. When she was told to prioritise a certain task that was not unfavourable, it was simply a day to day work direction. The fact that the outstanding task was one which had arisen during the claimant's previous absence for pregnancy related ill health, did not mean that the discussions about doing so were because of her pregnancy (or pregnancy related illness), The Tribunal did not find that there was

any hostile behaviour towards the claimant as alleged. It was not because of the claimant's pregnancy or pregnancy-related illness.

192. Allegation 10G was similar to allegation 10F, except that it related to the emails sent by Mr Weeks which referenced overtime and bonus pay. The issue of working overtime arose because the claimant raised it. She said in an email that she did not have the time to do the work, but if she worked overtime she would do so. In practice, what the claimant was being asked to do was to prioritise a particular piece of work. Mr Weeks' view was that if he (in his position) asked someone to prioritise a particular piece of work, he expected them to do so. It was also Mr Weeks' view (based, as he acknowledged, on the norm in the US), that salaried employees would be expected to undertake some unpaid overtime. In any event, particularly by the time of his last email, Mr Weeks simply expected the task he had said should be prioritised, to have been undertaken in any event. Mr Weeks' emails and response to the claimant were not because of her pregnancy or pregnancy-related illness.

193. Allegation 10G included complaint about the reference to bonus in Mr Weeks' email. With regard to his reference to bonus payment (R285), Mr Weeks was explaining to the claimant that she had received a quarterly bonus even though she had been absent during the relevant quarter. The Tribunal found that Mr Weeks referred to bonus to explain his view, based as it was on US practice (and a misunderstanding of the claimant's UK bonus entitlement), that the respondent had been generous in paying the bonus. He was not stating that bonus was being jeopardised, nor was he making a threat. He was pointing out an occasion when he thought the company had been generous. It was not unfavourable treatment for him to have done so and it was not because of pregnancy or pregnancy related illness.

194. Allegation 10H covered the same issues as 10G, but with a slightly different emphasis. The Tribunal accepted Mr Weeks' evidence about why he sent the email to the claimant. He was following up his earlier email and responding to the claimant's own email. He was trying to ensure that a task, which he considered to be a priority for the reasons he explained, was undertaken. It was his evidence that he did not know why it had only been sent to the claimant and not Ms Lomax as well, but he believed that may have been because he had simply pressed reply rather than reply to all. The Tribunal accepted that evidence. He was responding to what the claimant had said in her previous email and, as a result, the Tribunal did not find that what was said was unfavourable treatment. It was not because of pregnancy or pregnancy related illness. It was simply an exchange which was intended to get the claimant to undertake a piece of work which Mr Weeks wanted her to do.

195. Allegation 10I arose from the claimant being placed on furlough. The Tribunal heard evidence that the claimant was the fifth of five employees placed on furlough, that is that she was the last of those to be placed on furlough because of workloads and the time-lag between the impact of Covid and its impact upon the work which she undertook. The decision to place the claimant on furlough was a decision made by Ms Lomax in the context of the pandemic and it was taken when considering the expected reduction in work for the respondent as a whole and the impact that would be likely to have upon the requirements of the accounts function. This was a decision made which was about the claimant's unique role. It was a business decision which Ms Lomax was entitled to make. The Tribunal did not find that it was because of the claimant's pregnancy or pregnancy-related illness.

196. 10J related to the steps taken when the claimant was placed on furlough. The claimant contended that her dismissal was pre-determined at the time when she was placed on furlough. Her particular reason for asserting that was the case was because the respondent requested the return of her computer equipment and closed her account. Ms Lomax evidence was that she had not pre-determined that the claimant was to be made redundant, but these were decisions which she made as the claimant's direct line manager when she was not the direct line manager of others. It was her evidence that the request for return of equipment and the turning off of the connection was in order to ensure that the respondent complied with the Government guidance/requirement (at that time) that those furloughed should not carry out any work. The Tribunal accepted the respondent's evidence that any difference in treatment at the time was because of the differences in decisions made by line managers. The Tribunal did not find that the claimant's subsequent redundancy was pre-determined at the time. The Tribunal did not find that asking for the return of the equipment which was provided for work only, or turning off the claimant's access for work, was unfavourable treatment of the claimant at all where she was not required to undertake any work. It was noted that the respondent did not insist on the equipment being collected and, when the claimant subsequently asked the respondent to collect the equipment from her house, the respondent did so. In any event, the actions taken were not because of the claimant's pregnancy or pregnancy-related illness.

197. Allegation 10K was that on 29 April 2020 Ms Lomax failed to get back to the claimant regarding access to her payslip. The claimant had raised that she had not received her payslip. Ms Lomax identified that the password protected payslip had been sent to an incorrect email address. As she informed the relevant person and provided the correct address, Ms Lomax thought the issue had been rectified, so she did not respond to the claimant. Even if having a password protected payslip sent to an unknown email address might have been unfavourable, the reason why that occurred was due to error. The absence of any response from Ms Lomax was not because of the claimant's pregnancy or pregnancy-related illness.

198. Allegation 10L was that Ms Lomax lied about the claimant's bonus and did not address the grievance properly which the claimant had raised. This was alleged to have occurred on 6 May 2020. The claimant's entitlement to bonus, applying contractual principles, is addressed in detail below when determining the claim for unauthorised deduction from wages. The Tribunal accepted that when Ms Lomax responded to the claimant in May 2020, she was responding with what she believed to be the correct position. The Tribunal did not find that Ms Lomax lied. It was common ground that most bonuses were discretionary and all bonuses had required what had been described as sign off (the claimant referred to them requiring sign off in her own messages). Ms Lomax did not view what had been raised as the claimant having raised a grievance. She believed it was an enquiry, to which she had responded. The response and the treatment of the issue being raised was not unfavourable treatment but, even if it had been, it was not because of the claimant's pregnancy or pregnancy-related illness.

199. Allegation 10M arose from the claimant being selected to be at risk of redundancy. The Tribunal has considered at length what occurred as part of the decision on the unfair dismissal claim, including why the claimant's role was selected and why she was considered to be in a pool of one. The Tribunal found that the

claimant was selected because of her role and the business reasons evidenced by Ms Lomax about why she did so. Being identified as being at risk of redundancy was unfavourable treatment. The reason was not the claimant's pregnancy or pregnancy-related illness. In the allegation recorded in the list of issues, reference was made to those being selected being from admin, warehouse and support. That was correct, albeit not all of the people in all of those areas were placed at risk or made redundant. That was a broad description of the areas from which redundancies were proposed to be made. That did not add anything to the claimant's discrimination claim.

200. Allegation 10N was that there was no fair, valid redundancy consultation. The allegation also recounts what the claimant said occurred in the telephone call in which the claimant's potential redundancy was discussed when the claimant suggested that there was no point to the call (as evidenced in the Tribunal hearing, the claimant told Ms Lomax to crack on with the redundancy). The Tribunal has already recorded its findings about the consultation process undertaken. The Tribunal did not find that the length of, or content of, the consultation was because of the claimant's pregnancy or pregnancy-related illness. The length of consultation was because it was the claimant's unique role which had been placed at risk, the absence of any genuine alternatives, and the claimant's own response to the consultation process.

201. Allegation 10O was that the claimant was told that her selection for redundancy was because she was furloughed. That is confirmed as having been what was said in both notes of 23 July meeting (483C and 485C). The Tribunal accepted that the decisions as to who to place on furlough and who to make redundant, was a two stage process which occurred at different times. The claimant being placed at risk of redundancy because she was already on furlough was not because of the claimant's pregnancy or pregnancy-related illness.

202. Allegation 10P was that the claimant did not receive any bonus in her July pay. In fact, the claimant did receive some bonus pay in the July pay as she was paid the Q1 bonus. The respondent's case, which the Tribunal accepted, was that the payment of a Q1 bonus was exceptional for the claimant as others were not paid that bonus. The reason why the claimant was not paid a Q2 bonus was because of the position which the respondent took that the bonus was discretionary and, in particular, Ms Lomax's belief that was the case. In circumstances where others were not paid the discretionary Q2 bonus that non-payment was not because of the claimant's pregnancy or pregnancy-related illness.

