EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms J Wall	Gannons Commercial Law Limited

Heard at: London Central **On**: 9-12 January 2024
In chambers: 15- 17 January 2024

Before: Employment Judge Lewis
Ms J Cameron
Mr S Godecharle

Representation

For the Claimant: Represented herself

For the Respondent: Mr Steen, solicitor

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that:

1. The refusal to pay the claimant's pension contributions at any time prior to 26 January 2023 in respect of the year ending May 2022 was discrimination because she was exercising her right to statutory maternity leave.

2. The other claims for discrimination because of pregnancy, pregnancy-related illness or for exercising her right to maternity leave are not upheld.

3. The claimant was constructively dismissed. She was entitled to be given notice.

4. The constructive dismissal was not discriminatory.

5. The claim for ordinary unfair dismissal is not upheld as the claimant does not have sufficient qualifying service to bring such a claim.

6. The claim for automatic unfair dismissal under s104C is not upheld.

7. The claims for detriments contrary to s47E Employment Rights Act 1996 are not upheld.

8. The claim for breach of duty under s80G Employment Rights Act 1996, ie for not dealing with the claimant's application for flexible working in a reasonable manner, is not upheld because the claim was made out of time.

9. The claim for indirect sex discrimination is not upheld.

Remedy hearing

10. A hearing for remedy will take place by CVP on **8 April 2023** starting at 10 am. Directions are set out below.

REASONS

Claims and issues

1. The claimant brought these claims:
   1.1. Discrimination because of pregnancy / pregnancy-related illness / because she exercised or sought to exercise the right to statutory maternity leave – s18 Equality Act 2010
   1.2. Indirect sex discrimination – s19 Equality Act 2010
   1.3. Failure to deal with her flexible working application under s80F Employment Rights Act ('ERA') 1996 in a reasonable manner – s80G(1) ERA 1996
   1.4. Detriments for having made a flexible working application under s80F – s47E ERA 1996
   1.5. Automatic unfair constructive dismissal - s104C(a) and (c) ERA 1996
   1.6. Ordinary unfair constructive dismissal
   1.7. Breach of contract, ie notice pay.

2. The parties agreed a list of issues during a preliminary hearing. These were laid out and worded a little clumsily and we have attempted to tidy them. We attach the list to the end of these Reasons. We note the reference to 'direct' discrimination under s18 – but it is simply 'discrimination' under that section.

Procedure

3. The tribunal heard from the claimant, her mother Mrs Raudszus-Wall and from Catherine Gannon. The claimant provided a witness statement and a chronology which we treated as a further witness statement. The claimant's witness statement gave document references as 'exhibits' which had since

been incorporated into the trial bundle. Ms Gannon's initial witness statement was only 4 pages. In response to the claimant's chronology, she provided a further short supplementary statement. We allowed this in although no Order had been made.

4. There was an agreed trial bundle of 283 pages. During the hearing, the respondent supplied a further pensions bundle (R1) and an excel sheet of staff (R2). The claimant offered some documents related to her property and her relationship which we did not need and by agreement were not entered in evidence. Both sides provided written closing submissions.

Fact findings

5. So much of this case is about the alleged changing of position by the respondent on the return date and whether holidays could be added at the end, we have set out extracts from the relevant correspondence to a greater extent than we might usually do.

6. The claimant was employed by the respondent as a company commercial associate solicitor from 2nd November 2020. She was employed initially to assist Helen Curtis who was to be her supervisor and line manager. Clause 4 of the claimant's contract of employment stated her place of work. It says that the normal place of work is at 20-21 Jockeys Fields London and that "the employee is only permitted to work at home with advance approval from her line manager". At the time she was recruited the London office was still open.

7. The claimant came into the office for two or three days onboarding with another employee and afterwards she worked only from home. This coincided with the second national lockdown. The claimant says that an agreement to work at home was made with Ms Curtis (and someone else) at her second job interview, and that she was told a number of fee earners worked from home. Given the coincidence of timing, we think it more likely than not that the agreement was related to the lockdown and the pandemic generally. As well as the timing, we think it unlikely that the respondent would otherwise have agreed to homeworking for a new employee in other circumstances. We also note the wording of the July 2021 appraisal (see below) which links the home working to the pandemic. By that time, the claimant was pregnant and unvaccinated, which was another reason for her to stay at home during Covid.

8. The claimant discovered that she was pregnant at the end of January 2021. She had severe hyperemesis gravidarum and extreme sickness during her first two trimesters.

9. The claimant told the respondent about her pregnancy at an early stage as a result of these complications. The first notification was early March 2021 when the claimant's mother told Ms Curtis that the claimant was pregnant and she had had to take her to A&E because she was very unwell with extreme pregnancy-related sickness.

10. On 14 July 2021, Ms Gannon carried out an appraisal for the claimant as Ms Curtis was on sabbatical. The claimant noted, "I think I have settled in excellently particularly given starting remote working so soon into joining...". Ms Gannon added, "it has been a difficult start to the role due to forced working at home as a response to Covid and the challenges that brings." Ms Gannon concluded, "Jen has made the best start possible in the circumstances... Jen is already an asset to the firm and shows much potential to develop".

11. In the section about fees recovery, Ms Gannon noted, "There have been occasions when financial management on jobs has slipped but that could be due to handover issues. I have spoken to you and hope the problems are now behind you".

12. Following the appraisal, the claimant was given a £10,000 pay rise, increasing her salary to £75,000.

13. During the appraisal review meeting, the claimant's forthcoming maternity leave was discussed. Ms Gannon said that the firm would only pay Statutory Maternity Pay. The claimant says that Ms Gannon promised her a return to work bonus of three months' salary, but that when after the meeting she asked for that to be put in writing, Ms Gannon withdrew the offer and claimed no knowledge of having made it. Ms Gannon denies having ever made such an offer. She says she had merely said she would think about it. She said she subsequently decided not to offer such a bonus because the claimant had just been given a £10,000 pay rise.

14. Both parties appear to have forgotten the email sent by Ms Gannon on 14 July 2021 headed "Appraisal for 2021 and return to work bonus", where Ms Gannon said "Well done on making a good start…I confirm that a one off bonus of £5000 gross... will be paid to you following 12 months calculated from the date you return to work at Gannons after your maternity leave. During maternity you will receive your SMP."

15. We find that Ms Gannon did not promise a three month bonus. We think it unlikely that she would have done so. Ms Gannon was careful about money. She was giving a large pay rise. She did not pay contractual sick pay or maternity pay. We do not think she is the type of person who would have agreed on the spot to giving a three month return to work bonus without giving it careful consideration. She was too experienced and she was too conscious of money to have made such a commitment off the

cuff. It is possible that the claimant misunderstood. In any event, we find that Ms Gannon said she would think about the claimant's request and that she subsequently decided only to offer £5000.

16. During July 2021 there was an exchange of emails between the claimant and Neil Garrett, the practice manager, regarding the claimant's accrued holiday entitlement and when she could take it in relation to her maternity leave. The claimant said that she understood holiday accrued whilst on maternity leave and that employers should allow it to be carried over into the next holiday year. She said "this is typically tabbed on to the last few months so that would enable one to full pay instead of statutory which runs out after 39 weeks. If there are any problems with this let me know."

17. Mr Garrett said he would discuss the maternity arrangements with Ms Gannon and asked if the claimant had agreed her return date. The claimant replied by email dated 2 August 2021 saying, "I don't have a firm return date yet, but perhaps we should just say 12 months from the start of my maternity leave (which would be 24 September 2022) and hopefully I can then reduce it if I want to / financially need to return sooner. Ideally, if CG agrees, I would want to use my remaining holiday entitlement of 17 days for this year plus 24 days for next year plus eight days of bank holiday... so that I can get full pay for 49 weeks, ie 10 weeks after my SMP runs out after 39 weeks." She broke this down as weeks 0 – 6 90% earnings; weeks 7 – 39 (SMP); weeks 40-50 full pay for accrued holiday; weeks 51 – 51 no pay, week 53 back to work.

18. The claimant added, "I am also entitled to 10 keep in touch days at full pay at some point." Mr Garrett replied, "it is not the firm's policy - in common I think with other firms - to allow extensive blocks of holiday to be taken in one go because of the business disruption. The most holiday taken at one time is usually restricted to two weeks. You are asking for 10 weeks. Your proposal is agreed up to week 39, then for weeks 40 to 41 you will be on maternity leave unpaid, then on holiday for 10 weeks. On this basis when you return there will be no holiday left for 2022. There is no right to paid keeping in touch days. It's mutual agreement. We will leave the decision on keeping in touch days until we know if there is a need for them. You can keep up to date with legal developments via PLC, LexisNexis and Lexology and you can follow us on social media whilst on return to leave."

19. On 7 September 2021, Ms Gannon emailed the claimant to confirm that the firm was changing the holiday year. She went on "Apologies for the change of mind but I haven't had to think through maternity for an employee before". Ms Gannon suggested when the holiday should be taken, which was in part during maternity leave and partly paid in lieu. She sought the claimant's agreement. On 8 September 2021, Ms Gannon confirmed to the claimant that she would get her holidays as she (the claimant) wanted. Ms Gannon then realised that holiday could not be

taken during maternity leave. She therefore emailed the claimant again a few minutes later to say that existing accrued holiday plus holiday accruing during maternity leave could be taken following the end of the claimant's maternity leave. Ms Gannon said "we very much look forward to your return to work planned for in or around December 2022. You will be missed. In terms of keeping in touch I suggest the arrangement is you let Neil know when you want to be updated and he can update you. If anything crops up we believe you need to be aware of during maternity we will contact you. Please do let us know when your maternity leave will start and end."

20. The emails are a little confusing because of the extra complication of the respondent's change of holiday year. However, it seems to us that Ms Gannon was willing to allow the claimant to take her accrued holiday in one go at the end of maternity leave, but understood that legally this could be added on only to 12 months maternity leave. This also seems to be the first mention of a December return.

21. On 13 September 2021, Ms Gannon emailed Ms Curtis regarding the claimant. The note refers to the claimant's target chargeable hours in September as £11,200 for 1 – 10 September 2021 as compared with fees excluding write offs of £3,115. It says that a decision on paper as to when to start maternity leave has to come from the claimant to avoid discrimination claims. "When you consider she has not taken much holiday but has taken considerable management her figures are not good. The problem is if we say nothing we leave ourselves vulnerable to attack if and when we do say something. Happy to discuss with you. Probably best if we both speak to her so there is a record. August will be blamed on the fee quoting help she worked she helped on so stick to Sept. I say.... I have already suggested maternity starts so she is riding us for what she can crab." [sic]

22. Ms Gannon told the tribunal that she was simply concerned about the claimant's health and safety working so close to her due date and that women usually stop working a few weeks in advance. We do not accept this. There is no mention of the claimant's health and safety in the email and that is not how it reads.

Maternity leave

23. On 15 September 2021, the claimant emailed Mr Garrett and Ms Gannon to say she would like to start her maternity leave on 24 September 2021. Because only 39 weeks would be paid, her end date would depend on whether the respondent agreed her previous proposal to take accrued holiday for this year plus for the maternity leave period plus a few extra days of her entitlement in a lump at the end of her maternity, so that she would have 12 months off with the baby overall. She suggested two

alternatives: either taking maternity leave up to week 42 and the balance of the year as paid accrued holiday with an expected return date of 24 September 2022 or taking maternity leave for the whole year and adding on paid accrued holiday with an expected return date of 3 December 2022.

24. Up to this point we would say the negotiations regarding when maternity leave would stop and the block of holiday leave would start were amicable and neither of the claimant's options had been ruled out.

25. In her 15 September 2021 email, the claimant also said she would really like to work 1 day/week as a keeping in touch day for the last 10 weeks before her return by way of a transition.

26. In fact, she went into labour while working on 16 September 2021, and her daughter Poppy was born the next day.

27. It seems there was no reply to the 15 September 2021 email – it may have been forgotten when the claimant suddenly went onto maternity leave – and there was no agreement at that stage about which of the two options would be taken.

Communication while on maternity leave

28. The claimant was a single parent and primary carer for her daughter.

29. The claimant says that she received only very curt replies from Ms Gannon during her maternity leave when she messaged her on WhatsApp. We can see from the WhatsApp print out that the respondent sent the claimant a very nice dress and handmade cardigan from Room 89. On 29 November 2021, the claimant messaged Ms Gannon to ask if she had received her thankyou card. She attached a batch of photos of the baby. She said she would speak to Mr Garrett about the Christmas party which she might not be able to make as she was breast feeding. She closed, "Can't wait for you to meet Poppy for some baby cuddles'.

30. Ms Gannon's immediately replied, "thanks for the update. Your card did not arrive. Poppy is a cute kid." The claimant responded "Oh no I'll have to do another. It was with her little footprint in some special ink. Thank you, I think so too though of course I'm biased being her mummy! Hope you are well." Ms Gannon replied "work is OK. Still wading through some of your clients who refuse to pay. Cheeky devils." The claimant responded "O dear cheeky devils indeed... if I can help with any of them let me know! I know how clients can really try it on when the fee earner isn't there to confirm what was agreed or said." Ms Gannon replied "I will check to see if the card is in the office before putting you to trouble. I am sure no one

would mind if Poppy came to the dinner." That was the end of the exchange on 29 November 2021.

31. On 22 December 2021 the claimant texted another photograph to Ms Gannon with a cover message. Ms Gannon replied the same day "Enjoy your special time with Poppy." The claimant answered "thank you. Take care and speak soon."

32. On 28 March 2022, Ms Gannon texted the claimant, "when are you free for a quick coffee and catch up? It has been a long time. Please bring Poppy. Look forward to some dates and times to suit you. Catherine." The claimant said she would get back to Ms Gannon in a couple of days regarding a date.

33. On 8 April 22 the claimant texted Ms Gannon suggesting arrangements to meet. She said that in terms of maternity leave she was keen to take her full 12 months followed by her accrued holiday "which takes us to around Christmas time I believe. Would you be willing to discuss the potential for a part-time WFH arrangement thereafter? I understand if not and I'm not sure how the firm dynamics are at the moment with promotions and new hires. Ideally 3 days - either shortened hours or just term time? Of course considerably less pay accordingly and maybe more of a support role for peer or other fee owners if that wouldn't work for the firm's clients." 'WFH' of course meant 'working from home'.

34. Ms Gannon texted to say she had responded by email.

35. The claimant says that she felt Ms Gannon's responses to her were cold and a little hostile. She felt 'Please bring Poppy', coming from Ms Gannon, was an instruction 'in no uncertain terms'.

36. We cannot see anything cold and hostile in Ms Gannon's responses. She engaged in an extended exchange on 29 November 2022. She said 'enjoy your special time with Poppy' in December. On 28 March, she initiated the suggestion of a coffee. We read, 'Please bring Poppy' as an invitation to bring the baby and an indication that she was interested to see Poppy. It is the opposite of cold.

The Hyde Park Meeting

37. Ms Gannon emailed the claimant on 8 April 2022. She started by saying she was glad all was good on the Poppy front and the dress was handmade from a tiny local shop. She said that meeting up in May was a good idea and they could meet for lunch somewhere nice, eg at the Serpentine. She said that to bring the claimant up to date, the firm had changed while she had been on maternity leave. They now had an HR consultant. They had improved their practice management systems.

Business was fairly quiet at the moment. She looked forward to hearing from the claimant with some dates for their May meeting. If the claimant would rather talk to the new HR person "about roles" please let her know.

