EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Kirilenko	**- V -**	Artionis (UK) Ltd

Heard at: London Central (CVP) **On**: 19 – 28 June 2023

Before: Employment Judge Baty
Mrs J Griffiths
Mr D Shaw

Representation:

For the Claimant: Ms E Sole (counsel)
For the Respondent: Mr M Withers (counsel)

RESERVED JUDGMENT

1. The claimant's complaints of direct maternity discrimination (under section 13 Equality Act 2010 ("EqA")) were withdrawn at the start of the hearing and dismissed, as were any complaints in the claim form which had by agreement between the parties been removed from the list of issues which had been agreed at the earlier preliminary hearing of 11 October 2022. The only remaining complaints were therefore those set out in the list of issues agreed at this hearing (the "LOI").

2. The claimant's complaints of unfavourable treatment for exercising her right to take maternity leave (under section 18(4) EqA) at issues 2.1.1, 2.1.2 (in relation to the December 2021 event only); 2.1.3; 2.1.4 (in relation to the 2021 birthday gift only) of the LOI; and her direct sex discrimination complaints (under section 13 EqA) at issues 3.2.1 of the LOI were presented out of time and it is not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear those complaints and they are dismissed. If the tribunal had had jurisdiction to hear those complaints, they would all have failed.

3. The claimant's complaints of detriment for family and domestic reasons (under section 47C Employment Rights Act 1996 ("ERA") and

regulation 19 Maternity and Parental Leave etc Regulations 1999 ("MAPLE") at issues 2.1.1, 2.1.2 (in relation to the December 2021 event only); 2.1.3; and 2.1.4 (in relation to the 2021 birthday gift only) of the LOI were presented out of time and it was reasonably practicable to have presented them in time. The tribunal does not therefore have jurisdiction to hear those complaints and they are dismissed. If the tribunal had had jurisdiction to hear those complaints, they would all have failed.

4. The claimant's remaining complaints of unfavourable treatment for exercising her right to take maternity leave (under section 18(4) EqA); direct sex discrimination (under section 13 EqA); and detriment for family and domestic reasons (under section 47C ERA and regulation 19 MAPLE); and her complaints of automatically unfair dismissal for family reasons (under section 99 ERA and regulation 20 MAPLE) and constructive unfair dismissal all fail.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 21 July 2022, the claimant brought complaints of unfavourable treatment for exercising her right to take maternity leave; direct maternity discrimination; direct sex discrimination; automatically unfair dismissal for family reasons; constructive unfair dismissal; detriment for family and domestic reasons; indirect sex discrimination; direct race discrimination and breach of contract (failure to pay bonuses).

2. The respondent defended those complaints.

3. The claimant subsequently withdrew her complaints of indirect sex discrimination; direct race discrimination and breach of contract (failure to pay bonuses) and these complaints were dismissed.

4. At a preliminary hearing on 11 October 2022 before Employment Judge Henderson, the dates of this hearing were listed and it was agreed that this hearing would cover liability only.

5. The hearing was listed to and did take place remotely by CVP.

The Issues

6. At that preliminary hearing, the parties produced a list of issues which was agreed with EJ Henderson and annexed to her note of that hearing. That list of issues was a lengthy one.

7. At the start of this hearing, Ms Sole produced an opening note which contained a further draft list of issues which sought to reduce the bulkiness of the previous list of issues (which had set out all the factual allegations repeatedly in

relation to the various different types of heads of claim) and which also removed some of the complaints which were set out in that previous list of issues.

8. That draft was discussed between the tribunal and the representatives at the start of this hearing. The parties were happy to agree the factual allegations in that list of issues (subject to one point which required an amendment - see below). There was, however, some uncertainty as to which heads of claim were being pursued. The judge discussed this with the representatives. Ms Sole confirmed that there were now no complaints of direct maternity discrimination (pursuant to section 13 EqA); she confirmed that these were withdrawn and, with the agreement of the parties, the tribunal dismissed those complaints.

9. The judge also noted that some of the complaints which had been set out in the earlier list of issues were now no longer in the updated list of issues and wanted to be clear as to whether the claimant was withdrawing those complaints to the extent that they were no longer set out in the updated list of issues. Ms Sole confirmed that she was and, with the agreement of the parties, the tribunal dismissed those complaints.

10. What remained in terms of complaints which were not withdrawn was all set out in that updated list of issues.

11. There was also some discussion about the way the legal questions which the tribunal needed to answer were set out in that updated list of issues.

12. At the tribunal's request, Ms Sole produced a further version which made clear under which heads of claim the various factual allegations were made. The tribunal reviewed this the following day and noted that the legal questions were in some respects either incorrect or incomplete or didn't properly reflect the statutory language. The tribunal therefore overnight sent to the representatives an updated markup of that list of issues amending these areas accordingly. The representatives confirmed by email and then orally at the start of the next day of the hearing (the third day) that this list of issues was agreed. Although the claimant had started giving her evidence by that point, this adjustment to the list of issues made no difference to the evidence as there had been no change to the factual allegations (and therefore to the scope of the evidence to be given) since the version of the list of issues which was discussed prior to the commencement of hearing the evidence.

13. A copy of the list of issues is annexed to these reasons. The judge made clear to the representatives that these were the issues which the tribunal would be determining at this liability hearing and no others and repeated this at other points during the hearing.

Amendment application

14. As noted, one of the issues was subject to an amendment application. This was the issue set out at 2.1.3 of the list of issues.

15. There was an allegation in the claim form of an alleged failure by the respondent to invite the claimant to attend a briefing in August 2021 on the new HR system. Both parties acknowledged that there was no such briefing in August 2021 and that, if the allegation remained as it was, it would inevitably fail on the facts. It was, however, common ground that there was a briefing in March 2021. Hence, Ms Sole sought to amend the factual allegation at 2.1.3 to state *"The Respondent did not invite her to attend a briefing on the new HR system"*, rather than limiting it to an August 2021 date. Ms Sole accepted that an amendment would be required.

16. The application was opposed. By agreement with the representatives, the tribunal heard the application after it had done its pre-reading of the witness statements and documents but before oral evidence commenced (it heard it at the start of the second day of the hearing).

17. The tribunal heard submissions from both parties and adjourned briefly to consider its decision. When it returned, it gave its decision to the parties orally. The tribunal decided to allow the amendment for the following reasons.

18. The leading case on amendments is Selkent Bus Co Ltd -v- Moore [1996] ICR 836. In determining whether to grant an application to amend, an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing the amendment; it is essentially an exercise in balancing the prejudice to one party in granting the amendment against the prejudice to the other party in refusing it.

19. We noted that the application was made late, right at the start of a multi-day hearing, when the knowledge about the absence of an August 2021 briefing had long since been available. The application could have been made, for example, at the previous preliminary hearing in October 2022 or at least at a much earlier stage following completion of disclosure. We noted, in this respect, that the claimant was not a litigant in person and that she had solicitors as representatives throughout (albeit Ms Sole, who sought to make the application, had not represented her until a much later stage in the proceedings); there was therefore even less excuse for not making the application earlier. We also noted that, given the timing of the application, this allegation was prima facie made considerably out of time. We also noted that, in one sense, it was a substantive amendment in that it developed a single time-limited allegation about an invitation to an August 2021 briefing into an allegation of much wider temporal scope. We make clear to the parties that this application should of course have been brought much earlier.

20. However, we noted that, both in its response, its witness evidence and in the emails set out in the bundle relating to invitations to the March 2021 briefing (which by this stage we had read), the respondent was fully prepared to deal with this allegation. Furthermore, little extra time would be needed in terms of evidence in relation to this single allegation in the context of the eight-day hearing. There was, therefore, minimal prejudice to the respondent in granting the amendment (other than the fact that the complaint would need to be

defended). By contrast, there would be considerable prejudice to the claimant if it was not allowed, as she would be left only with a complaint that was doomed to fail. Therefore, notwithstanding the facts above, we considered that the balance of prejudice was such that the prejudice to the claimant in refusing the amendment would exceed the prejudice to the respondent in granting it.

21. We therefore granted the amendment.

22. The judge noted and made clear to the representatives, however, that the issues regarding time limits (already set out in the agreed list of issues) still applied to this complaint as amended and referred them to the case of Galilee v The Commissioner of Police of the Metropolis [2018] ICR 634 which was likely to be relevant to this particular allegation.

Adjustments

23. At the start of the hearing, the judge asked the representatives whether there were any adjustments which the tribunal would need to put in place to enable representatives, parties or witnesses to participate properly in the hearing. The representatives each confirmed that no such adjustments were necessary.

The Evidence

24. Witness evidence was heard from the following:

For the claimant:

The claimant herself;

Ms Svetlana Valdmane, who was employed by the respondent until September 2021 and who reported to the claimant; and

Ms Sonata Sveckiene, who was employed by the respondent until December 2021 and who reported to the claimant.

For the respondent:

Mr Andy Skulimowski, who has been employed by the respondent as an HR Business Partner, having joined the respondent on 3 February 2022;

Ms Caroline Stephant, who was employed by the respondent as an HR Business Partner until 4 December 2021;

Mr Sandeep Rana, who is employed by the respondent at the grade of Senior General Manager and with the job title “Head of Business Processes and VAS”; and

Mr Gaurav Khot, who has been employed by the respondent since December 2020 as “General Manager - Quality and Operations”.

Documents

25. An agreed bundle numbered pages 1-672 was produced to the tribunal. In addition, a further bundle, which was known as the "respondent's correspondence bundle" and which was numbered pages 1-76, was also produced to the tribunal.

26. Both parties produced their own cast lists and chronologies (which were not agreed but overlapped substantially). As noted, Ms Sole also produced an opening note.

27. There was also produced a transcript of a conversation between the claimant and Ms Stephant from November 2020 which the claimant had at the time covertly recorded. The respondent included the transcript in the respondent's correspondence bundle. The claimant then produced her own version which contained a very limited number of amendments. At the start of the hearing, the judge discussed this with the representatives. Mr Withers agreed that, although the transcript would be referred to in the evidence, we could and should use the claimant's version; those areas of disagreement were clearly marked on that version so there should be no confusion and, with the exception of one area, he said that he would not be taking witnesses to any sections of it which were in dispute. Both parties agreed that there was no need for the tribunal to hear the original recording. The tribunal proceeded on this basis.

28. In addition, at the claimant's request, the respondent partway through the first day of the hearing sent through three further PDF documents. The judge checked with the representatives and they each confirmed that these documents could be adduced as evidence to the tribunal and they were.

29. During her evidence, the claimant made reference to a business card which she had when she was working at VFS (the organisation from which she transferred to the respondent in September 2020 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")) together with an email she had written whilst at VFS in which her email sign off referred to her as "Operations UK & Europe; Business Development Special projects". These had not been disclosed to the respondent nor were they in the bundle. It was agreed that the claimant should forward these documents to her representatives during the next break (although without writing any covering email) and the prohibition on her contacting her representatives about the case whilst she was giving evidence was by agreement relaxed to this extent and to this extent only. The claimant duly sent the documents. Both representatives then agreed that they should be put before the tribunal and they duly were.

30. The tribunal read in advance (on the first day of the hearing after preliminary matters had been dealt with) the witness statements and any documents in the bundles to which they referred, together with Ms Sole's opening note.

Agreed admission

31. After the claimant had completed her evidence, Ms Sole informed the tribunal that there was a further document which the claimant wished to disclose. It was agreed that the document should be disclosed to Mr Withers and that the parties should then revert to the tribunal as to their position on whether it should be adduced as evidence before the tribunal.

32. After the next interval, the representatives informed the tribunal that it was not necessary to adduce the document as evidence but that they had agreed the text of an admission instead, which they then sent to the tribunal.

33. The text of the admission was as follows:

1. There were two meetings to discuss with and answer questions from staff affected by the TUPE transfer from VFS to R, which took place in London in:
    a. On a date between 18 – 21 December 2019
    b. In January 2020, before 31 January 2020
2. At those meetings the Claimant raised a question as to whether there would be a budget for birthday/internal staff matters as there was at VFS.
3. The answer given, was that this was a matter had not been defined at R, and would need to be determined there.

34. The tribunal was happy to proceed on that basis.

Timing and timetabling

35. An indicative timetable for cross-examination and submissions was agreed between the tribunal and the representatives at the start of the hearing.

36. At the start of the hearing, there was also some discussion about when Ms Stephant would give her evidence. Ms Stephant was based in the Netherlands. The respondent had applied for permission for her to give her evidence from the Netherlands but there had been no response from the relevant embassy. It was therefore obliged to ensure that she came to the UK in order to give her evidence. She had childcare responsibilities and so it would be beneficial to know exactly when she should make the journey to the UK to give that evidence and there was discussion about when she should attend.

37. Mr Withers initially indicated that Ms Stephant was due to fly over for the following Monday (day 6 of the hearing). Ms Sole informed the tribunal that, given her estimate of the time required for evidence, that might result in a “dead day” on the Friday (day 5 of the hearing) and that this might be prejudicial to her client in terms of counsel’s fees unnecessarily incurred, but she would check this and confirm if there was any objection from the claimant to Ms Stephant giving her evidence the following Monday.

38. The following day (day 2), Mr Withers informed the tribunal that the respondent had instead arranged for Ms Stephant to fly to the UK on the Friday (day 5), so the issue fell away.

39. However, in fact the indicative timetable slipped considerably. The delays in the timetable were partly because of the various case management matters and applications which the tribunal had to deal with as outlined in these reasons, but mainly for the reasons set out below.