203. Allegation 10Q was that the claimant's redundancy was contended to have been an act of discrimination. The Tribunal accepted that the claimant was made redundant for the reasons evidenced by Ms Lomax. It was not because of the claimant's pregnancy or pregnancy-related illness. In the allegation in the list of issues it was stated that the claimant was not informed about an appeals process. The claimant was informed about her right of appeal in the letter which was sent to her (R372), albeit that she chose not to do so.

204. Allegation 10R was that the respondent did not include bonuses in the claimant's final pay detail and Ms Lomax did not acknowledge this with any update to the previous grievances. The claimant and Ms Lomax did exchange emails about the bonus and the claimant's entitlement to it. Ms Lomax provided information to the

claimant about why she said she was not due any further bonus (over and above that paid). The Tribunal did not find those decisions or the information provided about them to be because of the claimant's pregnancy or pregnancy-related illness. Allegation 10S was that the claimant alleged that Ms Lomax lied about the claimant's bonus. That allegation has effectively already been addressed. The Tribunal did not find that she did so or that what she said was because of the claimant's pregnancy or pregnancy-related illness. Allegation 10T was that Ms Lomax, in August 2020, was dismissive of the claimant's pay grievances. The Tribunal did not find that she was dismissive of them, she simply did not agree with them (and the reason she did so was not because of pregnancy or pregnancy-related illness). Allegation 10U was that bonus was withheld in the final pay. That allegation has already been addressed and determined in the findings already recorded.

Sex discrimination

205. As a result of the way in which the case has been argued, where the sex discrimination allegations were in fact allegations of unfavourable treatment because of pregnancy, but brought under section 13 of the Equality Act 2010, the findings in those claims have already been addressed and determined in the previous section of this Judgment. However, the Tribunal did also go on to consider what was alleged as allegations of sex discrimination (without reliance on pregnancy).

206. The first issue A reflects that alleged to have been discrimination because of pregnancy issue 10A which has already been addressed (what Ms Lomax said in the telephone call in November 2019). The Tribunal did not find that the claimant was treated less favourably than a comparator of a different sex would have been, as Ms Lomax would have responded to anyone else telephoning her to inform her that they had lost a child in the same way. To succeed in her claim for sex discrimination, that comparison was required. In any event, for the reasons already given in finding that what was said was said was not unfavourable, the Tribunal would not have found that what was said was less favourable. The Tribunal also found that what was said was also not because of the claimant's sex.

207. The first issue B reflected discrimination because of pregnancy issue 10B which has already been addressed (some work which had arisen during absence. not being covered). The Tribunal did not find that the claimant was treated less favourably than a male employee would have been in comparable circumstances (there being no evidence or something more to show she was). The Tribunal also found that the fact that the claimant was asked to undertake the limited work required was not because of her sex.

208. The first issue C reflected discrimination because of pregnancy issue 10C which has already been addressed (sickness absence and the company sick pay). For the same reasons as already explained, the Tribunal did not find that the claimant's sickness absence was treated as excessive. The payment of statutory sick pay reflected that the claimant had already exceeded the five days which the respondent had decided to usually pay as company sick pay. The Tribunal found that the claimant was not treated less favourably than a male comparator would have been, as they would also have been paid statutory sick pay in circumstances where they had already exceeded five days sickness absence in the relevant year. The fact that the claimant was paid statutory sick pay was not because of sex.

209. The first issue D reflected pregnancy discrimination issue 10D which has been addressed (what the claimant was told about her chair, when she raised issues with her chair on her return from absence). For the same reasons as explained for that allegation (but when addressing the different form of discrimination), the Tribunal did not find that the claimant was treated less favourably than a male comparator would have been if they had raised issues with their chair following a meeting, and that the response to the claimant raising the issues was not because of the claimant's sex.

210. The second issue A reflected pregnancy discrimination issue 10E which has been addressed (the insensitive email about the claimant's colleague's baby). The Tribunal did not find that the claimant was treated less favourably than a male colleague was, as the same email was sent to all employees. The fact that the email was sent to the claimant was not because of her sex.

211. The Tribunal did consider all of the claimant's other allegations of sex discrimination. Each of them was separately considered and determined. The factual findings and the reasons for the findings have already been addressed when considering the allegations of unfavourable treatment due to pregnancy, above. The test for sex discrimination is different because what must be considered is whether the claimant was less favourably treated than a hypothetical male comparator in the same circumstances would have been. For the reasons already explained, for all of the claimant's other allegation of less favourable treatment because of sex, for the same reasons as have already been given in explain the findings in the pregnancy discrimination claims (but applying the slightly different test and considering sex as the protected characteristic), the Tribunal did not find that the claimant was treated less favourably than a man in materially the same circumstances would have been or that the reason for the treatment was because of sex.

Harassment

212. The Equality Act 2010 does not include pregnancy and maternity in the list of protected characteristics for which harassment is unlawful. That is a decision made when the law was introduced. It is not a decision for this Tribunal. For that reason, none of the claimant's claims that she suffered unlawful harassment related to pregnancy could succeed, unless what was alleged was also related to sex.

213. What was alleged to have been unlawful harassment A, reflected the allegation upon which the Tribunal's findings as they applied to direct discrimination on grounds of pregnancy and sex have already been recorded (allegation 10A in the former, and the first 10 for the latter - what Ms Lomax said in the telephone call in November 2019). The Tribunal accepted that what Ms Lomax said to the claimant in the call was, broadly, unwanted, in that the claimant was unhappy with the way in which the call had been conducted and that Ms Lomax had not responded as she would have liked (even though, at the time, after Ms Lomax had apologised in an email that the call had been awkward, she responded to say it was ok with two kisses). However, the Tribunal did not find that what was said related to the claimant's sex. It related to the claimant's pregnancy, but that is not a protected characteristic for the harassment provisions. The awkward response was not sex-specific or related to the claimant being female; an awkward response to a male employee informing Ms Lomax about an unsuccessful pregnancy could equally have

occurred and that showed that the harassment alleged was related to pregnancy but not sex.

214. For allegation A, the Tribunal also found that the purpose of what Ms Lomax said in the call was not those required for unlawful harassment. The Tribunal considered carefully whether what was said had the required effect on the claimant. In the light of what the claimant said in her email sent to Ms Lomax shortly after, the Tribunal did not find that what was said did in fact have the required effect. There was no doubt that the call had upset the claimant. The claimant in her own evidence emphasised that she approached the call with trepidation; it was undoubtedly a difficult call for her to have made. However the Tribunal focussed upon the words in the statute which set out what is required: violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Creating or adding to an upsetting environment was not enough to meet this test. In the light of the claimant's email, the Tribunal did not find that how Ms Lomax responded in the call did have the required effect. In any event, and for similar reasons, the Tribunal would not have found it reasonable for what it found Ms Lomax to have said during that call, to have had that effect (even if in practice what was said had done so).

215. Harassment allegation B was the email sent to the claimant (and others) which informed her about the birth of her colleague's baby. The facts are addressed at paragraphs 55-56 and the related direct discrimination allegations were 10E and the second allegation A. The Tribunal accepted that receipt of the email was unwanted for the claimant. The Tribunal did not find that Ms Lomax's purpose in sending the email was to undermine the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for her. That was not why the email was sent, it was to inform employees about the birth of the colleague's baby. As with the previous allegation, the Tribunal noted that the requisite effect does not include that of creating upset for the claimant or an upsetting environment for her. The Tribunal entirely understood why it was the claimant might be upset. However the Tribunal did not find that the effect on the claimant was to create what was required for the statutory definition of harassment to be satisfied, that is for it to have undermined her dignity or to have created an intimidating, hostile, degrading, humiliating or offensive environment for her. Even had the Tribunal found that such an effect had in fact occurred, it would not have found it reasonable that an email about the birth of a colleague's child did have that effect. Whilst the test must take into account the claimant's own circumstances, it must also take account of all the other circumstances, and the Tribunal did not find that it would be reasonable for an email congratulating a colleague about the birth of a child to have the effect of creating an offensive environment for the claimant (or any of the other elements of the statutory test).