38. The claimant responded on 12 April 2022 regarding the arrangements to meet. She asked for details of the HR consultant "to discuss where I could potentially slot back into the firm later this year... Perhaps it will be easier to discuss / foresee nearer the time although I know that good childcare... does get booked up quite far in advance".

39. On 13 April 2022, Ms Gannon emailed to confirm suggested meeting time. She added that it was far too early to speak to HR as there were many months left before the claimant's return to work, but as a guide in terms of arranging childcare, the claimant should work on the basis that she return to her full-time position in the office on normal hours now that Covid had lifted.

40. The Hyde Park meeting was arranged for 12 May 2022 and the claimant arrived with her baby. Ms Gannon did not arrive and Ms Gannon's sister, Julie Greenwood (who also worked at the firm and had some HR responsibilities), arrived on her behalf.

41. About 20 minutes after the agreed meeting time, Ms Gannon texted the claimant to apologise and she said she had been unwell. Ms Greenwood had told the claimant that Ms Gannon was caught up with a client. In fact, Ms Gannon told the tribunal that it was because her teenage daughter had a meltdown over exams. Ms Gannon says she keeps private domestic issues out of work and she would not have revealed that. She says she does not know what Ms Greenwood chose to say.

42. We accept that the claimant said something to Ms Greenwood at the meeting was her but we do not know in what context or what was said.

43. No alternative meeting with Ms Gannon was arranged. The claimant believes that Ms Gannon deliberately did not turn up so as to avoid having a conversation about her flexible working request. We will address this in our conclusions.

<u>The flexible working request</u>

44. On 13 May 2022, Ms Gannon emailed the claimant to say "time is rapidly flying by and we have now reached the point where we need to agree arrangements for your return to work. If you wish to make a flexible working request please follow the attached link. During Covid you like the rest of the population had to work from home and you continued to do so after Covid restrictions had been lifted as you were not vaccinated. Your employment contract states your place of work is at the London office and

that has not been varied. Please let me have your written request by Friday 20 May."

45. The claimant submitted her flexible working request at 1.59 pm on 16 May 2022. Where asked to describe the working pattern she would like to work in the future, she put "part-time - 8.30 to 4.30 pm working remotely with occasional trips to the office for client meetings, team building or training events. Ideally 2.5 or 3 days per week term time only." When asked when she would like the working pattern to commence from, she said "I would like to return to work on a part-time basis after taking my full 12 months maternity leave and then my accrued holiday at full pay.... This would take us to the start of December 2022. Part-time arrangement to resume thereafter." She said she would need to have a slightly reduced caseload pro rata although she would hope that would be manageable given that corporate work was quiet at the moment with no plans to replace Alistair Manning who was leaving. She said that client and colleague expectations would need to be "somewhat managed in terms of speed of reverting and turning things around". She felt that the new working pattern could be accommodated by appropriate work allocation and delegation to ensure that extremely urgent work was still dealt with in a timely fashion; by having good lines of communication with a line manager who was able to pick up unforeseen emergencies on days when she was not working; by having more emphasis on supporting colleagues with their caseloads; by being open and transparent with clients about her working days and availability; by ensuring she communicated regularly with her colleagues to maintain working relationships; and being sure that she had a good IT set up.

46. At 2.57 pm, Ms Gannon emailed the claimant with her response to the claimant's request. She stated "please confirm your decision on returning to work to me by 20 May 22", ie 4 days later.

47. Ms Gannon replied in writing to the flexible working request. She said that prior to being informed of the claimant's pregnancy, her place of work was the London office as set out in her contract. She had worked remotely during Covid and only continued to do so once lockdown had been lifted because she was pregnant and not vaccinated. Regarding the requested working pattern, Ms Gannon said that "at the moment the firm does not engage any part-time employees and there are no plans to do so. We do offer flexible working for a few days per week but only for full-time very senior staff able to manage teams and who are London-based able to attend the London office at short notice. There are many commercial reasons for this policy."

48. She then set out some of the reasons, ie competition in the market and the need to respond to clients promptly as otherwise they would soon go elsewhere; that the respondent's clients were usually run by one solicitor

with no team as such able to deal with matters during normal business hours when a solicitor may not be available; the budgets on jobs were not such as to absorb handover for part-time hours and school holidays; attendance at many face to face meetings was possible often in evenings as an important part of the role to form relationships with clients and contacts. She said that was not practically possible from Wigan. Also, that would be more difficult with home based working. Also remote working impacted on professional development. Term time working would not work because clients' needs were not dependent on school terms; a large firm might be able to cope with that but the respondent could not. Ms Gannon said that Mr Manning had left by natural wastage and was not being replaced by someone working remotely. Another associate was leaving because they had not agreed their flexible working as required. The firm was recruiting, but only for staff who would work from the office. Corporate work would not flourish without fee earners out in the market working contacts and meeting clients. It was very much the ethos of the firm that associates should be looking to build business for themselves and the firm rather than waiting for it to come to them. The firm did not wish to run a department where clients and colleagues expectations were "managed in terms of speed of reverting and turning things around" to accommodate the claimant's flexible working request.

49. Ms Gannon said they needed the claimant back in the office full-time from 19 September 2022. The claimant's holiday entitlement covering holiday accrued before and during maternity leave could be taken before she returned from maternity leave. If she decided not to return to work, they would treat her last day of employment as 16 September 2022 and roll up a notice period to coincide with that end date.

50. Ms Gannon admitted in cross-examination that she had already decided in advance of the application to refuse the request for part-time homeworking. She had been thinking about the matter because she knew what was coming from what the claimant had said to Ms Greenwood at the Hyde Park meeting and presumably because the claimant had flagged it in her April WhatsApp message. It was put to Ms Gannon that the ACAS Code recommends meeting and discussing the matter with the employee. Ms Gannon did not see the point of that because she had already decided.

51. The claimant replied to Ms Gannon on 16 May 2022 to ask for an extension to 20 June to consider the matter. She pointed out that only a few weeks previously Ms Gannon had said it was far too soon to decide her role as her return was a long way off and now it was suddenly urgent and she was essentially given an ultimatum of just four working days. She said that Ms Gannon appeared to be saying she must return full time to work from the office or nothing. Was that correct? She said this was very much contrary to the spirit of the flexible working guidelines and legislation

and also amounted to sex discrimination. She some of the other fee earners who were not office based. She said the train from Wigan to Euston was just one hour 59 minutes. It was perfectly doable. She said her part-time working did not need to be term time only - that was merely a suggestion, she had said 'ideally'. Further Ms Gannon had previously employed Ms Curtis on a term time only arrangement when Ms Curtis's children were younger. It seemed extremely arbitrary to say she would not entertain employing anybody on a part-time basis and very old fashioned.

52. Regarding the work issues, the claimant said she had been a new employee with a lower target for the first six months. In addition she had severe hyperemesis gravidarum during pregnancy. She was also asked to do large amounts of non chargeable work. Finally she was unaware of any client complaints. If they were a factor, she asked for a list and an explanation why they were her fault as opposed to general client niggles and attempts to avoid payment which every fee earner has from time to time. The claimant said that Ms Gannon had agreed previously that she could come back in December and use her holiday in the way outlined. She asked whether Ms Gannon was now reverting on these assurances. She said she was very disappointed at Ms Gannon's inflexible response.

53. The claimant wrote again on 18 May 2022. She said it was a shock to be told that she had to be back in the office full-time from September 2022 when previously a return in December 2022 had been agreed. She felt that she was being pushed to resign which she was not prepared to do. She did not consider it fair or legal to be required to provide a definitive return to work date well before the end of her leave. She also felt pushed away by Ms Gannon's refusal of her suggestion of keeping in touch days and the fact that Ms Gannon did not turn up to the planned meeting in Hyde Park. On that, Ms Greenwood had said Ms Gannon was held up with a client whereas Ms Gannon had said she was not well. Whichever was the case, the claimant had made a considerable effort to attend with Poppy in tow as had been requested.

54. The claimant said she had always found their clients tended to respect people's working patterns as long as they were informed. She felt the complete refusal was sex discrimination. Regarding her performance, the claimant was more than £20,000 ahead of target for the financial year ending March 2021. Ms Gannon and Ms Curtis had been happy with the claimant's financial performance and raised no concerns. It was also remarkable given how unwell the claimant was during her pregnancy. There would naturally be a drop in the claimant's fee earning potential when her line manager left on sabbatical as she had been employed to assist her. For the financial year starting April 2021, amongst other things, the claimant was wrapping up matters so there would not be a great deal of live unfinished work when she left to have her baby. She felt it was

unfair to look at September 2021 since she gave birth on the 16th of the month.

55. The claimant said she felt Ms Gannon's swift rejection of her flexible working request meant she had made up her mind even before she asked for the flexible working.

56. Ms Gannon replied on 20 May 2022 that as the claimant had told her on 8 April 2022 that she intended to return to work part-time and from home, Ms Gannon had had plenty of time to think about it. She had wanted to respond quickly because matters were stressful for the claimant. She said she had already apologised for the error around holidays. Regarding the return to work date, there was no need to feel pushed out: her job was open for her. She said they did need notice themselves and she had extended the time for the claimant letting them know to 1 August. The claimant should say if she felt that was unreasonable. Ms Gannon said the respondent did not have a need for part-time work. If the claimant could point to cases where tribunals have found small employers to have acted discriminatorily in refusing to create part-time roles where none existed, she should please send them to Ms Gannon and Ms Gannon would consider them. As for the workplace, that became irrelevant if there was no need for part-time work. Regarding performance, Ms Gannon said she had no intention of opening up a performance review while the claimant was on maternity leave. She had mentioned fees in the context of explaining why the respondent needed the claimant back in the office. As far as Ms Gannon was concerned, the past was the past and on the claimant's return, they could start afresh with new management.

57. On 28 May 2022, Ms Gannon wrote to the claimant on a 'without prejudice' basis. (Both sides waived 'without prejudice' in this hearing.) She said that the respondent was not replacing staff because it was moving to a consultancy model. Ms Gannon said it struck her that the claimant's requirements may be suited to this model. She said the claimant would be offered the same deal as the other consultants. Basically she would receive 40% of fees received from the clients and 50% of fees on work which she brought in. She could start immediately and she would be free to work for other firms. The letter said that the respondent would pay the claimant's holiday up to 5 December on receipt of a signed settlement agreement. She asked the claimant to let her know if this arrangement would be of interest.

58. The claimant replied on 4 June 2022. She said this would offer her no future job or income security and she would be giving up all her employment rights if she were to agree. Quite apart from this, she had little confidence at this moment in time and given everything that had been said, that the firm would actually pass on to her any work under the proposed arrangement. She also felt the fee share terms were not

particularly competitive. The claimant went on to set out some case law regarding sex discrimination when refusing a part-time working request. She said the key issue for her was that Ms Gannon reverted so very quickly with an outright refusal, point blank turning down both part-time and remote working and offering no suggested compromises. She would have been happy to look at different duties or a job share even if that meant a pay reduction. She looked forward to hearing from Ms Gannon and hoped they could sort this out soon.

59. On 7 June 2022, Ms Gannon emailed the claimant regarding a potential part-time role. She said the claimant had mentioned she would consider roles which came with a pay reduction and that had made Ms Gannon think that the attached admin role which they were about to start recruiting for might be attractive. The salary would be £25,000 per annum pro rata along with holiday and pension. They would be able to offer a reasonable amount of flexible working within that role. She understood that the claimant may not be considering an admin role, but she wanted to offer what opportunities they had which could potentially work for her. For the avoidance of doubt, the claimant's current full-time role remained open on her return from maternity leave if no other role could be found for her. She asked the claimant to confirm several points, ie whether the attached role was of potential interest; her home address; that she would be based in Wigan permanently. She asked the claimant to confirm that she would let them have her decision on her return to work on or before 1 August 2022. She asked whether the claimant could be more flexible in her requirements and her ideas for roles which suited the needs of the business and could suit the claimant.

60. On 10 June 2022, Ms Gannon emailed again with some further details of the post to assist the claimant in her deliberations. She said the role was being ‘especially newly created’ for the claimant to accommodate her move to Wigan and her desire to work from home part-time. She said the hours could be fitted around the claimant’s schedule but they would need her to work every day for the equivalent of a 2.5 day week, so something like Monday to Friday 9:00 -12:30 pm or 3:00 - 5:30 pm. They would need consistency on the time she would work as she would be job sharing. The salary would be £12,500 per annum with a 5% pension and 24 days holiday plus Christmas and New Year's Eve. The role would be a mixture of chargeable and non chargeable work which was variable to fit the needs of the business. Chargeable work would cover corporate support work, legal research, filings, board minutes etc. Non chargeable work would be onboarding eg terms of engagement, client due diligence etc, invoicing, debt chasing and any other roles which the office manager thought she could help with. Ms Gannon said she was still waiting for the claimant’s responses to the questions she had asked in her 7 June 2022 email. She said if the claimant was in fact returning to London then the focus would of course shift from the part-time role she was discussing

back to how the claimant could make the full time London-based role fit the needs of the business. She said that if the claimant needed any more information, she should let Ms Gannon know.

61. The claimant replied on 10 June 2022. She said that the proposed new salary worked out at 16% of her previous daily pay which was just not sensible by any stretch. Also the job description sounded like she could very much end up doing pretty much the same as what she used to do, but for a fraction of the salary. Given the above, the role as it stood was not of interest to her. The pay did not justify having to put her daughter into nursery every day of the week for 47 weeks of the year, something she really was not comfortable with. The claimant gave her address. She said "my circumstances are such that, at this moment in time, I cannot commit to moving down to London in the near future but I am happy to commute to the office a couple of days per month or as and when required for client meetings, team building, networking and training with some notice. I have accommodation I can stay in my parental home and childcare wouldn't be an issue either as Poppy can be with my mother. Yes I can be more flexible in my requirements Such as my old associate role working from home as I always have done but 2.5 or 3 days per week at the same daily rate as I received pre maternity leave thus ignoring the term time suggestion; This would be my preferred option. Alternatively my old role but four days per week but the in term time only. Other options might be a corporate support solicitor role 2.5 or 3 days per week or four days but term time only without personal targets but supporting other fee earners with legal work and drafting for a lesser salary eg say perhaps £55,000 pro rata or a marketing role or an administrative role without chargeable legal work perhaps 9:30 - 12:30 spread over four days again with a lesser salary eg £45,000 pro rata. I am happy to look at different combinations of days working hours and perhaps more holiday or unpaid leave instead of the term time only. I consider that there is no reason why I can't feasibly do my previous role at my previous rate of pay from home as was always the case and on a part-time basis provided there is transparency with clients and I can manage my workload and the files I take on accordingly. I am happy to consider alternatives within reason but I cannot accept 3/20 of what I was earning for working Monday to Friday with 24 days holiday."

62. At the time, the claimant had two places she could stay. She had owned a house in Lancashire for 10 years and her parental home in London which she had co-owned with her mother since 2016. The London house had 4 bedrooms. She had been trying to sell the Lancashire property but the sale fell through in September 2021. The claimant told us that during her maternity leave, she spent some time in Lancashire because she had friends in the area and it was peaceful. It was also further from her ex partner who had been harassing her.