40. The claimant's evidence, which began on day 2 of the hearing, took far longer than anticipated, because the claimant persistently failed to answer the questions which were put to her by Mr Withers, with the result that far more time was needed to complete her evidence. In the end, her evidence concluded late on the afternoon of day 4 of the hearing, having in total taken over two days to complete, as opposed to the one day which had originally been anticipated.

41. As a result of the extra time needed for the claimant's evidence, it was agreed that the evidence of Ms Sveckiene and Ms Valdmane should at the start of day 3 of the hearing be interposed between the claimant's evidence (in the light of commitments which Ms Sveckiene had later that day and which Ms Sole had informed the tribunal about at the start of the hearing). This was duly done.

42. As a result of the delays referred to above, the respondent's evidence began late on the afternoon of day 4. Mr Skulimowski was the first witness called by the respondent. He had anticipated, understandably, that his evidence would have started much earlier than it did. Ms Sole had indicated earlier in the hearing that she would need roughly two hours with Mr Skulimowski (and around the same amount of time with Ms Stephant). We heard one hour of Mr Skulimowski's evidence before the close of day 4.

43. As already indicated, Ms Stephant was flying to the UK on day 5 and she was due to give her evidence from a hotel room at the airport and then fly back to the Netherlands on the same day. She was due to be available from 11am to 3pm, which should have been more than enough time in the light of Ms Sole's estimation of time needed for cross-examination. As at the end of day 4, it was anticipated that Mr Skulimowski's evidence would be completed in the first hour or so on day 5, with more than enough time to hear Ms Stephant's evidence after that.

44. However, the first 45 minutes of day 5 was used up because of Ms Sole's having to inform the tribunal about the extra document which the claimant wanted to disclose and the consequent agreement of the admission referred to above (which, had it not been resolved as it was, might have resulted in the claimant having to give further evidence). In the light of the time, the judge therefore suggested to the parties that the hearing should go straight into Ms Stephant's evidence and interpose it in between Mr Skulimowski's evidence, given the time constraints on Ms Stephant.

45. Mr Skulimowski then asked if he could ask a question about timing which, having first checked with the representatives, the judge allowed him to do. He explained that he needed to do the payroll that day for all the companies in the respondent's group; that to do so efficiently he needed to start working on it at about 1 pm and that he would need to speak to Mr Rana and Mr Khot in order effectively to do so; and that there were financial penalties in some of the non-UK

jurisdictions in the group if he failed to do so. He therefore said he needed to be able to complete his evidence first to be able to do this, given the restrictions on him on communication prior to the end of his evidence.

46. Ms Stephant, who had joined the hearing by this point, helpfully said that she could stay until 4pm and still be able to get her 5pm flight. The judge therefore suggested that, given the time indications Ms Sole had given in relation to Mr Skulimowski and Ms Stephant, there should be time to finish Mr Skulimowski's evidence well before 1pm, the tribunal could take a short half hour lunch break, and there would still be enough time to hear Ms Stephant's evidence (including tribunal questions and any re-examination) by 4pm. The representatives both agreed.

47. Mr Skulimowski's evidence recommenced at 11 am. However, by shortly before 1pm, Ms Sole had not yet completed her cross-examination of him. The judge asked how long she had left; she said 45 minutes. There was then a discussion of what to do in the circumstances. There appeared to the judge to be very little urgency on the part of the representatives to help find a solution to this problem and the judge expressed his irritation at this and exhorted them to assist him in that respect. The judge made clear that it would be unjust to expect Ms Stephant to come back from the Netherlands on another day to give her evidence and that this ought to be avoided. He suggested instead that there should be a derogation from the rule about a witness not being able to speak to others before his evidence was completed for the sole purpose of enabling Mr Skulimowski to do the payroll that day. Ms Sole took instructions and said the claimant was happy to do that if Mr Skulimowski did not speak to Mr Rana and Mr Khot and the exercise was done by email. That would however have been impractical and Mr Withers objected. The judge suggested therefore that the position should be that the derogation was that he could do whatever he needed to do the payroll including speaking to Mr Rana and Mr Khot to the extent necessary properly to do this but that any such activities must be limited to carrying out the payroll and he should not in any circumstances speak about the case. Ms Sole eventually agreed to this.

48. The tribunal therefore proceeded on that basis. There was a further break in Mr Skulimowski's evidence (which eventually was completed after a further 90 minutes' cross-examination of him the following Monday (day 6)); the tribunal took a half hour lunch break, with the judge explaining before it did so that Ms Sole needed to complete her cross-examination of Ms Stephant within 2 hours to enable tribunal questions and re-examination, to which Ms Sole agreed; Ms Stephant's evidence began at 1.30pm, she was cross-examined for just over 2 hours and there was just enough time for tribunal questions and re-examination, and her evidence was completed by 4 pm, just in time for her to catch her 5 pm plane.

49. If ever there was a case which would have benefited hugely from an international treaty enabling witnesses to give evidence remotely from abroad to a hearing in a UK court or tribunal, it was this one.

50. As noted, Mr Skulimowski's evidence had taken far longer to complete than anticipated, as was the case with other witnesses of the respondent. This was because they tended to give detailed answers to the questions, containing lots of context; but also because the same points were often put to them repeatedly in different ways, which resulted in the same answers being given repeatedly.

Management of the hearing

51. On a couple of occasions in her evidence, the claimant became tearful. She was asked if she would like a break but she said that she was okay to carry on; the hearing therefore continued and the claimant appeared fine to carry on.

52. As noted, the claimant persistently failed to answer questions put to her during her oral evidence, even those of a simple and straightforward nature. Whilst the judge chose not to interject a great deal initially, he increasingly had to remind the claimant to answer the questions as matters went on, but this pattern of not answering continued. Consequently a great deal of extra time was required to complete the claimant's evidence.

53. Where there was a break before a witness had completed their evidence, the judge always informed the witness in question that, until their evidence was completed, they could not speak about or otherwise communicate about the case with anyone, including their representatives. He stressed the importance of this for the integrity of the process.

54. In the light of the length of her evidence, the claimant had had at least two such warnings (prior to breaks) prior to the incident which we describe now. The claimant had given evidence for most of day 2 of the hearing. As noted, the evidence of Ms Valdmane and Ms Sveckiene was then heard, interposed within the claimant's evidence, on the morning of day 3. There was a mid-morning break between the evidence of Ms Valdmane and Ms Sveckiene.

55. When the hearing reconvened after the break, Ms Sole explained that she needed to inform the tribunal of something. She went on to explain, in summary, that she had passed on a query which she had had from Mr Withers to her instructing solicitors to answer. One member of that organisation had then asked another what she should do as she did not have an answer to the question; that other individual told her to ask the claimant, which she duly did. She emailed the claimant. Furthermore, notwithstanding the warnings given, the claimant replied. The matter was on an area on which Mr Withers had not yet but would in due course cross-examine the claimant. When Ms Sole found out about this, she, quite rightly, immediately informed Mr Withers and then informed the tribunal when the hearing reconvened. Mr Withers said that he did not wish to make an application but expressed his deep concern about what had happened.

56. The tribunal took a short break to discuss the matter. When the hearing reconvened, the judge made absolutely clear in stark terms that what happened was unacceptable; he said there was considerable blame on the part of the claimant's representatives for asking the question of the claimant; but there was

also blame on the part of the claimant - whilst on the one hand it might be understandable to respond to a query from representatives whom one had instructed, the claimant was an intelligent individual who had held a senior position at the respondent and had been warned at least twice in absolutely clear terms about the importance of not having any communications about the case until her evidence was completed; she could have ignored the email or at the least replied to say "Can I answer you in the light of the judge's warnings?"; however, she had not. The judge reminded the parties that there were cases where, as a result of breaches of these obligations, claims had been struck out; this was because of a consequent loss of trust and confidence in the party in question, leading to the conclusion that a fair trial was no longer possible. The judge said that the tribunal did not consider that that threshold had been reached in this case and noted that Mr Withers did not make an application in this respect and he said that the tribunal considered that striking out the case would be disproportionate in these circumstances. However, he made absolutely clear that the conduct was entirely unacceptable and must not be repeated.

Submissions

57. Both parties produced written submissions, which the tribunal read in advance of hearing their oral submissions.

Decision

58. Notwithstanding the significant delays referred to above, the evidence and submissions were completed on the last day of the eight day listing. However, there was not enough time to give a decision at the hearing and the decision was consequently reserved.

Findings of Fact

59. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

60. We first set out an overview by way of background before going on to make our more detailed findings of fact below.

Background and overview

RNT

61. The claimant began working for RNT Ltd ("RNT") on 14 January 2009. RNT provided visa services to the Russian Mission/embassy in the UK; in other words it had a contract with the Russian Mission which involved RNT providing services, in particular the process of obtaining visas, for individuals in the UK who wished to travel to Russia. The claimant's work for RNT was in connection with the operational aspects of RNT's providing these services.

VFS

62. This contract with the Russian Mission relating to visa services in the UK was taken over from RNT by VFS in 2017. The claimant's employment was transferred under TUPE from RNT to VFS with effect from December 2017. The claimant's employing entity was "VF Services (UK) Ltd". However, VFS is a very large global organisation, of which the claimant's employing entity was just one subsidiary company. When we refer to "VFS" in these reasons, we are referring to the whole global organisation.

63. There were also VFS subsidiary companies or operations in several other countries which provided visa services to the Russian government/missions in those countries, for example in Germany, where the activities correspondingly related to providing visas and visa services to German citizens wanting to travel to Russia.

64. Furthermore, VFS had contracts for the supply of visa services with a large number of national governments, roughly 40 to 50 different governments in total in 2019; the various contracts for services with the Russian government represented only one of these. Similarly, as with the various services supplied to the Russian government, VFS's contracts for services with other national governments could also cover a large number of different countries (in other words, there were separate operations in those countries assisting the citizens in those countries to obtain visa services and visas for travel to the country with which VFS had the contract).

65. By this stage, the claimant's core role was managing the day-to-day operations for visa services supplied by VFS to the Russian Mission in the UK and her core duties were the running of the day-to-day operations in relation to the visa services supplied by VFS to the Russian Mission in the UK (also referred to as the "Russian Visa Application Centre UK" or "RVAC"). By this stage, RVAC had three offices in the UK, in London, Edinburgh and Manchester. The claimant was based in London but was responsible for operations in all three offices.

66. By this stage, the claimant's direct reports included Ms Valdmane (Senior Operations Manager) and Ms Sveckiene (Accountant), each of whom had transferred from RNT to VFS under TUPE at the same time as the claimant. Ms Valdmane's employment at RNT had commenced in March 2013; Ms Sveckiene's in October 2011.

Artionis

67. The Artionis group was set up in or around 2019. It was founded by Mr Siddarth Raja. Its holding company is Artionis AG, a Swiss company owned 100% by Mr Raja. It has a number of subsidiaries, one of which is the respondent (Artionis (UK) Ltd). References in these reasons to "the respondent" are to Artionis (UK) Ltd and references to "Artionis" are to the wider Artionis group.

68. Artionis was set up to acquire the contracts for visa services which VFS had with the Russian government (and no others, although it was hoped that in

due course it may be able to expand its operations and gain contracts with other governments).

69. The respondent duly took over from VFS the contract to provide visa services and visas in relation to the Russian government in the UK; other Artionis companies took over the contracts with the Russian government in other countries. These transfers took place at various points over 2019 and 2020.

70. VFS's UK Russia operations transferred to the respondent with effect from 1 September 2020. At that point, those employees working on VFS's UK Russia operations, including the claimant, Ms Valdmane and Ms Sveckiene, transferred under TUPE to the respondent.

71. The claimant was at all times employed under a contract signed when she was at RNT. She remained employed under that contract until her employment with the respondent ended.

Mr Rana

72. Mr Rana had been employed by VFS since May 2008. By April 2017, he had become "Senior General Manager - Operations (UK and Europe)" and "Head of VAS - Europe". "VAS" stands for "Value Added Services". We will return to the details of the job titles and structures at VFS and the respondent in due course. At VFS, Mr Rana was also the appointed transition manager to oversee the transition of VFS' UK Russia business to the respondent.

73. However, well before the UK Russia operations of VFS transferred to the respondent (which, as noted, happened on 1 September 2020), Mr Rana was approached by Mr Raja, the founder of Artionis, who already knew Mr Rana, and offered a position at the respondent. He accepted. He signed a contract of employment with the respondent on 18 June 2020, although his employment with the respondent did not commence until 1 October 2020. He did not transfer to the respondent under TUPE.

74. As noted, Mr Rana's job title at the respondent was and is "Head of Business Processes and VAS".

75. From the point when Mr Rana commenced employment with the respondent, he became the claimant's line manager and remained so until she went on maternity leave. The claimant was aware of this at the time.

76. When he was at VFS, Mr Rana was considerably more senior than the claimant, being two levels above the claimant and having managed the largest (by both volume and revenue) countries and accounts at VFS, and having between 6-7 direct reports who were comparable in terms of level to the claimant herself (three Country Managers and four Deputy General Managers, one of whom was also a Country Manager).

Mr Khot

77. Mr Khot worked for VFS since May 2011 in a variety of positions, based variously in the UK, India and the US. His last role at VFS was based in the US as General Manager, Quality and Transformation (for Americas and Europe). His grade of General Manager was one grade higher than the claimant, who was a Deputy General Manager. Importantly, Mr Khot had 12 years' experience' in the field of "Quality".

78. The respondent needed a manager with experience in Quality.

79. Mr Khot was looking for other job opportunities. He asked Mr Rana, whom he knew previously as a result of their respective long employments at VFS, about job opportunities and Mr Rana told him that there were some job opportunities at the respondent and directed him to the websites on which the respondent advertised. One of the roles advertised was for the position of "General Manager - Quality and Operations". This role was based in the UK and the employing company would be the respondent.