216. Harassment allegation C reflected direct pregnancy discrimination allegation 10F and direct sex discrimination second allegation C. The Tribunal did not find that Ms Lomax slammed the phone down as alleged, but it did find that there were discussions with the claimant about undertaking the work and, to an extent, a direction to her to do so (albeit that Ms Lomax agreed to undertake half the work outstanding and, ultimately after the claimant was placed on furlough, she did undertake it all). The Tribunal accepted that the conduct was unwanted in the sense that the claimant did not want to undertake the relevant task which had first arisen

when she had been absent and, therefore, taking a broad view, any discussion or direction about the need to do so was unwanted. However the Tribunal did not find that this was related to sex. Even though the discussions were about work which had first arisen when the claimant was off and had been outstanding on her return, the Tribunal did not find that the context in which the work had arisen meant that it was related to sex. What was said to the claimant also did not have the requisite purpose or effect (what was required having already been explained in detail in this judgment), nor would it have been reasonable to have had the requisite effect even had it done so.

217. Harassment allegations D and E arose from the email of 31 March 2020 about the completion of outstanding work. That has been addressed when considering direct pregnancy discrimination allegations 10G and 10H. The fact that Mr Weeks emailed the claimant about the work was unwanted. The Tribunal found that the email related to the question of prioritisation of work, when to do it, and whether the claimant should undertake it whilst working paid overtime. The Tribunal found that what was said in the email was not related to sex. The Tribunal did not find that the purpose of the email was that required by the Act. The Tribunal also did not find that what was said in the email had the requisite effect, and (even if it had had that effect) it would not have been reasonable for it to have done so. The Tribunal has already emphasised the particular words used to define unlawful harassment in the Equality Act 2010 and what was said in this email could not, in the view of the Tribunal, be reasonably found to have undermined the claimant's dignity or to have created an intimidating, hostile, degrading, humiliating or offensive environment for her.

218. Harassment allegation F was that Ms Lomax failed to get back to the claimant regarding access to her payslip. The issues as they applied to a direct discrimination claim have been explored when considering allegation 10K. What was alleged did not have the requisite purpose or effect, nor could it reasonably have had the requisite effect even had it done so. The Tribunal also did not find that the absence of an email was related to sex.

219. Allegations G and H related to the non-payment of bonus and the allegation that Ms Lomax lied about it. As already recorded, the Tribunal did not find that Ms Lomax lied about the bonus even though she was mistaken about the correct legal position. What she said was not related to sex. It was Ms Lomax stating what she believed to be the position. In any event, what Ms Lomax said in the emails and messages of 6 May and 5 August 2022 did not have the requisite purpose or effect, nor would it have been reasonable for it/them to have had that effect (even if it/they had done so).

Victimisation

220. In her claim for victimisation, the claimant was not relying upon an actual protected act, she was relying upon her contention that she asserted that the respondent had believed that she may do a protected act (as she was able to do under section 27 of the Equality Act 2010). Issue 27 asked whether the respondent believed that the claimant had done or might do a protected act, in that she might bring a claim, or make allegations/complaints about her treatment in November 2019 and subsequently. The Tribunal has explained at paragraph 109 its findings about this. The Tribunal did not find that either Mr Weeks or Ms Lomax believed that the claimant would do a protected act. There was no genuine assertion that they

believed she had already done so. As a result of that finding, the claimant's claims for victimisation could not succeed, as the claimant cannot succeed in a victimisation claim where there has not been a protected act and the respondent did not believe that she had done a protected act or would do so.

221. Of the matters alleged to have been detriments as set out at issue 28, the Tribunal would have found them all to have amounted to detriments for the claimant, with the exception of the request to the claimant to return her work equipment and the disconnection of the claimant from the work system when she was not being asked to undertake any work. The Tribunal did not find that: the claimant's redundancy was pre-determined when she was placed on furlough; the claimant was lied to about bonus; or the respondent was dismissive of the claimant's bonus-related complaints. Had it been required to do so, the Tribunal would not have found that any of the detriments relied upon were because of the issues that the claimant had raised or because of any issues which had arisen relating to conversations about her pregnancy and/or her return to work.

Other matters

222. Having reached its decision on the substantive issues, the Tribunal did not need to consider the issues of time limits, or which of the claims would have been found to have been in time if the claimant had succeeded in those claims. The Tribunal also did not need to determine the remedy issues which it had identified would have needed to be determined alongside liability issues, if she had succeeded in any of her discrimination or harassment claims.

Unauthorised deduction from wages

223. The claim for unauthorised deduction from wages arose from the non-payment of some of the claimant's bonus for the year in which her employment terminated. The claimant was paid the bonus for Q1, albeit slightly later than might have been the case. The claim was therefore limited to the bonus payable for Q2 (throughout which the claimant was still employed), Q3 and Q4. The list of issues set out as issues 32-35 the issues as the claimant believed the claim should be considered and at issues 38-44 the issues as the respondent believed they should be approached. As set out the legal section, for there to have been an unlawful deduction from the claimant's wages, the claimant must have had a legal entitlement to receive the specific sum on a specific date (when it was not paid) and the sum must have been properly payable. It was not for the Tribunal to determine whether it would have chosen to exercise its discretion in a particular way or whether the respondent should have done so, where payment of a sum was at the discretion of the respondent.

224. The Tribunal started by considering the claimant's terms and conditions of employment (R192). There was no mention of bonus within that document. However the company handbook did provide within its introduction (R200) that the rules in the handbook formed part of the individual's contract of employment. That meant that what was said in the handbook was contractual. The relevant part of the contract was the short statement about bonus schemes (R202) set out at paragraph 28 of this Judgment above. The Tribunal considered very carefully what was said in that paragraph. The respondent relied upon the reference to discretion and the final sentence as meaning that the claimant had no entitlement to bonus, because the

handbook (as incorporated into the contract) made clear that all bonus payments were discretionary and there was no contractual entitlement to a bonus. Had the Tribunal read the provision as stating what the respondent contended, the unauthorised deduction from wages claim would have failed. However, the Tribunal noted the use of the words "*additional*" (to describe the discretionary bonuses) and "*other*" (to describe the bonuses for which there was no contractual entitlement). The inclusion of those words meant that what was said could not have been intended to have applied to all and any bonuses (as if that was the case the handbook could have said so). The Tribunal accordingly found that the handbook clause described two separate types of bonus. The first was a bonus entitlement to which the discretion did not apply; and the second was a discretionary bonus which was discretionary and not contractual (being the other and additional bonus).

225. The claimant had not had a bonus described in her initial terms and conditions. However the Tribunal found that in October 2014 the claimant and the respondent agreed to the payment to the claimant of a bonus which was, in the words recorded by Ms Lomax in her email (229) "*different for you*". That email explained that the claimant was to be paid a different and higher bonus which differed for her, as a means of increasing her remuneration. The email also said that the respondent "*will*" scale the claimant's bonus payments in terms of getting her where she wished to be salary wise; it was an absolute statement and not an equivocal one. The Tribunal found what was recorded in Ms Lomax's email to be clear: it gave the claimant am absolute commitment to the respondent paying her a contractual bonus. The email did not, as it could have done, refer to what was said as being discretionary or subject to the company's discretion. It did not refer to any particular factors or variables which would, or could, result in the bonus not being paid. Reading the email which evidenced the agreement reached between Ms Lomax and the claimant in 2014 alongside the handbook, the Tribunal found that the commitment to pay bonus was to be read as being consistent with the first type of bonus payable, rather than the second other or additional bonus.

226. As set out in the email, it is clear that what Ms Lomax had agreed was that the claimant was to be treated differently to other employees with regard to the payment of bonus, because that was exactly what the email said. The aim of the agreed bonus was to make up the shortfall in the salary which could be paid to the claimant. That finding meant that the Tribunal did not accept the respondent's evidence about the treatment of the claimant's bonus being the same as that for bonuses of others.

