EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs R L Gouvianakis		Blackberry UK Limited

Heard at: London Central (by video) **On**: 18, 19, 20 and 21 October 2022 and (in chambers) on 16-18 January 2023

Before: Employment Judge H Stout
Tribunal Member L Jones

Representations
For the claimant: Ms G Churchhouse (counsel)
For the respondent: Mr B Randle (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Claimant's claim of unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996) is not well founded and is dismissed.
(2) The Claimant's claim that she was subjected to detriments contrary to section 47(c) ERA 1996 and regulation 19 of the Maternity and Parental Leave Regulations (MPLR 1999) is not well-founded and is dismissed.
(3) The Respondent did not contravene the Equality Act 2010 (EA 2010) by directly discriminating against the Claimant contrary to ss 18(2), (4) and 39 and that claim is dismissed.
(4) The Respondent did not contravene the EA 2010 by indirectly discriminating against the Claimant because of her sex contrary to s 19 and 39 EA 2010.

REASONS

1. Mrs Gouvianakis (the Claimant) was employed by Blackberry UK Limited (the Respondent) (or its predecessor company Good Technology Ltd) from 9 February 2015 to 10 February 2021 when her employment was terminated by the Respondent ostensibly on grounds of redundancy. In these proceedings she claims that her dismissal was unfair and that she was prior to, and in relation to, dismissal subjected to detriments/discriminated against by the Respondent because of pregnancy, maternity leave or sex.

The type of hearing

2. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. We were satisfied that it was fair to conduct the hearing in that way. The public was invited to observe via a notice on Courtserve.net. No members of the public joined. There were no significant connectivity issues.

3. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

4. The issues on liability to be determined at this hearing were agreed to be:

Jurisdiction

EA 2010 claims

(1) In relation to the EA 2010 claims, were these claims presented within three months of the acts complained of in accordance with section 123(1) EA 2010 (taking into account the EC period)?

(2) If any act took place more than three months less one day of the date on which the claim was presented to the Tribunal, does it form part of conduct extending over a period within the meaning of section 123(3) EA 2010?

(3) If the Tribunal finds that any act complained of was not part of conduct extending over a period (and was brought outside the primary limitation period), is it just and equitable for the Tribunal to exercise its discretion and extend the time limit for submission of those claims, in accordance with section 123(1)(b) EA 2010?

ERA claims

(4) Were these claims presented within three months of the detriment complained of or the effective date of termination in accordance with ss 48(3) and 111 (2) ERA, respectively (taking into account the EC period)?

(5) As regards any detriment claim, if any act took place more than three months less one day of the date on which the claim was presented to the Tribunal, does it form part of conduct extending over a period within the meaning of section 48(4) ERA?

(6) If not, was it reasonably practicable for the Claimant to present her claim within that period of three months?

(7) If not, did the Claimant present her claim within such further period as the Tribunal considers reasonable?

Automatic Unfair Dismissal section 99 ERA 1996 and regulation 20 MPLR 1999 or Ordinary Unfair Dismissal section 98 ERA 1996

(8) Can the Respondent discharge the burden of proof of showing that the reason for dismissal was redundancy under section 98(1) or (2) ERA 1996?

(9) The Respondent contends that the reason for dismissal was redundancy. As to that:

a. Was the dismissal wholly or mainly attributable to the fact that the requirements of the Respondent's business for employees to carry out work of a particular kind; or
b. carry out work of a particular kind in the place where the Claimant was employed; had ceased or diminished or were expected to cease or diminish.

The Claimant contends that the reason or principal reason for dismissal was her pregnancy, maternity, childbirth and/or maternity leave.

(10) If so, was the dismissal of the Claimant fair in all the circumstances (having regard to equity and the substantial merits of the case)? In particular, was the dismissal within the band of reasonable responses available to the Respondent? Did the Respondent act reasonably in treating the redundancy as a sufficient reason for the dismissal? As to that:
a. Did the Respondent fairly select the Claimant for redundancy?
b. Did the Respondent carry out a meaningful consultation process with the Claimant?
c. Did the Respondent appropriately consider alternative employment for the Claimant?

Detriment section 47C ERA 1996 and regulation 19 MPLR 1999

(11) Did the Respondent subject the Claimant to a detriment? The Claimant relies on the following:
   a. The redundancy process (18 January 2021 — 9 February 2021) conducted by Ms Johnson and Mr Wagler
   b. Loss of promotion opportunities from around January 2018.
   c. Poor performance review (April to 1 May 2020) conducted by Mr Foote and line manager, Ms Vasyk
   d. Ignoring or dismissing the Claimant' concerns raised in her grievance made on 7 May 2020 in the meeting of 27 May 2020 and shouting at her in relation to the same;
   e. Ms Vasyk criticising the Claimant via email after the grievance meeting on 27 May 2020;
   f. Flawed review processes (completed by 1 May 2020); conducted by line manager, Ms Vasyk;
   g. The handling of her grievance raised on 3 August 2020 (completed by 6 November 2020) conducted by Mr Merten;
   h. The handling of her grievance appeal (completed by 4 January 2021) conducted by Ms Park;
   i. Hostile inter-personal treatment, in particular:
      i. Mr Foote raising his voice to the Claimant and shouting "enough is enough" on 13 September 2019;
      ii. Mr Foote raising his voice to the Claimant and telling her she was lying and what she said was a lie on 27 May 2020;
      iii. Ms Johnson telling the Claimant not to use the word "discrimination" because what had happened was not discrimination on 27 May 2020;
   j. The email from Mr Laughton-Brown regarding the grievance appeal on 9 February 2021;
   k. Ms Vasyk failing to keep in touch with the Claimant during her maternity leave;
   l. Ms Vasyk failing to inform the Claimant of her work details on return;
   m. Selecting the Claimant to be placed in the redundancy pool;
   n. Adopting unfair redundancy selection criteria;
   o. Unfairly applying the redundancy selection criteria to the Claimant;
   p. Failing to adapt the redundancy scoring criteria and the Claimant's redundancy score to take in to account the Claimant's absence on maternity leave.