80. Mr Khot applied for the role in March 2020 (there were roughly 200 applications for it). He was offered the job (subject to his ability to obtain a visa to work in the UK, which in due course he did obtain) and he signed a contract of employment with the respondent on 17 June 2020 (several months before the UK Russia business of VFS transferred to the respondent and the claimant became an employee of the respondent which, as noted, took place on 1 September 2020). However, because of the length of the process of obtaining a visa, Mr Khot's employment with the respondent did not actually commence until December 2020.

81. One of the requirements of the General Manager - Quality and Operations role at the respondent was that the candidate required "blackbelt" Sigma Six certification (a Quality-related qualification) as an express requirement. Mr Khot had this. The claimant, as she admitted, did not.

82. Mr Khot's background, as well as including comprehensive quality work, including strategic operations oversight (as opposed to merely day-to-day operational management); despite the reference to "operations" in their respective job titles at the respondent, therefore, Mr Khot's duties did not overlap with those of the claimant.

The claimant's maternity leave

83. In November 2020, the claimant informed the respondent that she was pregnant.

84. On 1 March 2021, the claimant commenced annual leave.

85. On 10 March 2021, the claimant's maternity leave commenced.

86. On 24 January 2022, the claimant gave notice in writing that she would be returning from maternity leave.

87. On 1 February 2022, the claimant's maternity leave ended and she commenced annual leave. (We wondered whether this was a typographical error and whether the claimant's maternity leave in fact ended on 1 March 2022 with her annual leave commencing after that, but both the claimant's and respondent's chronologies state that her maternity leave ended on 1 February 2022 and in the absence of any other evidence we accept that.)

88. There were various discussions and interactions between the claimant and individuals at the respondent around this time, which we will return to in due course.

89. The claimant was due to return to work on 4 April 2022. However, she supplied a medical certificate on 1 April 2022 and remained absent from work due to sickness. She never returned to work prior to her subsequent resignation.

90. On 8 April 2022, the claimant submitted a grievance. Two grievance meetings were held, on 5 May 2022 and 17 May 2022 respectively, between Mr Skulimowski, who heard the grievance, and the claimant.

91. On 16 May 2022, prior to the second grievance meeting, the claimant commenced ACAS Early Conciliation (with Early Conciliation completing on 26 June 2022, on which date ACAS issued its certificate).

92. Mr Skulimowski issued his grievance outcome letter on 24 May 2022. He did not uphold the claimant's grievance.

93. The claimant appealed against that outcome on 30 May 2022. The appeal was heard on 30 June 2022 by Mr Jagpreet Bhatia, Artionis' Global Head of HR. Mr Bhatia issued his grievance appeal outcome letter on 5 July 2022. He did not uphold the appeal.

94. The claimant resigned with immediate effect on 14 July 2022.

Geopolitical events

95. Two events of a geopolitical nature provide important context to the relevant facts of this case.

96. The first of these was the Covid 19 pandemic. This commenced at around the time Artionis was acquiring VFS's Russian visa services operations. It had a significant impact on the volumes of business for the respondent because of its impact on the ability of people to travel in general, including to Russia. As a consequence, many staff at the respondent agreed temporary pay cuts, there were some redundancies, and the respondent's Manchester office was temporarily closed. There was optimism that business would improve as the restrictions associated with the pandemic were relaxed.

97. The second was Russia's invasion of Ukraine which commenced on 24 February 2022, right in the midst of some of the core events relating to this claim. Within a couple of days, the volumes of business which the respondent was doing reduced by 95%. In addition, the respondent had to deal with many serious ancillary issues such as its offices being vandalised and its staff being abused because of the connections with Russia.

Reliability of Evidence

98. Before going on to make our more detailed findings of fact, we set out at this point our observations on the reliability of the evidence given by the witnesses. We do so because this is relevant to the fact-finding which we make after that.

The claimant

99. We have serious concerns about the reliability of the evidence given to us by the claimant for a number of reasons. We note, in this context, that the claimant is an intelligent individual who held a senior position with the respondent with a variety of responsibilities. Whilst English is not her first language, her English language skills are very good and we were at no point concerned that she did not understand the questions which were being put to her.

100. First, and foremostly, as already indicated, the claimant repeatedly failed to answer questions which were put to her in cross-examination, even of the simplest kind and even ones where she must clearly have known exactly what she was being asked. This was particularly so when she was asked questions where the answers were obvious but nonetheless detrimental to her case. As a result of this approach, as already noted, it took over two days to complete her cross-examination, which was more than twice the amount of time which was anticipated to be needed or indeed which should have been required. This was despite repeated and clear interventions and reminders by the judge that the claimant should answer the questions put.

101. Secondly, there were various clear factual inaccuracies in her written grievance of 8 April 2022. For example, she asserted that a bonus was paid to other colleagues in 2021 (when in fact no bonuses were paid because of the financial position of the company and at a time when employees were agreeing salary cuts). However, the claimant made this assertion without any evidence. That is demonstrative of someone who is at best careless about whether what she asserts is factually accurate or not.

102. Thirdly, at paragraph 64 of her witness statement, the claimant rhetorically asked, in relation to the new Special Projects role which she was offered in February 2022 (see issue 2.1.6): *"So why would I change the existing established and secured role for a new one with unclear potential and even name (Head of Special (?) Projects) that would require my professional time to grow and tailor. Such an oddly named role never even existed at VFS, as per my knowledge."*. Part way through her evidence (as referred to earlier), the claimant disclosed a business card and an email sign off which she herself had chosen to

use when she was at VFS and which expressly contradicted her own sworn written evidence (as the business card described her role as *"Business Development - Special Projects"*).

103. Fourthly, the only reason which the claimant gives as to why she did not bring those complaints which are prima facie out of time earlier was set out in her witness statement at paragraphs 110-111. There she says that she was not aware of the changes to *"her role, demotion or promotion of colleagues"* until 16 March 2022 and was not therefore aware of the nature or extent of the discrimination until she returned from maternity leave and could not therefore have taken action before then. However, one of the two alleged "promotions" related to Mr Rana. In the transcript of the conversation between the claimant and Ms Stephant in November 2020 (which the claimant covertly recorded), the claimant states *"For example, the position that Sandeep took, right? The head of businesses and VAS services. Why it was not advertised? Why it was not promoted? Why it was not, like, I was approached for that position. How did that happen?"*. She goes on to state that she feels *"kind of like discriminated here"*. (For clarity, this is not a section of the transcript which is in any way disputed.) This evidences that the claimant was, in her own words, considering even at that point back in November 2020 that she was discriminated against. However, even more significantly, in terms of the reliability of her evidence, it flatly contradicts what she asserts in her witness statement; she knew full well what the job was which Mr Rana had back in November 2020, because she stated exactly what it was in her own words at that meeting with Ms Stephant; she was therefore fully aware at that time of the role Mr Rana had been appointed to, contrary to her assertion at paragraphs 110-111 of her witness statement.

104. Fifthly, the claimant's evidence, as noted, finished after the evidence of her two witnesses, Ms Valdmane and Ms Sveckiene. Both were former colleagues and friends of the claimant and both gave clear evidence. However, notwithstanding that, the claimant nevertheless then attempted to paint them as forgetful or mistaken about their own contractual positions, despite the clear evidence which they had given, when that evidence was unhelpful to the claimant's case.

105. Sixthly, the claimant sought to cherry pick matters that were helpful to her case but could not accept matters which were unhelpful. A striking example was in relation to the bonus clause in her employment contract; she sought to argue that part of it applied to her but another part (which was unhelpful to her case) did not. This was plainly unsustainable.

106. Seventhly, the claimant had a practice of making unauthorised and covert recordings of the respondent's employees without thought to their rights, privacy and emotions (the latter of which was only too evident from the level of upset which Ms Stephant clearly and powerfully expressed at the start of her evidence in relation to the claimant's covert recording of their November 2020 conversation). The transcript of the recording was available at the hearing. However, the claimant in cross-examination admitted to having made unauthorised covert recordings of the respondent's employees on *"at least two"* occasions. We may not have taken this example alone as evidence of concerns

about the reliability of the claimant's evidence if it was the only one; however, in conjunction with the other examples and because it relates to a clear breach of trust by the claimant, we consider that it is part of this pattern.

107. Mr Withers also submitted that we should take into account in this respect the claimant's blameworthy ignoring of the judge's multiple and clear warnings not to communicate with anyone (including her legal representatives) during her evidence (as referred to above). However, notwithstanding the blameworthiness of her conduct, we did not see the emails between her and her representatives and have not heard the representatives' explanations for their conduct (what we heard was only via Ms Sole) and (perhaps charitably) we do not consider that we are in a position to conclude that the claimant's actions were deliberate in this respect as opposed to merely a very poor lack of judgment.

108. Notwithstanding that, for the many reasons set out above (with the exception of the paragraph immediately above this one), we have serious concerns about the reliability of the claimant's evidence, to the extent that we consider it hard to rely on her evidence unless it is corroborated by contemporaneous documentation or the witness evidence of others.

The respondent's witnesses

109. By contrast, we do not have any concerns about the evidence given by the witnesses of the respondent.

110. They did answer the questions put to them (often despite those questions not being put particularly clearly). Some of them, in particular Mr Rana and Mr Skulimowski, answered very fully, giving lots of context and detail, such that their answers were often lengthy; however, they did their best to answer the questions put. Subject to one area referred to below, we found that they were materially consistent, both with their own evidence, with the contemporaneous documents and with the other witnesses of the respondent.

111. Secondly, the respondent's witnesses were prepared to accept matters which were not in the best interests of the respondent's case. In particular, Ms Stephant and Mr Rana accepted that they could, and with hindsight perhaps should, have informed the claimant whilst she was on maternity leave about certain organisational changes, such as Ms Valdmane and Ms Sveckiene leaving the respondent and the temporary closing of the Manchester office. This is indicative of honesty and openness in answering questions.

112. Ms Sole pointed to two areas where she thought the respondent's witnesses were inconsistent.

113. The first was Mr Skulimowski's evidence in relation to the phrase *"desired flexibility"* set out in his letter of 16 February 2022 to the claimant. The matter is, as we will come to, not in fact directly relevant to the factual allegation at 2.1.6 as it is drafted, but even so, we did not consider, as Ms Sole submitted, that Mr Skulimowski's explanation in relation to this was implausible.

114. Secondly, Ms Sole asserted that Mr Rana was inconsistent when, in relation to the December 2021 Christmas party, in relation to which those witnesses who gave evidence said that the reason for the limitations on who was invited was (in summary) because of the Covid 19 situation, Mr Rana also said in one answer in cross-examination that he did not think to invite the claimant and that if he had done so, he would have. He was then asked about the apparent discrepancy and again stated that the Covid 19 risks were the background to the decisions made on who to invite. There is a discrepancy between the two; whilst it is plausible that, in the light of the Covid 19 risks, he would not even have thought to have invited the claimant, an assertion that if he had thought about inviting her, he would have done so, is inconsistent with that. It is, however, only one point in evidence which went on for several hours and where many of the questions were not clear; we do not consider that it is indicative that Mr Rana's evidence was in general terms unreliable. Overall, we consider that his evidence, and that of the other witnesses for the respondent, was honest, open and reliable.

Conclusion regarding reliability of evidence

115. Therefore, where in the absence of any contemporaneous documentation there is a discrepancy between the evidence given by the claimant and that given by the witnesses for the respondent, we prefer the evidence given by the witnesses for the respondent.

Detailed findings of fact

The claimant's role at VFS

116. As noted, the claimant remained on the same employment contract (which she entered into when she was employed by RNT) over the whole period of time up to her resignation from her employment with the respondent.

117. In terms of duties, that contract included the following:

"Job flexibility

it is an express condition of employment that you are prepared, whenever necessary, to transfer to alternative departments or duties within our business. During holiday periods, etc. it may be necessary for you to take over some duties normally performed by colleagues. This flexibility is essential as the type and volume of work is always subject to change, and it allows us to operate efficiently and gain maximum potential."

118. The only clause relating to bonuses in the claimant's employment contract states:

"A1c…

Team early bonuses will be considerate and paid at the month of DECEMBER each year. The amount of bonus will be paid at discretion of the overall team performance and agreed by senior management. Employees who decide to take on extra duties will be compensated as per earlier agreement with the management. Staff members who been appointed to carry with various projects during the year, may be extra remunerated. The amount will be agreed as per performance level and support provided."

It is agreed that the word “considerate” should in fact read “considered”.

119. Job grades at VFS included, in ascending order of seniority: Senior Operations Manager (the grade that Ms Valdmane was at); Deputy General Manager (the grade that the claimant was at); General Manager (the grade that Mr Khot was at); and Senior General Manager (the grade that Mr Rana was at).

120. When the claimant transferred from RNT to VFS, her job title was “Deputy General Manager - Operations”. This job title was confirmed when she transferred across from RNT to VFS and the claimant agreed to it at that time.

121. When the claimant transferred from VFS to the respondent, her job title did not change. Indeed, on a “new starter form” which the claimant completed after she had transferred to the respondent, she herself stated her job title to be that of “Deputy General Manager”. Furthermore, the “employee information” received by the respondent from VFS on the TUPE transfer also stated that the claimant’s job title was “Deputy General Manager - Operations”.