227. The claimant could only have a contractual entitlement to a bonus if it was clear what sum it was to which she was entitled. That was not set out in the October 2014 email. As recorded in the facts at paragraph 33 above, Ms Lomax agreed that the amount of the bonus payable was an agreed value: £800 for each of Q1, Q2, and Q3; and £1,200 for Q4. That was reflected by the invariable payment of those amounts from October 2015 onwards (C380). Whilst the precise date of payment had varied slightly, the amount which should be paid for each quarter was clearly evidenced by the pattern of invariable payment.

228. The Tribunal accepted the respondent's evidence that no one else received a bonus for 2020 as a result of the Covid pandemic. Had the terms agreed with the claimant incorporated some element of discretion or some requirement for a certain level of company performance for the bonus to have been payable, the Tribunal would have accepted the pandemic as providing a reason for non-payment of an

agreed bonus to the claimant. The Tribunal understood the position taken by Ms Lomax and Mr Weeks as to why they believed the claimant was not entitled to the bonus instalments. However, as the Tribunal found that the respondent had contractually committed to paying the claimant the bonus without any discretion, nothing in the terms agreed with the claimant provided for non-payment in certain circumstances (and it is not necessary to imply any terms which would do so).

229. In his submissions, the respondent's representative emphasised the messages exchanged between the claimant and her colleague about the bonus. He submitted that the words used showed that the claimant knew that the bonus was discretionary. What was said is quoted at paragraph 81 above. The Tribunal did not find that what was said by the claimant in that exchange with a colleague did genuinely evidence that she believed the bonus was discretionary (particularly in circumstances when she had been told by the respondent that her arrangement was exceptional and should not be discussed with others). The claimant expressed some doubt about being paid on time and appeared to acknowledge, by the use of the word "*if*", that there was a possibility of not receiving part of the bonus during the pandemic. The Tribunal notes what was said, but did not find that the claimant expressing that doubt evidenced a belief on the claimant's behalf that the payment of the bonus was discretionary. The Tribunal also did not find that (as submitted): the bonus was clearly a profit or performance related bonus (as that was not what was said in the 2014 email); or that it made no sense to say that rather than pay a salary increase, the respondent would pay a contractual bonus (as that is exactly what the respondent said and explained it by not wishing to, or being able to, increase salary).

230. Accordingly, the Tribunal found that the claimant was entitled to receive a bonus of £800 for each of Q1, Q2, Q3 and £1,200 for Q4 where she was employed on the relevant payment date, based upon what was agreed in 2014 (and the subsequent agreement as to amount).

231. The claimant was paid the bonus due for Q1 of £800. There was no unlawful deduction where that bonus was paid later than expected (or, at least, even had an unlawful deduction been made when it was not paid in or around May 2020, that unlawful deduction was rectified when the payment was subsequently made). The Q2 bonus for £800 was usually paid in June or July, with one payment made in August at the latest. Accordingly the Tribunal found that there was an unlawful deduction made when that sum was not paid to the claimant in the pay roll in one of those months (in practice in July 2020, but it made no material difference whether the deduction was made from July or August's pay).

232. The claimant was not employed by the respondent on the dates when the bonus for Q3 and Q4 2020 would have been due to be paid. The respondent did not make an unauthorised deduction from the claimant's wages when she was not paid a bonus on the dates when she was no longer employed. There was no need to, or basis for, implying a term into the contract that bonus would continue to be paid after the claimant had ceased to be employed. The claimant's representative argued that the total annual bonus should be pro rata'ed and the claimant should be paid the portion of the total bonus due for the proportion of the year for which the claimant had been employed. The Tribunal did not accept that argument and it found no basis for implying into the contract such a term (which would appear to run contrary to the purpose of paying the bonus in different amounts, with a higher amount for being employed following the fourth quarter). The Tribunal accordingly did not find that

there had been any unauthorised deduction from the claimant's wages as a result of her having not been paid the bonuses for Q3 or Q4 or her having not been paid bonus equivalent to the pro rata amount of the total bonus payable based upon the portion of the year for which she had been employed.

The ACAS code and the uplift to the award made for unauthorised deductions from wages

233. Issue 36 related to the ACAS code of practice on disciplinary and grievance procedures, whether the respondent had unreasonably failed to comply with it, and whether the award made as a result of the unauthorised deduction from wages claim should be uplifted as a result. As was recorded when addressing the unfair dismissal issues, the Tribunal found that the claimant was dismissed due to redundancy and, as a result, the ACAS code did not apply. The respondent did not unreasonably fail to comply with it and the award should not be uplifted as a result.

The failure to provide a statement of changes to the written statement of terms and conditions and the uplift to the award made for unauthorised deductions from wages

234. Issue 37 in the list of issues recorded "*Was the respondent required to provide a written statement of any changes to the claimant's terms and conditions of employment (Employment Act 2002 section 28)*". The list of issues then went on to record the question of whether an additional award should be made and, if so, how much.

235. The Tribunal heard evidence from Ms Lomax that the respondent never provided any statement in writing to its employees when pay was increased (nor did it provide an updated section one statement). The claimant's salary had increased during the period of her employment and no written confirmation had been provided to her. Section one of the Employment Rights Act 1996 requires the statement to include the scale or rate or remuneration or the method of calculating remuneration. Section four requires that if there any changes to any of the particulars required by section one, the employer shall give to the worker a written statement containing the particulars of the change. As a result, each time the claimant's salary was increased, the respondent was in breach of section four when it did not put the change in writing (something which Ms Lomax said the respondent did not do). The Tribunal found that at the time that proceedings were begun, the respondent was in breach of the obligation to have provided the claimant a statement in writing of the changes to her terms and conditions of employment.

236. In his response to the claimant's written submissions, the respondent's representative asserted that this was never pleaded as part of the claimant's claim nor was it set out in the list of issues. He argued that the Tribunal had no jurisdiction to consider the complaint. However, section 38 of the Employment Act 2002 does not require the parties to plead the entitlement to an uplift for failure to give a statement of changes to employment particulars as what is provided for in that provision is a duty which is incumbent upon the Tribunal in any event whether or not such a claim is pleaded. What is accepted is that a party must have been put on notice of the potential increase to any award and have been given the opportunity to respond. The respondent's statement that it was not included in the list of issues is simply incorrect. As is quoted at paragraph 234, issue 37 expressly and clearly stated that an uplift was claimed based upon the respondent not having provided a

statement of changes to the claimant. Accordingly, the Tribunal found that the requirements of section 38 of the Employment Act 2002 were met and the respondent having been found to have made an unauthorised deduction from wages, the Tribunal was obliged to uplift the award made by at least two weeks' pay.

237. In his submissions, the claimant's representative sought an uplift of four weeks pay to the award. The Tribunal considered whether it would uplift the award by that higher amount. In light of the fact that the failure found was to have provided a written statement of changes and that failure was limited to a statement about changes of remuneration, the Tribunal decided that the award should be uplifted by two weeks pay and not by any higher amount.

238. Whilst the Tribunal has been able to determine the amount of the unauthorised deduction from wages made and has determined that the amount should be uplifted by two weeks' pay, the Tribunal is not in a position to determine the final remedy due, as remedy issues were left to be determined at a further hearing and the Tribunal therefore does not know what amount a week's pay should be. In her schedule of loss, the claimant claimed that a week's pay was £475.29, which would mean that the award should be uplifted by £950.58. The respondent is given twenty one days from the date when this order is sent to the parties to write to the Tribunal to confirm whether than amount of the uplift is agreed, or if it is not whether the respondent has been able to agree the amount of a week's pay with the claimant and what it should be. If the issue is in dispute, a separate remedy hearing will need to be arranged to determine the correct amount for a week's pay and the appropriate uplift to the award to be made.