63. Ms Gannon replied on 16 June 2022. She said it was a pity the claimant had turned down the role as it could have worked if she had given it a chance. The position had now been filled. Ms Gannon said she could see that the claimant had revised her position regarding flexible working and was now considering offering greater flexibility which could open up more opportunities, but "it remains our policy that we do not engage part-time client facing fee earners wherever they wish to work for the reasons you cite relating to disruption to the service for clients. However that does not rule out the possibility of other virtual roles arising for non client facing work which I am pleased to see you mention". Ms Gannon said that the market rates for working from home in the North West of England were not the same as London rates for non client facing work. Without realism they would not be able to find a role for the claimant. She appreciated the claimant said she was now prepared to travel to London on occasion but it would be unreasonable for an employer to expect a part-time employee to travel for four hours each way and for that reason they would not explore that possibility. If the claimant could return to work earlier than December that would open up more opportunities.

64. We interject here that the claimant told us it would not have been a difficulty to travel to London on odd occasions because she could stay in the London house. She would have stayed for a few days and then returned. This was not something she spelt out to the respondent.

65. Ms Gannon ended the email by saying that when Pia and John left, the firm would be left with one senior solicitor and one newly qualified person in the corporate team. She did not have plans to replace them with employed staff as she intended the work to be done by consultants. She was prepared to keep on looking for a suitable role for the claimant but the original working time request was rejected because it did not match the business need. The email ended "if a suitable role is not agreed with you, you will have to choose between giving notice to avoid having to return to the office, or returning to work in the office."

66. On 10 August 2022, Ms Gannon emailed the claimant to say that they had continued to look for flexible part-time roles which could be undertaken from Wigan but nothing suitable had arisen. They did need to finalise her holiday pay and her return to work date. She said that as the claimant had notified them on 15 September 2021 that she wished to take maternity leave up to 24 June 2022, they would treat her as on holiday from 27 June until 30 August 2022. She had told them she would not return to her full-time London job, in which case her employment would terminate on expiry of holiday leave on 31 August 2022. Her job would remain open until 31 August. Ms Gannon said she did not approve the claimant working her notice from Wigan or part-time.

67. The claimant replied the same day. She said she thought they had long since agreed that she would be taking a full 12 months maternity leave up until 17 September 2022 and then her holiday up until December 2022. Why was Ms Gannon now changing this? The claimant said that in their last email exchange a few weeks previously it had been left that they would see nearer to December 2022 if there was anything suitable role wise. The claimant was not sure why this also had suddenly changed and why Ms Gannon was talking about her role terminating at the end of this month. The claimant said she had never said she would like to resign from the respondent. She did not agree that Ms Gannon could retrospectively put her on holiday. The claimant said again that she felt she was being discriminated against regarding the refusal to allow part-time and remote working and by the suggestion that her employment be terminated in just 2½ weeks time, when she had neither resigned nor given notice, and indeed her notice period was three months.

68. On 11 August 2022, Ms Greenwood emailed the claimant, saying Ms Gannon had asked her to deal with the matter. She said they had forgotten that the claimant had decided to take the full 12 months maternity leave. Payroll had now recalculated her return date as 17 September 2022 “with a holiday entitlement included of 42 days”. The email reiterated the same point regarding home working and part-time working. “Our position is we do not engage part-time employed fee earners and we cannot be forced to do so. Experience tells us it is not practical or profitable for Gannons to engage part-time employees. As an exception we are considering a part- time non fee-earning role for you and depending on the role it may be capable of being performed from Wigan. We did make an offer for a role that could be performed in Wigan but you did not consider this suitable.... your role is open and we need you back in the London office from Monday 19 September 2022 working as before Covid and receiving the management, support and training you need to develop. We have not intended to create the impression that you are being forced to hand in your notice. But if you do not attend the office on the 19 September at 9:30 am we will assume you have handed in your notice and will issue a P45 after payment of holiday and pension. Please let us know your intention. The calculations below are based on you taking 12 months maternity leave to Friday 16 September 2022. During that period of 12 months your holiday amounts to 42 days. Holiday does not accrue during holiday. If holiday is added onto the maternity leave as you claim that would in effect mean we are paying holiday for holiday which is not part of your rights as an employee. As already said we are not approving holiday until you're settled back into your full-time role.”

69. On 12 August 2022, Ms Greenwood emailed the claimant again saying that “payroll has now pointed out that we should give you the choice of being paid for your 42 days of holiday at the end of your maternity leave on 17 September or adding on 42 days of holiday to the end of your

maternity leave which takes your return to work date to 16 November 2022. If you do not return to work your holiday will be treated as taken during your notice. To avoid you being in breach of contract as would otherwise be the case if you served notice but did not return to work in London".

70. On 5 September 2022, the claimant emailed in reply that she would prefer to be paid the 42 days accrued holiday on 17 September. She did not accept that holiday did not accrue while on holiday. She asked confirmation when her pension contributions would be paid as it was now September and they should have been paid in April. She said she found this rather worrying that it still had not been done. Finally, was there any response at all from Ms Gannon regarding their discussion concerning the part-time role and leave entitlement?

71. Meanwhile, on 22 August 2022, Mr Pyant emailed the claimant to introduce himself as the practice director in charge of all solicitors at the firm. He said there had been a number of changes as a result of which "there is now a part-time WFH opportunity we think would be suitable for you". This would entail working from home five days per week on 3.75 hours per day or 18.75 hours per week. The job would be as an associate solicitor in the corporate team. She would report to Yao Trinh. Salary was £60,000 per annum paid pro rata ie £30,000 per annum. Holiday was pro rata of 24 days, ie 12 days per annum plus public and bank holidays. There would be regular performance reviews with the practice director. Meeting the chargeable hours target would be a key requirement of the role. The claimant's accrued holiday entitlement of 42 days would be preserved. The firm would prefer the claimant to return to work at the end of her maternity leave on 16 September and start back at work from home on 19 September, but they would allow her to take her accrued holiday as previously agreed and the latest return to work date would be 16 November. If the terms were acceptable, the respondent would issue a revised employment agreement. Mr Pyant suggested that they have a Teams meeting.

72. The claimant responded that day by email. She said his suggestions sounded encouraging and were much more positive than previous emails on the subject of her return to work. However she would like to discuss in more detail the proposal of five days a week and 12 days holiday. Regarding the date of her return, she confirmed that she very much wanted to stick to the agreement made before going on maternity leave to take all of her accrued holiday at the end of her maternity leave.

73. The claimant and Mr Pyant spoke on 23 August 2022. It was their only telephone communication. Otherwise they communicated by email. Amongst other things, the claimant asked about her pension contributions in this conversation. We have no evidence regarding what was said.

74. Ms Gannon said in evidence that she knew nothing about the 22 August 2022 offer made by Mr Pyant and that he had not even consulted Yao and Pia before making such offer. We cannot believe that Mr Pyant had not talked to Ms Gannon before making such a precise and significant offer.

75. On 12 September 2022, Mr Pyant emailed the claimant to say he had spoken to Yao about the proposal for part-time working as she would be the claimant's line manager. Mr Pyant said that Yao had told him that the proposed working pattern would not work for her. He said he had also spoken to Ms Gannon who had previously spoken to Catherine Ramsey who had said that Ms Ramsey's work was outside the claimant's area of expertise. Mr Pyant said the upshot was that currently there was no position available that would support part-time hours. He said "we will continue to review the situation and assess other roles that may come up that would be suitable for part-time hours up to your return to work date. There is no right of appeal from a decision to turn down flexible working".

76. Mr Pyant said that he had asked payroll to pay the claimant 43 days holiday which covered all her entitlement due up to 16 November 2022. "This is your full holiday entitlement due up to your return to work date of 16 November 2022 which is paid in advance of the normal due dates for payment of holiday at your request." Mr Pyant asked the claimant to "particularise why, citing full authority", the respondent was required to pay notice if she failed to return to work on 16 November 2022. He said "when you return to work we will meet with you and set out how we will deal with managing your performance under the new team. If you disagree with any matter or feel you have any claim against Gannons please fully particularise and cite the authorities on upon which you will rely and the solution to avoid a claim you see is workable."

77. The claimant replied on 14 September 2022 that this was the first she had heard about Yao being her line manager and Mr Pyant had not said that he needed to speak to Yao about the arrangement. She had understood from her call with Mr Pyant in August that he would be speaking to Ms Gannon and that her line manager was yet to be confirmed. When she had gone onto maternity leave it had been proposed that Pia would be her line manager on her return, but it seemed that Pia had already left the firm. Regarding any purported performance complaints, the claimant said she had been deliberately winding down her caseload and focusing on non chargeable projects when she was in the final stages of her pregnancy. She had also been suffering from severe and crippling hyperemesis gravidarum which had seen her hospitalised on numerous occasions.

78. We interject that the claimant was not correct about there having been no previous mention of Yao being her line manager because this was stated by Mr Pyant in his letter initially making the offer.

79. The claimant said that an 18 hour week spread over 5 days with just two weeks holiday entitlement per year was not workable with a child because it essentially still meant full-time childcare provision and did not allow sufficiently for inevitable child illnesses, childcare closures and attending nursery fixtures, still less a family holiday. She said that Mr Pyant had also been going to address by return email the justification for the £10,000 pay cut prior to the pro rata 50% drop.

80. The claimant went on "by your email below [the above12 September email 2022], reminding me that I have no right of appeal to the part-time working request (of which I have already been reminded numerous times), asking me to set out why I should be paid my notice and asking me to particularise my claims, it is with an extremely heavy heart that I must consider this the final straw and therefore myself dispensed with by Gannons. I really had sincerely hoped to return to my job (or something similar) on a part-time basis compatible with modern motherhood and working remotely as I always have done for the firm and consistent with the new business model which Gannons seems to be adopting in employing flexible self-employed consultants. "I will not do the firm the favour of particularising my claims now by email as I have already explained my position and partly done this: for example previously citing some relevant authorities concerning sex discrimination and part-time and in my reply to the derisory £12,500 per year 5 days per week admin job 'offer' which was supposedly created specially for me but immediately filled by someone else... As you will know time is of the essence with employment claims and limitation and timetables are tight. Instead then, I will focus on commencing ACAS Early Conciliation and direct my energies to the task of drafting the ET1 and particulars of claim that accompany it. That said, you will know that any constructive dismissal does amount to a wrongful dismissal which does lead to notice pay becoming due save for where there is gross misconduct. I trust the holiday will still be paid as outlined on 10 October (although a previous email from Julie Greenwood did confirm it was to be paid on the 17th September)?"

81. The claimant told the tribunal and we accept that Mr Pyant repeating yet again the various stern and unnecessary reminders she had received that she had no right to appeal her flexible working request, and his repeated requests to set out and 'particularise' what claims she thought she might have, made the claimant feel that the respondent had no intention of welcoming her back to the firm as a new mother.

82. The respondent says that this email was a resignation by the claimant. The claimant says that it was not and that she did not resign until

November. She says this is clear from her subsequent emails. She says that she would not have resigned before she was due back from her maternity leave. We will address this in our conclusions.

83. On 15 September 2022 the claimant emailed Mr Pyant simply stating "Please also confirm when the pension will be paid and the holiday pay and tax further to my previous email." The claimant received no reply. She chased him without success on 21, 24 and 29 September 2022.

84. On 11 November 2022, Mr Pyant emailed the claimant as follows. "I hope this email finds you well. In advance of your return to work following the end of your maternity leave, I thought I would drop you a quick email. On your first day back 16 November 2022 I would ask that you come into the office at 10:00 am. I will ensure that these systems are all up and running for you. You will be allocated a desk within the corporate team grouping. We will have a meeting with you to update you on the developments within the firm and you will get to meet Yao. There have been a lot of staff changes so there will be a lot of new faces for you to meet. I will conduct some refresher training with you on the systems and firm procedures... I look forward to welcoming you back."

85. The claimant replied by email dated 15 November 2022. She said she was surprised by the email's content given she had received no response to her emails of 14, 15, 21, 24 or 29 September and various messages she had left with reception for a call back from Mr Pyant. She said she had assumed she was being ignored. As she had received no response or anything to "counter the suggestion of constructive dismissal set out in my email of 15 September, or any return to work plan or further proposal incorporating remote working/ part-time working (as we had discussed by telephone), I of course have not put in place any nursery provision for Poppy. Therefore I will not be able to come to the office tomorrow for my first day back proposed below. In fact, we had not managed to agree anything yet with regard to working days, hours, pay, targets or annual leave. Also, I still do not seem to have received my pension payment for the financial year ending April 2022 or a response to my repeated question about that. Look forward to hearing from you."

86. Ms Gannon could not explain why Mr Pyant sent his 11 November 2022 email if the respondent thought that the claimant had resigned on 15 September 2022. She was not copied in to the email and she says she knew nothing about it. We cannot believe that Ms Gannon was unaware of Mr Pyant's letter. We will comment in our conclusions regarding why we think it was written.

87. On 23 November 2022, the claimant emailed Mr Pyant, "in the absence of a response from the firm, just a heads up that I have submitted my ACAS

early conciliation and reported the firm to the Pensions Regulator." The claimant says that this letter constituted her resignation.

88. Mr Pyant replied the same day. He apologised for the delay in responding because he had been off work with Covid the previous week. He said that "there was never any doubt that you were free to return to your position within the firm following maternity leave. I take it by your email below that you do not intend on returning to work and that you have resigned as of 14 September 2022 as per your earlier email. I have previously given instructions for the pension payment to have been made so I am unsure why this has not happened. I will investigate. I note the position with regard to ACAS early conciliation."

89. Without getting into unnecessary detail, the claimant had opted out of the firm's NEST pension scheme and it had been agreed that the respondent would make contributions of 5% of her pay to her own personal pension in a Hargreaves Lansdown account. The respondent's first contribution was paid on 9 August 2021 in respect of the financial year ending 31 May 2021. We were not shown any correspondence suggesting that the claimant had complained about that delay. The next payment, ie for year ending 31 May 2022, was not made until 26 January 2023, after the claimant had said she was reporting the matter to the Pensions Regulator. We were not clear about the exact date when the employer's contributions were supposed to be made, but both parties seemed to think there should have been an annual payment at some point in respect of each financial year.

90. The ACAS certificate records that ACAS was notified by the claimant under the early conciliation scheme on 23 November 2022. The certificate was issued by email on 4 January 2023. The ET1 was presented on 28 January 2023.

<u>Evidence regarding the claimant's performance</u>

91. The tribunal asked Mr Steen to put to the claimant in cross-examination any client complaints which the respondent was relying on. Mr Steen did not cross-examine the claimant very much regarding poor performance. He said there was not a massive amount of evidence of client complaints in the case and Ms Gannon would give evidence regarding what she felt about the claimant working 200 miles away in Wigan.

92. The only written evidence of a client complaint about the claimant which we were shown and was put to the claimant was an email from a Mr Murray on 18 April 2021 saying that he had had to ask Ms Curtis to correct errors in her work on three occasions, and they needed to be confident in the respondent's work. This apparently related to a matter on which the claimant and a partner, Ms Ramsey, had been called in to help when Ms

Curtis was off sick. They did not have the complete background and Ms Ramsey also made an error, sending the wrong version of a document to the client. There is an email the next day showing that Ms Gannon had a chat with the claimant about the matter regarding what she should do when brought in mid-point on a case and that she should check assumptions and run things past a partner. The tone of the email does not suggest that it was any major or ongoing issue.

93. On 29 December 2021, Ms Gannon emailed Mr Deane asking him to provide her with a note of the complaints he had dealt with on matters involving the claimant, a brief outline of the complaint, the resolution and the fee reduction – 'just a short summary for the record'. Mr Deane did not provide any list. Ms Gannon said he reported back to her orally. We do not think he had anything to report. Ms Gannon had specifically wanted something 'for the record' and if there was something of any significance, we would expect to have seen it in writing from him or noted down by her.

