EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Mrs E M Torres		Apple (UK) Limited

Heard at: **London Central Employment Tribunal**

On: **18,19, 21 and 24 June 2024**
25 June (In chambers)

Before: **EJ Webster**
Ms J Cohen
Mr J Sharma

Appearances
For the Claimant: **Ms Redman (Counsel)**
For the Respondent: **Ms Berry (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claims for direct sex discrimination are not upheld.

2. The Claimant's claim for indirect sex discrimination is not upheld.

3. The Claimant's claim for constructive unfair dismissal is not upheld.

4. The Claimant's claim for wrongful dismissal is dismissed upon withdrawal.

5. The Claimant's claims that the Respondent breached section 80G and 80I Employment Rights Act 1996 and Regulation 4 of the Flexible Working Regulations 2014 are not upheld.

REASONS

The hearing

1. The parties had not agreed a final list of issues prior to the hearing. The Claimant also made an application to amend her claim. This meant that the first day was used by the Tribunal reading and subsequently determining the applications and finalising the list of issues. Oral reasons were given regarding the applications and the finalisation of the list of issues at the time and will not be repeated here. The amendments and alterations to the List of Issues are reflected in the List attached as Appendix 1. This list was compiled and agreed by the parties after we had delivered our judgment in respect of the amendment applications.

2. The hearing was conducted via CVP. Unfortunately it had been listed across a judicial non-sitting day. The Tribunal therefore arranged to sit the fifth day in Chambers on 25 June in order to deliberate.

3. Evidence began on the second day. We had witness statements for and heard oral evidence from the following:

    (i) The Claimant
    (ii) Ms Darcy Wallace (People manager for the Respondent)
    (iii) Ms Blanka Budak (the Claimant's line manager)
    (iv) Ms Katherine Jones (Ms Budak's line manager)

4. Both counsel provided thorough and helpful written submissions and addressed us orally. The Tribunal reserved its decision.

Relevant Law

S136 Equality Act 2010 - The Burden of Proof

5. S.136(2) Equality Act 2010 (EqA) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

6. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

7. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

8. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

9. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave a clear set of guidelines which we have had due regard to.

Direct discrimination: Equality Act 2010 s13

10. 13 Equality Act states:

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

11. We have reminded ourselves that discrimination such as this is rarely obvious and it is unusual that any such treatment is openly admitted to or confirmed by clear written evidence as confirmation. The tribunal must consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

12. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

13. We have considered the guidance set out by HHJ Mummery in In *Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA*, According to Lord Justice Mummery: '*In this case the issue of less favourable treatment of the claimant, as compared with the treatment of the hypothetical comparator, adds little to the process of determining the direct discrimination issue. I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground*.' Therefore, although considering the treatment of a comparator will often be the most straightforward way of determining whether direct disability discrimination has occurred, the issue may sometimes take a back seat to a common-sense appreciation of the facts.

14. We have therefore also considered what is referred to as the 'because of' or 'reason why' test to the claimant's assertions. We have considered, the subjective motivations — whether conscious or subconscious — of the respondents in order

to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on. As set out in *Nagarajan v London Regional Transport 1999 ICR 877, HL* we have considered the relevant mental processes of the respondents and the context in which they made their decisions. As Lord Nicholls put it '*Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances*.'

15. We have reminded ourselves that it does not matter if the motive is benign or malign. This is set out in the EHRC Employment Code (see para 3.14). In other words, it will be no defence for an employer faced with a claim of direct discrimination to show that it had a 'good reason' for discriminating.

16. The protected characteristic need not be the main reason for the treatment provided it is the 'effective cause'. (*O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT*).

Indirect Discrimination

17. S19 Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ('PCP') which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

a) A applies, or would apply, it to persons with whom B does not share the characteristic,

b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it

c) it puts, or would put, B at that disadvantage, and

d) A cannot show it to be a proportionate means of achieving a legitimate aim.

18. The leading case regarding the 'salient features' of indirect discrimination is Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27.
19. The burden of proof lies with the Claimant to establish the following necessary parts of an indirect discrimination claim:

(i) That the Respondent operates a provision, criteria or practice ('PCP')
(ii) That this PCP puts people who share the Claimant's protected characteristic (in this case, sex) at a disadvantage when compare with those who do not
(iii) That the claimant has experienced that disadvantage

20. If the Claimant does establish all of the above that the Respondent must show that the PCP is a proportionate means of achieving a legitimate aim.

21. We were referred by both parties to the case of Dobson v North Cumbria Integrated Care NHS FoundationTrust 2021 ICR 1699, EAT. That case is considered in our conclusions below.

Constructive Unfair Dismissal

22. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

23. The leading case in this area, *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract.

> *'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'*

24. In order to claim constructive dismissal, the employee must establish that:
    (i) there was a fundamental breach of contract on the part of the employer
    (ii) the employer's breach caused the employee to resign
    (iii) the employee did not delay too long before resigning, thus affirming the contract

25. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL*. The Judgment established that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

26. A tribunal will therefore consider, when assessing whether the implied term of mutual trust and confidence has been breached the following questions:
    (ii) was there 'reasonable and proper cause' for the conduct?
    (iii) if not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'?

27. In considering whether there has been a breach of the implied term of mutual trust and confidence, a Tribunal must apply a contractual test of repudiation and not import a range of reasonable responses test. The issue of reasonableness in such cases might assist in deciding whether the conduct was sufficient to constitute a

fundamental breach of contract. (*Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA).*

Flexible working Regulations

28. S80F Employment Rights Act 1996

A qualifying employee may apply to his employer for a change in his terms and conditions of employment if

(a) the change relates to—
(i) the hours he is required to work,
(ii) the times when he is required to work,
(iii) where, as between his home and a place of business of his employer, he is required to work, or
(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations.

(2) An application under this section must—
(a) state that it is such an application,
(b) specify the change applied for and the date on which it is proposed the change should become effective, and
(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

(5) The Secretary of State may by regulations make provision about—
(a) the form of applications under this section, and
(b) when such an application is to be taken as made.

29. Flexible Working Regulations 2014 (SI 2014/1398)

34.1 Reg 4 Form of application
A flexible working application must—
(a) be in writing;
(b) state whether the employee has previously made any such application to the employer and, if so, when; and
(c) be dated.

34.2 Regulation 6 provides,

> "*For the purposes of section 80I of the 1996 Act (remedies) the maximum amount of compensation is 8 weeks' pay of the employee who presented the complaint under section 80H of the 1996 Act*."

34.3 The ACAS Code of Practice 5 Handling in a reasonable manner requests to work flexibly (2014), which can be taken into account by employment tribunals, contains the following guidance to employers,

> "*6. 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…*
>
> *8. 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 ...*

(i) *if you reject the request you should allow your employee to appeal the decision*."

30. Time Limits

35.1 s80 Employment Rights Act 1996

(1)An employee may present a complaint to an employment tribunal that his employer—

(a)has unreasonably postponed a period of parental leave requested by the employee, or

(b)has prevented or attempted to prevent the employee from taking parental leave.

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

(a)before the end of the period of three months beginning with the date (or last date) of the matters complained of, 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.

35.2 S123 Equality Act 2010

(1) proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

Facts

31. We have only made findings of fact in relation to matters which have contributed to our conclusions. Where we have not referenced evidence or information that we were provided with during the hearing that does not mean that we have not considered it, simply that it was not relevant to our conclusions.

32. All of our findings are reached on the balance of probabilities.

Claimant's role

33. The Claimant has worked for the Respondent in various capacities over 11 years though there were breaks in her continuity of employment. Relevant to the purposes of this case, the Claimant commenced employment on 23 April 2019 on the EMEA Platform publisher based in Madrid. Subsequently she applied for and was offered and accepted the role of EMEA Platform publisher video Lead (the "Video Lead" role) which she took up from 3 August 2021. It was not in dispute that this was a London based role operating from Apple's London hub.

34. The Claimant's daughter had been born in August 2020 and the Claimant took one year's maternity leave. When she returned from that maternity leave in August 2021 it was to the Video Lead Role. Initially the Claimant performed that role remotely from Madrid because of the global pandemic when all staff were required to work from home and which prevented the Claimant. There then followed a return to office working and the Respondent initiated a hybrid working model from May 2022 which required individuals to work partly from home and partly from an office. The Claimant and her family (her husband and child) relocated to London at this time, finally securing permanent accommodation in September 2022. The Claimant's husband was able to perform his job for a different employer in London.

35. The Claimant's role involved a large amount of Webex or similar calls with teams across the world. The Respondent is an international business and the Claimant's work involved working internationally and, compounded by the pandemic, much of the Claimant's work could and was done virtually. This continued even after she moved to London and was working in the office.

36. The Respondent wanted its staff to return to the office. It initiated a hybrid system which required employees to work from the office 3 days per week giving them the option to work elsewhere 2 days per week.

37. We did not hear evidence from the Claimant as to whether she attended work 3 days per week or more whilst living in London but we assume that she did and that she or her partner had organized childcare accordingly.