Submissions

239. In his closing submissions, the respondent's representative included a submission that if ever there was a scale of wickedness one thing that would factor into it would be someone taking advantage of an awful and tragic circumstance such as a miscarriage. In his closing submissions the claimant's representative responded. As part of what he said, he said the following:

> "*It was completely unacceptable and unnecessary to accuse the claimant of being, amongst other things, "wickedness", "cruel" and – most shockingly – having a "warped mindset" and accusing her of "trying to take advantage of a tragic circumstance"….that tragic circumstance being referred to by Mr Searle was the devastating loss of the claimant's, and mine, very much loved unborn baby and any suggestion that the claimant, or even I as her representative, would "take advantage" of that situation is out of order and offensive that I cannot even put into words. We are completely disgusted and shocked at those comments which are completely unfounded"*

240. The Tribunal agreed with the claimant's representative that the comments were completely unfounded and were unnecessary and inappropriate, taking into account the nature of the claim.

Summary

241. For the reasons given, the claimant succeeded in her claim (in part) for unauthorised deduction from wages and that award should be uplifted as a result of

the failure to provide a written statement of changes to the terms and conditions of employment. The claimant did not succeed in her other claims for the reasons given, and those claims are dismissed. If the parties cannot agree the amount of a week's pay (and therefore the increase to the award due), a remedy hearing will be required to determine that issue. The Tribunal hopes that the issue will be capable of agreement, but, if not, a half day hearing by CVP will be listed so that it can be determined.

Employment Judge Phil Allen

Date: 4 August 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 August 2023

FOR THE TRIBUNAL OFFICE

Annex
The list of Issues

Time limits

1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before one of 1 June, 31 May or 13 May 2020 would not have been brought in time, unless part of a series.

2. The Claimant says that the series ended with her dismissal and/or the alleged deductions made from the claimant's final payment, which she says was an act of sex discrimination and was also pregnancy related discrimination. If the Tribunal agrees, then every other claim was made in time. If not, then the claims may be out of time.

3. The Tribunal will then decide:

    3.1 Were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

        3.1.1 Why were the complaints not made to the Tribunal in time?

        3.1.2 Is it just and equitable in all the circumstances to extend time?

Unfair dismissal

4. The Claimant was dismissed:

    4.1 What was the reason or principal reason for dismissal?

        4.1.1 Was it a potentially fair reason (ie redundancy)?

        4.1.2 Was there a redundancy situation? The Claimant says that her work remained to be done, and that it is a temporary pretext that the MD does her work until after this case ends.

        4.1.3 If there was a redundancy situation, the Claimant says it was not the reason for her dismissal, which she says it was sex discrimination and S18 pregnancy related discrimination.

        4.1.4 Did the Respondent act reasonably in all the circumstances in treating the redundancy situation as a sufficient reason to dismiss the Claimant?

    4.2 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy. The Claimant says that it was objectively unfair. She also says that it was the culmination of the Respondent's MD's discrimination arising from her pregnancy related discrimination since November 2019

4.3 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

4.3.1 The Respondent adequately warned and consulted the Claimant;

4.3.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

4.3.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

4.3.4 The Claimant says that it was unfair to dismiss those furloughed and keep those not furloughed;

4.3.5 She says also that she could do the jobs of most people in the office, but that the others could not do her job;

4.3.6 She says also that new members of staff were kept while she was dismissed, and that there was no logical reason to do so (so that it was unfair to select her, that there was the ulterior motive of sex discrimination and pregnancy discrimination);

4.3.7 She says that even if there was a redundancy situation, and her position was selected for redundancy, someone else should have been dismissed as redundant ("bumping"), and not her.

Remedy for unfair dismissal

As issues 5-9.8.5 are remedy issues they will only be considered if the claimant succeeds in her claim except for 9.6, 9.7, 9.8 and 9.9 which will also be considered alongside the liability issues

5. Does the Claimant wish to be reinstated or reengaged to other suitable employment?

6. If so, should the Tribunal order reinstatement or reengagement? The Tribunal will consider in particular whether this is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

7. If reengagement what should the terms of the re-engagement order be?

8. What basic award is payable to the Claimant, if any? There is unlikely to be one as a statutory redundancy payment of the equivalent amount was paid.

9. If there is a compensatory award, how much should it be? The Tribunal will decide:

9.1 What figure is to be awarded for loss of statutory rights?

9.2 What expenses have there been seeking employment?

9.3 What financial losses has the dismissal caused the Claimant?

9.4 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.5 If not, for what period of loss should the Claimant be compensated?

9.6 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

9.7 If so, should the Claimant's compensation be reduced? By how much?

9.8 The ACAS Code of Practice on Disciplinary and Grievance Procedures may not apply (this was a redundancy dismissal, and the issues are fairness, and sex (and pregnancy related) discrimination).

9.8.1 If yes, did the Respondent or the Claimant unreasonably fail to comply with it by [specify alleged breach]?

9.8.2 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

9.9 If the Claimant was unfairly dismissed, did the Claimant cause or contribute to dismissal by blameworthy conduct?

9.9.1 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

9.10 Does the statutory cap of 52 weeks' pay apply?

Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)

10. Did the Respondent treat the Claimant unfavourably by doing any of the things set out below?

(where (3.1) is the date; (3.3) is the individual(s) alleged to be responsible; and (3.4) is whether anyone was present and, if so, who – the same sub-numbering applies to later lists)

A
3.1 Nov 2019
3.2 Inappropriate comment / intrusive question about pregnancy
3.3 Jessica Lomax
3.4 No - phone call.
3.5 The Claimant called to explain reason for absence. As soon as the Claimant said she was pregnant, Jessica interrupted with a gasp and said were you trying/did you know (or words to that effect)

B

3.1 Nov 2019
3.2 Work not covered during pregnancy absence, and not communicated to Claimant.
3.3 Jessica Lomax
3.4 No
3.5 Upon return to work, the Claimant was told the majority of her work had been done so she didn't need to worry about catching up.

C
3.1 25 Nov 2019
3.2 The Claimant's pregnancy illness was treated as an excessive sickness absence and held against her - Company sick pay was available as an uncapped benefit, but discretion was exercised to deny this for the Claimant's pregnancy absence.
3.3 Jessica Lomax
3.4 No
3.5 Jessica told the Claimant she would not get the available company sick pay because she had had enough days off that year as Jessica had decided to allow 5 days per year. But that her work had been covered so she didn't need to worry about catching up.

D
3.1 25 Nov 2019
3.2 Failed to provide reasonable support for the Claimant, or to record her request on the back to work meeting form
3.3 Jessica Lomax
3.4 No
3.5 At her back to work meeting Jessica asked if there was anything that could be done to help. The Claimant explained the chair she had was very uncomfortable, and would benefit from some sort of chair support due to continued pain and discomfort. Jessica just said to see how she gets on.

E
3.1 Dec 2019
3.2 Insensitive email communication sent to the Claimant regarding a warehouse colleague's new baby.
3.3 Jessica Lomax
3.4 Yes - email sent to all UK staff
3.5 No conversation was had about the email. The Claimant received it without warning while she was working. The content, together with it being unexpected, caused understandable upset to the Claimant considering her recent pregnancy loss.

F
3.1 Early 2020
3.2 Claimant's comments about outstanding work were not acknowledged, and hostile behaviour toward
Claimant.
3.3 Jessica Lomax
3.4 Yes - Bridie Gaynor, Mandy Littler

3.5 Jessica called the Claimant regarding a work task she had done during the Claimant's pregnancy absence, that required correction. The Claimant pointed out that she had a large backlog of work, as other work wasn't covered, that took priority, and reminded her that she hadn't received pay for the period she was trying hard to catch up on. Jessica just asked if she was going to do it. The Claimant said yes if she was asking her to, but it would take some time until she can get to it. Jessica said "OK, I'll think on" and slammed down the phone.

G
3.1 31 March 2020
3.2 Held the Claimant responsible for work not completed during her pregnancy absence. Expected the Claimant to have worked unpaid overtime to catch up on her return to work. She was reprimanded for not having done so - despite nobody having asked her to - with her bonus pay jeopardised.
3.3 Warren Weeks and Jessica Lomax
3.4 No - email
3.5 After Warren asked the Claimant to catch up on work not covered during her pregnancy absence, the Claimant had explained she was incredibly busy but offered to work overtime. Following a discussion between Warren and Jessica, Warren then replied to reprimand the Claimant for having not already worked overtime, unpaid, to catch up on work after her pregnancy absence. He referred to her bonus as discretionary and suggested she was not entitled to the bonus pay she'd received, due to her behaviour. When the Claimant replied to clarify the situation, he did not reply.