(12) If so, did the Respondent subject the Claimant to any such detriment because the Claimant exercised the right to maternity leave?

<u>Pregnancy and Maternity Discrimination section 18 EA 2010 2010</u>

(13) Did the Respondent treat the Claimant unfavourably because of her pregnancy?

(14) The Claimant relies on the unfavourable treatment set out at paragraph 11 above under the heading `Detriment'.

(15) If so, did the decisions regarding the unfavourable treatment take place in the "protected period" as defined by s. 18 (6) EA 2010 and qualified by 18(5) EA 2010 2010.

Maternity (s. 18 (4))

(16) Did the Respondent treat the Claimant unfavourably because she had exercised the right to maternity leave?

(17) The alleged unfavourable treatment relied on by the Claimant are the factors set out at paragraph 11 above under the heading `Detriment'.

Indirect sex discrimination section 19 EA 2010 2010

(18) Did the Respondent apply the following redundancy selection criteria:
   a. An assessment of performance in respect of Independently undertaking bespoke project work;
   b. An assessment of performance in respect of Preparing statutory accounts;

(19) The Respondent accepts that it applied these selection criteria and that they each constituted a PCP and that it applied these PCPs to all persons subject to selection.

(20) If so, did the said PCP put persons of the same sex as the Claimant (women) at a particular disadvantage when compared with persons with whom the Claimant did not share this protected characteristic (men)?

(21) If so, was the Claimant put at that particular disadvantage?

(22) If so, was the said PCP a proportionate means of achieving a legitimate aim? (The Respondent relies upon the following legitimate aim: the use of consistent and relevant criteria which are required to successfully carry out the role.)

5. In addition, it was agreed that we should as part of this hearing consider the issues of *Polkey* and increase/reduction for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures in the event that we found in the Claimant's favour on liability.

The Evidence and Hearing

6. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

7. We explained our reasons for various case management decisions carefully as we went along.

8. We received a witness statement and heard oral evidence from the Claimant.

9. For the Respondent we received witness statements and heard oral evidence from:

    a. Mr Foote – currently Head of Investor Relations, based in California, USA, previously Senior Director, Finance until October 2019;
    b. Ms Vasyk – Senior Manager, EMEA Finance;
    c. Ms Park – Senior Director of Marketing, EMEA;
    d. Mr Thorne, Senior Manager, EMEA Business Development;
    e. Ms Johnson – Director and HR Business Partner;
    f. Mr Laughton-Brown – Senior Director and HR Business Partner.

10. We had been allocated a third panel member in the usual way, but unfortunately he was unable to proceed on the day of the hearing for personal reasons and the parties consented to continue with the judge and one lay member, Ms Jones (it having been identified to the parties that Ms Jones is on the 'employee' panel).

11. The case had been listed for 7 days, but the judge was only available for four days. After discussion, it was agreed (and, insofar as not agreed, determined by the Tribunal) that the best course, in line with the overriding objective, was for the evidence to be heard in the four days available, the parties then to make written submissions and the panel then to convene later for deliberation. That deliberation was originally scheduled for December 2022, but then postponed as a result of panel availability until January 2023, with apologies being sent to the parties. We apologise to the parties again for the overall delay that has occurred in determining this case.

The facts

12. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities. In reaching our findings of fact, we have had regard to the guidance given by Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHCA 3560 (Comm) at [17]-[22] (and relied on by the Respondent) as to the potential unreliability of historic oral evidence unsupported by documentation.

The start of the Claimant's employment

13. The Claimant's employment with Good Technology commenced on 9 February 2015 as a Senior Accountant. In January 2016 the Claimant's

employment transferred under TUPE to the Respondent along with the rest of the Good Technology finance team.

14. The Claimant worked full time in an accounting team led in London by Mr Foote (Senior Director, Finance), who in turn reported to Mr Chai (Corporate Controller), based in the US. There were six or seven team members at that time, including Ms Vasyk (Senior Manager, Finance), who by the time of the Claimant's dismissal had been promoted to her line manager.

15. The Claimant's role at the start of her employment included helping the Professional Services team to report and keep their spend within budget, forecasting and profit analysis. She enjoyed this work particularly. She also took on ad-hoc responsibilities where needed for accounts payables and intrastat submissions. Although her role was not at the time formally divided up, the Claimant agreed that a percentage allocation estimated by Mr Foote in January 2018 broadly described her role, i.e.: 50% business partnering for the Professional Services business on 3rd party delivery costs, 25% month-end close activities, 15% statistical returns and 10% 'other ad hoc' (123).