38. The Respondent's evidence was that although the Claimant could perform a lot of her work remotely, this was a London office based role. Their reasons for it being a London role were that London was the EMEA (Europe, Middle East and Africa) hub and headquarters for Apple services and that other key stakeholders like the Video Business team, Design team and Partner operations were also based in

London. Ms Budak in evidence said that the Respondent was trying, post pandemic, to foster a culture of office presence again in order to generate a spirit of cross team cooperation.

39. It is difficult for us to evaluate the necessity of any face to face working for the Claimant's role in circumstances where the Claimant spent so little time in the London office before moving back to Spain. Her account of what was happening is based on a very short period of time when she was getting to know the office and her surroundings as well as the relevant teams. We accept that during this period it is likely that the majority of her interactions with other teams could be and was done remotely. The Respondent has stated that the role has grown significantly as a result of being based in London but that it had not done that yet during the period the Claimant was in post. We had no persuasive evidence (beyond the witnesses' assertions) to substantiate either party's position on this matter.

Tax

40. We heard limited information regarding the relevant structure of the business. The Claimant and the Respondent witnesses we heard from worked for the Services group or were affiliated to it at the relevant time as opposed to the Business Group.

41. The tax position of the Respondent is complex. It is an international business. None of the witness statements dealt with the actual value of specific business tax liability that was referenced by them in evidence and was clearly relevant to this case. Nor was it particularly apparent from the documents we were taken to. In answer to questions from the Tribunal, it was clarified by the Respondent witnesses that the business was under particular scrutiny in respect of where and how it generated income. This meant that those performing an international role as opposed to a country specific role were based in 4 main hubs – London, Cork, Singapore and California. This, as we understand it, meant that they were limiting their tax exposure to tax payments in those countries even though they were creating content and products that generated income internationally. The country specific roles continued to operate in the individual separate countries and relevant tax was paid there as a result.

42. There were exceptions to this. We were told that where there was a business need, the respondent would take a business tax risk and allow international work to be done from non-hub countries. However from around May 2022, the in house tax team wanted to limit these exceptions and the Claimant was told that they were not going to grant any further exceptions including for her.

43. When asked about personal tax liability, Ms Wallace explained that in special projects, the respondent would sometimes pay a person's personal tax liability in that country if there was a business reason for the person to be there. The example she gave was that if you work in California for more than 30 days, then it triggers a personal tax liability and the Respondent would cover that.

44. Ms Wallace also explained that different business groups within the Services team took different approaches to the business tax risk. Apple Pay would say no to any tax risk whereas the Tech team would often make exceptions due to the perceived

elite nature of their skills and the need to keep the individuals employed. We assess the impact of the tax considerations in our analysis below.

The Claimant's move

45. The Claimant's husband was offered a promotion in Spain in summer 2022. The Claimant wanted to support him. The Claimant therefore initiated a conversation with Katherine Jones and Blanka Budak on 10 August 2022. Both sides accept that this was a cordial meeting during which the Claimant communicated to them that she was considering the move and exploring possibilities. It is not agreed whether the Claimant said that she wanted to work wholly remotely from Spain or whether she was open to alternative arrangements from Spain such as working in the Madrid office.

46. On balance we find that the Claimant did ask to work wholly remotely from Spain given that, the first time we see the matter referred to in writing is (pg 121) on 12 August from Ms Budak to Ms Wallace indicating that the Claimant wanted to work wholly remotely. We do not think that Ms Budak would have made this up in all the circumstances. She was referencing what she had understood the Claimant was seeking and we cannot see that this would have come from anyone other than the Claimant in the meeting on 10 August.

47. The Claimant's position is that even if she had said that she would like to work wholly remotely, she was open to working in the Madrid office. We do not doubt that but we find that she did not suggest it or request it at this meeting.

48. The Claimant did not, during this conversation, as far as we can tell, provide the date upon which she considered this new arrangement would start nor, as far as we can tell, identify what the impact would be on her caring responsibilities. It was her husband that was, in theory (at this stage) moving, not that her position regarding her child or its needs had changed. We did not hear any evidence at all from the Claimant as to how the move affected her childcare arrangements nor how the move would affect them. Her evidence was based solely on the fact that she wanted (understandably) to keep her family unit together and therefore she felt she needed to move back to Spain with her husband. We did not hear, for example, that her husband had caring responsibilities for their child that would be difficult or could be difficult to replace if he left and she remained in London with the child. Nor did we hear about difficulties that the family would encounter if the Claimant or her husband was to commute either to London or Spain whilst the other remained at a 'home' base with the child. The basis was, put simply, that the family unit wanted to remain together.

49. Ms Budak and Ms Jones' initial thoughts are probably best reflected in the email on p121 where they indicate that they are supportive of a 6 month transition to Spain but that the role would then be readvertised in London. Ms Wallace's response is to say that the role sounds like it needs to stay in London and flagging that any move would involve tax repercussions.

50. Ms Wallace then got tax advice from the tax team. The Claimant asserted that we had no evidence that such tax advice was sought. Ms Wallace said that post pandemic she had been seeking tax advice on several employees who wanted to

move across the business and the world and so was relatively on top of the tax positions in different countries and teams. She said that because of the volume of people wanting to move she had calls with the tax team that covered several individuals at once and they were not always confirmed in writing.

51. We did not see any specific level of risk identified in an email from Rachel Whitehall about the Claimant. However we did see the notes of her interview for the purposes of the grievance (page 341-342). She says there:

> *"Most cross border working requests come from talent mobility team - talent mobility will normally send me job grade / role title / JD / cost centre and what the request is. I will look at the request and see what the job involves and look at what activities take place in the country where they want to go. If that function already takes place in the country and the individual is in a role where they will be supporting the country where they want to localise, that may be fine but it does depend on the details of the role. I consider whether the activities create a risk of a taxable presence of ADI in the country. If that's the case it would be a no unless the activities can be modified to take away / minimise the tax risks. There are roles that are easier to approve for cross border working, like G&A roles eg a lawyer providing legal advice. Such a role is unlikely to create a taxable presence of ADI.*
>
> *The 4 weeks remote working policy provides all employees with some time to remote work (although certain functions have restricted activities when remote working cross border). Once remote working exceeds 4 weeks, only limited types of role are possible because of the risk of creating a taxable presence. Risks may also be created in other functions such as privacy.*
>
> *….*
>
> *Reason is risk mitigation strategy. The longer you spend remote working cross border, the greater the possibility that a tax authority could argue that a taxable presence of the employing entity has been created. The local tax authority could decide to assess taxes on the Apple entity on the basis that the role creates profit and some element of that should be taxed in Spain. The 4 weeks remote working period was a decision taken at a global team level looking at remote working cross border consequences across different risk areas including tax. In the ideal world you wouldn't have remote working across borders.*
>
> *…*
> *We would never agree a permanent remote working request. If someone asked for permanent remote working, pushback would be we can't agree that and it would have to become a localised role (subject to the activity being allowed in the relevant country).*
>
> *Only 4 weeks - exceptional circumstances beyond that. The policy talks about reasons why you could extend beyond the 4 weeks eg to give time for coming back to the country due to children schooling.*
> *…*

It would have to become a role in Spain permanently."

52. We accept that this would have been the substance of her advice to Ms Wallace at the time. There were clearly set policies and systems that the tax team used to evaluate these requests and in this interview Ms Whitehall is outlining the approach she would take as opposed to her answer for this specific case because she could not remember this specific case.

53. We accept that there is no written evidence that this was the advice received by Ms Wallace at the time. She explained this saying that there were numerous such requests being dealt with at that time because of the return to the office post covid. We accept that evidence and we accept that she took tax advice. She references speaking to the tax team in her emails and we do not consider that she would lie about this at the time as she had no reason to do so.

7 September meeting

54. This was a catch up meeting between the Claimant and Ms Jones. At this meeting the Claimant confirmed that she would definitely be moving to Spain. We accept that this was the first time Ms Jones had been told this.

55. There was some dispute as to whether the Claimant was told that her request had definitely been refused at this meeting. Ms Jones said that she said there were very limited options and the Claimant understood that she was being told it was not possible. We consider that it was entirely reasonable that the Claimant thought that Ms Jones was telling her 'no' at this point given that Ms Jones was relaying the advice that she had received from the tax and business teams that this move would not be supported. We accept that perhaps she also indicated that she would continue to explore the circumstances in the meantime but we think that the 'mood music' from Ms Jones was that the likely answer would be 'No' and that this is what the Claimant understood at this meeting.

56. After this meeting both the claimant and Ms Jones continued to look for either location exceptions or solutions that would assist the claimant at this time.

4 October meeting

57. There was a follow up meeting on 4 October at which Ms Jones communicated again that despite her efforts no alternative could be found. They discussed transition arrangements.

58. During that discussion there was an understanding that the Claimant would leave the UK on 18 November and that she would be allowed to take 4 weeks exceptional leave in 2023 as well as using her 4 weeks' exceptional leave in 2022. The Claimant subsequently left on 7 November and then was told on 8 November that her extended leave could not be agreed because the 4 weeks from 2023 could not be taken consecutively with the 2022 weeks and would not in fact be allowed.