H
3.1 31 March 2020
3.2 The Respondent intimidated and humiliated the Claimant by the CFO emailing to reprimand her, and jeopardise her bonus pay, rather than her line manager. And then by ignoring the Claimant's response.
3.3 Warren Weeks and Jessica Lomax
3.4 No - email
3.5 Following a discussion between Warren and Jessica, Warren emailed directly to reprimand the Claimant for not working overtime after her pregnancy absence. The Claimant replied to clarify the situation and Warren did not reply.

I
3.1 17 April 2020
3.2 The Claimant was unfairly selected for furlough with a busy workload, over other colleagues with vastly reduced/minimal workloads. And furlough was imposed rather than requested.
3.3 Jessica Lomax
3.4 No - email
3.5 Jessica informed the Claimant that the company was furloughing employees and as a result she would be furloughed from 20th April. A letter attached to the email stated a consequence of not agreeing would be job loss. The Claimant acknowledged the furlough.

J
3.1 17 April 2020
3.2 Respondent pre-determined the Claimant's dismissal & treated the Claimant as though employment was terminated - requested return of equipment, closed the Claimant's work account prior to commencement of furlough, and did not offer a means of future communication. Furloughed colleagues had not had their equipment requested or accounts closed.
3.3 Jessica Lomax
3.4 No - email
3.5 Jessica told the Claimant to leave her computer equipment outside her front door that same day and she would bring a box to collect them. The Claimant said she would store the equipment until she was back in the office as it wasn't appropriate to leave everything outside and Jessica acknowledged but then closed the Claimant's work account without any warning or notification. Jessica did not offer a means of future communication until requested by the Claimant.

K
3.1 29 April 2020
3.2 Failure to get back to the Claimant regarding access to her payslip
3.3 Jessica Lomax
3.4 No - Whatsapp
3.5 The Claimant requested access to her payslip. Jessica said it should have been sent via email and she would check. She did not update the Claimant.

L
3.1 6 May 2020
3.2 Lied about terms of Claimant's bonus & failure to address grievance properly
3.3 Jessica Lomax
3.4 No - Whatsapp & email
3.5 The Claimant requested a bonus update as it had not been received in April's pay. Jessica said it was unlikely to be paid and it was discretionary based on company performance. She then stated it is either part of T&Cs or discretionary, before stating again that all bonus is discretionary. The Claimant disputed this and requested supporting information, which wasn't available, then formally requested investigation of the discrepancy. Jessica said there was no discrepancy, it was not yet signed off and she'd be updated. No further update was provided.

M
3.1 16 July 2020
3.2 The Claimant was unfairly selected for redundancy risk. Not all staff within the specified redundancy pools were at risk, or even aware redundancies were being considered, including staff with minimal work. No selection reason was provided.
3.3 Jessica Lomax
3.4 Yes - Martin Hamer
3.5 The Claimant was informed she was at risk of redundancy. She was told the selection pools were Admin, Warehouse and Support. Jessica said there would be a further call and she would receive an email.

N
3.1 23 July 2020
3.2 There was no fair, valid redundancy consultation
3.3 Jessica Lomax
3.4 No - phone call
3.5 Jessica gave a relatively positive business update with VEX Competitions being the only significant loss. Jessica said redundancies were required to avoid making contributions to the furlough scheme, the Claimant was selected as she was on furlough, and 5 were at redundancy risk in total. Jessica said she could not tell her specifically who, but it was across Admin, Warehouse and Support. Jessica confirmed she was taking on the Claimant's work, and that she was not up against anyone for redundancy. The Claimant suggested there was no point to the call as it was being made impossible for her to discuss any potential suggestions and it appeared the Respondent had already made the decision. Jessica agreed with the Claimant, listed and ruled out any potential suggestions she could have made and confirmed the call was just a legal requirement.

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3.3 Jessica Lomax
3.4 No - phone call
3.5 During the Claimant's redundancy consultation call, Jessica said the Claimant was chosen for redundancy as she had been on furlough. They were making redundancies as otherwise the company was going to need to start contributing to the furlough scheme.

P
3.1 28 July 2020
3.2 The Claimant did not receive any bonus in her July pay, and still no update to her grievance. Bonus was still due from April, and now July.
3.3 Jessica Lomax
3.4 No
3.5 The Claimant still did not receive any update to her grievance.

Q
3.1 29 July 2020
3.2 The Claimant was unfairly made redundant. There was still a business need for the Claimant's work to be carried out. She was not informed about an appeals process, and did not receive final pay values.
3.3 Jessica Lomax
3.4 No - phone call & email
3.5 The Claimant was informed she'd been made redundant. She was told she'd receive written confirmation with details of final pay and a reference would follow.

R
3.1 4 Aug 2020

3.2 The Respondent didn't include bonuses in the Claimant's final pay detail, or acknowledge this with any update to the previous grievances.
3.3 Jessica Lomax
3.4 No - email
3.5 The Claimant requested her final pay values. Jessica provided the calculation, and the Claimant queried the missing bonus payments.

S
3.1 5 Aug 2020
3.2 Lied to Claimant about terms of bonus
3.3 Jessica Lomax
3.4 No - email
3.5 When the Claimant queried her missing bonus payments she was informed the Respondent would "include Q1 bonus despite there being no bonus for the entire company" but would not pay any additional bonus as "the bonus scheme is not applied any differently to you than anyone else."

T
3.1 7 August 2020
3.2 Dismissive of Claimant's pay grievances
3.3 Jessica Lomax
3.4 No - email
3.5 The Claimant had disputed the non-payment of bonus, with reference to past communication, and also asked for payment for the outstanding CIMA funding to be included. Jessica replied stating her pay had been calculated correctly.

U
3.1 13 Aug 2020
3.2 Bonus pay withheld in final pay
3.3 Jessica Lomax
3.4 No - email
3.5 Jessica had stated it was not a contractual entitlement.

11. What was the protected period?

12. Did the unfavourable treatment take place in the protected period?

13. For unfavourable treatment which did not take place in a protected period:

    13.1 Did it implement a decision taken in the protected period?
    13.2 Was the unfavourable treatment because of the pregnancy?
    13.3 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?
    13.4 Was the unfavourable treatment because of the respondent's perception/expectation of a subsequent pregnancy?

Sex discrimination (Equality Act section 13)

The parties were unable to agree how these issues should be worded and they were not included in the previous case management order. There is no dispute that the

matters relied upon are as set out at paragraph 20, but the issues to be decided as proposed by the claimant are 14-15 and by the respondent are 16-19.

14. Did the respondent treat the claimant less favourably than it treated or would have treated others in comparable circumstances, by doing any of the things set out at 20 below? If so:

    14.1 Was the less favourable treatment because of the claimant's pregnancy?
    14.2 Was the less favourable treatment because of illness suffered as a result of the pregnancy?
    14.3 Was the less favourable treatment because of the respondent's perception/expectation of a subsequent pregnancy?

15. Is a comparator required?

    15.1 The claimant says no comparator is required, in line with the *Webb* principle, due to reasons of pregnancy.
    15.2 The respondent says this is misconceived.

16. The claimant says that no comparator is required, relying upon the principle in *Webb v EMO Cargo (UK)* and that all sex discrimination complaints are on the grounds of pregnancy.

17. The respondent says that the claimant must bring her complaint under section 18, that her case is not one of the specific, but rare, circumstances where she can bring a claim for direct sex discrimination under section 13 instead of under section 18. Consequently, the respondent says that the Tribunal has no jurisdiction to hear this complaint.

18. If the claimant can rely on the *Webb* principle, did the respondent treat the claimant as alleged in paragraph 20 below?