16. Whereas Good Technology had been a relatively small company where the finance team carried out a wide range of roles, Blackberry was a much larger company with different finance functions carried out by different teams based in the UK and US. There were some redundancies as a result of the merger of the Good Technology and Blackberry teams. The Claimant was not among those and her role did not change significantly post transfer to Blackberry. At Blackberry, one of the teams in the US (headed by Mr Green) was principally responsible for doing the Professional Services finance work. Mr Foote and Mr Green were of the view that following the merger it did not make much sense having some members of Mr Foote's team doing Professional Services work, but nothing was done to change that at this stage.

<u>The Respondent's performance review process</u>

17. The Respondent has an annual performance review process which is operated through a computer programme called WorkDay. During the period with which we are concerned, there have been three grades available in the system. The precise wording for these three grades has changed during the period, but in substance they have remained the same: 'meets expectations', 'needs improvement' and 'does not meet expectations'. The Respondent also has a performance management policy and a performance improvement plan (PIP) process for those employees whose performance causes substantial concern. This case has not been concerned with performance management.

18. The normal process followed by the Respondent for employees at work is, we find, as follows:

    a. At the start of the financial year, employees and managers agree goals for the upcoming performance review year. The employee will input these goals into WorkDay;

b. During the year, the manager should provide feedback as and when required. This may be in the course of 1:1s. Practice at the Respondent differs between managers on how these will be handled: Mr Thorne (Senior Manager, EMEA Business Development) personally had a practice of following up 1:1s with an email (505), but Ms Park, Ms Johnson, Mr Foote and Mr Laughton-Brown all denied that was the norm, and we find that practice varies and that most managers at the Respondent do not follow up all 1:1s with emails, even when minor issues have arisen about performance;
c. Towards the end of the year, usually in January (the normal deadline is end of January), the employee will complete a form to self-review their performance. The form allows space for the employee to complete a full self-review as to: whether goals have been completed; what the employee's key accomplishments and achievements have been by reference to Blackberry's values of Customer Focus, Innovation, Integrity, Team Work, Mutual Respect and Accountability (and not necessarily by reference to the goals: see 79); areas of improvement required in the current role; areas that can support you in your career development; and then overall evaluation;
d. Once the employee has submitted their self-review, the manager is notified by the WorkDay system that they need to complete their review. The deadline for that is normally 1 March. They have the same form to fill in as the employee, but in addition to writing commentary they give the employee a rating of one of the three grades;
e. Internally, the manager's review and grading is then subject to a moderation process at senior leadership level. The Claimant was not aware of this step in the process as she had never been a manager;
f. Once the moderation has been completed, the completed form will be returned to the manager;
g. A meeting will then be held during which the manager and employee can discuss the employee's performance, giving the employee the opportunity to comment on the manager's feedback and/or the awarded grade. There were variations in practice as to whether or not the employee would have access to the manager's full review and grading prior to or at this meeting. The Respondent's FAQs document indicates that the employee could either be given a hard copy printed out by the manager or sent the form in WorkDay prior to the discussion. Sending the form to the employee in WorkDay had the effect on the Respondent's system of automatically marking the review as 'complete'. This was disputed by the Claimant, but as she personally has no knowledge of how the system works from the manager's perspective, we prefer the evidence of the Respondent's witnesses, which was unanimous on the effect of a manager 'submitting' a review in WorkDay. Indeed, Ms Vasyk said (and we accept) that in order to get to the point of printing a hard copy from WorkDay it was also necessary finally to have 'submitted' it. On the basis of the FAQs document, accordingly, the 'norm' was for the

review to have been 'submitted' before the meeting and thus marked complete before the meeting occurred;

h. In the alternative, if the form has not been 'submitted' before the meeting, it will be submitted after the meeting and the performance review will then be 'complete' on the system;
i. Until a manager submits the review form, the WorkDay system will continue sending the manager reminders to do so;
j. On submission of the review form by the manager, the employee is sent an automatic email notification and if they then log on to the system they will be able to see their completed performance review;
k. The FAQs explain that once the final review is released both employee and manager cease to have the functionality to edit the review, but in fact as part of the Claimant's later grievance process, Ms Johnson was able to confirm that the review form could be 're-opened' after submission (315).

19. The Claimant disputed that the process set out above was the process followed by the Respondent. She maintained that the proper process was for the discussion with the employee to happen *before* the manager arrived at even a provisional grade, prior to moderation. From her perspective, this may have been how it appeared if Mr Foote had not submitted the form in WorkDay prior to his meetings with her. However, as a matter of fact we conclude that the system operated as we set out above so that normally the manager graded and finalised the review before the performance discussion happened.

20. The Respondent's FAQs document states that when an employee is on leave of any sort, including maternity leave, *"The leader will complete their portion of the employee's review and send it back to the employee to complete when they return. If the employee has not been actively employed at all during the fiscal year, consult your HR Business Partner and the review will be cancelled and the reason documented in the comment section of WorkDay. If the employee has been actively employed for any portion of the fiscal year they should be evaluated against the goals set for them during that period of time".*

21. In practice, this meant that employees on maternity leave (we have heard evidence of personal experience of this from Ms Vasyk as well as the Claimant) would receive a notification from WorkDay that their performance review was complete and so would receive the completed form and grade from their manager without any performance discussion taking place. The notification would, however, state that a performance discussion had taken place because the system was set up so that a manager could only submit the form by simultaneously confirming that (471). An employee reading the FAQs document ought, however, to know that the review is not really final at this point because the absent employee still needs to fill in their self-review and the discussion with the line manager needs to happen.