122. However, during her time at VFS, the claimant was clearly very interested in promotion and also in developing in a business development direction (although, to be clear, business development is to some degree part of the duties of most managers at VFS and at the respondent). We have seen in the bundle several examples of email correspondence between the claimant and managers at VFS (to be clear, not Mr Rana or Mr Khot) where she sought an expansion in her role. At one point, it was made clear to her in an email of 26 March 2019 that a Head of Operations position at VFS (in other words, promotion to a position which would have been the equivalent level to Mr Rana’s), which she had expressed an interest in, was not something that she was eligible to apply for as it would mean a double promotion.

123. As to business development, the claimant clearly sought to involve herself in business development projects at VFS and indeed, as noted, of her own volition, chose at times to use a business card containing the words “Business Development - Special Projects” and to sign off some emails “Operations UK & Europe; Business Development Special Projects”. However, this did not alter the fact that her core role was to run the day-to-day UK operations in relation to the Russian Mission and it did not alter her job title or grade.

124. Managers at VFS were, however, aware of the claimant’s ambitions and the direction in which she had indicated she would like her career to go, in other words that she was seeking promotion and that she had expressed an interest in doing business development work.

125. Indeed, on 6 November 2020, only six weeks after her transfer to the respondent, the claimant even went so far as to send a detailed letter to the Chief Executive Officer of Artionis in which she outlined the business development activity which she said she had been undertaking whilst at VFS. The purpose of this letter was to highlight her business development experience in the hope that

she would be given the opportunity to lead the business development department at Artionis.

The claimant's meeting in November 2020 with Ms Stephant

126. As noted, in November 2020, the claimant informed the respondent that she was pregnant. Furthermore, in November 2020, the claimant had a lengthy meeting with Ms Stephant which, as noted, she covertly recorded.

127. Ms Stephant had been employed by VFS in an HR capacity since March 2017. She therefore already knew the claimant. She joined the respondent in early 2020 as "Deputy General Manager - HR" (she did not transfer to the respondent under TUPE with the remaining employees in September 2020).

128. The transcript of the lengthy conversation between the claimant and Ms Stephant evidences an HR professional who was open, kind and considerate in a conversation with an employee who was about to go on maternity leave and had a number of queries. It is not necessary to relate all of the detail. However, the points below are of relevance.

129. First, the claimant spent a lot of the conversation dwelling on her job role and it was again evident that she had ambitions to move into a business development role. She told Ms Stephant that she was *"hungry for promotion"*. However, she confirmed her understanding of what her job role actually was when she stated *"No, of course, but I guess I'm expected to handle only operations, right? Since I don't have the BD role, so I'm not going to expect to have to handle…"*.

130. Secondly, as already quoted above, she expressed antipathy to the fact that Mr Rana was in the role that he was in and suggested that she should have been approached for it.

131. Thirdly, there was a lot of discussion between them about the position while the claimant was on maternity leave. The claimant has maintained in her claim that she informed Ms Stephant that she wanted to be informed of *"all relevant news and updates, including organisation changes and promotion opportunities, business, and transition updates"*. Ms Stephant denies that that was the case; she maintains the claimant only asked to be updated about promotion opportunities. The claimant's position is not evidenced in the lengthy transcript; the only reference it contains is to the claimant requesting contact in relation to promotional opportunities, which accords with Ms Stephant's position. Furthermore, Ms Stephant subsequently sent the claimant a maternity letter dated 13 January 2021 which set out what they had discussed in terms of contact. This included the following:

"**Keeping in Touch Days**
If you wish, and with the approval of your reporting manager, you may work up to a maximum of 10 days during your maternity leave without losing SMP or ringing your leave period to an end. These days are called Keeping in Touch days (KIT) and can be taken during the entire period of your OML and AML, except during the first 2 weeks following the day of childbirth.

Reasonable contact
Under the regulations, "reasonable contact from time to time" between an employer and employee may be permitted. Accordingly, we may make reasonable contact with you to discuss your return to work plans or to update you about work developments. The purpose of reasonable contact is to encourage communication and contact between the parties during the maternity leave period."

There is no reference to the respondent agreeing to keep the claimant informed on the range of matters which the claimant now maintains she asked for.

132. Ms Stephant had also discussed keeping in touch days with the claimant at the November 2020 meeting and explained what they were. However, whilst there was no obligation on the claimant to utilise them, at no point did the claimant ever use or seek to use any keeping in touch days.

133. For all of the above reasons, including our findings on the respective reliability of the evidence of the witnesses, we find that the claimant's request about being kept informed was limited to promotional opportunities. It is particularly unsurprising that the claimant would focus on that in particular, given that she had clearly expressed her desire to be promoted and indeed to move into a business development role if possible. Furthermore, in terms of volume, so much of the transcript of the November 2020 conversation relates to the claimant seeking to discuss promotional opportunities; this was clearly something that was at the forefront of her mind and it is therefore further unsurprising that that is the area which she specifically asked Ms Stephant to keep her informed about.

134. There were no promotional opportunities during the course of the claimant's maternity leave; therefore, no communication was made to her about promotional opportunities. To be clear, in this respect, both Mr Rana and Mr Khot were not promoted; they were both appointed from outside the respondent's organisation. Furthermore, although their appointments did not take effect until after 1 September 2020, both of those appointments were made well in advance of 1 September 2020 (in other words, before the claimant had even become an employee of the respondent).

135. When an opportunity did arise (the Deputy General Manager - Special Projects role – see issue 2.1.6), the first person whom the respondent notified was the claimant. However, this occurred on 16 February 2022, after the end of the claimant's maternity leave on 1 February 2022.

136. Ms Stephant candidly accepted that the claimant had asked her, should she need to communicate with the claimant during her maternity leave, to email her on her private email address as opposed to her work email address (on the basis that she would not be checking her work email address so frequently).

Changes during the claimant's maternity leave

137. There were a number of operational aspects of the business which did change during the course of the claimant's maternity leave. First, as noted, the Manchester office was, because of the decline in business as a result of the pandemic, closed, the respondent hoped temporarily. Secondly, of the claimant's

two direct reports, Ms Valdmane resigned in September 2021 and Ms Sveckiene, again because of the financial constraints caused by the pandemic, was made redundant with effect from December 2021. The respondent did not inform the claimant about these changes at the time of them. Ms Stephant candidly accepted during cross-examination that she could and possibly should have informed the claimant of them.

138. As noted, the claimant was prior to her maternity leave aware of Mr Rana having joined the respondent and of the fact that, at that point, he was her line manager.

139. However, she was not aware of Mr Khot joining the business until much later. Although Mr Khot commenced employment in December 2020, the UK was at that time in a Tier 4 lockdown and consequently he did not come into the office and meet colleagues until a much later date, after the claimant had commenced her maternity leave. At some point, the respondent proposed that Mr Khot would become the claimant's line manager rather than Mr Rana. It is not clear at what point that decision was taken. However, not long after the claimant went on maternity leave, Mr Khot became the line manager for Ms LO, who was the claimant's maternity cover. From that we infer and find that it was assumed by the respondent by as early as March/April 2021 that Mr Khot would be the claimant's line manager when she returned from maternity leave. However, the first time that the respondent informed the claimant of this was at a meeting on 16 March 2022 between her and Mr Rana and Mr Khot which took place in anticipation of the claimant returning to work in early April 2022.

Bamboo HR

140. The respondent was in the process of introducing a new HR system called Bamboo HR. The claimant was prior to her maternity leave well aware that it was about to be introduced, as were other employees. It is a very simple system. It would require only 10 minutes or so to update someone on it and its use.

141. Only one formal briefing on the system was held, on Microsoft Teams, around the time of its introduction in March 2021. Group email invitations to the briefing were sent to all relevant employees, including the claimant. The email address used for the claimant was, as was the case with other employees, her work email address and not her private email address. The emails were sent by Harald Schmidt, another member of the HR team, not by Ms Stephant. The briefing was to take place and did take place on 18 March 2021, which was the day before the claimant's due date. The claimant could not have attended it nor was she expected to attend. There were no adverse consequences for the claimant in not attending the briefing, as she could very swiftly and easily have been briefed on the system when she returned to work in due course (which she did not in the end do).

Bonuses

142. We have quoted above the only clause related to bonuses in the claimant's contract of employment. The provision of a bonus is discretionary. There is no contractual entitlement to a bonus.

143. Bonuses have been paid in previous years. However, as noted, the respondent's business was extremely adversely affected by the Covid 19 pandemic, to the extent that many employees took temporary salary cuts and indeed the Manchester office was closed, hopefully temporarily. Consequently no employees were paid bonuses at all for the years 2020 and 2021.

144. The two bonus years about which the claimant complains for the purposes of her claim (issue 4.1.2) are for the years 2021 and 2022.

145. As noted above, the reason why the claimant was not paid a bonus for 2021 was that, due to the financial constraints on the business, no bonuses were paid at all for 2021.

146. The claimant resigned with effect from 14 July 2022. Bonuses for 2022 would have been decided upon and paid in December 2022, some five months after the claimant's employment terminated. The claimant accepted in cross-examination that she would not have been eligible for a bonus for 2022 because she was no longer an employee of the respondent and that she was in fact not (contrary to the allegation in the list of issues) arguing that she should have been eligible for a bonus for 2022. In any case, no bonuses were paid for the 2022 year either, again because of the financial constraints on the business.

147. For the sake of completeness, we note that we have also been referred to a separate incentive scheme known as the VAS incentive scheme. This was introduced at VFS to try to incentivise junior staff to increase sales in return for monthly monetary payments. However, the employers who are eligible to participate in that scheme are junior ranking employees only. Senior ranking employers such as the claimant were not part of that scheme and the claimant was therefore never eligible to participate in it.

Staff events

148. In December 2021, it was not clear until the last minute whether the respondent would hold any social gathering by way of a Christmas party. This was because of the restrictions and anticipated restrictions due to the pandemic. At the start of December 2021 it was anticipated that the government would shortly publish its guidance on Covid 19 restrictions. At short notice on Friday, 3 December 2021, and in anticipation of impending restrictions on social gatherings, the respondent took the decision to hold a scaled-down Christmas party. The claimant's maternity cover, Ms LO, organised the venue and sent out invitations that day. The party then took place on Monday, 6 December 2021. Staff who were regularly in contact with each other and who had been attending the London office (plus Russian Mission staff who were also in regular contact with those staff of the respondent) were invited to attend. Staff who were not

attending the London office or who were from the respondent's other offices in Manchester and Edinburgh were not invited to attend. The claimant, as was the case with other individuals who were not regularly in the office, was not invited to attend.

149. We have already referred to the internal inconsistency in Mr Rana's evidence in relation to this. However, the other evidence we have seen is consistent that the background to and the rationale for the way the party was organised was the Covid 19 pandemic and the impending government restrictions. Mr Rana, when asked in cross-examination, said that he did not think about inviting the claimant (which we accept and which is consistent with the fact that it had been decided not to invite any staff who were not regularly in the office). However, when pushed in cross-examination, he said that, if he had thought about it, he might have invited the claimant; that we do not accept as it would have been inconsistent with the policy approach.

150. We accept therefore that the reason the claimant was not invited was because of the background of the pandemic and the respondent's policy in this respect.

151. However, whether that was the case or whether the reason was that Mr Rana simply forgot to ask her, the reason was not because of the fact that she was on maternity leave.

152. The claimant has also alleged that she was not invited to a staff event on 4 March 2022. However, there was no staff event on 4 March 2022. Official Womens' Day celebrations had been planned with the Russian Mission but these had been cancelled in the last week of February 2022 due to the conflict in Ukraine which commenced on 24 February 2022. Instead, Ms LO ordered some food into the office, together with flowers on the morning of 4 March 2022. 4 March 2022 was a normal working day and no activities took place other than that some of the staff consumed the food that was purchased while they continued working that day. The claimant admitted in cross-examination that there was no staff event that day.

Birthday gifts

153. The claimant has alleged that the respondent had a practice of buying birthday gifts for employees and that, in breach of this practice, it failed to buy her a birthday gift on her birthday in both March 2021 and March 2022 (her birthday is 30 March).

154. We heard evidence from numerous witnesses on this matter.

155. What is clear is that, at VFS, there was a minor, non-contractual allowance for staff well-being such as the purchasing of cake or a soft drink in the sum of around £5 per head on such occasions.

156. Furthermore, there was a practice, initiated by the claimant within her team (including Ms Valdmane and Ms Sveckiene) only, of buying each other

birthday presents. This was not, however, a policy of the respondent. Ms Stephant and Mr Rana both gave evidence, which we have no reason to doubt and therefore accept, that they never received a birthday gift from the respondent (or VFS) and that it was not customary for the respondent to buy birthday presents nor was there any policy in this respect; the first Mr Rana had heard of a suggestion that there had been such a practice was when he read the claimant's claim. Furthermore, Ms Stephant of all people, as an HR manager, both at the respondent and at VFS, is most likely to know what the position is and whether or not there was such a policy, custom or practice at VFS or the respondent.

157. The only people who knew about the birthday present practice initiated by the claimant were members of her team. However, when it was suggested to the claimant in cross-examination that, on that basis, the only people who could be at fault for failing to buy birthday presents were her other team members (because they were the only ones who knew about the practice initiated by the claimant), the claimant (perhaps understandably) declined to assert that Ms Valdmane or Ms Sveckiene were in any way to blame for any failure to buy her a birthday present in either March 2021 or March 2022 (by which latter occasion they had both long since left the respondent's employment).

158. We therefore find that it was not customary for the respondent to provide the claimant (or anyone else) with a birthday gift. Furthermore, there was no fault on the part of the respondent in not providing the claimant with a birthday gift.

The end of the claimant's maternity leave

159. As noted, the claimant did not use any of her keeping in touch days or contact the business during her maternity leave, until the point when she notified the respondent of her intended return to work on 24 January 2022.