94. Ms Gannon said repeatedly during the tribunal hearing that the claimant showed lots of promise and would be a good lawyer, but she was at the stage of her career where she needed more management and supervision on skills such as quoting for jobs and dealing with clients who were very fees conscious. She said it was difficult to do this kind of management and supervision if the claimant was working remotely. She said that the firm had a lot of complaints after the claimant had left regarding costs. She accepted that clients do tend to complain about costs when they find out that the fee earner is not around to defend the position, but she said that there were more complaints about the claimant than was usual. We were not shown any evidence beyond these vague assertions.

95. We were shown figures for the first financial year of the claimant's employment. The claimant exceeded her fees targets, often by a substantial amount, from December 2020 to April 2021 inclusive. In May 2021, her target appears to have doubled and she fell well short. We were not shown figures for any months after that.

<u>Evidence and submissions on the feasibility of part-time working in the claimant's role</u>

96. The claimant argues that it is possible to do her role on a part-time basis, for example working only Monday Wednesday and Friday so that there is only ever one day when she is not available. She believes clients will accept this if you are transparent with them from the outset. She says that of course clients always want their solicitor to be available at all times, but that is not possible in any event because a solicitor has more than one case to run. The claimant says that Ms Gannon had a rigid closed policy of no part-time working and following the logic of that, no women with children would ever be able to work as corporate lawyers.

97. Ms Gannon says that it may well be possible in larger firms with teams, but it is not possible for a corporate solicitor in her small busy firm. She says corporate work is particularly pressurised and clients are demanding.

98. Ms Gannon said there are three main stages in corporate work: converting, scoping and transaction. The conversion stage is speaking to potential clients when they ring in, If no one is available to talk to them that day, they will ring round other firms and find someone else. The claimant does not deny that availability is a factor, but she says that clients do not simply select the firm who speaks to them first. She says there are other matters such as the firm's prior reputation, and clients do tend to shop around.

99. The scoping stage is basically working out and estimating the cost of the likely work. Ms Gannon argues that again it is necessary to get back to potential clients quickly because competitor firms will also be getting back to those clients quickly. Scoping may also need to fit in with when other specialists in the firm such as tax specialists are available. The claimant says that scoping easily runs over into the next day anyway. Regarding liaison with tax specialists and other professionals, they also cannot drop everything. It is not as instantaneous as Ms Gannon makes it sound. She adds that that she would not rigidly do nothing on her days off. If something sounded really promising, she could find a quick 20 minutes to get the measure of the matter. Ms Gannon said she did not want people working hours they were not contracted to work.

100. Once the client is onboarded, there is the transaction stage. Ms Gannon argues that although a paralegal does a certain amount of basic drafting, it needs to be checked. The solicitors on the other side will look to point score at every opportunity, which includes if there are delays getting back on track-changes. Clients can be very impatient and if they think they do not have the desired service, they will phone Ms Gannon and complain. Dealing with client complaints is all non-chargeable time. The claimant agrees that everyone wants everything done instantly. But she says that once the solicitor has given the client a lot of advice, they are not going to leave the firm because of short delays on getting back over track-changes.

101. The respondent's website says this about its flexible consultancy model: "in the new world post COVID with changing working patterns we found the typical employed solicitor model tired. There was a problem to solve. Our solution to the problem is to devise a model which delivers the new way of working. The new way is popular because it offers a world where solicitors work to their strengths, decide their own hours, set their own objectives and define their earning potential. We are finding this translates to happy clients".

102. Corporate work is the most profitable work in the firm. Ms Gannon would not give a case to a consultant if there was an available in-house solicitor.

103. Regarding home working, all solicitors were employed on a contract of employment which said their workplace was in the London office unless agreed otherwise. There was some dispute between the claimant and Ms Gannon regarding who worked in the office in practice, but we prefer Ms Gannon's evidence, partly because she was the principal of the firm and unlike the claimant, was regularly in the office and would see who was there, and partly because the claimant's impression would have been gained during the unusual period of Covid including lockdowns. When Ms Gannon talks about working in the office, she includes some limited flexibility in that people can occasionally do a bit of work at home. Subject to that, Ms Curtis, Mr Deane, Mr Moore, Pia and Yao worked in the office. One other person worked in the office except latterly when her very elderly mother was in a nursing home and she split her time. There were three or four unsuccessful hires who had all been working outside London (two of whom were not corporate lawyers anyway). There had been complaining clients and write-offs and this had influenced Ms Gannon's views.

Law

104. We noted the law referred to by the parties in their written closing submissions and we do not repeat it all here.

<u>Flexible working requests</u>

105. Under s80G ERA 1996, an eligible employee can make a flexible working request to change their hours, times of work or workplace. There are various formalities which must be followed in making the request. Under s80G, the employer must deal with the request 'in a reasonable manner'.

106. Guidance in the 'ACAS Code of Practice on handling in a reasonable manner requests to work flexibly' must be taken into account by employment tribunals when considering relevant cases. The code says at paragraph 4 "once you have received a written request, you must consider it. You should arrange to talk with your employee as soon as possible after receiving their written request." At paragraph 5, it says the employee should be allowed to be accompanied by a work colleague for this. At paragraph 6, the code says "you should discuss the request with your employee. It will help you get a better idea of what changes they are looking for and how they might benefit your business and the employee." Paragraph 8 states "you should consider the request carefully looking at the benefits of the requested changes in working conditions for the employee and your business and weighing these against any adverse

business impact of implementing the changes". Paragraph 12 states "if you reject the request you should allow your employee to appeal the decision. It can be helpful to allow an employee to speak with you about your decision as this may reveal new information or an omission in following a reasonable procedure when considering the application."

Time-limits for complaining about the handling of flexible working requests

107. Under s80H(5) and (6) ERA 1996, a claim can be brought for non-compliance with the employer's duties which are set out in s80G. It must be made within 3 months of the relevant date or, if that was not reasonably practicable, within such further period as the tribunal considers reasonable. In this case, the 'relevant date' is the first date when the claimant could complain that the respondent failed to deal with the application in a reasonable manner.

108. All references to time-limits in this decision are subject to the ACAS early conciliation rules.

Detriment and automatic unfair dismissal in relation to flexible working

109. Under s47E, an employee has the right not to be subjected to any detriment done on the ground that the employee (a) made or proposed to make an application under s80F or (d) alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.

110. Under s104C, it is automatic unfair dismissal if the reason or principal reason for dismissal is that the employee (a) made or proposed to make an application under s80F or (d) alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.

Time-limits for detriment in relation to flexible working

111. Under s48 ERA 1996, the claim for detriment must be presented within 3 months of the action or failure to act or, if there us a series of similar acts or failures, within 3 months of the last of them. If that deadline is missed, the claim must be brought 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 within the 3 month deadline.

112. The time-limit for unfair dismissal is set out below.

Indirect sex discrimination

113. Under s19 Equality Act 2010, it is indirect sex discrimination where:

113.1. An employer applies a provision, criterion or practice to a woman (the claimant)

113.2. Which it applies or would apply to men, and
113.3. Which puts or would put women at a particular disadvantage when compared with men, and
113.4. It puts or would put the claimant at that disadvantage, and
113.5. the employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

114. A tribunal must take judicial notice of the childcare disparity if relevant, ie that women bear the greater burden of childcare responsibilities and this can limit their ability to work certain hours. However, that does not necessarily mean that the group disadvantage is made out. Whether or not it is, will depend on the interrelationship between the general position that is the result of the childcare disparity and the particular PCP in question. The childcare disparity means that women are more likely to find it difficult to work certain hours (eg nights) or changeable hours (where the changes are dictated by the employer) than men because of childcare responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking notice of the childcare disparity. However if the PCP as to flexible working requires working any period of eight hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with childcare responsibilities, then it would be open to the tribunal to conclude that the group disadvantage is not made out. (Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729, EAT.)

115. Regarding whether the respondents can justify the provision, criterion or practice, the employer has to show that applying the provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The employer does not have to show that no other option is possible. However, it does not have the margin of discretion it has in unfair dismissal claims and the band of reasonable responses does not apply. The tribunal has to undertake a critical evaluation and make its own judgment as to whether the provision, criterion or practice is reasonably necessary. (Hardys & Hansons plc v Lax [2005] IRLR 726, CA)

116. In Hampson v Department of Education and Science [1989] IRLR 69, the Court of Appeal stated:

> 'Whether a requirement or condition is "justifiable" requires an objective balance to be struck between the discriminatory effect of the requirement or condition and the reasonable needs of the person who applies it. It is not sufficient for the employer to establish that he considered his reasons adequate.'

117. In Allonby v Accrington & Rossendale College [2001] IRLR 364, a dismissal case, the Court of Appeal said:

> 'Once a finding of a condition having a disparate impact on women had been made, what was required of the tribunal at a minimum was a critical evaluation of whether the employers' reasons demonstrated a

> real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.'

Pregnancy and maternity discrimination

118. Under s18 Equality Act 2010, it is discrimination to treat a woman unfavourably during the protected period because of her pregnancy or illness suffered by her as a result of it, or because she is exercising, seeking to exercise or has exercised a right to ordinary or additional maternity leave. The protected period in relation to pregnancy discrimination runs from the start of the woman's pregnancy to the end of her maternity leave period.

119. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. (Nagarajan v London Regional Transport [1999] IRLR 572, HL) 'Significant' in this context just means 'more than trivial' (EAT in London Borough of Islington v Ladele [2009] IRLR 154, [2009] ICR 387, EAT; upheld by CA.)

KIT days

120. An employee is allowed to work for her employer for up to 10 days during her statutory maternity leave without bringing that leave to an end. These are called keeping in touch ('KIT) days. KIT days are purely voluntary on both sides. Payment is also optional. SMP is set off against any contractual pay agreed.

Burden of proof under the Equality Act 2010

121. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision..

122. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

Time-limits under the Equality Act 2010

123. Under section 123(1)(a) EqA 2010, the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made.

124. Dismissal is a discriminatory act under s39(4)(c). Under s39(7), dismissal includes constructive dismissal. The CA in Nottinghamshire County Council v Meikle confirmed (albeit under the previous Disability Discrimination Act) that the time-limit for a discriminatory constructive dismissal runs from the termination date. The act complained of in a case of constructive dismissal is the unlawful dismissal which is constituted by the termination of the employee's employment when she accepts the repudiation by her employer.

125. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts

126. Under s123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable. This is essentially an exercise in assessing the balance of prejudice between the parties using the following principles:

127. The burden of persuading the tribunal to exercise its discretion to extend time is on the claimant.

Ambiguous / unambiguous resignation

128. Most recently, in Omar v Epping Forest District Citizens Advice [2023] EAT 132, the EAT reviewed the case law and set out a list of principles as follows. In each case, the summary referred equally to dismissal cases, but for ease of reading and absorbing, we have deleted the words 'or dismissal' as this case is about resignation. The principles thus modified were as follows:

a. There is no such thing as the 'special circumstances exception'; the same rules apply in all cases where resignation is given in the employment context.
b. A notice of resignation once given cannot unilaterally be retracted. The giver of the notice cannot change their mind unless the other party agrees.
c. Words of resignation, or words that potentially constitute words of resignation, must be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation. The

subjective uncommunicated intention of the speaking party are not relevant; the subjective understanding of the recipient is relevant but not determinative.

d. What must be apparent to the reasonable bystander in the position of the recipient of the words is that:

   i. the speaker used words that constitute words of immediate resignation (if the resignation is 'summary') or immediate resignation (if the resignation is 'on notice') – it is not sufficient if the party merely expresses an intention to resign in future; and,

   ii. the resignation was 'seriously meant', or 'really intended' or 'conscious and rational'. The alternative formulations are equally valid. What they are all getting at is whether the speaker of the words appeared genuinely to intend to resign (or dismiss) and also to be 'in their right mind' when doing so.

e. In the vast majority of cases where words are used that objectively constitute words of dismissal or resignation there will be no doubt that they were 'really intended' and the analysis will stop there. A tribunal will not err if it only considers the objective meaning of the words and does not go on to consider whether they were 'really intended' unless one of the parties has expressly raised a case to that effect to the tribunal or the circumstances of the case are such that fairness requires the tribunal to raise the issue of its own motion.

f. The point in time at which the objective assessment must be carried out is the time at which the words are uttered. The question is whether the words reasonably appear to have been 'really intended' at the time they are said.

g. However, evidence as to what happened afterwards is admissible insofar as it is relevant and casts light, objectively, on whether the resignation was 'really intended' at the time.

h. The difference between a case where resignation was not 'really intended' at the time and one where there has been an impermissible change of mind is likely to be a fine one. It is a question of fact for the tribunal in each case which side of the line the case falls.

i. The same rules apply to written words of resignation / dismissal as to spoken words.

Constructive dismissal

129. An employee will be entitled to terminate her contract without notice to her employer if her employer is in repudiatory breach of contract: see Western Excavating (ECC) v Sharp [1978] ICR 221.The claimant contends that her employer was in breach of the implied term of trust and confidence. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT).

130. In Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462. the House of Lords held the implied term of trust and confidence to be as follows:

> 'The employer shall not without reasonable and proper cause conduct itself in a manner calculated *and* likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

The italicised word 'and' is thought to be a transcription error and should read 'or'. (Baldwin v Brighton & Hove City Council [2007] IRLR 232).

131. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

132. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

133. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)

134. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract.(United Bank Ltd v Akhtar [1989] IRLR 507, EAT).

135. A claimant may resign because of a 'final straw'. The key case of London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 establishes these principles in regard to the final straw:

> (1) the final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts,

contribute something to that breach and be more than utterly trivial.

(2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

(3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.

(4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence."

136. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. She may demonstrate by what she says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign. (Chindove v William Morrisons Supermarket PLC UKEAT/0043/14.)

137. The 'final straw' might refer to two different situations: either the employer's conduct has not previously amounted to a breach of trust and confidence or it may be that the employer's conduct has already crossed that threshold, but the employee has soldiered on until the last act which triggered her resignation. The significance of the 'last straw' is then that it revives the employee's right to resign. (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.)

138. An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts, even if she has previously affirmed, provided the final act forms part of the series (in the way explained in Omilaju). The final action does not land in an empty scale. (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.)

139. A last straw constructive dismissal can amount to discrimination if some of the matters relied on, though not the last straw itself, are acts of discrimination. Where there is a range of matters which taken together amount to constructive dismissal, some of which consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to

render the constructive dismissal discriminatory. (De Lacey v Wechseln Ltd (t/a The Andrew Hill Salon) [2021] IRLR 547, EAT; Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 600, EAT.)

Time-limits for unfair dismissal

140. S.111(2) ERA 1996 says that a tribunal shall not consider an unfair dismissal claim unless it is presented to the tribunal '(a) before the end of the period of three months beginning with the effective date of termination, 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.'

Conclusions

141. We did not feel the agreed List of Issues had set out the claims in the most logical order for decision. We have covered everything but in a different order.

When did the claimant resign?

142. We start with when the claimant resigned. The respondent says the claimant resigned by her email dated 14 September 2022. The claimant says she resigned by her email dated 23 November 2022.

143. We find that the claimant resigned on 14 September 2022 with immediate effect. The wording of her email, while not actually using the word 'resign', is very clear. She says "it is with an extremely heavy heart that I must consider this the final straw and therefore myself dispensed with by Gannons. I really had sincerely hoped to return to my job (or something similar) on a part-time basis.." She talks about being 'dispensed with' by Gannons. She talks about the 'final straw'. She later refers to 'constructive dismissal'. 'Final straw' in the context of constructive dismissal has a very specific meaning which, coming from a lawyer, would strike a reasonable reader of the email as intended. The claimant also talks about wrongful dismissal and notice pay becoming due.