59. Thereafter is it appears that the relationship between the Claimant, Ms Budak and Ms Jones deteriorated with neither side trusting each other. The Respondent's

emails refer to toxic attempts by the Claimant to find alternative work and the Claimant raised concerns firstly with Ms Wallace on 21 September and then in her grievance which she submitted on 1 December 2022.

Alternative work search

60. The Claimant was encouraged, throughout the process, to look for alternative roles within the Respondent. However the Respondent's evidence and emails at the time, suggest that they disapproved of the manner in which the Claimant made those attempts. They suggest that the Claimant behaved inappropriately and was, in effect, trying to move her role and its attached funding (referred to as headcount) from Ms Jones' team to another team and that this was underhand and contrary to the business needs and what had been communicated to the Claimant.

61. We think that the Claimant was genuinely exploring options which whist they may have included trying to move her role to a different team were entirely focused on trying to preserve her employment. To label them as toxic conflates the respondent witnesses' opinion of what the Claimant was saying regarding the unfairness or discriminatory nature of their refusal with her genuine attempts to mitigate the possibility of losing her job altogether.

62. Of particular relevance to the Claimant's case was a role referred to as the BPP job. This was a role that someone requested the Claimant to carry out. It was a project role and the email specifically requested that she do it. We accept the respondent witness evidence that this was not a standalone, complete role. It was a role that would have been in addition to her Video Lead role as is demonstrated by the fact that her counterpart, Hiro, ended up undertaking it in addition to his role that was broadly similar to the Claimant's. We heard evidence that it would have been roughly a day per week's work across the week and we accept that evidence.

63. The Claimant was told in November, that the role was not a valid possibility for the Claimant at the time (p180). The reasons given there are that the role would have placed the Respondent at the same tax risk. It does not give the explanation that we received that it was not a complete role. They also did not explain the tax reasons to the person requesting the Claimant for the role – they simply said that she was leaving the team and that she therefore could not perform the role.

64. Nevertheless we accept that the Respondent's reasons for telling the person that the Claimant was not able to undertake the role were correct. She was leaving the team and she had left for Spain. In those circumstances she was not available for the role as it could not be done as a stand alone role even if the Claimant's skill sets were perfect for it. Nevertheless, they ought properly to have involved the Claimant in that conversation and informed her of the high regard that she was held in by colleagues. This might have assisted in restoring some of the trust that had been lost between the parties.

Resignation requests

65. We consider that Ms Budak did communicate to the Claimant that she needed to resign or else return to London shortly after the Claimant had moved to Spain. We accept that it probably was said with increasing frustration given the Claimant's lack of engagement at this stage. We accept that the lack of engagement may have

occurred because the Claimant was becoming unwell. However, Ms Budak did not know that and had no reason to think that at this time. Ms Budak was setting out the logistical position in light of what she perceived to be the Claimant's intent to remain in Spain. She was being told by her managers that the Claimant needed to resign as she could not fulfil her role from Spain after the end of the calendar year. The Claimant did not seem to want to accept that possibility and Ms Budak was frustrated by this stance.

Grievance and appeal

66. The Claimant's grievance, dated 1 December 2023, asserted, amongst other things that she was being discriminated against on grounds of sex. She cited several examples of men who had been granted the right to work overseas or relocate. She considered that she was being treated less favourably than those men and sought an explanation as to why discretion was being exercised in their favour and not hers. She also complained about the way in which her move had been handled by Ms Budak and Ms Jones and the fact that her ability to work until March 2023 had been removed without explanation and had been dealt with outside the Respondent's policies and procedures regarding flexible working requests.

67. There are no claims in relation to the way in which the grievance or its appeal were handled. Nevertheless it is relevant to briefly outline what occurred. The grievance was considered and investigated by Hattie Zawyrucha. To complete that investigation Ms Zawyrucha interviewed the Claimant (on 3 January 2023) and the following individuals.:

Darcy Wallace 18th January 2023
- Katherine Jones 19th January 2023
- Blanka Budak 24th January 2023
- Liz Jarvis 3rd February 2023
- Rachel Whitelaw 6th February 2023
- Mark Kirby 8th February 2023

She also considered the following documents:
- Working Remotely Policy
- Four Week Remote Working Policy
- Grievance Policy
- Absence & Attendance Policy
- Documents provided by yourself dated 1st December 2022
- Emails provided by Blanka Buda, Katherine Jones and Darcy Wallace

68. The outcome report prepared by Ms Zawyrucha does not uphold the Claimant's grievance as set out in the report (pgs 283-294).

69. Subsequently, the Claimant appealed against the outcome on 6 March 2023. In the appeal she again asserts that the Respondent was discriminatory in the way that it had handled her request to work from Spain. Mr Tim Rumble heard the appeal. He did not uphold the appeal as per his letter on 11 May 2023.

70. Both the grievance and the appeal outcome cited tax implications as being the reason that the Claimant's request was being refused. They do not set out clearly what those tax implications are though they do explain that they are caused by cross border working.

Sick leave

71. The Claimant was signed off sick from 28 December. In her email providing her first sick certificate, she specifically requested that all correspondence be via her solicitor, Mr Evans as she was feeling so unwell. We were not provided with any evidence that shows that she rescinded that instruction.

72. The grievance appeal occurred during this period and the outcome was to not uphold it.

73. Also during this period, at the point at which the Claimant's sick pay ran out (June 2023), the Respondent notified the claimant of her right to apply for Income Protection. The Claimant applied but the insurers did not approve it. The outcome of that application was sent to the Claimant on 17 August 2023. The claimant appealed against that decision on 14 August 2023. She was notified of the outcome of her appeal on 12 October 2023.

74. Ms Budak and Ms Jones had little or no interaction with the Claimant during this period. The Claimant asserts that this was contrary to their sickness absence policy. The Respondent witnesses accepted during cross examination that they would normally have more contact with someone who was off sick for such a long period of time. We did not have a copy of the absence policy but accept that it is more likely than not that the policy suggests regular contact subject to exceptions or flexibility if, for example, the employee or OH suggests that their managers do not contact them if it exacerbates their illness. Ms Budak said that she did not want to place the Claimant under further stress given that she was off with work related stress and anxiety. She did not recall why she took this stance or what changed to make her consider contacting her again at the end of September. We note however that the Claimant had specifically asked her managers not to correspond with her directly and that they should only correspond with her lawyers. We also note that there was rarely a long period when the Respondent (as opposed to Ms Jones or Ms Budak) was not corresponding with the Claimant or her lawyer regarding various issues such as the grievance, the grievance appeal and the insurance application (though we can see that the insurer was with an external provider separate from the Respondent).

75. On 28 September 2023 Ms Budak emailed the Claimant and asked for a conversation which they then had on 4 October 2023. The Claimant considers that this was prompted by the initial Employment Tribunal Preliminary Hearing which was heard on 2 October. Ms Budak said that she was unaware of the hearing until the Claimant told her about it. The Claimant in her witness statement (para 61) says that at the meeting or call on 4 October she was still signed off sick. The latest sick note/fit note that we had in the bundle was dated 1 July 2023 and said that it ran for 3 months thus running out on 1 October. However in the invitation letter to the meeting and in the notes of the meeting between the Claimant and Ms Jones

and Ms Lucedarska-Slack (HR) on 17 October record that her sick note would end on 22 November 2023. We assume that this latter date is correct.

76. The meeting with Ms Budak was by phone as opposed to video. The Claimant says that she found the meeting difficult but not why. We can understand, given her health at the time, that discussing her situation with Ms Budak may have been difficult. Nevertheless, we do not consider that Ms Budak said anything inappropriate by asking her whether she would be returning to work and whether she intended to return to London. Almost a year had passed since the Claimant had left the UK, she had been off sick for most of that and she had exhausted the grievance process and her sick pay. In the absence of an explanation by Ms Budak however as to why she contacted the claimant when she did, we find, on balance, that even if Ms Budak did not know about the preliminary hearing, someone at the Respondent instructed Ms Budak or Ms Jones to start managing the Claimant again and this was probably triggered by the Tribunal proceedings.

77. Following her meeting with Ms Budak where she had said that she felt the meetings were premature because she was still signed off sick and was awaiting the outcome of the insurance claim (though she had in fact been notified that it had been turned down but she had appealed). The Claimant was invited to another meeting by letter dated 9 October 2023. In that letter it states that they wanted to discuss the Claimant's return to work from 23 November and it is made clear that if she could not relocate to the UK then they may have to consider terminating her employment.

78. The Claimant was notified that her appeal regarding her insurance claim was not upheld on 12 October 2023.

79. The Claimant sent an email dated 15 October 2023 (p431) which set out a list of questions which she would like discussed/answered at the meeting.