22. We further note that Ms Johnson's email to Mr Laughton-Brown and Ms Park in December 2020 (when dealing with the Claimant's grievance appeal: 315) indicates that Global Compensation took the view that where for whatever

reason it was not possible to hold a discussion with the employee around the time that the review was completed, managers could either hold the task in their WorkDay inbox and submit when the employee was back from leave (the effect of this being that the employee would not see the review at all while on leave or until it was submitted), or submit the task (so that the employee would see the review in WorkDay as 'finalised') and the manager would need to remember to discuss the details with the employee on their return.

Claimant's FY16 and FY17 performance reviews

23. In the 2016 financial year (FY16) and FY17 the Claimant was graded as "Meets Expectations" on performance reviews, which is the highest of the Respondent's three grades. She also received Bronze STAR bonus awards, in 2016 for hard work on issues experienced following NetSuite go-live and in 2017 for hard work generally.

24. Her FY16 review did, however, note that there was *"always room for improvement"* and the Claimant *"can reduce the small number of errors that she makes even further"* (69). Her FY17 review noted that she could use too much of her time on issues that were not her core role and thus run out of time to do her core role, and that Mr Foote was keen for her to 'own' the Professional Services analysis work more (73). The Claimant did not see these as criticisms: she was happy with these performance reviews, although we observe that, objectively, these were small criticisms of her performance. In her FY17 review, she identified both statutory accounting and professional services work as areas for development.

Financial Force

25. On 9 August 2017 Mr Foote informed his team about a new accounting system that was to be introduced, called Financial Force, which would automate more of the Respondent's processes. It was immediately recognised by both Mr Foote and the Claimant that this would have a significant impact on the Claimant's role, reducing the amount of time she would need to spend on spreadsheets. In a 'chat' the Claimant welcomed this, but also queried its implications for her role. Mr Foote told her that they would *"need to make sure we expand your role"* (103).

Promotion opportunities

26. Around this time, the Claimant alleges Mr Foote discussed with her a potential promotion to the Finance Business Partner role once she had gained her ACCA Qualification (which she was only one exam away from completing), but he denies this as it would not have been 'in his gift' to arrange for her to get a job with another department. He did, however,

encourage her ambitions in this respect by facilitating her taking up a mentorship programme with Mr Green.

27. The Claimant also alleged that Mr Foote discussed with her a potential opportunity covering revenue recognition. In oral evidence, the Claimant acknowledged that this was not a separate job, but a potential additional responsibility. The Claimant alleges that Mr Foote advised her to prepare for an interview with Mr Green and to study the Accounting Standard. The Claimant says she prepared for interview and chased Mr Foote for updates but did not hear anything back. Again, Mr Foote denies saying that this was dealt with by a department in Canada run by someone called Ms Terrell and was a very technical aspect of accounting which was not the Claimant's strength. He was clear he would never have suggested this to her as an opportunity.

28. In relation to these two alleged promotion opportunities, we find that if there was a discussion about promotion to Finance Business Partner once the Claimant had completed the ACCA Qualification, it was in general terms as Mr Foote was not in a position to 'gift' the Claimant such a promotion and in any event at that point she did not have the qualification so the discussion could only have been about possible future opportunities. What did happen, as is agreed between the parties, is that Mr Foote put the Claimant forward for a mentorship opportunity with Mr Green. As to the revenue recognition opportunity, even on the Claimant's case this was not a promotion opportunity but the possibility of an additional responsibility and on the balance of probabilities we find that the Claimant must have misunderstood whatever was said about this because the responsibility was not one under Mr Green's remit in any event, was Canada-based and a technical role which Mr Foote did not consider fell within the Claimant's skill set.

<u>August 2017 - Claimant's first pregnancy</u>

29. In August 2017 the Claimant found out she was pregnant with her first child.

30. The Claimant informed Mr Foote of her pregnancy on 20 September 2017. This was before she was three months' pregnant, but she felt she needed to tell him as she had appointments to attend and was experiencing morning sickness. Mr Foote enquired whether he should inform HR, but the Claimant said 'not yet' (105).

31. On 2 November 2017 Mr Foote texted the Claimant to ask how she was and how many weeks pregnant she was (106). They spoke and then she emailed to confirm that she was 13 weeks' pregnant with the due date 6 May 2018, and that she would intend to start maternity leave in March 2018. The Claimant alleges that Mr Foote wanted her to tell HR and Mr Rai (Chief Finance Officer) so that they would know she would not be available to take on a project due to start in May 2018. Mr Foote then notified HR and Mr Rai on 2 November 2017, asking for support on following company policy and for temporary maternity cover while the Claimant was away (110).