160. Ms Stephant had left the respondent with effect from 4 December 2021. On 24 January 2022, the claimant therefore informed Mr Schmidt by email that she would be returning to her duties on 2 April 2022 (albeit she may have meant 4 April 2022, which was a Monday). Mr Schmidt engaged with her and tried to set up a call to update her on any developments, but the claimant declined. Mr Schmidt suggested that she use a keeping in touch day at some point prior to return so that the respondent could update her in terms of developments and upcoming projects, but on 9 February 2022 she declined, stating that she was currently abroad but would be happy to use a keeping in touch day closer to the end of her maternity leave period (although, for clarity, her maternity leave period had by that point ended (on 1 February 2022) and she was at that point on annual leave until her expected return in April 2022).

161. As Mr Schmidt was due to move to a different role in the company on 1 March 2022, he copied in Mr Skulimowski, the respondent's new senior HR Business Partner, and explained that Mr Skulimowski would contact her going forwards. As noted, Mr Skulimowski had only joined the respondent on 3 February 2022. He had therefore not met and knew nothing of the claimant at that point.

Proposal of role of Deputy General Manager - Special Projects

162. Towards the end of 2021 and the beginning of 2022, the respondent was considering creating a new role in the organisation. It was essentially a business development role. It would be a highly strategic role and would involve working closely with the Chief of Strategy, Mr Anirudh Singh, to whom the role reported. Mr Singh was a very senior individual at the respondent, who reported directly to the Chief Executive Officer. He was more senior, for example, than Mr Rana (who himself was two levels of seniority higher than the claimant).

163. The role would be at a pan-organisational level and not just at the UK level (as was the case with the claimant's existing operational role).

164. The proposed salary for the role was to range from a minimum of £47,000 per annum to a maximum of £52,000 per annum. In her existing role, the claimant's salary was £46,464 per annum.

165. The grade of the role was "Deputy General Manager", which was the same grade as the claimant's existing role.

166. Whilst at its initiation, the jobholder would not initially have any reports, the aim of the position was that the individual would set up their own department and recruitment the staff needed.

167. As noted, and for the reasons set out earlier in our findings of fact, managers at the respondent knew the claimant was not only seeking promotion but had also made it very clear that she wanted to do business development work. For this reason, the respondent decided to offer the claimant the new position before opening it up to external applications. It is not clear exactly which individual at the respondent took the decision to offer the position to the claimant, although it is likely to have been Mr Singh, to whom the new role would report (Mr Singh was not at the tribunal to give evidence and Mr Skulimowski could not confirm exactly who took the decision to offer it, albeit he was tasked by Mr Singh with writing to the claimant to make the offer of the new position to her).

168. The claimant's case is that the new role would have been a demotion in comparison to her existing role. However, it was not. The job grade was the same as the claimant's existing role (Deputy General Manager); the salary would be higher, possibly considerably higher; and the reporting line would instead be into very senior management at the respondent (Mr Singh). Although, because it was a new role, there would be no direct reports initially, that would change as the jobholder grew and developed the role and the team, so it would be a role running a team just as the claimant had run a team in her existing operational role. In no sense could this role be described as a demotion. At worst, it could be described as having parity with the claimant's existing role but the reality was that, given the exposure to senior management and the potential for development in an area which the claimant had repeatedly expressed an interest in, this would have been, had she accepted the role, a promotion.

169. Importantly, the respondent had reacted to the claimant's own repeatedly expressed desires to be involved in business development work. Although the managers at the respondent may not have been aware of it at the time (because they were only produced at this hearing), it is ironic that the claimant herself had of her own volition been using business cards and email sign offs with the words "Special Projects" on them; that is a further indication that this role was something which accorded with what the claimant had previously expressed that she wanted.

170. Whilst, as we shall see, the respondent offered the claimant this new role, it did not force her to take it or put undue pressure on her to do so. When, in due course, the claimant made clear that she was not interested in the role, the respondent did not pursue the matter further with her.

171. On instructions from Mr Singh, Mr Skulimowski wrote a reasonably detailed letter to the claimant on 16 February 2022 in relation to the new role. As noted, he had had no previous contact with the claimant and the information in the letter was based on what he learned from Mr Singh and from any personnel information relating to the claimant which was available to him. The letter emphasised the strategic nature of the role, the reporting line, emphasised that the respondent could not *"think of a better suited candidate than"* the claimant for the role, stated that the respondent would like to *"check on your interest in this role"* and, should the claimant be interested, set up a call with Mr Singh to discuss further.

"Desired flexibility"

172. In one passage in the letter, Mr Skulimowski stated:

"We have always valued your contribution and as a long-standing resource, I truly believe, this role may not only allow you to expand your skills but also help you with the desired flexibility when it comes to the execution of this role since this will no longer deal with day to day operations at a VAC level and therefore, would be largely a remote role with visits to the office or travel only on a need basis."

173. Whilst this passage is not directly relevant to the issues which we have to determine, we have referenced it here as much as anything because so much emphasis was placed on it by Ms Sole in cross-examination and submissions. Ms Sole maintains that Mr Skulimowski's use of the expression *"desired flexibility"* is indicative that he made an assumption that someone returning from maternity leave would want to have a job role which enabled them to work from home. That is not an allegation the list of issues, hence it is not of direct relevance to the issues we have to determine. However, Ms Sole asserts that this alleged mindset is something which should lead us to accept that the burden of proof would switch in relation to the allegation about the offer of the Special Projects role. That does not, however, assist the claimant because, as we have found as a fact, the role was not a demotion and the claimant's allegation is that it was; hence the factual allegation in relation to this issue is not established and the complaint fails at that stage before one even gets to considering the burden of proof. Hence it is not relevant.

174. However, to be clear, we do not in any case except Ms Sole's assertion. Although Mr Skulimowski is an experienced HR professional, English is not his first language and, although his English is very good, some of his phraseology in his written documents is at times awkward. He readily admits that, when he puts together letters, he uses a series of templates and pulls phrases from them to assist him. Even in the passage quoted, it is awkward for him to have said *"We have always valued your contribution…"*; Mr Skulimowski himself had never met the claimant and knew nothing of her previously so, whilst it may have been true that the respondent had always valued her contribution, using the expression *"We"* (including himself) is an example of this awkwardness; he could never have previously valued the claimant's contribution because he didn't even know who she was.

175. The same applies to the expression *"desired flexibility"*. Mr Skulimowski knew nothing of the claimant previously and had no knowledge of whether flexibility in a role was something attractive to her or whether she had expressed any such desire in the past. However, he himself clearly saw flexibility as a potential advantage for any job; indeed, he works from home himself and waxed lyrical in his evidence about how fantastic he found it to be able to do so. This was also at a time, in early 2022, when, as a result of the pandemic, large numbers of people were working from home and in many cases finding that experience beneficial. Mr Skulimowski simply saw this additional flexibility as something which may be another attractive element of the role and therefore included it in his letter amongst all the other elements which he hoped would be attractive to the claimant. As noted, the respondent did not put undue pressure on the claimant to accept the role; however, as is clear from Mr Skulimowski's letter, they would have been very happy had she accepted it and they sought to persuade her that it would be advantageous to her and the business if she accepted it.

176. In short, we do not accept that this particular piece of awkward phraseology in the letter is indicative that Mr Skulimowski made an assumption that anyone returning from maternity leave would want to work from home.

The claimant's response to the Special Projects offer

177. On 21 February 2022, Mr Skulimowski followed up his letter of 16 February 2022 with an email attaching a copy of the job description for the Special Projects role and again asked the claimant if and when she would like to discuss it with Mr Singh.

178. The claimant replied briefly by email of 22 February 2022 stating that the role did not appear to be a promotion but rather to be a demotion. She also asked Mr Skulimowski if he could *"please share with me Artionis's current Org chart?"*

179. Mr Skulimowski thought, in the context of the claimant's email, that she was requesting an organisation chart so that she could see whether the new role would be ranked as a promotion or demotion within the respondent; she did not

specifically request the organisational chart for the wider global Artionis group of companies.

180. As noted, on 24 February 2022, Russia invaded Ukraine, with dramatic consequences for the respondent and its business. Consequently, Mr Skulimowski did not respond immediately to the claimant, although he sent her a polite email on 28 May 2022 apologising for not getting back earlier and telling her that he would revert shortly.

181. Three days later, on 3 March 2022, he provided the organisational chart for the respondent to the claimant by email (which was what he thought she was seeking). He also attached a draft chart which he had himself created showing where the new role would be positioned if the claimant decided to take it on. He assured her that the proposed new role was not a demotion. He explained that the respondent would appreciate her further input in the shaping and direction of the new role and said that she and Mr Singh could discuss and build the role together.

182. The claimant subsequently asked for the full global organisational chart for Artionis. By email of 8 March 2022, Mr Skulimowski informed her that the full organisational chart could be viewed on the Bamboo HR system, which he said she had access to, but that, if she required assistance in accessing it, she should let him know. In that email, Mr Skulimowski also sought a response from the claimant regarding the Special Projects role and explained that the respondent was hoping to place someone in that new role by the first week of April 2022 and would need at least two weeks to recruit another candidate should the claimant decide not to accept the new position.

183. In a rather terse email of 9 March 2022 to Mr Skulimowski, the claimant stated *"As I wasn't interested in the new role reasons you know, I turned it down."* and *"Furthermore, as I already advised you, the new role you offered me was a demotion in my opinion and I am not interested. I'll rather stay in my current role."*. From that point, therefore, Mr Skulimowski and the respondent did not pursue the proposal of the new Special Projects role with the claimant any further. Mr Skulimowski confirmed this to the claimant in an email of 11 March 2022 and stated that, instead, he would set up a separate meeting for the claimant with Mr Khot and possibly Mr Rana to bring her up to speed before she resumed her original role in April 2022. We return below to this meeting, which took place on 16 March 2022.

Access to Bamboo HR

184. In the claimant's email of 9 March 2022 to Mr Skulimowski, she also stated *"This is the first time I'm hearing about HR Bamboo system. I was never informed or updated about it."*. This was not true as the claimant was aware before she went on maternity leave that the system was due to be introduced (albeit it was actually introduced shortly after she went on maternity leave in March 2021).

185. The claimant was, however, unable to access Bamboo HR when she tried. This was not because of the complexity of the system; as noted it is a very simple system. However, Ms LO, the claimant's maternity cover, had access to the Bamboo HR system and, because of the way the system works, it was not possible for the claimant to access it at the same time as Ms LO, as the system effectively treated them as one position. Mr Skulimowski was not aware of this at the time he directed the claimant to Bamboo HR. We have seen email correspondence showing the efforts of Mr Skulimowski and others to identify what the problem was and to solve it. On 22 March 2022, Ms LO's access to Bamboo HR was suspended (as she was out of the office that day) which allowed the claimant to gain access to it. She was, therefore, able to view the organisational chart on Bamboo HR at this point.

186. However, as is evident from an email of 14 March 2022 from the claimant to Mr Skulimowski, the claimant had been separately provided with the global organisational chart on 14 March 2022, presumably by Mr Skulimowski, notwithstanding the ongoing and as yet unresolved issues with her accessing Bamboo HR.

The claimant's meeting of 16 March 2022 with Mr Rana and Mr Khot

187. The meeting on 16 March 2022 between the claimant and Mr Rana and Mr Khot took place remotely. In it, Mr Rana introduced Mr Khot and explained his role. They also updated the claimant on any changes to the business which had taken place whilst she was away. This included the closure of the Manchester office. The claimant also asked why the roles previously held by Ms Valdmane and Ms Sveckiene no longer existed and why the respondent had let them go. She had, therefore, learnt previously that they were no longer employed by the respondent. Mr Rana and Mr Khot explained the financial difficulties facing the business and the reduction in volumes and that any remaining activities performed by Ms Valdmane and Ms Sveckiene had been split between other teams.

188. In connection with that, they asked the claimant to assist with accounting tasks because Ms Sveckiene, the person who was previously employed to do this, had left the respondent. This was consistent with what had happened generally at the respondent, where individuals had left due to the overall downturn in volumes and any residual duties which they had were divided amongst others. Furthermore, the respondent was contractually entitled to request the claimant to do this, in accordance with the job flexibility clause in her contract which we have quoted above. However, the claimant refused to do this. Therefore, Mr Rana and Mr Khot did not pursue the matter further. The accounts tasks are now carried out by Mr Khot instead.

189. In a subsequent email dated 23 March 2023 to the claimant, Mr Khot confirmed that she would not be involved in those accounting duties. He confirmed that her role and job description within the respondent remained the same as they were before her maternity leave.

190. The claimant replied by email of 25 March 2022 to Mr Khot to confirm that she understood that she would not be required to carry out these tasks and that she would do exactly as she had been doing before she took maternity leave.

191. There was, therefore, no change at all to the claimant's role and responsibilities. She remained in the same role as she was in prior to commencing her maternity leave. Furthermore, as is evident from her email of 25 March 2022, she knew this at the time.

192. The meeting of 16 March 2022 was the first occasion when the claimant learned that Mr Khot was going to be her line manager going forwards rather than Mr Rana.

193. To be clear, and as already noted, the roles of Mr Khot and the claimant did not overlap.

The claimant's grievance

194. As already noted, the claimant did not return to work on 4 April 2022 as planned (or at all). She provided a sickness certificate on 1 April 2022 to the respondent.

195. On 8 April 2022, she submitted a grievance. The grievance was heard by Mr Skulimowski. He did not uphold it. The claimant then appealed. The appeal was heard by Mr Jagpreet Bhatia, Artionis' Global Head of HR. He did not uphold her appeal.