80. During the meeting, Ms Jones and Ms Lucedarska-Slack spoke to the Claimant about what her position was. We accept that the Claimant told them that she was willing to relocate back to London. They answered the questions she had asked. The Claimant confirmed this to a great extent during cross examination. They may have expressed queries about whether she was intending to come back from Spain at the outset given that some of her questions relate to a flexible working request. However, in the note, they confirm that she has told them she will be returning to London and they don't question it. Whilst these notes were sent after the Claimant had resigned, we do not consider that they were doctored to fit the situation and that they are a fair summary of the discussions.

81. The Claimant has asserted that she was told at this meeting that her questions were strange and her request to change line manager was extreme. They also say that she was told that moving line managers was only done if there were allegations of sexual harassment. She says that the overall approach at the meeting was to pretend as if the previous issues had not arisen, in particular her allegations of bullying against Ms Budak, and that she would not be supported in her return to work.

82. During cross examination, the Claimant accepted that all of her questions had been discussed with her and answered. In particular, it was confirmed to her as follows that:

    (i) She would be allowed a gradual return to work
    (ii) How the People team would support her return to work including making available to her people who had not been part of the grievance and appeal process
    (iii) That if she had specific concerns regarding retaliation she should let them know what they were
    (iv) That they could offer mediation before she returned
    (v) That she would be referred to OH to ensure any necessary adjustments were made
    (vi) That she probably could not report to a different manager
    (vii) That she could submit a flexible working request but that all her working time would need to occur in the UK not in Spain

83. The Claimant however felt that she had '*no confidence from the way my questions were being dismissed that I was going to be given a fair opportunity and if anything, my managers' position had hardened and that I was being forced into a position where I resign, be humiliated or be dismissed on the spot for refusing to return to London without any assurances of support."*

84. We find that the Claimant's questions were not dismissed. They were all discussed and answered. The Claimant did not like some of the answers and did not feel supported by them. However they were not dismissed out of hand. We accept that she may have been told that a change in line manager was normally only contemplated where allegations of sexual harassment had been made. This sounds like a plausible stance for an employer to take. However we do not accept that this means that her concerns regarding a return to work were dismissed. She was clearly told what support would be in place and that included someone new from HR to talk to and mediation.

85. What was clear to the Claimant though was that she would not going to be able to work from Spain and resuming her role meant returning to London. We find that she was in no way prepared to return to London. That may have been due to her health or her family commitments or a combination of the two. Nevertheless, the fact that this situation was again confirmed to the Claimant meant that she had a stark and difficult decision to make.

Comparators

86. We had relatively little evidence regarding the comparators. However, each person's situations were put to the Claimant during cross examination.

87. Loic Gramaglia (International TV App Project Manager)

Loic applied for a London based role in 2022 (whilst living and working for the

Respondent in Paris) after May 2022 when the Respondent had changed its policy regarding remote working overseas. He was allowed to take that role but deliver it remotely from Paris despite having the same tax risk as the Claimant would have generated in Spain. The business decided to take this risk on the basis that the video market in France was the second largest in Europe which was a contrast to that in Spain.

88. Pablo Amor, Senior Editorial Manager

Pablo relocated to Spain from London in 2020. The Claimant asserted that he moved with his role and then subsequently took on a new role. The Respondent states that the new role was a promotion and that this took place before May 2022. We accept that in order to remain in Spain the role involved less international work. However it is clear that he managed people overseas. Pablo worked from the office in Madrid he did not seek to work remotely.

The Respondent states that although it may have been possible for the Claimant to accept a demotion to work in Spain in a non international role but there was no need for that role in Spain at that time because it was already being delivered by a woman called Goretti and as Spain was a small market, they did not need anyone else at that level.

89. Bohdan Solyanyk, International Partner Operations Manager

Bohdan worked at the level of ICT4 which the Claimant accepted meant that he worked on the technical side of the business. It was the Claimant's case that he moved back to Copenhagen without any proper approvals in place. We accept that this may have occurred. The move took place in 2018/2019.

The tax advice that the Respondent received regarding Bohdan's move was that it attracted the same tax risk as the Claimant did.

90. Thierry Marimoutou – International Technical Partner Manager

Thierry's rôle was a Tech role so a different part of the business to the Claimant. Thierry moved from the US to Paris and had never worked in London. However he did move from one of the 'hubs' to a non hub location in 2020. We accept the Respondent's evidence that the role involved a demotion. We also accept the Respondent's evidence that the Tech side of the business was willing to take more tax risks due to wanting to keep the 'talent' but also because their work was not necessarily as international.

91. Daniel Matray – Director of Apple Store and Apple Media Services for Continental Europe

Daniel moved from London to Paris in 2016 due to a change in role. He was promoted to a director level role in 2019. His role is more senior than the Claimant's. He leads stores and services across Europe from Paris so this is clearly an international role. Ms Wallace gave evidence that Daniel does not have any strategic responsibilities for the UK to minimise the tax risk but it is

acknowledged that he has an international role that carries a tax risk and the business is willing to take that risk.

92. Overall we make the following findings relevant to the issue of the comparators:
    (i) The Respondent adopted a different approach to tax risks post May 2022 due to the increase in staff seeking to work internationally. After this date they were less likely to say yes but there is no blanket rule.
    (ii) The Respondent is willing to take tax risks on a case by case basis if they feel that the business can justify it.
    (iii) Different sides of the business adopt different approaches and the Tech side of the business, which is male dominated, is more willing to take tax risks than the **Services** side of the business.
    (iv) Often the business will attempt to accommodate people moving overseas by adapting their role to include less international work and this will sometimes amount to a demotion.

Conclusions

Flexible Working Regulations 2014

93. We find that this claim is out of time. The deadline for bringing a claim pursuant to s 80 ERA is 3 months (subject to ACAS Early Conciliation) from the date that the application was rejected unless the Claimant can show it was not reasonably practicable to submit a claim within that time and that she has submitted a claim within such period as the tribunal considers reasonable thereafter.

94. The Claimant, in her direct sex discrimination claim, says that her request for flexible working was rejected on 7 September 2022 thus making the primary deadline 6 December 2022. This was also the date recorded in the List of Issues.

95. The Claimant contacted ACAS on 22 May 2023 and did not submit her claim until 24 July 2023.

96. The Claimant has provided us with no evidence that it was not reasonably practicable for her to submit a claim prior to this date. She instructed a solicitor in December 2022 and from that date he appears to have been actively involved in correspondence directly with the Respondent. It is not clear if the solicitor was instructed before 6 December. Access to legal advice is not necessarily a factor that will persuade us that it was not reasonably practicable to submit a claim in time however it is something that we can consider. The Claimant has not explained why it was reasonable for her to wait until July 2023 to submit her claim. She has pointed to the fact that she was off sick but we do not have evidence that suggests that she was unable to submit a claim during that period due to her ill health. Conversely she was able to engage in the internal grievance process during this period and she did have legal support all of which support our conclusion that there was no identifiable obstacle to her submitting her claim in time.

97. It is for the Claimant to establish that it was not reasonably practicable for her to submit a claim in time and she has not provided us with any such evidence on that topic. We therefore consider that it was reasonably practicable for her to have

submitted a claim in time and/or that she has not established that it was not reasonably practicable for her to do so where the burden is on her to prove that.

98. If we are wrong in relation to our conclusions regarding the timing of the claim we have in any event gone on to consider the substance of the claim.

99. We do not accept that the Claimant submitted a flexible working request that complies with s80F ERA 1996. At no point, in writing, did the Claimant submit a request that stated that she wanted to work remotely from Spain. We were not taken to any such request by the Claimant either in her witness statement or by counsel in cross examination. As was pointed out in the Respondent's submissions, the fact that the Claimant relies upon a wide time span, the concept of an iterative request that developed over time and does not at any time commit to any one document as being her flexible working request shows that no such document exists.

100. We accept that the Respondent knew what the Claimant was asking for. She was asking to work from Spain. We accept that they knew why. Her husband had a new job offer and she wanted to move with him to keep their family together and/or avoid one of them having to commute in some way between Spain and the UK.

101. There was some dispute from the Claimant as to whether she was asking to work wholly remotely from Spain or just from Spain. Again however, the lack of written clarity counts against the Claimant having made a request – it does not support it.

102. The wording of the legislation is clear and as the Respondent's submissions point out – very prescriptive:

(i) The request must state that it is a flexible working request. There is no such document before us.
(ii) The Claimant did not state what date the request needed to be effective from. She moved before the date on which she had said she was going to and no firm date was ever stated by her as being the date from which she would start work again.
(iii) The application must state whether a previous application had been made. There is no document before us including that information.

103. The Claimant's argument was that she did not need to comply with these requirements because she was not told that she had to by the Respondent and she had effectively communicated to them what she was seeking. We accept that failing to point the Claimant to their flexible working policy was a failure by the Respondent. We understand the indignation that the Claimant now feels that an employer ought not to be able to rely upon its signposting failures to counter-assert a failure to comply with its policies. However, the requirements that we must consider are not the Respondent's internal policy requirements but the statutory requirements necessary to make a claim in accordance with the legislation. Here, the Claimant's request or requests do not comply with the statutory requirements.