32. The Claimant alleges that just before Christmas 2017 Mr Foote suggested to her that her colleague Ms Tudor (Accounts Payable Processor) could be promoted to her position while she was on leave in a way that suggested to the Claimant it would be a permanent change. She also alleges that Mr Foote suggested she could return after maternity leave on a part-time basis. She says Mr Foote 'bullied her' by pressing her as to whether she wished to use her full entitlement for maternity leave and warned her that her role might change if she chose to stay at home for a whole year. The Claimant lost confidence and felt stressed. Mr Foote denies that he said her colleague Ms Tudor could be promoted in a way that made it seem to be a permanent change, or that he suggested she could return to work part-time. His understanding was that the part-time suggestion had arisen in conversations between the Claimant and HR. Ms Tudor was not a qualified accountant but an accounts payable processor and Mr Foote denies suggesting she should be a permanent replacement for the Claimant. He also points out that she has also subsequently taken maternity leave, and that Ms Vasyk was on maternity leave when he proposed her for promotion to cover his role.

33. So far as this initial period of the Claimant's pregnancy is concerned, we accept that the Claimant's concern about Mr Foote's attitude towards her was genuine. However, we do not consider that it had a reasonable basis. The Claimant was concerned about confidentiality at the outset and thought it was obvious that no one other than Mr Foote needed to know about her pregnancy before week 13. She was therefore upset when Mr Foote asked her if he should tell anyone. However, from Mr Foote's perspective, it was reasonable for him to ask the question and once the Claimant had said she did not want to tell anyone at that stage, he rightly did not press her. It cannot have been other than a coincidence that he managed to text her on Week 13 of her pregnancy, and his text message to her was appropriate in the circumstances as a reasonable enquiry. We understand why the Claimant, feeling vulnerable about pregnancy and work, was upset by it, but it was not reasonable for her to regard Mr Foote's actions as inappropriate.

34. We also understand that the fact that Mr Foote did not make any specific plans to cover the Claimant's maternity leave by, for example, recruiting a maternity cover, left the Claimant feeling insecure about whether there would be a role for her to come back to. There was some basis for that insecurity because, as Mr Foote's later email of 26 January 2018 shows (122), the business was in flux and he was uncertain about how her role would look in 12 months' time. However, we do not consider (in the light of all the evidence we have heard) that Mr Foote ever intended to 'get rid' of the Claimant; he was just uncertain about the future shape of the department and that uncertainty led to insecurity for the Claimant. Whatever Mr Foote said about Ms Tudor covering the Claimant's role during maternity leave, he clearly did not intend to promote her into the Claimant's role given her lack of qualifications (and he did not do so) and we do not accept that he said anything to suggest that. The Claimant has not identified what it was that he said that made her think this is what he meant. We find that the Claimant here misunderstood as a result of her insecurity. Likewise, if Mr Foote made a

suggestion about working part-time on return (as we accept he probably did given his uncertainty about the role going forward), there is nothing wrong with making such a suggestion, flexible working options generally being welcomed by employees. There is no evidence (even from the Claimant) that any pressure was put on her either way as to the basis on which she might return to work. Again, it was the Claimant's insecurity that led to her taking this as evidence of a negative attitude on Mr Foote's part. Likewise, even if Mr Foote did warn her that if she remained off work for 12 months her role might change, that was entirely proper as the statutory right to return after 12 months' maternity leave (as distinct from 6 months) is a weaker one and any responsible employer would warn an employee that things might change in a year (especially if their thinking about the future is as set out in the email of 26 January 2018). It is apparent, however, from the HR notes at 146 that the Respondent was clear that the Claimant should have the same or similar role available to her if she returned from maternity leave and even on the Claimant's case there is no evidence that Mr Foote conveyed any different message to her. We do not therefore accept the Claimant's case that Mr Foote was from the outset negative towards her about her pregnancy or maternity leave.

35. The Claimant was informed at her pregnancy growth scan in mid December that her pregnancy was not progressing properly and that stress could be a factor in this.

36. We observe that 'chat' conversations between the Claimant and Mr Foote on 3 January 2018 (600) and 22 January 2018 (601) show the two maintaining a friendly working relationship at this time, despite the Claimant's concerns.

37. The Claimant decided to start her maternity leave two weeks earlier than planned because of concerns about the pregnancy (11 weeks before her due date on 19 February 2018). Mr Foote was not happy about this (114), initially said he would not authorise it and then only agreed to it because he 'had no choice' (120). In oral evidence Mr Foote said, and we accept, he was not happy because it was the financial year end and the busiest time of year. However, it had to be approved by HR in any event because they had to calculate the dates for her. HR advised Mr Foote that she was entitled to start her maternity leave on 19 February and so there could be no objection to it, hence the terms of his email at p 120.

38. Mr Foote began to make plans to cover the Claimant's role. The Claimant produced a job description for her role to help with the process on 12 January 2018.