196. It is not necessary to go into any great detail in relation to the contents of the claimant's grievance, much of which overlaps with the allegations of her employment tribunal claim. That is because the claimant accepted in cross-examination that it was conducted fairly and in line with the respondent's grievance policy. We concur. We have reviewed the documents in question regarding the handling of the grievance. Mr Skulimowski conducted a thorough grievance investigation, including two grievance meetings with the claimant, and made reasonable conclusions based on the evidence. Mr Bhatia's conclusions were similarly reasonable.

197. One area of complaint by the claimant in her claim was to do with alleged delays in dealing with the grievance. However, she was taken in cross-examination through every aspect of the timeline between the instigation of the grievance on 8 April 2022 and the delivery of the outcome of the appeal on 5 July 2022. She accepted that there were no unreasonable delays on the part of the respondent (indeed, most of the delays in the process were at the claimant's instigation) with the exception of a five day period in relation to the appeal when Mr Bhatia was away from the office. We do not accept that that five day period amounted to an unreasonable delay given that Mr Bhatia was not even at work at the time. Furthermore, independent of the claimant's own answers in cross-examination, we have seen the timeline for the grievance and the appeal and do not consider that any delays were unreasonable. In fact, given the number of

issues in the grievance, we consider that the grievance and the grievance appeal were dealt with in a timely manner.

198. The grievance appeal outcome letter was issued on 5 July 2022.

Resignation

199. As noted, the claimant resigned with effect from 14 July 2022.

Trade Union

200. The claimant was at all relevant times a member of a trade union. She knew how to access and take advice on rights from the union and other sources.

The Law

Maternity discrimination

201. Section 18 EqA provides as follows:

18 Pregnancy and maternity discrimination: work cases
(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity…
(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave…
(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
(a) …, or
(b) it is for a reason mentioned in subsection (3) or (4).

Direct sex discrimination

202. Section 13 of the EqA provides:

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

203. Sex is a protected characteristic in relation to direct discrimination.

204. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

205. Under each of the above provisions it is necessary that the treatment by the employer amounts to a detriment to the employee. Detriment can be anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. However, an unjustified sense of grievance alone would not be enough to establish detriment.

Burden of Proof under the EqA

206. The burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene a provision of the EqA. To do so the employee must show more than merely that she was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more (Madarassy v Nomura International plc [2007] IRLR 246). If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision and the employer must prove that the treatment was "in no sense whatsoever" because of the relevant characteristic. If the employer is unable to do so, we must hold that the provision was contravened and discrimination did occur.

207. However, the burden of proof provisions will not necessarily assist the tribunal, if on all of the evidence a positive finding of fact one way or the other can be made. In such circumstances the tribunal is entitled to make that finding without resorting to the burden of proof provisions. See Martin v Devonshires Solicitors [2011] ICR 352.

Time Limits under the EqA

208. Section 123(1) of the EqA provides that proceedings may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the tribunal thinks just and equitable. The primary time limit is subject to adjustment as a result of time spent in ACAS Early Conciliation.

209. Section 123(3) provides that, for these purposes, conduct extending over a period is to be treated as done at the end of the period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the Court of Appeal held that the burden is on the claimant to prove, either by direct evidence or by inference from the primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

210. The tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, it is for the claimant to persuade the tribunal that it is just and equitable. There is no automatic presumption that it will be extended. The exercise of discretion is thus the exception rather than the rule (Robertson v Bexley Community Centre [2003] IRLR 434 CA).

Detrimental treatment because of exercising etc right to maternity leave – section 47C ERA/regulation 19 MAPLE

211. Section 47C ERA provides as follows:

47C.— Leave for family and domestic reasons.

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

212. MAPLE are the current regulations referred to. Regulation 19 of MAPLE provides as follows:

Protection from detriment
19.—(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee—

…
(d) took, sought to take or availed herself of the benefits of, ordinary maternity leave;
(e) took or sought to take—
(i) additional maternity leave…

(4) Paragraph (1) does not apply in a case where the detriment in question amounts to dismissal within the meaning of Part X of the 1996 Act…

213. The concept of detriment is again applicable and is similar to detriment for the purposes of the EqA.

Time limits in relation to section 47C ERA/regulation 19 MAPLE

214. Section 48 ERA provides:

48.— Complaints to employment tribunals.
(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of … [section 47C(1)….
(3) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)—
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on;
and, in the absence of evidence establishing the contrary, an employer… shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

215. The primary time limit is again subject to adjustment as a result of time spent in ACAS Early Conciliation.

Constructive unfair dismissal

216. In order successfully to make a complaint of unfair dismissal an employee must first prove on the balance of probabilities that he or she was dismissed by the employer. Section 95(1)(c) ERA states that:

"there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct."

217. This form of dismissal is commonly referred to as constructive dismissal. In the leading case on the subject, Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA, the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. In order to claim constructive dismissal the employee must establish on the balance of probabilities that:

(i) There was a fundamental breach of contract on the part of the employer;

(ii) The employer's breach caused the employee to resign;

(iii) The employee did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.

218. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" by itself does not amount to a breach of contract or even unreasonable conduct (although it would be rare for objectively reasonable conduct to constitute a "last straw"). It suffices if it contributes to the employer's earlier breaches (if any) and/or cumulatively undermines trust and confidence.

219. An employer must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (Malik v Bank of Credit and Commerce International SA [1997] ICR 606.

220. If the employee can prove that he or she was constructively dismissed, the burden of proof switches to the employer to show that, on the balance of probabilities, the dismissal was for a potentially fair reason in accordance with s.98(1) and (2) ERA.

Automatically unfair dismissal – section 99 ERA/regulation 20 MAPLE

221. Section 99 ERA provides as follows:

99.— Leave for family reasons.
(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.
(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
(3) A reason or set of circumstances prescribed under this section must relate to—
(a) pregnancy, childbirth or maternity…
(b) ordinary, compulsory or additional maternity leave…

222. MAPLE are the current regulations referred to. Regulation 20 of MAPLE provides as follows:

Unfair dismissal
20.—(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3)…

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

…
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave;
(e) the fact that she took or sought to take—
(i) additional maternity leave;

223. Where the employee resigns, she will still need to prove that she was dismissed (constructively dismissed) in order to be able to pursue an automatically unfair dismissal complaint under section 99 ERA.

Conclusions on the issues

224. We make the following conclusions, applying the law to the facts found in relation to the agreed issues. We deal first with the substantive issues, in the order set out in the list of issues, before considering the jurisdictional issues (time limits).

Unfavourable and/or Detrimental Treatment Because the Claimant Is Exercising or is Seeking to Exercise or Has Exercised the Right to Maternity Leave (s.18(4) EqA and/or s.47C ERA and/or reg 19 MAPLE Regs)

2.1.1 The Respondent failed to maintain contact with her during maternity leave, as she had requested, and failed to notify her of organisational changes, new job opportunities or the appointment of her new line manager.

225. This factual allegation breaks down into two parts.

First part

226. The first allegation is that the respondent failed to make contact with the claimant during maternity leave as she had requested. However, the only area in relation to which she requested that the respondent contact her was in relation to promotional opportunities. As we found, no promotional opportunities arose during her maternity leave.

227. To be clear, as we found, Mr Rana and Mr Khot were appointed externally and were not promoted and their appointments were both made well before the claimant went on maternity leave (and indeed well before the claimant became an employee of the respondent).

228. Furthermore, the only other promotional opportunity which subsequently arose was the Special Projects role and the respondent did inform the claimant of this and indeed specifically offered it to her before advertising it externally. (To be clear, although discussion of the possibility of creating this role took place at management level before the end of the claimant's maternity leave (in late 2021/early 2022), this job opportunity was one which arose after (in the sense that the respondent had finally decided that it would create it) and was communicated to the claimant after her maternity leave had ended on 1 February 2022, albeit when she was still absent from work on annual leave; it was communicated to her by Mr Skulimowski on 16 February 2022 and he cannot have been given the instruction that the respondent had decided to create this role any earlier than 3 February 2022, because that was the date he joined the respondent. As the opportunity arose after the end of the claimant's maternity leave, there can therefore have been no failure to notify her of it during her maternity leave).

229. As the respondent did not fail to contact the claimant during maternity leave as she had requested, this factual allegation is not established and any complaints based on it fail at this stage.

Second part

230. The second part of this allegation is that the respondent failed to notify the claimant of organisational changes, new job opportunities or the appointment of her new line manager.

231. As already noted above, the respondent did not fail to notify the claimant of new job opportunities as there were none. However, the respondent did not notify the claimant during her maternity leave of certain organisational changes which took place during her maternity leave (for example, the closure of the Manchester office and the termination of employment of her two reports, Ms Valdmane and Ms Sveckiene). In addition, it did not inform her during her maternity leave of the change in her line manager from Mr Rana to Mr Khot albeit, as we have found, that decision was likely to have been made as early as March/April 2021. These matters were instead discussed at the meeting of 16 March 2022 with Mr Rana and Mr Khot.

232. This second part of allegation 2.1.1 is, however, not specifically time limited to the claimant's maternity leave (as the first part is). It's very drafting therefore drives a coach and horses through the allegation, as the respondent did of course notify the claimant of these organisational changes – at the meeting with Mr Rana and Mr Khot on 16 March 2022. Furthermore, the relevant parts of the legislation under which the claimant is bringing her complaints (section 18(4) EqA and regulation 19(2)(d) and (e) MAPLE are not limited to acts and omissions which are said to have taken place during the period of maternity leave itself (in

contrast to other parts of that legislation, such as section 18(2) EqA, which is so limited). The claimant's own choice of section/regulation does not therefore preclude the allegations from referring to acts/omissions which took place outside the maternity leave period; the only requirement is that the allegations must be that the acts/omissions were said to have been done because the claimant had at some point taken or sought to take maternity leave. As it is drafted, therefore, this second part of the allegation fails on its the facts at the first stage.

233. However, these were not arguments that were made before us and it appeared to us that both advocates presented their cases on the basis that the allegation was of an alleged failure to notify the claimant of these organisational changes during her maternity leave (it being unspokenly accepted that the respondent did of course discuss them later with the claimant, at the meeting of 16 March 2022). We therefore approach the determination of the issue on that basis.

234. As a result, the factual allegations of the second part of issue 2.1.1 are established; the respondent did not notify the claimant during her maternity leave of certain organisational changes which took place during her maternity leave (for example, the closure of the Manchester office and the termination of employment of her two reports, Ms Valdmane and Ms Sveckiene, or the change of her line manager from Mr Rana to Mr Khot).

235. Did these omissions amount to a detriment?

236. As noted, both Ms Stephant and Mr Rana candidly accepted that they could and possibly should have informed the claimant about the closure of the Manchester office and the termination of employment of her two reports. Furthermore, although the claimant actually found out about the departure of her two reports via another source before the meeting of 16 March 2022, that does not prevent the fact that the respondent did not itself tell her about them from being a detriment. We balance this against the fact that it is always a matter of fine judgement for an employer as to the extent of information they should send to employees on maternity leave, balancing any desire to keep them informed against a wish to avoid overburdening them and that, furthermore, in this case, the claimant herself showed no particular interest in being informed of operational matters, neither requesting it specifically, nor seeking to take any keeping in touch days, nor even contacting the respondent at all until she notified it on 24 January 2022 of her proposed return from maternity leave. However, given that the test for a detriment is a relatively low bar and that we do not consider that this is merely an "unjustified sense of grievance" on the claimant's part, we do consider that these omissions are enough to satisfy the threshold of being detriments; they are all operational matters of significance to the claimant and which she would likely want to be informed about, even if it were just a brief email communication. We therefore consider that it was reasonable for the claimant to consider that the failure to inform her during her maternity leave of the termination of employment of her two reports, the closure of the Manchester office and the change in her line manager were detriments; and we find that they were detriments.

237. The next question is, therefore, as to the reason for the treatment. As we shall come to in a moment, the wording is slightly different for the purposes of section 18(4) EqA and regulation 19 MAPLE. However, as is evident from Ms Stephant's and Mr Rana's responses, there was no deliberate attempt to conceal this information from the claimant and the reason for not telling her was merely a case of oversight; they could have informed her of these things but didn't think to do so.

238. As to section 18(4) EqA, it is important to bear in mind that the test is as to the reason why and is not a "but for" test. It is self-evidently the case that, had the claimant not been on maternity leave but been working, she would have been told about these things (because she would have been in the office working and/or in regular contact with her managers and/or involved in the operations of the business). But that does not mean that her maternity leave was the reason for the treatment, merely that it was the background to it. The reason was, as set out in the paragraph above, oversight. We are able to make a clear finding in this respect without having to resort to the burden of proof; however, even if we applied the burden of proof, the claimant has not established any facts which would cause it to shift and the respondent has provided a non-discriminatory explanation for the treatment, namely oversight. The section 18(4) complaint therefore fails.

239. As to regulation 19 MAPLE, firstly, a successful complaint requires an act or a deliberate failure to act by the respondent and there was neither; there was no act by the respondent and its failure to act was not deliberate as it was due to oversight. There was no thought process by the respondent's witnesses; they merely failed to consider whether to inform the claimant of these matters. Secondly, the reason for the treatment was oversight and not the fact that the claimant was on maternity leave. For each of these reasons, the section 19 MAPLE complaint therefore fails.

2.1.2 The Respondent failed to invite her to staff events in December 2021 and March 2022.

240. There was a Christmas party organised at short notice for 6 December 2021 and the claimant was not invited.

241. Was that a detriment? Whether the claimant would in fact have gone to the party had she been invited is not determinative (and in fact she may well have been abroad at the time anyway so may not even have been able to attend); however, we consider that the claimant feeling hurt through not being invited is enough to pass the relatively low bar of being a detriment; this was more than an unjustified sense of grievance.