104. The Claimant has failed to comply with the requirements of the statute despite having access to legal advice, from as early as December 2022. She therefore cannot rely upon ignorance of the law. She could easily have established that her initial discussions regarding working from Spain were not compliant with the legislation and submitted a compliant request at any stage during her employment with the Respondent. She did not do so.

105. In the absence of a request that complies with s80F ERA 1996, the Claimant's claims under s80 ERA 1996 must fail. We therefore do not uphold the Claimant's claims.

106. In addition, for the sake of completeness, we make the following very broad observations regarding the way in which the Claimant's request to work from Spain was handled. Broadly, the Claimant's managers were reasonable in that they discussed the situation with the Claimant and they informed her relatively quickly that her request could not be accommodated. They told her that the reason was the tax implications which could fit within one of the statutory reasons for refusal. It cannot be held against the Respondent that they did not give a definitive answer sooner when the Claimant cannot date her definitive request as there was not one.

107. We accept that no right of appeal was given and we accept that the information given regarding the tax risks was incomplete and did not really set out what that risk meant to the business or why it occurred and what impact it might have. Nor was it explained in writing as to why some parts of the business took different approaches and why different decisions were made for different colleagues. In circumstances where there is an international business, making case by case decisions regarding relocations and associated risk; the appearance of applying policies somewhat arbitrarily and differently to different people can only give rise to feelings of unfairness and resentment. That is the case even where decisions may be legitimate and justified. Any lack of transparency regarding explanations fuels those feelings as it did here. However the reduction in transparency and communication went both ways in this case as once the Claimant made the decision to move to Spain without a definitive answer from the Respondent, she also started to be less than transparent regarding her situation and decision making.

<u>Indirect discrimination (Equality Act 2010 section 19)</u>

108. We find that this claim is, on the face of it, out of time. The Claimant states that she knew that the PCP she relies upon was applied to her and disadvantaged her on 7 September 2022. This decision was followed up by the Respondent's HR on 24 October and 3 November 2022. Even taking the later of these dates, the primary deadline was 2 February 2023. She then commenced ACAS Early Conciliation on 22 May 2023. She did not submit her claim until 24 July 2023.

109. The Claimant has not provided any evidence in her witness statement regarding why she did not submit a claim earlier. She indicated to the Tribunal that she wanted to try and sort things out with her employer and that she was unwell and had moved with her young family to another country thus making submitting a claim

in time difficult.

110. We can, even in the absence of evidence take a view as to whether it is just and equitable to extend time. Our overarching approach must be to weigh the relative prejudices to the parties. As confirmed in Jones v Secretary of State for Health and Social Care [2024] EAT 2**, a**lthough the relevant factors will vary from case to case, in Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA Lord Justice Leggatt said that 'factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)'

111. The prejudice to the Claimant is clear and obvious. If we find that her claim is out of time and do not extend time then she will be prevented from having legal recourse against her employer. Nevertheless, the prejudice to the Respondent is also significant. This is a case where the Claimant remained employed for almost a year after her initial request was refused. She went through the internal grievance and appeal processes and was well enough to fully engage with it. She also had a lawyer supporting her throughout.

112. The outcome for the grievance appeal process was provided on 11 May 2023. The Claimant contacted ACAS on 22 May 2023. That suggests that she was attempting to engage with the internal processes first to avoid the necessity of going to Tribunal. In those circumstances therefore, where the Respondent was fully aware of the conflict and the basis for the claimant's concerns, she contacted ACAS very quickly after the internal process had been completed we consider that there is little or no prejudice to the Respondent in terms of fading memories or lack of information and that whilst the original refusal had been in November 2022, the issues being considered remained unchanged and had been the basis for a thorough internal investigation and consideration and the claims do not arise out of the blue. We therefore conclude, on balance, that it is just and equitable to extend time to consider the Claimant's indirect discrimination claims.

113. From March 2022, the Respondent did have a general policy which required employees based in London to attend the office in London (and not be allowed to work fully remotely overseas). The Respondent witnesses accepted that this requirement was generally applied to people (men and women) with a London based role in the services team.

114. This PCP was applied to the Claimant. She was not allowed to work wholly remotely from Spain or, in fact, from Spain at all apart from the 4 weeks overseas working policy which was also afforded to other employees in accordance with the Respondent's policy.

115. Part of the Respondent's case was that it did apply this criteria to everyone from May 2022 onwards. It did, sometimes make exceptions, but nevertheless, it is clear that London based roles, in general were required to be done in London and certainly within the UK and that any remote working could only be done within the UK.

116. The parties disagreed as to the law on how we should approach the question of whether the PCP put women at a particular disadvantage when compared with men, in that, childcare responsibilities fall principally on women and therefore the requirement to work in London and not remotely overseas means that women are less able to continue to work for the Respondent.

117. Both relied upon the case of *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] IRLR 739. The Claimant stated that given that we could take judicial notice of the impact that any restriction on flexible working arrangements had more of a negative impact on women than men, we did not need to go any further to establish disparate impact in this case.

118. The Respondent disagreed. They cited paragraphs 50 to 52 in their submissions and in particular the following passage:

> *"taking judicial notice of the childcare disparity 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 (e g 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 judicial 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. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an 'indisputable fact' (of which judicial notice may be taken) to a 'disputable gloss' (which may not be apt for judicial notice): see HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2017] EWCA Civ 1426, [2018] IRLR 334, [2018] 1 WLR 1471 (CA) at para [108]. Taking judicial notice of the childcare disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage.*"

119. In this particular case we are being asked to find that the Respondent's requirement that employees with a London based role worked within the UK and attended the London office in accordance with is hybrid working policy, had a disparate negative impact on women. This case is clearly predicated on both aspects of that PCP. It is not just that they must attend the London office, but also that they could not work overseas. Even if we remove the somewhat disputed 'fully remotely' aspect of the PCP, the Claimant was insisting that she be able to work

entirely overseas whilst in a London based role. We do not accept that we have been given evidence to be able to establish that not being allowed to work from overseas in a UK based role has a disparate negative impact on women as opposed to men. We do not believe that this is a situation so well known that we can take judicial notice of it. We consider that this aspect of the PCP is a disputable gloss on the indisputable fact that there is a childcare disparity between the sexes. We do not have any evidence that those who take roles in London and have to remain working either in London or at least within the UK, find it harder to do so because of caring responsibilities. It is possible that this is the case but it is not sufficiently obvious that we must take judicial notice of it and we have been given no evidence upon which we could make such findings.

120. On whether the PCP has the negative impact on the Claimant as opposed to women generally, it is notable that the Claimant's evidence to us provided absolutely no explanation as to how her move to Spain related to or affected her childcare responsibilities. Her evidence was that she wanted to keep her family together, not that her child caring responsibilities were affected by either the move or by her not moving if her husband and child did. We were provided with no evidence as to how the possible absence of her husband if she chose not to move both her and her daughter with him, would affect the day to day caring responsibilities for her daughter. Nor did she provide evidence of how any childcare responsibilities in Spain prevented her from travelling to London to undertake her role. Her evidence and the cross examination of Respondent witnesses on her behalf was about the burden on women to keep family units together. That is different from the impact relied upon which is the burden to undertake childcare responsibilities. There is, in our view, a difference between caring responsibilities and having to move countries to keep a family unit together. We have been given no information that we can properly take judicial notice of regarding whose responsibility it is to keep family units together when work might require families to move overseas. It was not just a move within the UK, it was a move overseas that caused the issues between the Claimant and the Respondent.

121. In the absence of any evidence from the Claimant as to the impact that her husband moving or her not moving to Spain would have had on their childcare responsibilities, we do not consider that we have enough to reach a conclusion that the PCP put the Claimant at the disadvantage she states. The disadvantage the Claimant had was that, in circumstances where she wanted (understandably) to remain living in the same country as her partner, one of them needed to make a choice as to whether they continued their careers in the same roles. We were given no information that the choice was between caring for her child or not caring for her child or the impact any move or failure to move would have had on her caring responsibilities. The Claimant considers that it was the Respondent's obligation to ensure that she did not have to make a choice between her role and her husband's role. We disagree. The disadvantage occurred because she and her partner had international careers but wanted to live in Spain to enable her husband to be promoted. They had previously chosen to prioritise the Claimant's job. They subsequently chose to prioritise her husband's job. That was not the fault or responsibility of the Respondent.

122. If we are wrong in that analysis we find that the PCP was a proportionate means of achieving a legitimate aim. The aims relied upon by the Respondent were

i. Ensuring that the Respondent was not exposed to advice tax risks arising from employees being employed in the "wrong" jurisdiction;

ii. Ensuring that the Respondent's operational requirements were fully met.