144. This was not a case of an employee resigning in the heat of the moment and perhaps not meaning it. The claimant had engaged in a great deal of correspondence. She was obviously thinking about the situation. The words 'with an extremely heavy heart' do not sound impromptu.

145. The claimant's subsequent emails reinforce our view. The short emails of 15, 21, 24 and 29 September 2022 are entirely different to the claimant's earlier lengthy emails which seek to persuade the respondent to accommodate her requests. Those emails are not the way an employee usually writes when they think they are still employed. There was then nothing until Mr Pyant – not the claimant – made contact on 11 November

2022. Again that is not consistent with the idea that the claimant thought she was still employed.

146. We believe that the claimant intended to resign on 14 September 2022 (although that is not the test) and an objective bystander would understand her as having resigned that day.

147. Although the respondent's understanding is not determinative, it may shed light on how matters would be seen objectively. The respondent's reaction is hard to analyse. It neither emails back confirming the dismissal nor seeks to make the claimant change her mind nor responds to the 12 September 2022 email or the following four September emails. Nor does Mr Pyant on 11 November 2022 refer to the 14 September 2022 email or apologise for not responding to it. On balance, and having considered the respondent's approach at other stages to other matters, our view is that the respondent believed the claimant had resigned on 14 September 2022, but was concerned regarding potential legal claims and emailed the claimant on 11 November 2022 in an attempt to protect its legal position. This makes the most sense to us of the whole pattern of emails.

148. Finally we mention the claimant's response. She went along with the 11 November email to some extent, while saying nothing had yet been agreed and she could not come back on such short notice. The respondent did not reply. On 23 November the claimant emailed, "in the absence of a response from the firm, just a heads up that I have submitted my ACAS early conciliation and reported the firm to the Pensions Regulator." The claimant says that this letter constituted her resignation. It does not strike us as a resignation email. It says nothing about 'final straws' or 'dispensed with services' or 'heavy hearts'. It is more akin to the language used when a post-termination negotiation has come to nothing – a 'see you in court'.

149. For all these reasons, both looked at narrowly focusing on the 14 September 2022 email, and more broadly looking at the circumstances before and after; both looked at from a subjective and – more importantly - from an objective viewpoint, we find the claimant resigned on 15 September 2022.

<u>Pregnancy / maternity discrimination (issue 4)</u>

Issue 4.2.1: The claimant was made to do additional non fee-earning tasks which was a burden and was then criticised for her financial performance. The claimant says this was done because of her pregnancy and pregnancy related illness and the fact that she sought to exercise her right to maternity leave.

Issue 4.2.6: The respondent made baseless criticisms of the claimant's work with a view to undermining her and suggested that clients had complained about her in its response to her flexible working request. The claimant says this was due to her pregnancy and her maternity leave but not due to her pregnancy-related illness.

150. We review the facts applicable to these two alleged detriments together as they overlap.

151. Regarding issue 4.2.1, all fee-earners were required to do non-chargeable work in addition to their chargeable work. The evidence surrounding what non-chargeable work the claimant was given, when, and whether she found it a burden was too vague for us to reach conclusions. In any event, the claimant said she had agreed with Ms Gannon and Ms Ramsey to wind down her files and deal with a large amount of non chargeable work to enable a smooth transition. The claimant's real complaint as it was made in the tribunal was that her low billing in that period was then subsequently held against her by criticising her financial performance in the rejection of her flexible-working request.

152. The claimant had a good appraisal on 14 July 2021. It did not mention client complaints. It said that the claimant had made the best start possible in the circumstances (Covid) and was already an asset to the firm. Regarding fees recovery, Ms Gannon did note "There have been occasions when financial management on jobs has slipped but that could be due to handover issues. I have spoken to you and hope the problems are now behind you." This does not read as a big issue and the claimant was given a £10,000 rise following the appraisal.

153. The claimant exceeded her fees targets, often by a substantial amount, from December 2020 to April 2021 inclusive. In May 2021, her target appears to have doubled and she fell well short. We were not shown further figures. The claimant's financial performance was criticised in the 'she is riding us for what she can crab' email from Ms Gannon to Ms Curtis on 13 September 2021. That email referred to a target of £11,200 for 1 – 10 September 2021 as compared with fees excluding write offs of £3,115. The email says "When you consider she has not taken much holiday but has taken considerable management her figures are not good … Probably best if we both speak to her so there is a record. August will be blamed on the fee quoting work she helped on so stick to Sept. I say".

154. This email refers explicitly to figures in August and September. Given its tenor, we would have expected it to mention earlier months, eg June and July, if they were obviously short and if the claimant would have had no 'excuses'.

155. When rejecting the claimant's flexible working request on 16 May 2022, Ms Gannon said while the claimant had been working remotely, her financial performance was below target; that the respondent had previously mentioned the number of clients' complaints received about her and that they had not been able to address her performance to date as she had been on maternity leave but they planned to put in place more management and supervision for her in the office.

156. By reply, the claimant told Ms Gannon in response that for the financial year starting April 2021, amongst other things, she was wrapping

up matters so there would not be a great deal of life unfinished work when she left to have her baby. She felt it was unfair to look at September 2021 since she gave birth on the 16th of that month. She asked for a list of client complaints if they were a factor in her decision. Ms Gannon did not provide any such list. She answered that she had mentioned fees simply in context of why they needed the claimant back in the office. This sounds like a degree of back-tracking.

157. On 22 August 2022, when offering the part-time working-from-home ('WFH') job, Mr Pyant said it would involve regular performance reviews with the practice director. We cannot see the basis for talking about 'regular performance reviews', which has an underlying implication of generally inadequate performance. Indeed, on 11 November 2022, albeit after the claimant had resigned, Mr Pyant when referring to her return full-time back in the office said "we will also scope out your performance plan and give you all the support you need in reaching your chargeable hours and billing targets".

158. Ms Gannon was only able to give one example of a client complaint during her oral evidence. That related to a specific matter in April 2021 and we were shown some supporting emails. The claimant was not the only person who had made a mistake when coming in to cover Ms Curtis when she was off with Covid. This did not appear to be a major or ongoing issue and Ms Gannon simply gave some advice to the claimant on checking her assumptions and with partners when brought in mid-point on a case.

159. During her oral evidence, Ms Gannon was vague. She said a number of times that the claimant showed a lot of promise and would become a good lawyer. She did not talk about client complaints except as regards costs. She said the respondent had a lot of complaints from clients after the claimant left. She accepted that clients do tend to complain about costs when they find out that the fee earner is not around to defend the position, but she said that there were more complaints about the claimant than was usual.

160. Mr Deane apparently made an oral report to Ms Gannon in response to her email of 29 December 2021 asking him to provide her with a note of the complaints he had dealt with on matters involving the claimant. Given that Ms Gannon had wanted details 'for the record' and given that we were not shown any note of what Mr Deane allegedly said, we believe there was nothing of any significance.

161. Because of the above lack of supporting evidence, and indeed some evidence to the contrary, we find that Ms Gannon's statement when rejecting the flexible working request that there had been client complaints and performance issues to be addressed, and that there would be management and supervision in the office constituted a baseless criticism. The issues regarding financial management had some basis (they were mentioned in her appraisal), but was exaggerated as a problem.

162. However, this is not a matter on which the burden of proof shifts in respect of pregnancy or pregnancy-related illness or the fact that the claimant sought to exercise her right to maternity leave. The suggestion of performance issues and client complaints is made specifically in reply to the flexible working request. The claimant was already on maternity leave and prior to that, she had been employed while pregnant. There was no previous general criticism of this kind. We do not consider the 13 September 2021 email does this – it is just looking at recent targets. We would not be able to infer, if unexplained that the reason for the sudden broad criticism was because the claimant had been pregnant or her pregnancy-related illness or because she had had exercised her right to maternity leave. Moreover, it is obvious that the criticisms are a response to a request by the claimant to work remotely and flexibly. Ms Gannon did not want to agree to that way of working. The firm was in a state of flux and Ms Gannon wanted the claimant in the office on a full-time basis. She thought any other arrangement would be detrimental in terms of getting and retaining clients. Whether or not that was unjustifiable indirect sex discrimination is something we will consider later in this decision, but the claim that the criticisms were pregnancy /maternity discrimination is not upheld.

Issue 4.2.2: The respondent refused to permit the claimant any paid keeping in touch days and did not make the claimant feel that she was welcomed back. The claimant says this was done because of her pregnancy and pregnancy related illness and the fact that she sought to exercise her right to maternity leave.

163. The claimant raised keeping in touch days in her email on 2 August 2021. This was in the middle of discussions about holiday and when the claimant would take it because she was anxious about periods of unpaid maternity leave. The claimant added “I am also entitled to 10 keep in touch days at full pay at some point.” The claimant was not in fact entitled to keeping in touch days and was not entitled to be paid for any such days. Both the taking of such days and whether they are paid is legally completely voluntary on both sides. Mr Garrett was therefore accurate when he responded that, “There is no right to paid keeping in touch days. It's mutual agreement”.

164. Mr Garrett did not completely reject the possibility at that stage. He said “We will leave the decision on keeping in touch days until we know if there is a need for them. You can keep up to date with legal developments via PLC, LexisNexis and Lexology and you can follow us on social media whilst on return to leave.” As the claimant had not yet gone onto maternity leave, it was early to be discussing keeping in touch days and we do not think Mr Garrett’s reply at that point should be taken as unwelcoming.

165. On 8 September 2021, Ms Gannon said, “You will be missed. In terms of keeping in touch I suggest the arrangement is you let Neil know when you want to be updated and he can update you. If anything crops up we believe you need to be aware of during maternity we will contact you.” Again, it might have been particularly nice had Ms Gannon had a detailed

discussion about keeping in touch days at this stage, but her words were friendly enough and there is nothing objectively to make the claimant feel she would not be not welcomed back. Ms Gannon preceded her comments with 'You will be missed' and offered to update the claimant whenever she asked and if anything arose.

166. In her 15 September 2021 email, the claimant said she would really like to work 1 day/week as a keeping in touch day for the last 10 weeks before her return by way of a transition. This email was not answered because the claimant gave birth shortly afterwards. The 1 day/week suggestion does not appear to have been revived by either side. In any event, as we have said, these arrangements are voluntary under the law and we would need to see something more than the mere failure to agree paid days to indicate that the respondent's approach was less favourable treatment because of pregnancy, pregnancy related-illness or taking maternity leave. There was nothing hostile in the responses. There was an offer to keep the claimant updated. The burden of proof does not shift on this claim and it is not upheld.

Issue 4.2.3: The respondent refused to provide the return to work bonus it had promised to the claimant. The claimant says this was done because of her pregnancy and pregnancy related illness and because she had sought to exercise the right to maternity leave.

167. We have found that there was no promise of a three month bonus. Ms Gannon just said she would think about it. Her decision not to pay the requested three months was because she does not like paying out money unnecessarily. However, she did offer a £5000 bonus. This was a bonus for returning to work (and staying for a while) after taking maternity leave. Ms Gannon was not legally required to offer any bonus at all. We do not find it logical to say that the voluntary agreement to pay £5000 for returning from maternity leave, but not as much as the requested three months, was because of the claimant's pregnancy or maternity-related illness or because she was going to take maternity leave. The idea of the bonus only arose because of those specific circumstances and was a benefit offered only because of those specific circumstances.

168. The burden of proof does not shift on this claim and this claim is not upheld.

Issue 4.2.4: The respondent refused to pay the claimant's pension contributions since April 2021. The claimant says this is because she had sought to exercise her right to maternity leave.

169. The respondent's first contribution was paid on 9 August 2021 in respect of the year ending 31 May 2021. The next payment, ie for the year ending 31 May 2022, was not made until 26 January 2023, after the claimant had said she was reporting the matter to the Pensions Regulator. On 5 September 2022, in an email to Ms Greenwood and Mr Pyant about the holiday issue, the claimant also asked when her pensions contribution

would be paid as it was now September and she found it worrying that it had not been done. The claimant received no reply. After her resignation, on 15 September 2022, she emailed Mr Pyant asking when it would be paid. She received no reply to that or to her chasers on 21, 24 and 29 September 2022. In an email on 15 November 2022, the claimant pointed out she still did not have her pension payment or a response to her repeated question about that. On 23 November 2022, the claimant informed Mr Pyant that she had reported the firm to the Pension Regulator. It was only then that Mr Pyant told her he had given instructions for the payment to have been made, so he was unsure why it had not happened. We do not know when he had given such instructions or if indeed he had done so yet.

170. It took the respondent till August 2021 to pay the claimant's contributions for the year ending May 2021. We would therefore have expected the next year's payment to be paid by August 2022. It was not. At that time, the claimant was on maternity leave and only receiving SMP. She had been on maternity leave since mid September 2021, unlike the previous year, when she was pregnant but not yet on maternity leave.

171. The respondent accepted that pension contributions should have been paid at some point once/year. We find the burden of proof shifts because payment of contributions was made in the previous year at a time when the claimant was not yet on maternity leave and in respect of a period while she was not on maternity leave. The difference on this occasion was that she was on maternity leave for the entire period when one might have expected her to be paid. This was an employer who did not pay contractual maternity pay. It paid the bare minimum, ie statutory maternity pay. Taken together with the failure of the respondent to chase up the accountants or respond to the claimant's many chasers until after she said she had reported the firm, it shifts the burden of proof.

172. The respondent has provided no explanation for the failure to answer the chasers or for the delay in payment. We therefore find that the refusal to pay the claimant's pension contributions at any time prior to 26 January 2023 in respect of the year ending May 2022 was discrimination because she was exercising her right to statutory maternity leave.

173. The failure to pay the pension contributions ongoing as at the resignation date. Even if the time-limit is taken from the failure to answer the 5 September 2022 written query, the claimant notified ACAS on 23 November 2023. The certificate was issued by email on 4 January 2023. The ET1 was presented on 28 January 2023. This claim was therefore in time.

Issue 4.2.5: The respondent required the claimant to attend a meeting in a public park on 12 May 2021 on the pretence of discussing her return to work and then Catherine Gannon failed to attend the meeting. The claimant says this was due to her pregnancy and her maternity leave but not due to her pregnancy-related illness

174. Ms Gannon messaged the claimant on 28 March 2022 to suggest the meeting. On 8 April 2022, the claimant responded and also asked whether Ms Gannon would be willing to discuss part-time WFH arrangements after her return around Christmas. Ms Gannon emailed the claimant on 13 April 2022, re meeting dates. She added that it was too early to discuss with HR yet, but as a guide for arranging childcare, the claimant should work on the basis that she would be returning to a full-time position in the office. The meeting in Hyde Park was eventually arranged for 12 May 2021. Ms Gannon did not attend and sent Ms Greenwood in her place.

175. It is not possible to consider this by way of a two-stage burden of proof, because the explanations are part of the issue. The claimant was given two different explanations at the time. Ms Gannon texted her to say she was unwell and Ms Greenwood said that Ms Gannon was caught up with a client.