242. However, as we have found, the reason she was not invited was because, against the background of Covid 19, the invitations were only sent to those who were regularly in the London office and the Mission staff with whom they interacted. Anyone who was not coming into the office regularly, for whatever reason, and those working at the other offices in Manchester and Edinburgh, were not invited. That was a perfectly sensible policy against the

background of the pandemic. Furthermore, the reason was not because the claimant was on maternity leave; she would not have been invited whatever the reason was as to why she was not working regularly in the London office.

243. Again, for the purposes of section 18(4) EqA, we are able to make a clear finding in this respect without having to resort to the burden of proof; however, even if we applied the burden of proof, the claimant has not established any facts which would cause it to shift and the respondent has provided a non-discriminatory explanation for the treatment, namely its invitation policy in the light of the pandemic. The section 18(4) complaint therefore fails.

244. As to regulation 19 MAPLE, there was a deliberate failure to act in the sense that the respondent deliberately, in accordance with the policy it adopted, chose not to invite those who were not regularly in the office. However, the reason for the treatment was exactly that (an application of the policy regarding Covid 19 which it chose to adopt in relation to the party) and not the fact that the claimant was on maternity leave. The section 19 MAPLE complaint therefore fails.

245. As we have found, there was no staff event in March 2022. Any complaints based on this allegation therefore fail at the first stage.

2.1.3 The Respondent did not invite her to attend a briefing on the new HR system.

246. As we have found, the respondent did invite the claimant to the only briefing which took place on Bamboo HR, which was in March 2021, and we have seen the emails in the bundle evidencing this. The claimant may say that she did not read the emails as they were on her work email address as opposed to her personal email address; however, she was invited. The allegation as set out in the list of issues is not therefore established on the facts and therefore any complaints based on it fail at the first stage.

2.1.4 The Respondent failed to provide her with a birthday gift in March 2021 or 2022, as was customary.

247. As we have found, it was not customary for the respondent to provide birthday gifts; this was merely a localised practice initiated by the claimant amongst her own team. The allegation is not therefore proven on the facts and any complaints based on this allegation therefore fail at the first stage.

248. Whilst that disposes of these complaints, we should add for completeness that, if the allegation was simply that the respondent did not provide her with birthday gifts in March 2021 or 2022 (without the assertion about that being customary), any complaints would still fail. That is because, although it is factually correct that the respondent did not provide her with gifts, the reason for its not doing so is because it was not customary for it to provide employees with birthday gifts; it was not because she was on maternity leave.

2.1.5 The Respondent delayed presenting the Organisational Chart, despite numerous requests.

249. For the reasons below, the claimant did not make numerous requests for the organisational chart and the respondent did not delay presenting it. As the facts of these allegations are not established, any complaints based on them fail at the first stage.

250. Specifically, the claimant requested *"Artionis's current Org Chart"* on 22 February 2022 and Mr Skulimowski quite understandably assumed that she was seeking to know where the new Special Projects role would sit in the organisation given the concern she expressed in the same email that it was a demotion. He therefore sent her charts showing this, which he had gone out of his way to put together to try and assist her, and he did so on 3 March 2022 (only 5 business days after her email and that despite the fact that Russia had invaded Ukraine in the interim with all the major damaging consequences for the respondent's business that were otherwise occupying Mr Skulimowski and the respondent). When the claimant subsequently clarified that she was seeking the global organisational chart, he quite reasonably referred her to the Bamboo HR system given that he believed she had access to it. In any event, as is evident from the claimant's email of 14 March 2022, the claimant had been separately provided with the global organisational chart on 14 March 2022, presumably by Mr Skulimowski, notwithstanding the ongoing and as yet unresolved issues with her accessing Bamboo HR.

251. There were therefore only two requests, which Mr Skulimowski quite reasonably thought they were in respect of different things. There were not therefore "numerous requests" for "the organisational chart". Furthermore, on each occasion Mr Skulimowski responded promptly in the circumstances and supplied the charts he thought he was being asked for. There was therefore no delay.

252. As the facts of these allegations are not established, any complaints based on them therefore fail at the first stage.

2.1.6 Upon advising of her intended return, the Claimant was offered the position of Deputy General Manager – Special Projects which was, effectively, a demotion.

253. As we have found, the offer of the Special Projects role was not a demotion. As the facts of this allegation have not been established, any complaints based on it fail at the first stage.

254. For completeness, we should add, however, that offering this role did not amount to a detriment. Quite the contrary; the respondent was trying to assist the claimant in her career development by offering her a new opportunity before externally advertising it, in an area in which she had in the recent past repeatedly and forcefully expressed an interest. It was beneficial to her to offer her this role, not detrimental. Given what she had expressed in the past, one can only imagine the far more justifiable complaints which the claimant would have been likely to

have made had the respondent, by contrast, created this role and not notified her of it.

255. Furthermore, the decision to offer her the role was because the respondent considered that taking up this role would be in the claimant's own interests (as expressed by the claimant herself) and those of the respondent; it was in no sense whatsoever because she was or had been on maternity leave.

2.1.7 By the time of her intended return, the Claimant's pre-maternity leave position had changed so she was effectively being demoted.

256. By the time of the claimant's intended return (4 April 2022), the claimant's pre-maternity position had not changed at all, let alone to the extent that she had effectively been demoted. Whilst there had been discussion at the meeting of 16 March 2022 of the claimant taking on some residual accounting duties, she had refused to do so and Mr Rana and Mr Khot did not take the matter further. Mt Khot subsequently emailed the claimant on 23 March 2022 to confirm that her role and job description remained the same as before her maternity leave and the claimant duly confirmed this by return email of 25 March 2022.

257. As the factual basis for this allegation has not been established, any complaints based on this allegation fail at the first stage.

2.1.8 For the purposes of s. 18(4) EqA only, the Claimant was dismissed.

258. The claimant resigned from her employment. For reasons which we elaborate on in the sections below, the claimant was not entitled to treat herself as constructively dismissed and there was no dismissal. The factual basis for this allegation has not therefore been established and this complaint fails.

259. Furthermore, none of the other allegations of maternity discrimination under section 18(4) EqA have succeeded. Therefore, even if the claimant had established that she was constructively dismissed, the reason for that dismissal for the purposes of section 18(4) EqA could not have been because of the fact that she exercised or sought to exercise her right to maternity leave. This complaint would therefore fail for this reason too.

<u>Direct Sex Discrimination (section 13(1) EqA)</u>

3.1.1 Did Sandeep Rana and Gaurav Khot share the same material characteristics as the Claimant? The Claimant will aver that she was working at the same and/or similar role as both Mr Rana and Mr Khan pre-transfer.

260. For the reasons set out in our findings of fact above, neither Mr Rana nor Mr Khot shared the same material characteristics as the claimant and neither are appropriate comparators for the purposes of her sex discrimination complaints,

261. There are many material differences and we refer to our findings of fact in full, in particular at paragraphs 72 – 82 above. However, in summary, first of all

they did not, as alleged at issue 3.1.1, work at the same or similar role as the claimant prior to her TUPE transfer to the respondent. Mr Khot was one grade higher than the claimant and Mr Rana was two grades higher. Mr Rana was a Senior General Manager for a far greater percentage of VFS business and globally (the claimant only the UK); and had far more reports and reports of a much more senior level. Mr Khot was a General Manager with a specific focus in Quality and the relevant qualifications to go with it (which the claimant did not have) and operated at a strategic level. Both were recruited to the respondent separately and long before the respondent acquired VFS's UK Russia contract and so were appointed long before the claimant even became an employee of the respondent when she transferred under TUPE on 1 September 2020. Neither were "promoted" as the claimant has suggested; rather, they were appointed from outside the respondent's organisation before the respondent even acquired VFS's UK Russia contract and the employees who worked on it such as the claimant.

262. Any complaint of direct sex discrimination relying on a comparison between the claimant and either Mr Rana or Mr Khot therefore fails.

3.1.2 What are the material characteristics of a hypothetical comparator?

263. As to a hypothetical comparator, no attempt has been made by the parties to construct such a comparator. Having said that, in the light of our findings in relation to the 3 allegations of direct sex discrimination set out below, it is unnecessary for us to do so.

3.2.1 Not considering the Claimant and/or giving her the opportunity to apply for and/or otherwise work in either of the roles that Mr Rana and Mr Khot were appointed to.

264. As these allegations are based on a comparison of the claimant's treatment with that of Mr Rana and Mr Khot, they fail as neither Mr Rana nor Mr Khot are, for the reasons set out above, appropriate comparators.

265. However, in any case, the reason why the respondent appointed Mr Rana and Mr Khot to the respective roles at the respondent was because, as we have found, they were suitably senior, experienced and qualified for the roles to which they were appointed; the claimant was not.

266. Mr Rana's appointment arose because he was approached and offered a job by Mr Raja, the founder of the respondent, who already knew Mr Rana and his abilities; even if the claimant had been suitable for the role given to Mr Rana (which she was not) we have seen no evidence that Mr Raja even knew the claimant or knew her well enough to make a judgment about her abilities; his decision to approach Mr Rana and offer him the job and not the claimant cannot therefore have been because of the claimant's sex.

267. Mr Khot's appointment arose because he was looking to move anyway and he applied in an open, externally advertised recruitment round for the role, along with roughly 200 other candidates, and was offered the job because of his

suitability for it. The claimant did not apply for the role (although she would not have been eligible for it anyway as she didn't have the "blackbelt" Sigma Six certification (which was an express requirement for the role) or the background in Quality. The reason she was not given the role was because she did not apply (and even if she had applied, she would not have been given it because she wasn't qualified for it); it could not have been and was not because of her sex.

268. The reasons for these appointment decisions were therefore in no sense whatsoever because of the claimant's sex. We are able to make clear findings in this respect without having to resort to the burden of proof; however, even if we applied the burden of proof, the claimant has not established any facts which would cause it to shift and the respondent has provided non-discriminatory explanations for the treatment. These direct sex discrimination complaints therefore fail for these reasons too.

*3.2.2 ** Upon advising of her intended return, the Claimant was offered the position of Deputy General Manager – Special Projects which was, effectively, a demotion.*

269. As referred to at 2.1.6 above, the Special Projects role was not a demotion. The factual basis of this allegation is not established and this complaint of direct sex discrimination therefore fails at the first stage.

*3.2.3 ** By the time of her intended return, the Claimant's pre-maternity leave position had changed so she was effectively being demoted.*

270. As referred to at 2.1.7 above, the claimant's pre-maternity leave position had not changed at all by the time of her intended return in April 2022, let alone to such a degree as amounted to a demotion. The factual basis of this allegation is not established and this complaint of direct sex discrimination therefore fails at the first stage.

<u>Constructive Unfair Dismissal contrary to section 95(1)(c) and section 98(4) of the Employment Rights Act 1996 and/or Automatic Unfair Dismissal contrary to section 99 Employment Rights Act 1996 and regulation 20 of the Maternity and Parental Leave Regulations 1999</u>

4.1.1 The factual basis for the unfavourable and/or less favourable treatment and/or detriments identified at 2.1 and 3.2 above.

271. None of the complaints in 2.1 or 3.3 above succeeded. However, in relation to a large number of them, the claimant has not even succeeded in establishing the factual basis of the allegations occurred; such allegations cannot form part of the basis of any constructive dismissal complaints as the facts alleged did not happen.

272. Of the 9 separate complaints in 2.1 and 3.3, the only complaints where she did succeed in establishing the factual basis of the allegations were those at allegations 2.1.1 (in part only); 2.1.2 (in part only) and 3.2.1 (in summary, not notifying her during her maternity leave of organisational changes or the

appointment of her new line manager; not inviting her to the December 2021 Christmas party; and not offering her the roles to which Mr Rana and Mr Khot had been appointed. We will return to these after we have analysed issues 4.1.2 and 4.1.3 below.

4.1.2 Failure to pay her bonus in 2021 and 2022

273. The claimant did not have a contractual right to a bonus; she was merely eligible for a bonus, payable at the discretion of the respondent. Not paying her a bonus cannot therefore amount to a breach of an express term of the claimant's contract.

274. The respondent did not pay the claimant a bonus in 2021 or 2022. However, it did not pay anyone else a bonus in those years either. This was for the entirely proper reason that the respondent's business had been hit hard by the pandemic and, in 2022, the invasion of Ukraine, and there were not the funds to pay bonuses; indeed, other staff were taking temporary pay cuts at the time, so serious was the situation. Furthermore, the claimant was not even eligible for a bonus in 2022 as she had left the respondent by then.

4.1.3 Failure to deal with her grievance in a fair and reasonable manner.

275. As we have found, the respondent did deal with the claimant's grievance in a fair and reasonable manner and we cross-refer to our findings of fact above in this respect. This factual allegation is not therefore made out. It cannot therefore form part of the basis of any constructive dismissal complaints, as the facts alleged did not happen.

4.2 Was there any repudiatory breach?

276. That leaves four areas where the facts as alleged are established. None of them amount to a breach of an express term of the claimant's contract and the claimant therefore must rely on them as being individually of cumulatively a breach of the implied term of trust and confidence.

277. However, none of them either individually or cumulatively amount to a breach of the implied term of trust and confidence. Let us remind ourselves that the test is whether the respondent without reasonable or proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the claimant and the respondent. None of the four areas, either individually or cumulatively, get even close to satisfying this test. We summarise why below.