123. We accept that the Respondent was taking a new stance as to tax risks post May 2022. We accept that the tax advice we saw in answers to the grievance interview questions from the tax adviser was an accurate reflection of the risks associated with individuals that carried out international work outside the international hubs. We accept that the PCP had been applied differently or exceptions allowed in the past but we consider that post pandemic it was legitimate to have a stricter policy given the increased scrutiny that such firms were being subjected to and the increased numbers seeking to work overseas and remotely generally. Whilst the Tribunal had some initial misgivings given the lack of information regarding the extent of the tax risk i.e. the amount of money that it could cost the Respondent, we accept that it is difficult for the Respondent to place a cost on each individual given that the content and work differs as does each country's approach to taxing such work/content and the rates of tax applied in each country. Nevertheless, we accept that there was a tax risk and it had the possibility of being a sizeable one. It was therefore a legitimate aim to reduce their tax risk and we find that generally attempting to reduce that risk by not allowing hub based roles to be performed outside those hubs unless there was a good business reason to allow it was a proportionate means of achieving that aim.

124. We accept that the Respondent's operational requirements were a legitimate aim. There was a plausible argument that the Claimant would need to be present in the London office on some occasions to build effective relationships with her colleagues and other teams. However, there was little substantive evidence before us that would have allowed us to find that the Claimant could not do her job wholly remotely given her previous performance delivering the role wholly remotely and the amount of her work that continued to be done wholly remotely. The Respondent relied upon the fact that the role had grown since the Claimant left for Spain – nevertheless no precise information was given regarding that and explaining how the role could not have grown if the Claimant was out of the office. Therefore whilst the Respondent's operational requirements were a legitimate aim, we do not consider that we had sufficient evidence to substantiate that not allowing the Claimant to work wholly remotely was a proportionate means of achieving that aim given the fact that she had performed the role remotely, the truly international nature of the business and that significant amounts of the Respondent's meetings and interactions were already and continue to be done by remote meetings as opposed to being in person mean that the Respondent has not sufficiently evidenced to us that the role needed to be wholly in person.

125. Overall however, we consider that the Claimant's claim for indirect sex discrimination is not well founded and we do not uphold the Claimant's claims.

Direct Sex discrimination

126. The Claimant relies upon 3 separate acts of discrimination which she says occurred because of her sex.

Act One

127. We accept that her application to work wholly remotely from Spain was refused. Whether that occurred on 7 September is disputed. We accept that Ms Jones communicated to the Claimant on 7 September that it was very unlikely that her request would be allowed given the tax situation.

128. The Claimant compares herself to 5 specific comparators for the purposes of this claim. She says that men who made requests to relocate and continue their roles were allowed to do so whereas women were not.

129. The Respondent submitted that the comparators named were not suitable because they were not in the same circumstances. The exact circumstances the Respondent said were needed for them to be an appropriate comparator were that, having moved to London to undertake a London based role, they then asked to perform it wholly remotely from Spain.

130. We disagree that it needs to be this specific. Nevertheless we do consider that in order to be an appropriate comparator the person needs to have requested permission to perform a London based role from an overseas country that is not already a business or tax hub for the Respondent. We also consider that any such request must have been made after the Respondent changed its policy regarding tax risks. This means that any appropriate comparator must have made their request after May 2022. We accept that after this date the Respondent made its tax risk decisions differently and that this had, in the main, been prompted by the pandemic and the huge increase it had seen in people wanting to work remotely overseas.

131. The only comparator relied upon by the Claimant who satisfies those criteria was Loic Gramaglia. He applied for a London based role in 2022 (whilst living and working for the Respondent in Paris). We do not accept that the fact that he never moved from Paris to London and then asked to move back made him an inappropriate comparator. The key fact was that he was asking to do a London based role from overseas and Paris is not one of the business hubs for the Respondent so his move carried the same tax risk that the Claimant posed working from Spain. Despite receiving this analysis, the Respondent allowed him to remain in Paris and keep the London based role.

132. We accept that he performed his role from the office in Paris whereas the Claimant was seeking to work from home in Spain. We were told that there was no equivalent of home working in Spain and therefore the Claimant's request to work from home was a key part of their decision making as she was at least 3.5 hours

from the Madrid office. We are not disregarding this aspect of the request but we consider that, had working from Spain been easier from a tax point of view, the Respondent is more likely than not to have moved the conversation to how or if the Claimant could work from an office location as opposed to being an outright 'No' to her request. That response may have come later if the Claimant had been intransigent on where in Spain she worked, but we do not consider that the parties got as far as that because of the tax issue which did not alter depending on office or home working.

133. We consider that the Claimant has shifted the burden of proof to the Respondent in that she has established a difference in treatment between her and someone in broadly similar circumstances. That treatment is less favourable and amounts to a detriment.

134. We must therefore consider whether we accept the Respondent's explanation for that treatment. What was the reason why they said no to the Claimant when they had said yes to Loic. They say that they allowed Loic to perform his role from France because the video market in France was the second largest in Europe and therefore the business need was sufficient for them to take the tax risk. This was in contrast to the Claimant's desire to work in Spain which was a relatively small market and so having more employees there carrying out international work was not justified. The other two members of the team in Spain had smaller, less international roles. We accept that Pablo Amor's role was not solely Spain based as he managed people elsewhere and that a tax risk was and is created by him working in Spain but it is a smaller risk than had the Claimant taken her truly international role to Spain. We have also ruled out Mr Amor as a valid comparator because the decision regarding his move was made before March/May 2022 when the Respondent changed its tax assessment process.

135. In respect of the comparison to Loic Gramaglia, the key issue is whether the tax risk judgment call was made because of the sex of the individuals concerned or because of something else. We understand that direct discrimination is rarely openly obvious. Apparently innocuous judgment calls can be tainted by assumptions and ingrained prejudices within those making the judgment calls. Nevertheless, in this situation whilst there is a difference in treatment, with an appropriate comparator, we consider that the Respondent has provided a non discriminatory reason for the Claimant's treatment which is the relative sizes of the Respondent's business in France as opposed to the Respondent's business in Spain.

136. We have accepted that explanation for various reasons. Although the Claimant has provided examples of men being allowed to work remotely, there were also many examples of women being allowed to work remotely and move in accordance with family and personal needs where the business could accommodate it. Ms Jones' initial response to the Claimant had been positive and had been to say that they would attempt to find a way if possible. We do not consider that she would have said that had there been a desire to thwart the Claimant's attempts or a negative view of her motives or a perception whether conscious or not, that women ought not to be accommodated in this way. We accept that the other women about whom we were told were in different circumstances and often not asking to move from a hub location to a non hub location thus making the comparison non exact.

However what was a unifying theme across all of the evidence we heard regarding the movement of employees (men and women) across the globe, was that the Respondent did attempt to accommodate moves where the business could justify it. On many occasions, for both men and women, this included significant changes to jobs to allow people to remain employed but not exposing the business to unjustified risk. The individuals took reduced or changed roles based in their chosen country and tailored accordingly. The Respondent made those changes where it could and approached moves with the attitude of making it work if possible. Ms Jones herself had undergone a similar process. We accept that there was a degree of manager specific decision making as a result that could result in discriminatory decisions by individual managers. Nevertheless, here we consider that the true reason why the Claimant was not allowed to move her role to Spain was that her managers were told that there was a tax risk and it was one that the business could not accommodate for a role in Spain where the market was comparatively small. We accept that this was a genuine reason and the real reason why the Claimant was not allowed to perform her role from Spain. We consider that had there been a vacant, alternative, smaller role in Spain, then it is more likely than not that she would have been allowed to undertake it. However this was a relatively new role, that had been created specifically to be based in London as one of their hubs and moving it outside a hub location to a much smaller market share country carried a tax risk that the business was not willing to take. We consider that they would have taken the same decision had the Claimant been a man. The reason why was not the Claimant's sex.

137. We therefore conclude that the Claimant's claim for direct sex discrimination in respect of Act One in the List of Issues is not upheld.

Act Two

138. We have found that Ms Budak did ask the Claimant for her resignation in circumstances where she thought that the Claimant was not going to return to London. We have found that Ms Budak did this because she was asked to do so by her managers given that the Claimant had moved to Spain but had been told that she could not perform her role from Spain and there were no alternative roles for her within Spain.

139. The Claimant has not named a comparator but relies upon a hypothetical comparator. An appropriate comparator would be a man carrying out a London based role, who had moved to Spain at the same time in order to support his partner who had taken up a new job and been told that his role could not be carried out remotely from Spain.

140. We find that Ms Budak would have asked any employee in the same circumstances for their resignation. The reason she asked for the claimant's resignation was that the Claimant had moved, she had been told that she could not continue her role and there were no other options left. The Claimant did not, prior to these conversations, say at any time that if they could not accommodate her working from Spain she would return to London or the UK. She had been very open with her managers that she was moving to support her partner and by moving, without a definitive answer from the Respondent as to whether an alternative role could be found, we consider that by her actions and her previous explanations

regarding her motives, the Claimant was very clear that she did not want to work from London. The timing of Ms Budak's requests was prompted by the fact that the Claimant had now moved and her last date of the combination of 4 weeks' remote working and other types of leave was coming to an end. Ms Budak was trying to clarify with the Claimant what happened next. This was not because of the Claimant's sex but because the Claimant was overseas, showed no intention of returning to London and therefore her employment could not continue. We consider that Ms Budak's requests would have been to obtain certainty as to what the business would do next and did not occur because of the Claimant's sex.