39. On 24 January 2018, the Claimant had a one-to-one meeting with Mr Foote ahead of her maternity leave. The Claimant says that Mr Foote did not want to have the meeting but she insisted and then it only lasted 5 or 10 minutes. The Claimant had suggested another female accountant for maternity leave cover the day before (121), but Mr Foote replied to say he did not think *"this person would be right for the role"*, to which the Claimant replied that she would not ask for a reason because in her mind it was because he would be

concerned about the cover becoming pregnant too. The Claimant says that when she spoke to Mr Foote about this, he said, *"If she becomes pregnant in your maternity leave what am I going to do afterwards?"*. Mr Foote denies saying this. He said that the candidate the Claimant had proposed was *"absurdly over-qualified"* with *"eight years management experience in a big firm"*. He pointed out again that he has recruited a lot of women who have taken maternity leave, including not only the Claimant but also Ms Vasyk and Ms Tudur. The Claimant also accepted in oral evidence that he had recruited a lot of women during his time as her manager. As to what was said on this occasion, we prefer Mr Foote's evidence and consider that the Claimant has misremembered this. If Mr Foote had really said this at the time, we would expect the Claimant to have mentioned or complained about it earlier, but there is no evidence that she did. It is also implausible in the light of the other evidence we have of his attitude to the Claimant's maternity leave (and the maternity leaves of other female employees), which we find was not negative, that he would have said such a thing.

40. On 26 January 2018 Mr Foote emailed Mr Rai and others confidentially about staffing (122). He noted that another employee (who was covering payroll) had left on 5 January, and that the Claimant was going to be away for 14 months including annual leave and maternity leave and that no one had yet been recruited to a new 6-month contractor role that had been approved, so that from mid-February his team would be 3 FTE (full-time equivalents) down on its approved staffing levels, *"albeit in reality it is just 2 FTE"*. He reassessed current roles noting that the employee who had left and who was 100% allocated to payroll activities was at most a 0.25 FTE role. He noted that as a result of Financial Force going live on 1 March 2018, the Claimant's role would reduce to 60% FTE, losing 50% of the Business partnering function, as a result of the new Financial Force system coming in on 1 March 2018. He proposed redefining the Claimant's role removing Business partnering/professional services altogether to transfer that back to Mr Green's team (123) but creating a new 100% role focused on payroll and statutory accounts. He asked whether this should be discussed with the Claimant prior to her going on maternity leave. He noted that the Claimant was interested in a role that is *"FP&A in nature"* (i.e. Financial Planning and Analysis) and might not be interested in the new role as he had redefined it. He proposed merging the Claimant's maternity cover and other vacancy into one permanent new role. The Claimant did not see this at the time, but she agreed that Mr Foote's assessment in this email of the content of her current role was about right, although he was wrong that she was not interested in statutory accounting (or only interested in FP&A) as she had mentioned her interest in statutory accounts as part of her performance review. The plan was agreed by Mr Rai. An individual in HR commented on the internal chat: *"he won't even tell [the Claimant] he's planning for her to do Payroll"*.

41. This email of 26 January 2018 is important factually in this case. We take it at face value. Neither side has sought to suggest that it reflects anything other than Mr Foote's genuine thoughts at the time. What it shows, in our judgment, is that a genuine need for reorganisation of roles within the department had arisen. The email is problematic insofar as it proposes recruiting a permanent

FTE whose role would in part include covering the Claimant's maternity leave. Had the Claimant not been offered a full-time job back on her return from this maternity leave, this email would have been good evidence that the Respondent had failed to comply with its obligations to the Claimant in relation to maternity leave by not keeping her job open for her. As it is, however, the picture is less clear-cut than that. As is apparent from Mr Foote's email, he was at this time in principle three FTE ('in reality two') down on the approved headcount for the team, and all he was proposing was recruiting one FTE. In other words, in principle he was keeping one FTE role open. And, in fact, the Claimant did of course return to work following this maternity leave, and only did so part-time because that was her choice rather than because the Respondent had not offered her a full-time job back. However, in retrospect, it can be seen that it is this decision to recruit a new permanent role at this point rather than a maternity cover which is a 'but for' cause of the redundancy situation that ultimately arises after the Claimant's return from her second maternity leave because if a temporary cover had been recruited at this stage, the Respondent would probably not have found itself 'over numbers' in 2021. This is because the position as described in this email is that a need had arisen for temporary FTE contractor, which Mr Foote decided was unnecessary, the Claimant's FTE role needed a maternity cover, and the other supposedly FTE role was really only a 0.25 FTE and thus not a FTE role at all, i.e. in reality at this point the team was only 1.25 FTE down and the whole FTE was the Claimant. By recruiting a permanent FTE at this point, Mr Foote was thus using up the headcount for the Claimant's role, thus creating a potential redundancy situation when in fact if he had recruited a temporary/maternity cover at that point, who left when the Claimant returned to work, there would have been no redundancy situation. We consider in our conclusions (below) the implications of this for the issues we have to decide, but we emphasise here that we do not regard this email as evidence that Mr Foote was plotting to 'get rid' of the Claimant as she has argued in these proceedings. In line with the other evidence we have heard, we take this email as evidence that Mr Foote was seeking genuinely to address business needs without any ulterior motive in respect of the Claimant at all.

42. The Claimant spoke with Mr Partington, HR business partner, on 29 January 2018 (129). She raised her concerns about Mr Foote. He recommended that she take her doctor's advice and take medical leave in advance of her rescheduled maternity leave start date of 19 February. Her concerns about Mr Foote were recorded on the HR system (145), but it was decided not to investigate further as there were *"no tangible examples of how her Manager's behavior had changed towards her and her concern was centered around whether she would have a role to return to"* (sic). It was noted that Mr Foote and Mr Rai needed to ensure she would have the same or similar role to return to and then the 'case' was 'closed'.