176. Ms Gannon told the tribunal that the real reason she did not attend was because her daughter had a last minute meltdown about exams. She said she is a private person and did not want to divulge details about her daughter at the time. We find that credible. We understand that the claimant was upset having had a difficult journey with her baby in tow. However, Ms Gannon was the one who initiated the arrangement to meet. It was meant to be a social occasion and, despite what the claimant felt, we can only see the suggestion to bring Poppy as a friendly one. Ms Gannon did take the trouble to arrange someone else to meet the claimant. If Ms Gannon was not going to attend, Ms Greenwood was a reasonable substitute to send given her partial HR responsibilities.

177. We did consider the fact that the meeting was not rearranged. We think that was because events moved on with the flexible working application and lengthy written exchanges about that.

178. Given that Ms Gannon suggested the meeting in the first place and took the trouble to agree somewhere nice to meet, we cannot see that her failure to attend at the last minute was because the claimant had been pregnant or because she was on maternity leave. She was also on maternity leave when the meeting was arranged. This claim is therefore not upheld.

Issue 4.2.7: The respondent kept moving the goal posts and every job offer that was made was very quickly retracted or withdrawn. The claimant says this was due to her pregnancy and her maternity leave but not due to her pregnancy-related illness.

179. Apart from the offer to become a consultant, which remained open, the claimant was only made two alternative job offers.

180. The first job offer was the ‘admin’ role. On 7 June 2022 Ms Gannon emailed the claimant with the suggestion of an admin role which she said

they were about to start recruiting for. She asked the claimant to say whether the role was of potential interest. On 10 June 2022, Ms Gannon emailed with further details of the role which she now said had been especially created for the claimant. The role involved working every day for the equivalent of a 2.5 day week,. It was paid £25,000 pro rata and would be a mix of chargeable and non-chargeable work. The claimant replied on 10 June 2022 saying the role as it stood was not of interest to her because of the low pay and fact that she would have to take her child to nursery every day. The claimant then said she could be more flexible regarding her requirements eg her old role part-time from home at the same pay pro rata or 4 days/week term time only or a support solicitor role at a lesser salary 2.5 or 3 days/week. On 16 June 2022 Ms Gannon replied to say it was a pity the claimant had turned down the role because it could have worked. She said the position had now been filled.

181. This offer was not retracted or withdrawn until after the claimant had said it was not of interest to her.

182. The second job offer was conveyed by Mr Pyant on 22 August 2022 to work part-time from home as an associate solicitor in the corporate team and reporting to Yao Trinh. The claimant would have to work 3.75 hours on each of 5 days. He said the salary was £60,000 pro rata and holiday was 24 days pro rata, ie 12 days. The claimant responded the same day to say she would like to discuss in more detail the proposal of 5 days/week and 12 days holiday, but the suggestions were encouraging. The claimant spoke on the phone with Mr Pyant on 23 August 2022. On 12 September 2022, Mr Pyant emailed to say Yao had said the proposal would not work for her. He said he had also spoken to Ms Gannon who had ascertained that Ms Ramsey's work was outside the claimant's area of expertise. There was therefore currently no part-time position available.

183. The claimant responded on 14 September 2022 saying anyway that 18 hours spread over 5 days with just two weeks' holiday entitlement / year was not workable.

184. It is therefore not the case that offers kept being retracted and that goal posts kept being moved. However, it is true that this second offer was made and quickly retracted.

185. Applying the burden of proof, could the tribunal decide in the absence of any other explanation that the reason for the retraction was that the claimant had been pregnant or was taking maternity leave. We find that we could not. The surrounding circumstances show that the respondent did want the claimant to return to work. It is just that the respondent wanted the claimant full-time in the office as per her contract. This retracted offer was part-time from home. Even if the retraction was unexplained, the tribunal could not find on the facts that the reason for it was pregnancy or maternity leave. All the evidence suggests the real point is that Ms Gannon did not think that it worked for a corporate solicitor employed in her small firm to work part-time and from home.

186. The claim for this detriment is therefore not upheld.

187. We have also considered all the alleged detriments together to see whether they are any more suggestive of pregnancy or maternity leave discrimination when looked at as a whole. We find that they are not.

Detriments contrary to s47E (issue 6)

188. We now look at the claim for detriments contrary to s47E of the Employment Rights Act 1996. These are the same detriments as we have just been through in regard to direct discrimination.

189. The respondent accepts that the claimant made an application under s80F of the Employment Rights Act 1996 on 16 May 2022 requesting flexible working.

190. Regarding the other basis for the s104C claim, the initial question is whether the claimant alleged the existence of any circumstance which would constitute a ground for bringing proceedings under s80H. The respondent does not accept that she did. It says the claimant alleged sex discrimination, not a breach of s80H. That is not however the question. She does not need to explicitly allege breach of s80H.

191. On 4 June 2022, the claimant told Ms Gannon that the key issue for her was that Ms Gannon reverted so very quickly with an outright refusal. We find that amounts to the allegation of an existence of a circumstance that would constitute a ground for bringing s80H proceedings. The claimant is implicitly saying by mentioning those circumstances that Ms Gannon had not 'considered' the application after having received it. The ACAS Code says that once an employer has received the application they must consider it. .

192. The next question is whether the claimant was subjected to detriments because she made a s80F application on 16 May 2022 or because on 4 June 2022 she alleged the existence of a circumstance that would constitute grounds for bringing proceedings under s80H.

Issue: The claimant was made to do additional non fee-earning tasks which was a burden and was then criticised for her financial performance.

Issue: The respondent made baseless criticisms of the claimant's work with a view to undermining her and suggested that clients had complained about her in its response to her flexible working request.

193. As we have explained elsewhere in this decision, we do consider that baseless criticisms of the claimant's work and exaggerated criticisms of complaints about her financial management were made because Ms Gannon did not believe it was feasible for a corporate solicitor employed in her firm at that time to be working remotely and flexibly. The refusal was

not because the claimant had made the statutory request. This claim is therefore not upheld.

Issue: The respondent refused to permit the claimant any paid keeping in touch days and did not make the claimant feel that she was welcomed back.

194. As we have stated when we discussed this in relation to the pregnancy / maternity discrimination claim, there was nothing hostile in the respondent's responses and nothing which objectively speaking should have made her feel less welcome to come back because of it. Keeping in touch days are voluntary on both sides and there is no obligation on the employer to pay for them if granted. There is no evidence to show that the respondent's approach on this was in any way because she had made a flexible working request. In any event, the discussions regarding the keeping in touch days in August and September 2021 predated her flexible working request. This claim is therefore not upheld.

Issue: The respondent refused to provide the return to work bonus it had promised to the claimant.

195. The issue of the promise of a return to work bonus took place long before any flexible working request had been made. This claim is therefore not upheld.

Issue: The respondent refused to pay the claimant's pension contributions since April 2021.

196. We have discussed this detriment in relation to the pregnancy / maternity claim. We have found that the failure to pay prior to January 2023 was maternity discrimination. We see no evidence that the failure / refusal to pay pension contributions was anything to do with there having been a flexible working request. This claim is therefore not upheld.

Issue: The respondent required the claimant to attend a meeting in a public park on 12 May 2021 on the pretence of discussing her return to work and then Catherine Gannon failed to attend the meeting

197. This incident predated the flexible working request and therefore cannot have been a reaction to that request. This claim is therefore not upheld.

Issue: The respondent kept moving the goal posts and every job offer that was made was very quickly retracted or withdrawn.

198. We have discussed the relevant facts in relation to this detriment elsewhere in our decision. Only one offer was actually retracted prior to the claimant turning it down, ie the offer conveyed by Mr Pyant on 22 August 2022. The offer was made a few months after the claimant submitted her statutory flexible working request. We do not find that the offer was then retracted because of that request. All the evidence suggests that the offer

was retracted because the proposed line manager, Yao, said the working pattern would not work for her, because Ms Ramsey's work was outside the claimant's area of expertise, and because in any event, Ms Gannon did not believe that a corporate solicitor employed by her firm could satisfactorily work on a part-time remote basis. This claim is therefore not upheld.

Constructive dismissal (issue 1)

199. Although constructive dismissal is not a claim in itself, it potentially feeds into other claims concerning the dismissal.

200. The claimant says she resigned because of the actions listed in paragraph 1.1 of the List of Issues.

Item 1: Failure to pay a return to work bonus / threatened failure to pay a return to work bonus

201. Both sides accept that no bonus was actually paid because the claimant did not return to work. The claimant's complaint is that she was offered a three month return to work bonus in the appraisal meeting of 14 July 2021, but that when she asked for it to be put in writing shortly afterwards, the offer was retracted. We have found that what actually happened was that Ms Gannon said she would think about it and that she subsequently decided not to make such an offer, but instead to offer a £5000 return to work bonus if the claimant returned to work for 12 months. Obviously this is far less than the sum the claimant wanted. However, there is no obligation on an employer to offer any return to work bonus at all. Objectively speaking, rejecting the claimant's request for a three month return to work bonus and instead offering only a £5000 return to work bonus is not something which is capable of amounting to a breach of trust and confidence.

Item 2: failure to pay the claimant's pension

202. The claimant was entitled to a 5% employer contribution to her personal pension which was in a Hargreaves Lansdown account. The respondent's first contribution was paid on 9 August 2021 in respect of the year ending 31 May 2021. The next payment, ie for year ending 31 May 2022, had not been made as at the date of the claimant's resignation on 14 September 2022.

203. On 5 September 2022, the claimant asked in an email about holidays, when her pension contribution would be paid as it was now September and she found it worrying that it had not been done. The claimant received no reply prior to her resignation. The claimant had also asked Mr Pyant in her telephone conversation with him on 23 August 2022 and the claimant also raised the matter of her pension payment in some context with Ms Greenwood when they met in Hyde Park in May 2022. We do not know what was said in either of the two oral conversations.

204. The claimant resigned on 14 September 2022 and she followed up on 15 September 2022, with an email to Mr Pyant asking when her pension would be paid. She received no reply to that. Following her resignation, she also sent chasers on 21, 24 and 29 September 2022 and 15 November 2022. On 23 November 2022, the claimant informed Mr Pyant that she had reported the firm to the Pension Regulator. It was only then that Mr Pyant told her he had given instructions for the payment to have been made, so he was unsure why it had not happened. We do not know when he had given such instructions and the point is that the claimant had not been so informed prior to her resignation.

205. There was some discussion in the tribunal as to whether the sum which was eventually paid in January 2023 was correct. This was to do with how non-occupational pension contributions are calculated when an employee goes onto statutory maternity leave. This is not relevant for us to resolve. There is not a claim for shortfall in pension contributions per se. Moreover, no payment at all had been made at the time of the resignation, so the claimant did not then know there was going to be such a shortfall (if shortfall it be) once it was eventually paid.

206. We find that the failure to pay the claimant's pension contribution for the year ending May 2022 including failure to respond to her queries in writing on 5 September 2022 when she said she was worried, and on the telephone on 23 August 2022, contributed to the overall breach of trust and confidence caused by items 5, 7, 8 and 11.

207. However, at the resignation date, the respondent's conduct on this matter was not yet calculated or likely to destroy trust and confidence on its own. There was no precise date when payment was expected to be made - the previous year had been only been paid in August, which the claimant had accepted. There was no explicit refusal to pay the contributions and no implicit behaviour at that stage amounting to a refusal or suggesting they would not been paid. The claimant had as at her resignation date queried her pension on a couple of occasions, but this was buried in the far more extensive discussion about whether she could return to work on a flexible working basis and if not, why not. Only one of her pension queries was in writing, in an email also talking about holiday pay, and only 9 days before her resignation. It would not yet have objectively appeared that the respondent was deliberately refusing to respond. The main focus of Mr Pyant and the claimant in early September concerned the Yao offer. The pension matter would have looked much worse to the claimant after her resignation, when she sent focused emails on the point and was ignored. However, that is irrelevant to why the claimant resigned.

Item 3: The suggestion claimant give up the security of her employment

208. The respondent's suggestion that the claimant give up the security of her employment is a reference to the suggestion that she may be interested in becoming a consultant as it would give her flexibility, albeit no

guaranteed income or employment rights. This would involve signing a settlement agreement. The claimant would lose job security and employment rights.

209. The suggestion was not a breach of trust and confidence. The respondent was moving to some extent to that model and it was simply offering an opportunity which the claimant might wish to take up. She was not forced to do so. It would be different if the claimant had not been the person who initiated the discussion about changing her working hours and workplace. It would have been different if the substantive post was not still available. It may have been different if the firm was not generally moving to the consultancy model and if it was a response purely to an employee who had requested modification of her contracted hours and workplace due to childcare.

Item 4: Avoidance at Hyde Park meeting

210. We have discussed this in relation to the pregnancy / maternity discrimination claim. We do not think this was deliberate avoidance. Although we can understand why the claimant was upset to have made the journey herself with her baby and to be given two different explanations, Ms Gannon did send along a substitute and did later text the claimant personally to say that she could not attend. We do not think failure to attend a social meeting which had initially been suggested by Ms Gannon would be enough, objectively speaking, to breach trust and confidence. In any event, Ms Gannon had reasonable and proper cause for not attending (her daughter's meltdown).

Item 5: The respondent's suggestions that the claimant give notice and/or had resigned and the respondent's stated intention to assume she had resigned if she did not return to work on a date prior to 12 months maternity leave and that her job would only remain open until a date before the end of her maternity leave

Item 8: The respondent reneging on an agreement that the claimant would return to work in December 2022

211. Prior to the claimant going onto maternity leave, there was considerable correspondence between the parties regarding whether she could take accrued holiday at the end of her maternity leave and therefore when her return date would be. The claimant could not decide whether she wanted to avoid entirely unpaid periods as far as possible and thus only take 1 year altogether, and the respondent became confused at various points regarding whether holiday could be paid in lieu and whether it could be taken in the middle of maternity leave, which is what it thought was the effect of what the claimant was suggesting.

212. On 7 and 8 September 2021, Ms Gannon sent the claimant emails, showing some confusion. Realising that holiday could not be taken during maternity leave, Ms Gannon appears to have added on the accrued

entitlement to a 12 month period. She concluded “we very much look forward to your return to work planned for in or around December 2022”.

213. On 15 September 2021, the claimant emailed Ms Gannon to say she wanted to start her maternity leave on 24 September 2021 and offered two different options ie a total of 12 months off, returning 24 September 2022 and using her paid holiday after ending her maternity leave early, or adding the holiday to the end of 12 months maternity leave coming back 3 December 2022.

214. This is puzzling because Ms Gannon had already agreed on 8 September 2021 that the claimant could take the accrued holiday in one go. She had also indicated she was expecting to see the claimant back ‘around December 2022’. It was the claimant who then reopened the two options in her 15 September 2021 letter. Neither side wrote a clear decisive letter which would have nailed which of the two options would be followed, but the clear impression from the respondent at that stage is that it would have gone along with what the claimant wished.

215. Before this could finally be clarified, the claimant went into labour on 16 September 2021 and immediately onto maternity leave. The state of play at this point was that the respondent had agreed the claimant could take her accrued holidays at the end of her maternity leave, but it had not been resolved whether this meant after 12 months or whether the claimant could cut short her maternity leave and then add on the holiday within the 12 months. This seemed more a question of what the claimant would want to do, since Ms Gannon’s 8 September 2021 email had indicated she was at ease with the claimant returning around December.