141. We therefore do not uphold the Claimant's claim for direct sex discrimination in relation to Act Two.

Act Three

Katherine Jones denied her the opportunity to work with another department (in a US International business team in an International Direct Responsible Individual role) on 11 November 2022 because the Respondent assumed she was going to resign and the Claimant says this decision was confirmed to the Claimant on 24 November 2022 by the Respondent's HR Team.

142. We have concluded that this did not occur as described. This incident was explained to us and relied upon by the Claimant as being an alternative to the Claimant having to remain in her London based role. She was exploring other options to find alternative work within the business. A colleague wrote to Ms Jones extolling the Claimant's skills. Although Ms Jones did tell the other department that the Claimant was leaving the team, this role was never suitable for the Claimant as an alternative to her London based role in any event. We accept the Respondent's evidence that this was an 'add on' to the Claimant's existing role and could not be performed in isolation. Therefore nothing was denied to the Claimant by Ms Jones.

143. We address the other acts of alleged direct sex discrimination under the heading of constructive unfair dismissal because they are the same acts as relied upon as fundamental breaches of contract.

Constructive Unfair Dismissal (Employment Rights Act 1996 s98)

144. The Claimant relied upon the following, between 29 September 2023 and 20 October 2023 as breaches of the term of mutual trust and confidence.

i. Unreasonably escalate their requests for the Claimant to return to work following her sick leave under threat of disciplinary action, following 10 months of no communications from either line management and Occupational Health
ii. Failed to take into account the Claimant's certified sickness absence for stress and anxiety in the timing and manner of making those requests;
iii. Failed to provide the Claimant with any practical or emotional support;
iv. Failed to appropriately consider and respond to the Claimant's requests for information regarding how a gradual return to work would be addressed including support from Occupational Health

and the People Team and protections against retaliation and future transfers and being informed that such questions were "harsh';

We address each in turn.

145. We accept that it is unusual for there to be no contact between a line manager and someone off sick for 10 months. However we consider that the situation must be seen in context. At the outset of her sick leave, the Claimant had, via email, specifically asked the Respondent not to correspond with her directly but to correspond with her lawyer. She said that this was the case because she was not well enough and it added to her stress and anxiety. Until September 2023, the Respondent appears to have more or less respected that request. We do not consider that she can now seek to rely on any lack of direct contact when she had specifically requested it.

146. Further context was that the Respondent was in regular contact with the Claimant, mainly via her lawyer, regarding her grievance, the appeal and her insurance claim. She had not been forgotten in some way or deliberately ignored and other matters that she raised were being dealt with and she was being communicated with about those matters.

147. We accept that there was then a flurry of activity at the point at which the Respondent did decide it wanted to discuss her return to work. The timing of this was prompted by the initial refusal of her insurance claim in August 2023 and possibly the initiation of her Tribunal claim. There was a gap between then and Ms Budak getting in touch but we accept that the failure of the initial insurance application was the main prompt for her managers and HR to decide how best to reengage with the Claimant.

148. The initial meeting with Ms Budak which was organised by text message. She copied in her HR contact when Ms Budak messaged her and he specifically said that the meeting could go ahead. The purpose of that meeting was to touch base and discuss what might happen if the insurance appeal did not succeed.

149. Quite swiftly thereafter another meeting was scheduled with Ms Jones and a different HR business partner. The invitation letter did say that failing to attend the meeting could lead to the termination of her employment. When the Claimant said she did not want to attend the second meeting because she was still unwell she was told that the meeting needed to happen to discuss possible next steps. We accept that attending the meeting could have been difficult after so long off sick and with her health remaining poor. However we also note that the Claimant had

attended both grievance meetings and the appeal without any apparent difficulty in relation to her health. We had no medical evidence to suggest that she was not able to engage with meetings. She has not explained to us the difference in attending this meeting and attending the grievance meetings with regard to the impact on her health. The Respondent was aware that she had been able to attend the grievance meetings when they asked her to attend the sickness review meetings. It is also normal for sickness review meetings to have to take place whilst someone remains off sick and we think it was reasonable for the Respondent to want a meeting with the Claimant to discuss her possible return to work particularly given her ability to engage in other work-related meetings as she had to date.

150. The only issue here is the lengthy gap that the Respondent left before having such a meeting. However, given the situation with regard to her insurance claim having been rejected and her absence now having been ongoing for 10 months, overall we do not think that the Respondent's request for a meeting at this point amounts to a breach of trust and confidence. Whilst the covering letter stating that failure to attend the meeting may lead to dismissal does appear somewhat draconian for the first meeting we accept that it only says 'may' and we consider that it was simply outlining the Respondent's absence policy.

151. We also consider that the letter requiring her to attend the meeting and the insistence that she attend and the timing of it is worth viewing through the lens of how the tone of the meeting and how it actually progressed. The time was amended to allow for the Claimant's childcare responsibilities. The Claimant submitted a list of questions in advance that she wanted to discuss with the Respondent. That list was discussed in full. We do not accept the Claimant's evidence that any of the matters there were dismissed out of hand or labelled in such a way that they were seen as odd or difficult. The Claimant was given answers to all her practical questions such as whether she could submit another flexible working request, how OH would be involved, what a phased return to work would look like and how she would be supported by HR. We do not accept the premise of the third alleged breach of contract that the Respondent, "failed to appropriately consider and respond to the Claimant's requests for information regarding how a gradual return to work would be addressed including support from Occupational Health and the People Team." It is clear that all the Claimant's questions in regard to this were answered and addressed.

152. We accept that she was told that her line manager would not be changed and that such changes were usually only made in allegations of sexual harassment. We do not know if the word 'harsh' was used but if it was we do not accept that it was used in such a way as to dismiss the Claimant's concerns. When the Claimant expressed concerns regarding Ms Blanka specifically and bullying, Ms Jones had not heard those concerns before. We accept that there was no reason prior to this

meeting as to why Ms Jones needed to have considered alternative management for the Claimant. We also accept that in response the Claimant was told that she could engage with mediation and that she could approach the new and separate HR/ People Team person who had been assigned to her. The Claimant now says that this shows that her concerns and the possibility of bullying and retaliation were dismissed and that she felt she would not be protected. We disagree. The Claimant raised concerns and was told how they would be addressed. All her questions were answered and she was specifically informed what practical and emotional support would be available subject to OH advising the business on what adjustments needed making.

153. Therefore whilst we accept that the Respondent did leave a long gap before they started normal, line management sickness absence review meetings in the context we do not consider that this was unreasonable nor a fundamental breach of contract. The decision to then have two meetings in quick succession that the Claimant had to attend was not a breach of the clause of trust and confidence either and the Claimant's health was taken into account but was not seen as a barrier to the meetings progressing and we have no evidence that the Claimant's health did represent such a barrier. Further the requirement for the meetings to occur must be considered in the context of how those meetings were conducted. We consider that the meeting with Ms Budak was functional but not hostile. We also consider that the meeting with Ms Jones, the people team and the Claimant was supportive and provided answers and information all with a view to the Claimant returning to work. The answers that the Claimant was seeking different answers to – namely that she could submit another flexible working request to work from Spain and that she could have a different line manager were reasonably answered by the Respondent. The Claimant confirmed at the outset of the meeting that she would be returning to London. In that context she was told that the role remained London based and would require the Claimant to return to London even if she submitted a flexible working request. Their refusal to change her line manager was reasonable in all the circumstances particularly given that no formal bullying allegations had been made by the Claimant against Ms Budak. The existence of a wider survey of staff fearing recrimination was not, in our view, sufficiently explained by the Claimant to us as being the cause of her consternation in this regard.

154. In all the circumstances therefore, the three breaches relied upon as being breaches of the terms of mutual trust and confidence, when considered in context, do not amount to breaches of this implied clause of the contract and, whether taken separately or cumulatively, we do not accept that they amount to a fundamental breach of the implied term of mutual trust and confidence.

155. In any event we do not think that the Claimant resigned in response to any of the alleged breaches. We conclude that the Claimant resigned because she was told that the role remained London based and that any further flexible working requests to work from Spain would be subject to the same analysis as her original request and therefore receive the same answer. The Claimant was not willing to return to London and we consider that this was the real reason she resigned.

156. For all of those reasons we do not uphold the Claimant's constructive unfair dismissal claim.

157. We do not consider that the Claimant's allegations that the alleged breaches of mutual trust and confidence were acts of direct sex discrimination. The Claimant did not establish before us that a man who had been off sick for the same period of time would have been treated any differently. The Claimant considers that the treatment was unfair and unreasonable but she has not established that it was less favourable treatment than a man would have been subjected to and we do not consider that she has shifted the burden of proof. She has not pointed to anything that suggests to us these decisions occurred on grounds of her sex. Even without the comparative exercise, when looking at the reason why these incidents occurred, we have not been provided with any evidence that suggests that they occurred because of the Claimant's sex. The absence review meetings occurred because the claimant had been off sick for 10 months, her insurance application had been refused and because the Respondent wanted to manage her return to work. The Claimant's sex was not a factor in those decisions. We therefore do not uphold the Claimant's claim of direct sex discrimination.