43. On 2 February 2018, Mr Foote sent an email to the team about handing over the Claimant's responsibilities while he 'sorted out maternity cover' (139). He also enquired of HR as to whether he had to do *"an exit interview or something like this"* (137), but HR clarified that this was not necessary as she

would remain an employee, but that he did need to complete her end of year performance review. The Claimant has suggested that this was evidence that he was thinking of her as leaving the business, but we consider it to be clear from the terms of his email, that he was merely asking about process and whether there was any requirement for a final interview of any sort before an employee went on maternity leave.

44. On 5 February 2018, the Claimant commenced two weeks of medical leave ahead of maternity leave commencing on 19 February.

45. On 8 February 2018 preparations were made for the team to move floors and Mr Foote confirmed desk requirements to include the "new hire" which was *"in progress and I expect them to start in March"*, adding that when the Claimant *"returns from maternity in May 2019, we would need to revisit. However, that is a long way off right now"* (142). The desk plan shows that there were six team members at this point, including the new hire, Ms Guo, Ms Vasyk, Mr Foote and two others. We observe that this email too shows that Mr Foote was planning for the Claimant's return.

<u>February 2018 - Claimant's first period of maternity leave</u>

46. The Claimant's first period of ordinary maternity leave commenced on 19 February 2018.

47. While she was on maternity leave a Senior Accountant, Ms Rizk, was permanently recruited to the team in May 2018. (This was the permanent recruit envisaged in Mr Foote's email of 26 January 2018.)

48. Whilst the Claimant was on maternity leave, Mr Foote sought advice from HR about how to complete the Claimant's performance review and was told to do it without discussion with her. This resulted in the Claimant receiving an automatic email from the WorkDay system informing her of performance review completion in April 2018. The review graded her as Fully Meets Expectations (83), and noted many positive aspects of her performance, but contained criticisms about error rates, insufficient involvement with the business and failure to proactively produce reports, which concerned the Claimant as she felt they had not been raised with her previously. Mr Foote noted in the review that if the Claimant worked on these development points, then the possibility of being entered into the mentoring programme could be explored to allow her to do more financial planning and analysis work for which there was little opportunity in Mr Foote's team. The Claimant contacted HR on 16 April 2018 to discuss this and HR reassured her that she had the same grading as previous years and her bonus would be paid in full so 'not to worry'. The Claimant did not pursue it further.

49. We observe that if Mr Foote had indeed formed a plan to make the Claimant redundant after her first maternity leave, or otherwise to 'push her out of the business', he had in this performance review identified material that he could, if he had wished, have graded her as 'needs development/improvement', but

he did not. Despite his concerns, he gave the Claimant the highest possible grade.

50. For the next financial year 2018/2019 the Claimant was away for the whole of the year so her performance rating was maintained at "Fully Meets Expectations" (88) and it was noted that it was not possible to complete a review because she was on maternity leave.

April 2019 - Claimant returns from first period of maternity leave

51. The Claimant returned from her first period of maternity leave on 12 April 2019. She understood on her return that her role would have to be *"rebuilt and might not be as meaningful as it had been at least at first"*. She requested to return part-time, working five short days (9am to 3pm, with 30 minutes for lunch; 27.5 hours per week or 73% FTE of 37.5 hours). This request was granted and, in line with normal practice on flexible working requests, an ostensibly permanent change was made to her terms and conditions of employment (421), although her intention was to return to full time work in January 2020.

52. On her return to work, Mr Foote proposed new duties for her by email of 25 March 2019 as follows (155):-

- Preparation of monthly Audit & Accountancy accruals (all EMEA entities);
- Preparation & review of monthly Intercompany control workbook (all EMEA entities);
- Preparation of monthly balance sheet reconciliations for selected accounts (all EMEA entities);
- Ownership of preparation of stat packs, preparation of statutory financial statements (working with 3rd parties as required) and handling audit process for selected EMEA subsidiaries;
- Support ongoing wind-up of Good Technology entities;
- Support wind-up of newly acquired Cylance entities;
- Provide back-up for UK payroll activities in case primary resource is not in office.

53. The Claimant said that most of these were new responsibilities, in particular statutory accounts, and she was concerned that as she had no previous payroll knowledge, no training was proposed, but Mr Foote said she was unlikely to be required to do payroll, it was just back-up. The Claimant accepted Mr Foote's proposals as she *"didn't feel I was in a safe position to push back or ask for any changes to the plan"*.

54. When the Claimant returned from her first maternity leave, there were three Senior Accountants in the team: the Claimant, Ms Rizk and Mr Burton. Ms Guo was also Senior Statutory Accounts at that point. In June 2019 Ms Guo was promoted to Finance Manager, which is a role based entirely on statutory accounting work and therefore required (according to the Respondent's evidence) a specific skillset and level of qualification. It is also Grade F, whereas Senior Accountants are Grade D (two grades lower). As to the issue about whether the Finance Manager role really required a specific skillset or not, we accept the Respondent's evidence, while noting that the skillset required was not very different to that of the other Senior Accountant roles as they all did statutory accounts, Ms Guo specialised in this and took the lead

on it, as well as having responsibility for checking the work of the Senior Accountants as the more junior members of the team, so we accept that the skillset required for the role was materially different to that required for the role of Senior Accountant.