216. The matter next came up on 8 April 2022, when the claimant told Ms Gannon in a WhatsApp that she was keen to take her full 12 months followed by her accrued holiday, “which takes us to around Christmas”. The issue of flexible working was also raised in that WhatsApp message. In her statutory flexible working request on 16 May 2022, the claimant said she wanted to return on a part-time basis after taking 12 months maternity leave and then her accrued holiday, which would take them to the start of December. The claimant’s calculation was incorrect, but prior to her maternity leave it was Ms Gannon in her email of 8 September 2023 who had estimated the return date on that option as around December and had implicitly been open to it

217. Ms Gannon responded almost immediately, refusing the flexible working request and saying that the claimant had to be back in the London office full time from 19 September 2022, and that her accrued holiday could be taken before she returned. Ms Gannon said that if the claimant decided not to return, the respondent would treat her last day of employment as 16 September 2022 and roll up a notice period to coincide with that end date. The claimant was asked to confirm within 4 days that she was coming back to her job on 19 September 2022. Although that deadline was subsequently extended at the claimant’s request, it does not change the

fact that it was imposed in the first place. Moreover, there was no reason for such a peremptory approach given that this was only mid May and indeed given that on 13 April 2022 Ms Gannon had said it was far too early to speak to HR as there were many months left before the claimant's return to work.

218. We can see that this would have come as a considerable shock to the claimant. First she was told she must return on19 September 2022, not December 2022 which had previously appeared open to her and which she had recently confirmed she wanted. Second, she was told rather abruptly and out of the blue that, her flexible working request having been refused, if she did not return on 19 September 2022, it would be taken as her termination date including her notice. Third, she was told she must reply in 4 days.

219. Exchanges of emails continued about the flexible working issue. Then on 10 August 2022, Ms Gannon emailed to say that as the claimant had notified them on 15 September 2021 that she wished to take maternity leave up to 24 June 2022, they would treat her as on holiday from 27 June until 30 August 2022. She had told them she would not return to her full time London job, in which case her employment would terminate on expiry of holiday leave on 31 August 2022. The claimant replied the same day. She said she thought they had long since agreed that she would be taking a full 12 months maternity leave up until 17 September 2022 and then her holiday up until December 2022. Why was Ms Gannon now changing this?
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220. On 11 August 2022, Julie Greenwood emailed the claimant, saying Ms Gannon had asked her to deal with the matter. She said they had forgotten that the claimant had decided to take the full 12 months maternity leave. She said, "if you do not attend the office on the 19th September at 9:30 am we will assume you have handed in your notice and will issue a P45 after payment of holiday and pension. Please let us know your intention. The calculations below are based on you taking 12 months maternity leave to Friday 16 September 2022".

221. On 12 August 2022, Ms Greenwood emailed the claimant again saying that "payroll has now pointed out that we should give you the choice of being paid for your 42 days of holiday at the end of your maternity leave on 17 September or adding on 42 days of holiday to the end of your maternity leave which takes your return to work date to 16 November 2022. If you do not return to work your holiday will be treated as taken during your notice. To avoid you being in breach of contract as would otherwise be the case if you served notice but did not return to work in London".

222. We find that this course of conduct by the respondent was likely, without reasonable and proper cause, to seriously damage the relationship of trust and confidence between employer and employee. The respondent had in the most abrupt and unsympathetic way reneged on an effective agreement that the claimant could return in December if she wanted to. It set a deadline for return of 19 September, then 31 August, then back to 19

September, then 16 November 2022, all accompanied by talk of termination and notice if the claimant did not return. This was all in the context that Ms Gannon had never held a face-to-face meeting with the claimant to discuss her flexible working request. Even if the reason was incompetence on the part of the respondent or only a partial understanding of how to treat maternity leave under the law, this was not 'reasonable and proper cause'. The respondent is a firm of solicitors and while not specialising in employment law, it should have handled this correctly. Nor does it excuse the abrupt and hostile tone.

Item 6: Offering the administrative assistant role

223. On 7 June 2022 Ms Gannon emailed the claimant with the suggestion of an admin role which she said they were about to start recruiting for. She asked the claimant to say whether the role was of potential interest. On 10 June 2022, Ms Gannon emailed with further details of the role which she now said had been especially created for the claimant. The role involved working every day for the equivalent of a 2.5 day week. It was paid £25,000 pro rata and would be a mix of chargeable and non-chargeable work. Ms Gannon acknowledged that the claimant may not be considering an admin role. She said she was mentioning it because the claimant had said she would consider roles with a pay reduction. Ms Gannon said she wanted to offer what opportunities they had which could potentially work for the claimant, but the claimant's current full-time role remained open on her return from maternity leave if no other role could be found for her. She asked if the role was of potential interest.

224. We see nothing wrong with Ms Gannon offering this role. The claimant had indicated she wanted to work part-time from home and had said she would consider a pay reduction. There were not many possibilities. Ms Gannon explicitly acknowledged that she understood the claimant may not want that kind of role. The tone of the offer conveys that it is made just in case the claimant might be interested. Ms Gannon says the claimant's substantive role remains open. There is no implication this offer is all that the claimant would intellectually be capable of.

225. Offering the admin role was therefore not alone or together with other matters a breach of trust and confidence.

Item 7: Making allegations regarding the claimant's performance

226. As we have explained elsewhere in this decision, we do consider that baseless criticisms of the claimant's work exaggerated criticisms of complaints about her financial management were made in the reply to the flexible working request. Talk about client complaints and performance issues to be addressed, and that there would be management in the office, must have come as a shock to the claimant. The timing when the claimant was on maternity leave and when she had just asked to return on a flexible basis, the lack of any substantial foundation for such allegations, and the heavy-handed approach was in itself likely to seriously damage trust and

confidence. It also contributed to the overall breach of trust and confidence we have identified here.

Item 9: Failing to respond to the claimant's emails of 15, 21, 24 and 29 September 2022

227. These emails were sent following the claimant's resignation so they are not relevant to any constructive dismissal.

Item 10: The respondent's email regarding arrangements for the claimant's return to office on 16 November

228. This refers to the respondent's email of 11 November 2022 with arrangements for the claimant to return to work on 16 November 2022. This email post-dated the claimant's resignation and so is not relevant to any constructive dismissal.

Item 11: Reminding the claimant that she had no right to appeal the flexible working request

229. In his email of 12 September 2022 withdrawing the job offer on grounds that it would not work for Yao, Mr Pyant ended by saying the respondent would continue looking for any suitable part-time roles, and then added that there was no right of appeal from a decision to turn down flexible working. This was gratuitous. Mr Pyant had said they would continue to look for roles. The claimant had already been told by the respondent several times that she could not appeal the statutory procedure. Repeating this, together with Mr Pyant's repetitive requests that she 'particularise' her contentions 'citing full authority', created an adversarial tone to the communications. Following on from the matters described in items 5 and 8 and the respondent's tone in those, this item contributed to the breach of trust and confidence.

Item 12: Failing to engage with the claimant after 11 November 2022

230. This post-dates the resignation. It is therefore not relevant to any constructive dismissal.

Item 13: A course of bullying and discriminatory conduct by the above events

231. We do not find that the above events were a course of bullying conduct. 'Bullying' is an imprecise word. We have expressed our views that they were breaches of trust and confidence. We do not find the above events were a 'course of' discriminatory conduct. We have only found one matter was discriminatory ie the failure to pay the pension contributions.

232. The next question is whether the claimant resigned at least in part in response to the breach. We find that the claimant did resign in response to the breach of trust and confidence. She resigned because of the totality of the way she had been treated which included items 2, 5, 7, 8 and 11 above

(as well as other matters which we do not consider a breach of trust and confidence). The final straw was Mr Pyant's email of 12 September 2022 including its tone which included an unnecessary reminder that she had no right to appeal the refusal of her flexible working request and repeatedly in that email demanding she 'particularise' and cite authorities for her contentions. The tone and approach added to the feeling which she already had that she was not wanted

233. The claimant did not at any stage affirm. The matters leading to the breach of trust and confidence were cumulative. The claimant continued to negotiate and argue for a suitable offer right up to the 12 September 2022 withdrawal of the 22 August 2022 offer.

234. We therefore find the claimant was constructively dismissed.

235. The claim form alleges at paragraph 46.1 that the constructive dismissal was discriminatory. The only matter going to the breach of trust and confidence which was an act of discrimination was the failure to pay pension contributions as at 14 September 2022. Following the guidance in Williams and De Lacey the question is whether the discriminatory matter sufficiently influenced the overall repudiatory breach. We do not think that it did. At that time, it was a peripheral matter. It was not mentioned at all in her resignation email. She only remembered to mention it in her email the next day. We are not saying that she was not concerned, but it was relatively a very small factor in the overall breach of trust and confidence, where the central issue was the handling of her return to work and apparent criticisms of her performance. We do not think that at the date of the resignation, the unpaid pension contributions contributed very much at all to the breach of trust and confidence either on a subjective basis or on an objective basis. There was no fixed payment date and contributions for the previous financial year had not been paid till 9 August 2021. Unlike all the other matters which contributed to her breach of trust and confidence, which the claimant addressed extensively in writing, she had only made one small mention in writing, which was on 5 September 2022. She did say she was worried, but there was no outright refusal to answer at that stage and there were not yet lengthy periods of failure to answer as she resigned only 9 days later

236. We therefore find that the constructive dismissal was not discrimination because of pregnancy, pregnancy-related illness or because the claimant had taken maternity leave.

Notice (issue 7)

237. As the claimant was constructively dismissed, she was entitled to resign without giving notice.

238. The claimant was entitled to 3 months' notice under clause 2.2 of her contract. In context, this reads as calendar months, which would take the claimant to 13 December 2022. As at the claimant's resignation, the

claimant was required to return to work in the London office on 16 November 2022.

239. Although there will be a separate remedy hearing, we observe that from her resignation until 15 November 2022, the claimant would have been on unpaid maternity leave. Further, it was clear from the claimant's position and what she had said in correspondence, that she would not have been willing or able to work full-time in the London office during that notice period.

240. The notice pay claim was made in time. The termination date was 14 September 2022. The claimant notified ACAS on 23 November 2023. The certificate was issued by email on 4 January 2023. The ET1 was presented on 28 January 2023.

Ordinary unfair dismissal (issue 2)

241. The claimant resigned on 14 September 2022. She started her employment on 2 November 2020. She does not have the necessary service to claim ordinary unfair dismissal.

Automatic unfair dismissal under section 104C Employment Rights Act 1996 issue 3)

242. In the section on s47E detriments, we established that the claimant made a s80F application on 16 May 2022 and that on 4 June 2022 she alleged the existence of a circumstance that would constitute grounds for bringing proceedings under s80H. We have above found constructive dismissal. The question now is whether the sole or principal reason for the claimant's constructive dismissal was that she had made the said application or alleged the said circumstances. This involves looking at the reason for the detriments which comprised the breach of trust and confidence.

243. We do not find that any of the detriments to which the claimant was subjected or any of the matters comprising the breach of trust and confidence were carried out by the respondent because the claimant had made a flexible working application or because she alleged a circumstance which would constitute grounds for claiming the respondent had not complied with the rules for dealing with such an application. We have explained reasons for the findings regarding the individual detriments elsewhere. It was not the statutory application that was the problem or that the claimant had alleged Ms Gannon had made up her mind without due consideration of the statutory application. Ms Gannon's actions, to the extent that they related to flexible working, were simply because she did not believe it was feasible to employ a corporate lawyer on a part-time remote basis in her small firm.

Section 80F-H Employment Rights Act 1996 (issue 9)

Issue: Did the respondent fail in respect of a duty under section 80G(1)ERA1996 in that it did not deal with the claimants application under section 80F in a reasonable manner – ie did it fail to consider the claimant's application adequately or at all, as shown by the speed of response and total refusal to every aspect of it? Was the response predetermined and did the respondent never have any genuine intentions of considering a part-time or remote role for the claimant?

244. The claimant was given a concluded decision on 16 May 2022 without any meeting as recommended in the ACAS Code. Ms Gannon also did not consider the written application as recommended in the Code. She had thought about the matter and clearly made up her mind prior to receiving the application. She did not revisit the matter when she saw what was written in the application. Her reply in less than an hour involved a long typed document. We would have found that Ms Gannon did not deal with the request in a reasonable manner for these reasons. We have taken into account the subsequent long chain of emails but Ms Gannon never met the claimant and clearly had a rigid mindset on this subject.

245. Ms Gannon in her decision on 16 May 2022 did not offer any right of appeal. The claimant says she was told numerous times following the rejection of her request that she could not appeal. She did not give us the dates of these. We note that the claimant wrote to Ms Gannon with her comments on the refusal on 16 and 18 May 2022. Apart from the aspect of not inviting the claimant to a meeting, the claimant was allowed to make representations akin to an appeal on the reasons for refusal. Even if this were a breach of the ACAS Code, the time when we would have expected an appeal meeting to be offered, and therefore when the respondent first unreasonably failed to do so, was either on 16 May 2022 or at the latest, immediately following 18 May 2022. By 16 May 2022, a concluded decision had been provided at high speed and without any meeting. By 18 May 2022, the claimant had put in written responses and had not been invited to a meeting to discuss them.

246. Regarding time-limits, under s80H ERA 1996, a claim can be brought for non-compliance with the employer's duties which are set out in s80G. It must be made within 3 months of the relevant date or, if that was not reasonably practicable, within such further period as the tribunal considers reasonable. In this case, the 'relevant date' is the first date when the claimant could complain that the respondent failed to deal with the application in a reasonable manner.

247. The first date when the claimant could complain that the respondent had not deal with the application in a reasonable manner would be within 3 months of 16 May 2022 (or if the appeal point was upheld, 18 May 2022). The claimant needed to notify ACAS by 17 August 2022 but she did not do so until 23 November 2022. The claimant's only reason for not bringing a tribunal claim sooner was that she was still negotiating right up to when she resigned. We understand her thinking, but this does not amount to it not being reasonably practicable to have brought a claim in time.

248. This claim is therefore out of time.

Indirect sex discrimination (s19 Equality Act 2010) (issue 5)

249. We will follow the stages of the definition in the legislation.

Issue: Did the respondent apply to the claimant the provision, criterion or practice (PCP) that she work 5 days / week from the London office?

250. The respondent did apply that provision, criterion or practice to the claimant in respect of her return from maternity leave. Unless the claimant agreed to leave and become a consultant, or unless she accepted the admin job, she was required to work 5 days/week at the London office.

Did or would the respondent have applied that provision, criterion or practice to male employees?

251. The respondent would have applied this provision, criterion or practice to male employees in the claimant's job.

Did or would this provision, criterion or practice put women at a disadvantage compared with men

252. We can take judicial notice that a requirement to work 5 days / week in the office puts women at a disadvantage compared with men because women tend to have childcare responsibilities more than men do. The respondent did not seek to dispute this stage of the definition.

Did this provision, criterion or practice put or would it put the claimant at that disadvantage?

253. This provision, criterion or practice did put the claimant at that disadvantage because she wanted to spend a certain amount of time with her child. The requirement that every day be worked in London also put her at a disadvantage because the claimant was at that time living in Wigan and did not at that stage want to return. She was able to attend the London office for a few days each month when she would stay at the house she jointly owned with her mother, but not beyond that.

Can the respondent show requiring her to work 5 days from the London office was a proportionate means of achieving a legitimate aim?

254. The parties agreed this was the real issue on the indirect sex discrimination claim.

255. The respondent's aims were to have an arrangement which was responsive to clients' needs, kept clients happy and did not damage the income or reputation of the firm. The respondent wanted to avoid losing clients to competitors in a competitive corporate sector. The respondent

wanted the claimant to maximise her potential as a fee-earner, making contacts and meeting clients. These were all legitimate aims.