Employment Judge Webster

Date: 17 August 2024

JUDGMENT and SUMMARY SENT to the PARTIES ON

21 August 2024

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FOR THE TRIBUNAL OFFICE

Appendix 1

List of Issues

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **23 February 2023** may not have been brought in time.

1.2 Were the discrimination made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

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

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the complaint in respect of section 80G (request for contract variation) made within the time limit in section 80H of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within the three month (plus early conciliation extension) time limit of 6 December 2022?

1.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Employment Rights Act 1996 (ERA) Section 80G and 80I and regulation 4 of the Flexible Working Regulations 2014**

2.1 Did the Claimant submit a flexible working request within section 80F ERA, namely, a request made over the period from 10 August 2022 to 7 March 2023 that she be allowed to work fully remotely from Spain.

2.2 The Respondent asserts that the Claimant did not make a request

within the statutory requirements as set out in section 80F of Employment Rights Act 1996 (ERA) and only made an informal request. It puts the Claimant to strict proof of the same. Its position is further that (i) a request to work overseas is not within the scope of section 80F and (ii) if a valid request were made the Respondent nonetheless had permissible grounds to refuse the request.

2.3 Did the Respondent fail to deal with the application in a reasonable manner under S.80G (1) (a)? The Claimant alleges that it did not because:

2.3.1 It was dealt with in a non-transparent manner by the Claimant's line manager without consultation with the Claimant and not by or in conjunction with the Respondent's HR department/tax/international mobility team to assess its feasibility or potential compromises;

2.3.2 The Respondent told the Claimant that her request was outside the scope of its own flexible working policy and it was refused without a reason being given;

2.3.3 The Respondent failed to provide the Claimant with an appeal against its decision.

2.4 Did the Respondent breach S.80G (1) (aa) by failing to fail to notify the Claimant of its decision within the required statutory decision period, the decision period applicable to an employee's application under section 80F pursuant to S.80G (1B) being:

2.4.1 the period of three months beginning with the date on which the application is made, or

2.4.2 such longer period as may be agreed by the employer and the employee.

2.5 Did the Respondent breach S.80G (1) (b) by refusing the Claimant's request for an impermissible reason. The permissible reasons under S.80G (1) (b) being:

2.5.1 the burden of additional costs,

2.5.2 detrimental effect on ability to meet customer demand,

2.5.3 inability to re-organise work among existing staff,

2.5.4 inability to recruit additional staff,

2.5.5 detrimental impact on quality,

2.5.6 detrimental impact on performance,

2.5.7 insufficiency of work during the periods the employee proposes

to work,

2.5.8 planned structural changes, and

2.5.9 such other grounds as the Secretary of State may specify by regulations.

The Respondent says that if valid request was made it was rejected on permissible grounds being: (i) the burden of additional costs and/or (ii) detrimental effect on the ability to meet customer demand and/or (iii) detrimental impact on quality and/or (iv) detrimental impact on performance.

2.6 If the claim succeeds, the Tribunal will make a declaration.

2.7 Should the Tribunal make an order for reconsideration of the application? If the Tribunal makes an order for reconsideration, section 80G ERA shall apply as if the application had been made on the date of the order.

2.8 Should the Tribunal make an award of compensation to the Claimant and if so, how much is just and equitable to award up to the maximum of eight weeks pay capped at £571 per week or £4,568?

2.9 Regulation 4 of the Flexible Working Regulations 2014 provides,

"*A flexible working application must –*

(a) be in writing.

(b) state whether the employee has previously made any such application and, if so, when; and

(c) be dated"

2.10 Regulation 6 provides,

"*For the purposes of section 80I of the 1996 Act (remedies) the maximum amount of compensation is 8 weeks' pay of the employee who presented the complaint under section 80H of the 1996 Act*."

2.11 The ACAS Code of Practice 5 Handling in a reasonable manner requests to work flexibly (2014), which can be taken into account by employment tribunals, contains the following guidance to employers,

"*6. 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…*

8. 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 ...

12 *if you reject the request you should allow your employee to appeal the decision*."

3. **Direct sex discrimination (Equality Act 2010 section 13)**

3.1 The Claimant is a woman and they compares themself with the Respondent's treatment of men.

3.2 Did the Respondent do the following things:

3.2.1 **Act 1**: Refuse her application, which she says was initiated on 10 August 2022, to work fully remotely from Spain. She says her application was refused on 7 September 2022 by Katherine Jones followed up with HR department on 24 October 2022 and 3 November 2022?

3.2.2 **Act 2:** Blanka Budak asked her to resign on 9 November 2022 in a video conference and on 11 November 2022 by email and on 14 November 2022 by video conference?

3.2.3 **Act 3:** Katherine Jones denied her the opportunity to work with another department (in a US International business team in an International Direct Responsible Individual role) on 11 November 2022 because the Respondent assumed she was going to resign and the Claimant says this decision was confirmed to the Claimant on 24 November 2022 by the Respondent's HR Team.

3.3 The Claimant then raised Acts 1,2 and 3 as a grievance in December 2022. The grievance was not upheld on 1 March 2023. The Claimant appealed in March 2023 and the appeal was not upheld by the Respondent on 11 May 2023.

3.4 Was that conduct set out at 3.2.1 – 3.2.3 less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The Claimant says they were treated worse than the following male employees in respect of **Act 1**:

3.4.1 Loic Gramaglia (International TV App Project Manager)
3.4.2 Pablo Amor, Senior Editorial Manager
3.4.3 Bohdan Solyanyk, International Partner Operations Manager

3.4.4 Thierry Marimoutou, International Technical Partner Manager
3.4.5 Daniel Matray, Director of App Store and Apple Media Services for Continental Europe.

Act 2: the Claimant relies on a hypothetical comparator

Act 3: the Claimant relies on a hypothetical comparator

3.5 If so, was it because of sex?

4. **Indirect discrimination (Equality Act 2010 section 19)**

4.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

4.1.1 Required employees based in London to attend the office in London (and not be allowed to work fully remotely overseas)

4.2 Did the Respondent apply the PCP to the Claimant?

4.3 Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic, i.e. "men" or would it have done so?

4.4 Did the PCP put women at a particular disadvantage when compared with men, in that, childcare responsibilities fall principally on women and therefore the requirement to work in London and not remotely overseas means that women are less able to continue to work for the Respondent.

4.5 Did the PCP put the Claimant at that disadvantage?

4.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

4.6.1 Ensuring that the Respondent was not exposed to advice tax risks arising from employees being employed in the "wrong" jurisdiction;

4.6.2 Ensuring that the Respondent's operational requirements were fully met.

4.7 The Tribunal will decide in particular:

4.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

4.7.2 could something less discriminatory have been done instead;

4.7.3 how should the needs of the Claimant and the Respondent be balanced?

5. Unfair Dismissal (Employment Rights Act 1996 s98)

5.1 Was the Claimant constructively dismissed pursuant to ss 94, 95 and 98 of ERA?

5.2 Can the Claimant establish that the Respondent breached her contract of employment:

5.2.1 The Claimant relies upon the following:

Did the Respondent do the following things between 29 September 2023 and 20 October 2023 as relied upon by the Claimant:

(a) Unreasonably escalate their requests for the Claimant to return to work following her sick leave under threat of disciplinary action, following 10 months of no communications from either line management and Occupational Health
(b) Failed to take into account the Claimant's certified sickness absence for stress and anxiety in the timing and manner of making those requests;
(c) Failed to provide the Claimant with any practical or emotional support;
(d) Failed to appropriately consider and respond to the Claimant's requests for information regarding how a gradual return to work would be addressed including support from Occupational Health and the People Team and protections against retaliation and future transfers and being informed that such questions were "harsh';

5.2.2 The Claimant says the conduct relied upon amounted to a breach of the implied term of trust and confidence. The Tribunal will need to decide whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and whether it had reasonable and proper cause for doing so.

5.3 The Tribunal will need to decide whether the breach was a fundamental breach and that the Claimant was entitled to treat the contract as being at an end.

5.4 The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

5.5 If the Claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

5.5.1 Was it a potentially fair reason?

5.5.2 Did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the Claimant?

5.6 The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the

case under section 98(4) ERA.

6. **Wrongful dismissal / Notice pay**

6.1 What was the Claimant's notice period?

6.2 Was the Claimant paid (in full or in part) for that notice period?

7. Direct Sex discrimination (Equality Act 2010 section 13)

7.1 As outlined in paragraph 3.1 above, the Claimant is a woman and they compare themselves with the Respondent's treatment of men.

7.2 The Claimant relies on the matters outlined at paragraph 3.2 and 5.2 above.

7.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else would have been treated.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The Claimant relies on the comparators at 3.3.1 -3.3.5 for 3.2.1 and hypothetical comparators for 3.2.2 and 3.2.3 and says that they were treated worse than those male employees.

7.3 If so, was it because of her sex?