19. If so, was that treatment because of the claimant's sex?

20. *Issues A-D at the start of the list were added as reproduced from the list of alleged pregnancy discrimination, at the start of the third day. Those issues were added in addition to the previously listed A-Q. As they were inserted, the list has not been re-numbered, so there are two A-Ds.*
    (First) A
    1. Nov 2019
    2 Inappropriate comment / intrusive question about pregnancy
    3 Jessica Lomax
    4 No - phone call.
    5 The Claimant called to explain reason for absence. As soon as the Claimant said she was pregnant, Jessica interrupted with a gasp and said were you trying/did you know (or words to that effect)

    (First) B
    1 Nov 2019
    2 Work not covered during pregnancy absence, and not communicated to Claimant.

3 Jessica Lomax
4 No
5 Upon return to work, the Claimant was told the majority of her work had been done so she didn’t need to worry about catching up.

(First) C
1 25 Nov 2019
2 The Claimant's pregnancy illness was treated as an excessive sickness absence and held against her - Company sick pay was available as an uncapped benefit, but discretion was exercised to deny this for the Claimant's pregnancy absence.
3 Jessica Lomax
4 No
5 Jessica told the Claimant she would not get the available company sick pay because she had had enough days off that year as Jessica had decided to allow 5 days per year. But that her work had been covered so she didn't need to worry about catching up.

(First) D
1 25 Nov 2019
2 Failed to provide reasonable support for the Claimant, or to record her request on the back to work meeting form
3 Jessica Lomax
4 No
5 At her back to work meeting Jessica asked if there was anything that could be done to help. The Claimant explained the chair she had was very uncomfortable, and would benefit from some sort of chair support due to continued pain and discomfort. Jessica just said to see how she gets on.

(Second) A
2.1 Dec 2019
2.2 Insensitive email communication sent to the Claimant regarding a warehouse colleague's new baby.
2.3 Jessica Lomax
2.4 Yes - email sent to all UK staff
2.5 No conversation was had about the email. The Claimant received it without warning while she was working. The content, together with it being unexpected, caused understandable upset to the Claimant considering her recent pregnancy loss.

(Second B)
2.1 Early 2020
2.2 Claimant's comments about outstanding work were not acknowledged, and hostile behaviour toward Claimant.
2.3 Jessica Lomax
2.4 Yes - Bridie Gaynor, Mandy Littler
2.5 Jessica called the Claimant regarding a work task she had done during the Claimant's pregnancy absence, that required correction. The Claimant pointed out that she had a large backlog of work, as other work wasn't covered, that took priority, and reminded her that she hadn't received pay for the period she was trying hard to catch up on. Jessica just asked if she was

going to do it. The Claimant said yes if she was asking her to, but it would take some time until she can get to it. Jessica said "OK, I'll think on" and slammed down the phone.

(Second) C
2.1 31 March 2020
2.2 Held the Claimant responsible for work not completed during her pregnancy absence. Expected the
Claimant to have worked unpaid overtime to catch up on her return to work. She was reprimanded for not having done so - despite nobody having asked her to - with her bonus pay jeopardised.
2.3 Warren Weeks and Jessica Lomax
2.4 No - email.
2.5 After Warren asked the Claimant to catch up on work not covered during her pregnancy absence, the Claimant had explained she was incredibly busy but offered to work overtime. Following a discussion between Warren and Jessica, Warren then replied to reprimand the Claimant for having not already worked overtime, unpaid, to catch up on work after her pregnancy absence. He referred to her bonus as discretionary and suggested she was not entitled to the bonus pay she'd received, due to her behaviour. When the Claimant replied to clarify the situation, he did not reply.

(second) D
2.1 31 March 2020
2.2 The Respondent intimidated and humiliated the Claimant by the CFO emailing to reprimand her, and jeopardise her bonus pay, rather than her line manager. And then by ignoring the Claimant's response.
2.3 Warren Weeks and Jessica Lomax
2.4 No - email.
2.5 Following a discussion between Warren and Jessica, Warren emailed directly to reprimand the Claimant for not working overtime after her pregnancy absence. The Claimant replied to clarify the situation and Warren did not reply.

E
2.1 17 April 2020
2.2 The Claimant was unfairly selected for furlough with a busy workload, over other colleagues with vastly reduced/minimal workloads. And furlough was imposed rather than requested.
2.3 Jessica Lomax
2.4 No - email
2.5 Jessica informed the Claimant that the company was furloughing employees and as a result she would be furloughed from 20th April. A letter attached to the email stated a consequence of not agreeing would be job loss. The Claimant acknowledged the furlough.

F
2.1 17 April 2020
2.2 Respondent pre-determined the Claimant's dismissal & treated the Claimant as though employment was terminated - requested return of equipment, closed the Claimant's work account prior to commencement of

furlough, and did not offer a means of future communication. Furloughed colleagues had not had their equipment requested or accounts closed.
2.3 Jessica Lomax
2.4 No - email
2.5 Jessica told the Claimant to leave her computer equipment outside her front door that same day and she would bring a box to collect them. The Claimant said she would store the equipment until she was back in the office as it wasn't appropriate to leave everything outside and Jessica acknowledged but then closed the Claimant's work account without any warning or notification. Jessica did not offer a means of future communication until requested by the Claimant.

G
2.1 29 April 2020
2.2 Failure to get back to the Claimant regarding access to her payslip
2.3 Jessica Lomax
2.4 No - Whatsapp
2.5 The Claimant requested access to her payslip. Jessica said it should have been sent via email and she would check. She did not update the Claimant.

H
2.1 6 May 2020
2.2 Lied about terms of Claimant's bonus & failure to address grievance properly
2.3 Jessica Lomax
2.4 No - Whatsapp & email.
2.5 The claimant requested a bonus update as it had not been received in April's pay. Jessica said it was unlikely to be paid and it was discretionary based on company performance. She then stated it is either part of T&Cs or discretionary, before stating again that all bonus is discretionary. The claimant disputed this and requested supporting information, which wasn't available, then formally requested investigation of the discrepancy. Jessica said there was no discrepancy, it was not yet signed off and she'd be updated. No further update was provided.

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2.3 Jessica Lomax

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2.5 The Claimant was informed she'd been made redundant. She was told she'd receive written confirmation with details of final pay and a reference would follow.

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2.3 Jessica Lomax
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2.5 The Claimant requested her final pay values. Jessica provided the calculation, and the Claimant queried the
missing bonus payments.

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Q
2.1 13 Aug 2020
2.2 Bonus pay withheld in final pay
2.3 Jessica Lomax
2.4 No - email
2.5 Jessica had stated it was not a contractual entitlement.

Harassment related to sex or pregnancy (Equality Act 2010 section 26)

21. Did the Respondent do the things set out below?

A
2.10 Nov 2019
2.11 Inappropriate response / intrusive question about pregnancy
2.12 Jessica Lomax
2.13 No - phone call.
2.14 The Claimant called to explain reason for absence. As soon as the Claimant said she was pregnant, Jessica interrupted with a gasp and said were you trying/did you know (or words to that effect)

B
2.10 Dec 2019
2.11 Insensitive email communication sent to the Claimant regarding a warehouse colleague's new baby.
2.12 Jessica Lomax
2.13 Yes - email sent to all UK staff

2.14 No conversation was had about the email. The Claimant received it without warning while she was working. The content, together with it being unexpected, caused understandable upset to the Claimant considering her recent pregnancy loss.

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2.10 Early 2020
2.11 Claimant's comments about outstanding work were not acknowledged, and hostile behaviour toward Claimant.
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2.13 Yes - Bridie Gaynor, Mandy Littler
2.14 Jessica called the Claimant regarding a work task she had done during the Claimant's pregnancy absence, that required correction. The Claimant pointed out that she had a large backlog of work, as other work wasn't covered, that took priority, and reminded her that she hadn't received pay for the period she was trying hard to catch up on. Jessica just asked if she was going to do it. The Claimant said yes if she was asking her to, but it would take some time until she can get to it. Jessica said "OK, I'll think on" and slammed down the phone.