256. We do not accept the aim of managing the claimant's performance because, as we have stated elsewhere, that was not an issue apart from some assistance with financial management. Assisting the claimant with financial management would be a legitimate aim.

257. The next question is whether the respondent could show that applying the provision, criterion or practice was proportionate given the effect on women generally and the claimant, ie that if flexibility is not permitted, women would find it very hard to work as a solicitor in the corporate sector while bringing up children. This reduced opportunity for women is likely to affect their ability to hold jobs in small firms. Larger firms might still be able and willing to accommodate flexibility. Nevertheless, it is a notably reduced opportunity, so the reason for not allowing flexibility must be strong.

258. The claimant suggested the best model would be working Monday, Wednesday, Friday with only one day in between when she was unavailable. She also said that if clients complained on the intervening days or something urgent arose, the email would ping on her email and she could send a holding email. The trouble with that is that it relies on the claimant working on a day when she has a right not to work. Ms Gannon is entitled not to find such an arrangement acceptable in principle. There would be uncertainty regarding whether, if at all, and for how long, the claimant was monitoring her phone. It would be uncertain how much attention she was able to give a matter if it was her day off and she was looking after her child. She could not be told how much time or attention she should give on such days. She could complain if too much was asked of her. And it is wrong in principle to require an employee to be monitoring their telephone on their day off. Ms Gannon's ethos had always been to trade off salary by not requiring staff to work the unhealthy long hours required by many City firms.

259. The claimant agreed that clients can be demanding. But she said it is impossible anyway always to be at a client's beck and call, and commercial clients in particular always want more. That is true. The difficulty is that if a solicitor is already only available 3 days/week, their absence is an additional delaying factor which leaves less scope for manoeuvre on their working days. The claimant herself recognised the difficulty. In her flexible working request, she said that 'client and colleague expectations would need to be somewhat managed in terms of speed of reverting and turning things around'. We can see why the need for managing client expectations in a competitive corporate environment would be of legitimate concern to the respondent.

260. Our main concern is the small size of the firm and the instability of its staffing in the corporate employee area in the relevant period. From May – September 2022 there were only two other corporate lawyers (discounting

Pia who was about to leave), ie Yao and Mr Moore, both of whom had been employed for only a few months. The two long-standing experienced corporate lawyers, Ms Curtis and Mr Deane, had gone or had given notice. At the same time, the respondent was largely going over to a consultants model. There was no team structure to back up the claimant on days when she would not be working. The claimant herself recognised that matters could arise when she suggested she would be in a position to deal with anything urgent on her mobile. As we have said, the respondent is entitled to say that is not a satisfactory working model. Ms Gannon would have to have dealt with urgent problems on the claimant's non-working days which would have been an additional burden for her.

261. The small size of the firm also means it is harder to absorb lost or unhappy clients.

262. We note that Ms Curtis had been allowed to work term time only, but that was many years previously. Ms Curtis was also a more experienced solicitor and the structure of the firm was different at the time.

263. The claimant argues that consultants are allowed to fix their own hours and indeed that the respondent's website says that its model is a new way of working where solicitors work to their strengths, decide their own hours and this translates to happy clients. Although clients might not realise they are dealing with a consultant, so there are still reputational risks if things go wrong, the big difference is that the respondent is not obliged to provide consultants with work. The consultants, who in any event tend to be very experienced, take the financial risk of losing clients. We accept this is very different.

264. Working from home would make part-time working even more difficult in terms of others knowing what was going on if problems arose when the claimant was not in. Also, although we think that the claimant's work quality was good, and complaints about her financial management exaggerated, there were still some issues on financial management which required some level of supervision.

265. There was some dispute between the parties as to whether any other corporate lawyers had been allowed to work from home, and also whether that was just for the Covid period. In any event, Ms Gannon said that the employment of those who were not full-time in the London office had not been successful. It also seems these were full-time workers. None of this shed light on whether the claimant, with her particular level of experience and with the firm in the state it was in at May 2022, could successfully work part-time and from home.

266. For these reasons, we find that even taking account of the impact on women and on the claimant, the respondent has proved its requirement for full-time working in the office was a proportionate means of achieving its legitimate aims. Our decision is very much because of the small size together with the unusual circumstances and dynamics of the firm.

Alternatively, did the respondent apply a provision, criterion or practice to the claimant if she did part-time hours at home, that she do so over five days per week with only 12 days holiday per year, at a reduced salary, even allowing pro rata from the original salary?

267. We have to say this is a very strangely worded provision, criterion or practice, but this is the way the claimant phrased it.

268. The respondent did not generally apply this PCP to any jobs it might offer. The respondent made two offers involving working from home on a part-time basis across 5 days. However, the admin. offer in June 2022, from home, across 5 days and at a reduced salary, was was expressed to be for 24 days holiday. This offer therefore does not meet the description of this PCP.

269. The 22 August 2022 offer conveyed by Mr Pyant was from home across 5 days at a reduced salary and expressed to be with 12 days holiday. The respondent applied that PCP to that particular job offer and only for a short period of time until the offer was withdrawn on 12 September 2022.

270. The requirement to work part-time hours across 5 days would put women at a particular disadvantage compared with men because it would mean that childcare had to be found and paid for across 5 days.

271. It did not in practice put the claimant at a disadvantage because the job offer was withdrawn anyway for different reasons.

Remedy

272. A hearing for remedy will take place by CVP on **8 April 2023** starting at 10 am.

273. The parties may be able to reach agreement regarding compensation. If so, they should let the tribunal know as soon as possible.

274. Alternatively, if the remedy hearing is to go ahead, the parties should agree a small remedy bundle and exchange any witness statements and written submissions relevant to remedy on those matters which have been upheld by 11 March 2024.

Employment Judge Lewis

Dated: …17 January 2024……..

Judgment and Reasons sent to the parties on:

……19/01/2024.....

…….....
For the Tribunal Office

AGREED LIST OF ISSUES

1. Constructive unfair dismissal

1.1 The claimant contends that the respondent committed a fundamental breach of contract in that it breached the duty of trust and confidence between employer and employee. Did the respondent, without reasonable or proper cause, act in such a way as was calculated or likely to destroy or seriously damage the duty of confidence between employer and employee by doing the following:

1 the respondent's failure or threatened failure to pay a return to work bonus. (See paragraph 8 of the Grounds of Claim)

2 the respondent's failure to pay the claimants pension

3 the respondent's suggestion that the claimant give up the security of her employment

4 avoidance of the claimant by Catherine Gannon, ie Ms Gannon failing to attend a meeting in Hyde Park)

5 the respondent's suggestions that the claimant give notice and/or had resigned and the respondent's stated intention to assume that the claimant would have resigned if she did not return to work on a date before the expiry of 12 months maternity leave, and that her job would only remain open until a date before the end of her maternity leave

6 the respondent offering the claimant an administrative assistant role

7 the respondent making allegations about the claimants performance

8 the respondent reneging on an agreement that the claimant would return to work in December 2022

9 the respondent's failure to respond to the claimant's emails of 15, 21, 24, 29 September 2022

10 the respondent's email about the claimant 's first day back in the office dated 16th November

11 the respondent reminding the claimant that she had no right to appeal the flexible working request -

12 failing to engage with the claimant after 11 November 2022

13 the respondent thereby engaging in a course of bullying and discriminatory conduct

1.2 If so, did the claimant resign in response to the breach, and, if she did, when did she resign?

1.2.1 the respondent avers that from June 2022 the claimant wanted to leave the respondent business in any event

1.2.2 the claimant contends that she resigned on 23 November 2022. The respondent contends that she resigned on 14 September 2022.

1.3 Did the claimant affirm the breach by waiting too long to resign?

2. Ordinary unfair dismissal

2.1 If the claimant was constructively dismissed, given the date of dismissal, did she have two years service to bring an ordinary unfair dismissal complaint?

2.2 If she did, has the respondent shown a potentially fair reason for the dismissal? (the respondent contends that the potentially fair reason for dismissal was some other substantial reason. The claimant was based in Wigan, 300 miles away from her office. Her job was in London. It was not practical for her to travel to London. She was unable to undertake the job she was hired to undertake.)

2.3 Did the respondent act reasonably in dismissing the claimant for that reason?

2.3.1 Did it undertake fair procedure?

2.3.2 Was dismissal a reasonable response?

3. Automatic unfair dismissal under section 104C Employment Rights Act 1996

3.1 The claimant brings a complaint of automatic unfair dismissal relying on both s104C(a) (that she had made an application under s80F) and s104C(d) (that she had alleged circumstances which would constitute grounds for bringing proceedings under s80H) of the Employment Rights Act 1996.

3.2 Did the claimant make an application under s80F ERA 1996? (The claimant relies on her document dated 16 May 2022 requesting part-time working 8.30 am – 4.30 pm, working mostly from home with occasional trips to the office for client meetings, team building or training events etc. Ideally 2 ½ days/week or 3 days/week and/or possibly term-time only. The claimant contends that she set out the impact of her new suggested working pattern and how it could be accommodated.)

3.3 Did the claimant allege there were grounds for bringing proceedings under the against the respondent under Section 80H ERA1996?

3.4 If she did, and if the claimant was constructively dismissed, was the principal reason for dismissal the fact that the claimant had made an application under section 80F ERA 1996 or that she had alleged that there were grounds for bringing proceedings against the respondent under section 80H ERA 1996?

Applicable to unfair dismissal generally

3.5 The claimant says that the principal reason the respondent had treated the claimant in those ways was the fact that she had made a flexible working request or had suggested there were grounds for bringing proceedings.

3.6 if the respondent dismissed the claimant unfairly, what is the likelihood that the claimant would have been dismissed in any event? (The respondent will set out its contentions on Polkey.)

3.7 to what extent did the claimant cause or contribute to her dismissal? (The respondent will set out its contentions on contributory fault.)

4. Direct discrimination (s18 Equality Act 2010)

4.1 the claimant says that the respondent acted as it did because of her pregnancy and/ or illness she suffered as a result of her pregnancy and/ or because of her pregnancy related illness and the fact that she sought to exercise her right to maternity leave.

4.2 Did the respondent treat the claimant unfavourably by:

4.2.1 The claimant was made to do additional non fee-earning tasks which was a burden and was then criticised for her financial performance. The claimant says this was done because of her pregnancy and pregnancy related illness and the fact that she sought to exercise her right to maternity leave.

4.2.2 the respondent refused to permit the claimant any paid keeping in touch days and did not make the claimant feel but she was welcomed back. The claimant says this was done because of her pregnancy and pregnancy related illness and the fact that she sought to exercise her right to maternity leave.

4.2.3 the respondent refused to provide the return to work bonus it had promised to the claimant. The claimant says this was done because of her pregnancy and pregnancy related illness and because she had sought to exercise the right to maternity leave.

4.2.4 the respondent refused to pay the claimant's pension contributions since April 2021. The claimant says this is because she had sought to exercise her right to maternity leave.

4.2.5 the respondent required the claimant to attend a meeting in a public park on 12 May 2021 on the pretence of discussing her return to work and then Catherine Gannon failed to attend the meeting. The claimant says this was due to her pregnancy and her maternity leave but not due to her pregnancy related illness

4.2.6 the respondent made baseless criticisms of the claimant's work with a view to undermining her and suggested that clients had complained about her in its response to her flexible working request. The claimant says this was due to her pregnancy and her maternity leave but not due to her pregnancy related illness.

4.2.7 the respondent kept moving the goal posts and every job offer that was made was very quickly retracted or withdrawn. The claimant says this was due to her pregnancy and her maternity leave but not due to her pregnancy related illness.

4.3 if so, has the claimant shown facts from which the tribunal could conclude that the unfavourable treatment was because of the section 18 prohibited grounds as set out under the subheadings above?

4.4 If she has, has the respondents shown that the prohibited grounds were no part of the reason it acted as it did?

(The tribunal will use the two stage burden of proof where it is possible and sensible to do so.)

5. Indirect sex discrimination (s19 Equality Act 2010)

5.1 Did the respondent apply the following provisions, criteria and practices (PCPs):

5.1.1 requiring employees to work five days a week from the London office

5.1.2 requiring part time, from home, employees to still work on five days per week with only 12 days holiday per year and paying such employees at a reduced salary, even allowing pro rata from the original salary.

5.2 if the respondent did, did those PCP's put women at a particular disadvantage compared with men?

5.2.1 the claimant contends that more women than men are single parents with childcare responsibilities and are therefore less able to work full time five days a week and to attend the office each day because of such responsibilities

5.2.2 the claimant contends that more women than men work part time because of childcare responsibilities and are therefore more likely to be disadvantaged by less favourable part time terms of employment including pay and holidays.

5.3 Was the claimant put at such a disadvantage?

5.4 If so, has the respondent shown that the application of the PCP was a proportionate means of achieving A legitimate aim?

5.5 the respondent relies on the following as legitimate aims:

5.5.1 there were genuine business reasons which included:

(a) the business has to be responsive to clients needs

(b) Clients expect solicitors to be available to them

(c) The business would not survive if clients were unhappy with their solicitors who had concerns that their needs were not being attended to in an efficient manner

(d) There were only two corporate solicitors at the time

(e) The performance issues which the claimant had before going on maternity leave needed to be addressed.. Paragraphs 36-37, 42-46 of the respondents grounds of response.

(f) the respondent business is a small law firm

(g) the respondent has limited resources

(h) The respondent has to be able to make a profit otherwise it is not a viable business

(i) The respondent has to consider the impact on the business and impact on other members of the team

(j) The respondent has to consider clients desires needs and welfare as well as professional obligations

(k) The respondent has to consider how best to support and monitor the claimants work too not here to professional standards.

6. Detriment contrary to s47E ERA 1996 for having made an application pursuant to s80F ERA 1996 or alleged circumstances which would constitute a ground for bringing proceedings under s80H ERA 1996

6.1 The claimant relies on the same alleged unlawful acts as in the direct pregnancy / maternity discrimination complaint.

6.2 If the respondent did those acts, did they amount to detriments?

6.3 If so, did the respondent do those detriments because the claimant had made an application under s80F ERA 1996 or because she had alleged the existence of circumstances which would constitute a ground for bringing proceedings against the respondent under s80H ERA 1996?

7. Breach of contract – notice pay

Was the claimant entitled to resign without notice by reason of the respondent's repudiatory breach of contract?

8. Time-limits

8.1 Are the complaints out of time?

8.2 If the unfair dismissal complaint is out of time, should the time be extended under the not reasonably practicable test?

8.3 If the complaints for flexible working detriments are out of time:

8.3.1 should the time limit for presenting the claims be extended under the not reasonably practicable test?

8.3.2 was there a series of acts or failures, the last of which was in time, so as to bring the claim in time? (Arthur v London Eastern Railway Limited [2007] ICR193)

8.4 in respect of the section 18 and section 19 Equality Act 2010 complaints:

8.4.1 Was there a discriminatory state of affairs, or series of acts, the last of which was in time, so as to bring the claim in time? (Hendricks v Metropolitan Police Commissioner) [2002] EWCA Civ 1686)

8.4.2 should the time limit for presenting the claimants claims be extended under the just and equitable test?

9. Section 80F-H Employment Rights Act 1996

9.1 Did the respondent fail in respect of a duty under section 80G(1)ERA1996 in that it did not deal with the claimant's application under section 80F in a reasonable manner – ie did it fail to consider the claimant's application adequately or at all, as shown by the speed of response and total refusal to every aspect of it? Was the response predetermined and did the respondent never have any genuine intentions of considering a part time or remote role for the claimant?