278. Not informing the claimant about the organisational changes was not deliberate; it was merely oversight. The respondent did tell the claimant about the changes at the meeting of 16 March 2022 in anticipation of her return to work. The claimant had shown no particular interest in being kept up to date on such changes during her maternity leave and there was no aim to conceal any of this from her nor was there any reason to conceal it from her; if she had been in contact with her managers and asked about changes, she would undoubtedly

have been told of them. Whatever the claimant may have alleged now at this tribunal, it is not the case that failing to inform her damaged the relationship of trust and confidence between her and the respondent and certainly not to the serious degree required under the test.

279. The respondent had a reasonable and proper cause for not inviting the claimant (or anyone else not in the office regularly) to the hastily arranged December 2021 Christmas party, namely the background of the Covid 19 pandemic and the entirely sensible policy on invitations it adopted as a result. Not inviting the claimant did not in any way damage trust and confidence.

280. The respondent had reasonable and proper cause to appoint Mr Rana and Mr Khot to their roles, for the multiple reasons which we have outlined above and which we do not repeat here. The claimant was not suitable for these roles but they were. There was no breach of trust and confidence at all in appointing them and not appointing the claimant.

281. The respondent had reasonable and proper cause not to award bonuses in 2021 and 2022 (to the claimant and indeed to anyone else). That was because of its serious financial position. There was no breach of trust and confidence in not paying bonuses to the claimant in those years. Furthermore, any decision regarding the 2022 bonus would have been made in December 2022, some five months after the claimant resigned and could not therefore have been part of her reasoning for her decision to resign anyway.

282. In summary, there was no breach of contract at all, let alone a repudiatory breach entitling the claimant to resign and treat herself as constructively dismissed. The constructive dismissal complaint therefore fails.

4.2.2 Where a series of acts is relied on, has the Claimant proved a failure to deal with her grievance in a fair and reasonable manner and, if so, is this capable of being a "last straw".

283. For completeness, we should add that one of the allegations which the claimant failed to prove even on the facts of the allegation was the allegation that the respondent failed to deal with her grievance in a fair and reasonable manner; we found that the respondent did deal with her grievance in a fair and reasonable manner. As that allegation is not proven on the facts, it cannot form the basis of the alleged "last straw".

284. In the light of the conclusions above, issues 4.3 and 4.4 fall away and it is not therefore necessary to consider them.

4.5 For the purposes of reg. 20 MAPLE, was the reason or principal reason for dismissal a reason connected with the fact that the Claimant took, sought to take, or availed herself of the benefits of maternity leave?

285. As there was no dismissal, this complaint fails at the first stage.

286. However, even if the four proven actions of the respondent analysed in the section about had amounted to a breach of trust and confidence, the reasons for those actions were not principally (or indeed at all) reasons connected with the fact that the claimant took, sought to take or availed herself of the benefits of maternity leave. We have set out the reasons for those actions in our conclusions above and so not repeat them again here. The complaint of automatically unfair dismissal under section 99 ERA and regulation 20 MAPLE therefore also fails for this reason.

Summary of substantive merits

287. In summary, therefore, all of the claimant's complaints fail. However, that is not the end of the matter and we need to consider the issues of jurisdiction.

Time Limits and Jurisdictional Issues

1.1 Were the claims presented within the applicable time limits under the Employment Rights Act, Maternity and Parental Leave etc Regulations 1999 and Equality Act respectively?

288. ACAS Early Conciliation commenced on 16 May 2022 and ended on 26 June 2022. The claim was presented on 21 July 2022. The primary time limit under all of the types of claim brought is 3 months, adjusted as a result of ACAS Early Conciliation. This means that (subject to one exception) any complaint where the alleged act or omission took place prior to 17 February 2022 was presented prima facie out of time.

289. The exception is allegation 2.1.3, which was introduced by amendment on the second day of this hearing (20 June 2023). That means that, under the principles in Galilee, it is deemed to have been presented at the date of the amendment (20 June 2023) and is therefore prima facie considerably out of time; it is irrelevant that the alleged failure in that allegation (to invite the claimant to a briefing on the new HR system) relates to March 2022 which (had this complaint been set out in the original claim form) would have meant that it would have been prima facie presented in time.

290. The following allegations were therefore presented prima facie out of time: 2.1.1, 2.1.2 (in relation to the December 2021 event only); 2.1.3; 2.1.4 (in relation to the 2021 birthday gift only); and 3.2.1.

291. All the remaining allegations were presented prima facie in time and the tribunal therefore has jurisdiction to hear them.

292. (In relation to 2.1.1, we iterate that we have for reasons set out earlier taken the second part of that allegation as being an allegation of a failure to notify the claimant during her maternity leave of organisational changes, especially as not time limiting it in that way would have meant that it would immediately fail on the facts (as the claimant was told about these organisational changes by Mr Rana and Mr Khot at the meeting of 16 March 2022). The first part of allegation 2.1.1 was always clearly limited to alleged acts/omissions during the claimant's

maternity leave period. As we have found, the claimant's maternity leave period ended on 1 February 2022 (even though she remained on annual leave after that) such that any alleged failure to keep her informed during her maternity leave cannot have taken place later than 1 February 2022; as 1 February 2022 is earlier than 17 February 2022, both parts of allegation 2.1.1 are therefore prima facie out of time.)

Conduct extending over a period

293. In terms of those prima facie out of time complaints under the EqA, the claimant cannot successfully argue that any of them should be deemed to be in time as being part of conduct extending over a period with successful complaints which were presented prima facie in time. That is because, for the reasons set out in out analysis of the substantive merits of the complaints above, there were no successful complaints which are prima facie in time.

294. The same applies to those detriment complaints brought under section 47C ERA/section 19 MAPLE, which provides that where an act extends over a period, the "date of the act" means the last day of the period (section 48(4) ERA). As none of the in time allegations amount to proven acts of unlawful maternity detriment, there is no later in time proven act on which to attach earlier allegations which were prima facie out of time.

295. Therefore, all of those complaints identified as being presented prima facie out of time were indeed presented out of time.

1.2 If not, should the Tribunal exercise its discretion to extend time (applying the relevant tests)?

296. We therefore turn to the two separate tests in relation to the EqA discrimination complaints and the ERA/MAPLE detriment complaints as to whether we should extend time. The claimant must show in relation to her EqA discrimination complaints that it would be just and equitable to extend time, but in relation to her ERA/MAPLE detriment complaints the stricter reasonably practicable test applies.

297. We accept Mr Withers submissions that under either formulation, we should not extend time; it is not just and equitable to do so for the purposes of the EqA complaints and it was reasonably practicable for the claimant to have presented her claim in time for the purposes of the ERA/MAPLE detriment complaints. In concluding this, we take into account the following points.

298. The claimant is an articulate, well-educated and intelligent senior manager with around 10 years' experience at managerial level. She was at all relevant times a member of a trade union. She knew how to access and take advice on rights from the union and other sources. She identified alleged discrimination as early as November 2020, as is evident from the transcript of her covertly recorded conversation with Ms Stephant in which she suggests Mr Rana's appointment was discriminatory. She was able and willing to raise issues with her employer and take matters further if necessary (for example her

communications to managers at VFS about her view that she should be promoted, her November 2020 email to the Chief Executive Officer of the respondent seeking to promote her business development work and her May 2022 grievance.

299. The only ground which the claimant raised as to why she did not put in her claim earlier was that set out in paragraphs 110-111 of her witness statement. She says that she was not aware of the alleged changes to her role or alleged promotion of colleagues until the 16 March 2022 meeting with Mr Rana and Mr Khot. However, we know from the November 2020 transcript that she knew about Mr Rana's position well before her maternity leave commenced. Furthermore, she knew about at least some of the operational changes prior to the 16 March 2022 meeting, for example that her two reports had left the respondent. In addition, if the claimant had engaged and taken even the briefest interest in operational matters at the respondent during maternity leave, she could easily have found out all this information, which was not deliberately kept from her and which everyone in the office would have known about. As to the March 2021 birthday gift (allegation 2.1.4), the claimant clearly knew that she had not received a gift back in March 2021 itself (when she didn't receive one on her birthday on 30 March 2021). As to allegation 2.1.3, even though the claimant may not have read the emails about the Bamboo HR briefing in March 2021 as they were on her work email account, she would have been able to find that information out on her return from maternity leave in March 2022 and yet she waited until June 2023 to bring that complaint by way of amendment at this hearing.

300. For these reasons, we consider that it was reasonably practicable for her to have presented her out of time detriment complaints under the ERA/MAPLE in time. The tribunal does not therefore have jurisdiction to hear them and they are struck out.

301. Furthermore, for these reasons, we do not consider that it would be just and equitable to extend time in relation to the claimant's out of time complaints under the EqA. The tribunal does not therefore have jurisdiction to hear them and they are struck out. The fact that the complaints were weak complaints which failed further reinforces our view in this respect.

_____

Employment Judge Baty

Dated: 7 September 2023

Judgment and Reasons sent to the parties on:

07/09/2023

For the Tribunal Office

Annex

Agreed List of Issues

1. Time Limits and Jurisdiction Issues

   1.1 Were the claims presented within the applicable time limits under the Employment Rights Act, Maternity and Parental Leave etc Regulations 1999 and Equality Act respectively?

   1.2 If not, should the Tribunal exercise its discretion to extend time (applying the relevant tests)?

2. Unfavourable and/or Detrimental Treatment Because the Claimant Is Exercising or is Seeking to Exercise or Has Exercised the Right to Maternity Leave (s.18(4) EqA and/or s.47C ERA and/or reg 19 MAPLE Regs)

   2.1 The Claimant alleges that the conduct which amounted to unfavourable and/or detrimental treatment is:

      2.1.1 The Respondent failed to maintain contact with her during maternity leave, as she had requested, and failed to notify her of organisational changes, new job opportunities or the appointment of her new line manager.

      2.1.2 The Respondent failed to invite her to staff events in December 2021 and March 2022.

      2.1.3 The Respondent did not invite her to attend a briefing on the new HR system.

      2.1.4 The Respondent failed to provide her with a birthday gift in March 2021 or 2022, as was customary.

      2.1.5 The Respondent delayed presenting the Organisational Chart, despite numerous requests.

      2.1.6 Upon advising of her intended return, the Claimant was offered the position of Deputy General Manager – Special Projects which was, effectively, a demotion;

      2.1.7 By the time of her intended return, the Claimant's pre-maternity leave position had changed so she was effectively being demoted.

2.1.8 For the purposes of s. 18(4) EqA only, the Claimant was dismissed.

2.2 For the purposes of s. 18(4) EqA, where the Claimant has proved the treatment relied on, was that treatment unfavourable?

2.3 If so, was the unfavourable treatment because the Claimant was exercising, had sought to exercise or had exercised her right to maternity leave?

2.4 For the purposes of reg. 19 MAPLE, did any of the above treatment amount to subjecting the claimant to a detriment by any act or deliberate failure to act by the Respondent because the Claimant took, sought to take or availed herself of the benefits of maternity leave?

3. Direct Sex Discrimination (section 13(1) EqA)

3.1 The Claimant relies on actual comparators Sandeep Rana and/or Gaurav Khot in relation to 3.2.1 and/or a hypothetical comparator in relation to all of the allegations at 3.2.1 – 3.2.3:

3.1.1 Did Sandeep Rana and Gaurav Khot share the same material characteristics as the Claimant? The Claimant will aver that she was working at the same and/or similar role as both Mr Rana and Mr Khan pre-transfer.

3.1.2 What are the material characteristics of a hypothetical comparator?

3.2 Was the Claimant treated less favourably than the relevant comparator(s) where the less favourable treatment relied on is:

3.2.1 Not considering the Claimant and/or giving her the opportunity to apply for and/or otherwise work in either of the roles that Mr Rana and Mr Khot were appointed to; and/or

3.2.2 ** Upon advising of her intended return, the Claimant was offered the position of Deputy General Manager – Special Projects which was, effectively, a demotion; and/or

3.2.3 ** By the time of her intended return, the Claimant's pre-maternity leave position had changed so she was effectively being demoted.

(**N.B. Where either 3.2.2 or 3.2.3 is proved to be discriminatory contrary to section 18(4) EqA then the claims fall away as complaints of direct sex discrimination).

3.3 If so, was the less favourable treatment because of sex?

4. Constructive Unfair Dismissal Contrary to section 95(1)(c) and section 98(4) of the Employment Rights Act 1996 and/or Automatic Unfair Dismissal contrary to section 99 Employment Rights Act 1996 and regulation 20 of the Maternity and Parental Leave Regulations 1999

4.1 The Claimant relies on the following as acts as amounting to breach of contract either separately and/or cumulatively. Has the Claimant proved the acts relied on:

4.1.1 The factual basis for the unfavourable and/or less favourable treatment and/or detriments identified at 2.1 and 3.2 above; and/or

4.1.2 Failure to pay her bonus in 2021 and 2022; and/or

4.1.3 Failure to deal with her grievance in a fair and reasonable manner.

4.2 Where the acts relied on are proved:

4.2.1 Did any act and/or series of acts amount to a repudiatory breach.

4.2.2 Where a series of acts is relied on, has the Claimant proved a failure to deal with her grievance in a fair and reasonable manner and, if so, is this capable of being a "last straw".

4.3 If the Claimant does prove a repudiatory breach, did the Claimant resign in response to this?

4.4 Did the Claimant waive and/or affirm the repudiatory breach as a result of delay?

4.5 For the purposes of reg. 20 MAPLE, was the reason or principal reason for dismissal a reason connected with the fact that the Claimant took, sought to take, or availed herself of the benefits of maternity leave?

[The hearing listed from 19th June is for liability only]