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2.14 After Warren asked the Claimant to catch up on work not covered during her pregnancy absence, the Claimant had explained she was incredibly busy but offered to work overtime. Following a discussion between Warren and Jessica, Warren then replied to reprimand the Claimant for having not already worked overtime, unpaid, to catch up on work after her pregnancy absence. He referred to her bonus as discretionary and suggested she was not entitled to the bonus pay she'd received, due to her behaviour. When the Claimant replied to clarify the situation, he did not reply.

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2.12 Jessica Lomax
2.13 No - Whatsapp
2.14 The Claimant requested access to her payslip. Jessica said it should have been sent via email and she would check. She did not update the Claimant.

G
2.10 6 May 2020
2.11 Lied about terms of Claimant's bonus & failure to address grievance properly
2.12 Jessica Lomax
2.13 No - Whatsapp & email.
2.14 The Claimant requested a bonus update as it had not been received in April's pay. Jessica said it was unlikely to be paid and it was discretionary based on company performance. She then stated it is either part of T&Cs or discretionary, before stating again that all bonus is discretionary. The Claimant disputed this and requested supporting information, which wasn't available, then formally requested investigation of the discrepancy. Jessica said there was no discrepancy, it was not yet signed off and she'd be updated. No further update was provided.

H
2.10 5 Aug 2020
2.11 Lied to Claimant about terms of bonus
2.12 Jessica Lomax
2.13 No - email
2.14 When the Claimant queried her missing bonus payments she was informed the Respondent would "include Q1 bonus despite there being no bonus for the entire company" but would not pay any additional
as "the bonus scheme is not applied any differently to you than anyone else."

22. If so, was that unwanted conduct?

23. Did it relate to sex or pregnancy?

24. Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

25. If not, did it have that effect? The Tribunal will take into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

26. Can the claimant rely upon pregnancy as a protected characteristic for harassment?

Victimisation (Equality Act 2010 section 27)

27. Did the Respondent believe that the Claimant had done or might do a protected act, in that she might bring a claim, or make allegations/complaints about, her treatment on return in November 2019 and subsequently?

28. Did the Respondent do the following things?

A Warren did not reply to the Claimant's email on 31 March 2020;

B The Claimant was unfairly selected for furlough with a busy workload, over other colleagues with vastly reduced/minimal workloads. And furlough was imposed rather than requested;

C Respondent pre-determined the Claimant's dismissal & treated the Claimant as though employment was terminated - requested return of equipment, closed the Claimant's work account prior to commencement of furlough, and did not offer a means of future communication. Furloughed colleagues had not had their equipment requested or accounts closed;

D Failure to get back to the Claimant regarding access to her payslip;

E Lied about terms of Claimant's bonus & failure to address grievance properly;

F The Claimant was unfairly selected for redundancy risk. Not all staff within the specified redundancy pools were at risk, or even aware redundancies were being considered, including staff with minimal work. No selection reason was provided;

G There was no fair, valid redundancy consultation;
H The Claimant was told her selection for redundancy was because she was furloughed;

I The Claimant did not receive any bonus in her July pay, and still no update to her grievance. Bonus was still due from April, and now July;

J The Claimant was unfairly made redundant. There was still a business need for the Claimant's work to be carried out. She was not informed about an appeals process, and did not receive final pay values;

K The Respondent didn't include bonuses in the Claimant's final pay detail, or acknowledge this with any update to the previous grievances;

L Lied to Claimant about terms of bonus;

M Dismissive of Claimant's pay grievances;

N Bonus pay withheld in final pay.

29. By doing so, did it subject the Claimant to detriment?

30. If so, was it because the Respondent believed the Claimant had done, or might do, a protected act?

Remedy for discrimination, harassment or victimisation

As the issues at 31 are remedy issues they will only be considered if the claimant succeeds in her claim except for 31.5 which will also be considered alongside the liability issues

31. What financial losses has the discrimination caused the Claimant? Nb. This includes the claimant's claim for loss of CIMA study support

    31.1 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

    31.2 If not, for what period of loss should the Claimant be compensated?

    31.3 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

    31.4 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

    31.5 Is there a chance that the Claimant's employment would have ended in any event? Should the Claimant's compensation be reduced as a result?

    31.6 The ACAS Code of Practice on Disciplinary and Grievance Procedures may not apply (this was a redundancy dismissal, and the issues are fairness, and sex (and pregnancy related) discrimination).

        31.6.1 If yes, did the Respondent or the Claimant unreasonably fail to comply with it by [specify alleged breach]?

        31.6.2 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

Unlawful deductions from wages (Employment Rights Act 1996 part II)

The parties were unable to agree how these issues should be worded and they were not included in the previous case management order. The issues to be decided as proposed by the claimant are 32-37 and by the respondent are 38-44.

32. The claimant claims that in October 2014 her bonus terms changed and her bonus payments were no longer discretionary.

    32.1 The claimant claims that her annual bonus value increased to £3,600 from 2015.

32.2 The respondent admits that it has not paid the relevant portion of this sum in full to the claimant for the year 2020, including in its payment of notice pay and redundancy pay, and relies upon discretion as the reason.

32.3 The respondent denies that the claimant had entitlement to a particular amount of bonus, or bonus payments at all.

33. For the purposes of a claim of unauthorised deduction from wages, wages are defined in section 27(1)(a) of the Employment Rights Act 1996 as: any … bonus ...referable to his employment, whether payable under his contract or otherwise.

34. The issues for consideration by the Tribunal, in order to determine whether non-payment of the bonus constitutes in law an unauthorised deduction from the claimant's wages are:

34.1 What was discussed between the parties about a bonus of £3,600?

34.2 Did the claimant receive regular payments and, if so, of a certain amount?

34.3 Was a contractual obligation created and, if so, on what terms?

34.4 On a proper construction of those terms was the respondent's obligation to pay that bonus conditional or unconditional?

34.5 If conditional, were the conditions satisfied or not?

34.6 If conditional, and those conditions were satisfied, or if the obligation to pay was unconditional, was the respondent lawfully released nevertheless from its obligation to pay bonus and, if so, how?

34.7 Were any of the unauthorised deductions complained about presented to the Tribunal out of time? If so, was it not reasonably practicable for the claimant to bring her claim in time? If so, should the Tribunal extend the time limit?

35. What amount is properly payable to the claimant?

36. The ACAS code of practice on disciplinary and grievance procedures may not apply (there was a redundancy dismissal)

36.1 If yes, did the respondent or the claimant unreasonably fail to comply with it?

36.2 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what portion, up to 25%?

37. Was the respondent required to provide a written statement of any changes to the claimant's terms and conditions of employment (Employment Act 2002 section 28)? If so:

37.1 Any additional award due to the claimant in respect of the respondent's failure to do so? How much, up to 4 weeks pay?

38. The claimant's complaint relates to non-payment of quarterly bonus.

39. To identify whether there was a deduction from the claimant's wages, the Tribunal will need to determine whether the total amount of wages paid to the claimant on a particular occasion was less than the wages properly payable on that occasion. The Tribunal will determine:

    39.1 Which occasion(s) does the claimant complain about?

    39.2 In determining whether any wages were properly payable on such occasion, did the claimant have a legal entitlement to that sum? In the absence of any legal entitlement to the sum allegedly deducted, no claim for a deduction may be made. The respondent says that it has no legal requirement to make any bonus payments. The claimant asserts a contractual right to bonus.

40. If the claimant did have a legal entitlement, what was the entitlement, and was it conditional or unconditional?

41. If any legal entitlement was conditional, what were the conditions and were they satisfied?

42. Were there any deductions from any wages properly payable to the claimant? If so, what were those deductions?

43. Was the respondent entitled to make any such deductions?

44. Are any of the deductions complained about presented out of time? If so, was it not reasonably practicable for the claimant to bring her claim in time? If so, should the claimant extend the time limit?

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2415447/2020**

Name of case: **Miss C Logan** v **Innovation First International (UK) Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 22 August 2023

the calculation day in this case is: 23 August 2023

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office