55. Most of the work that the Claimant did after her return from maternity leave was statutory accounting. Although she had passed her ACCA statutory accounting examinations first time, and had previously worked in private practice preparing statutory accounts for clients, she had not done statutory accounting work previously at Blackberry and she was less keen on it than the Professional Services work that had formed the majority of her role before her first maternity leave. From the Claimant's perspective, on her return she was being asked to do relatively junior work, assisting Ms Guo with the statutory accounts. Ms Rizk was also working on statutory accounts, but her primary role was payroll.

56. The Claimant discovered she was pregnant again in May, but did not tell anyone until July 2019 when she notified Mr Foote.

Blackberry Germany statutory accounts

57. The major piece of work that the Claimant was asked to undertake on her own during the period between her two maternity leaves was the Blackberry Germany statutory accounts. She wrote in her later commentary on her performance review (216) that she started on this from scratch without assistance, based on the previous year's statutory pack and *"the knowledge gained from the Nigerian stat pack, performed for Cathy on my KIT day"*. She asked for help after a few hours because something was not adding up and Mr Foote pointed out that she was working in US Dollars rather than Euros. She accepted that she worked on this pack relatively slowly as she was working on her own, it was new to her, she was tired and had lost focus, and that she asked Mr Foote to assist her, which he did. Mr Foote says that there was a period in August 2019 when he provided daily assistance to the Claimant. The Claimant felt that she was not provided with any more assistance than anybody else and that Mr Foote was always open to helping his team members, but Mr Foote considered that the amount of assistance the Claimant was required was out of the ordinary. Ms Guo in her interview in relation to the grievance of 8 October 2020 also explained that, although everyone makes mistakes, the Claimant's work was not of the standard she would have expected and that *"one colleague at a lower level often delivered better outputs"* (291). Given the mutually supportive nature of Ms Guo's and Mr Foote's evidence, we accept that the Claimant did require more guidance than others.

58. In August 2019 the Claimant identified an error in the audit for Blackberry Germany for the previous year. Her colleague Ms Guo (Finance Manager) did not agree that the mistake was material and in an email of 13 August 2019 suggested the Claimant discuss it with Mr Foote when he was back. The Claimant acknowledged that her challenging Ms Guo on this had left Ms

Guo in tears. The Claimant then did discuss the matter with Mr Foote. His view was that the error the Claimant had spotted was not material and did not need to be dealt with as part of that year's accounts, although it was corrected for in subsequent years. His decision as manager was that they should 'move on' and finalise the accounts for that year. The Claimant was unhappy about this as she felt it was a material error and that this was demonstrated by the fact that it was corrected for in the subsequent year. We do not have to decide who was right about the materiality of this error. We heard enough to understand that both the Claimant and Mr Foote had reasonable grounds for the position they took regarding this error, but it was ultimately up to Mr Foote as the team manager to decide what action was taken, and in our judgment the Claimant ought to have recognised that and ceased pursuing the point.

59. In September 2019 Mr Foote told the Claimant and other members of the team (Ms Guo, Ms Rizk and Mr Burton) that he was being promoted. He told them that Ms Vasyk would be replacing him. He had chosen to promote Ms Vasyk to replace him. She was not at the meeting at that time because she was on maternity leave. The Claimant felt that Mr Foote's announcement was quite strange because he *"expressed regret at hindering Maryna's growth in the past and his belief that her new role would be a compensation for it"*. The Claimant says that she asked Mr Foote whether Ms Vasyk was senior enough to develop the team (as she thought that Ms Vasyk had previously said she did not wish to manage a team), and she alleges that Mr Foote responded that *"anyone who was not on board with the change would be fired"*. The Claimant said that she was frightened by this and unsettled, could not concentrate for the rest of the day and had to ask for help from Mr Foote with a task she would normally have been able to manage. Mr Foote denies saying either of the things. When cross-examined on this, he said that it was a nice, friendly meeting with cake and that saying *"would be fired",* would be a *"ridiculous statement"*. As to what happened at this meeting, we prefer Mr Foote's evidence. It is implausible that Mr Foote would have said anything like this at a team meeting, particularly given the evidence that we have even from the Claimant as to the care that he took in helping team members. In oral evidence, the Claimant added that Mr Foote had actually repeated the threat of 'firing' to some people, although this did not feature in her ET1 or witness statement. We find the Claimant's recollection on this point to be unreliable.

60. On 13 September 2019 the Claimant says that she discussed the audit issue she had raised with Ms Guo with Mr Foote and that he reacted with anger and shouted *"enough is enough"* on the open floor. The Claimant says that she looked around to see who had heard this as she was embarrassed, but although some people were around no one seemed to have noticed. Mr Foote denied shouting at her. He also did not recall using the words *"enough is enough"*. We find that as the Claimant had been raising the audit issue for some time, and Mr Foote considered he had made a decision and they ought to 'move on', he probably did react in a short-tempered manner to the Claimant on this date, and probably did use the words *"enough is enough"*, or other words to like effect, but we accept that he did not *"shout"* at the

Claimant. In this respect, we note that the Claimant described Mr Foote's behaviour in the video call with HR on 27 May 2020 (which we deal with below) as 'shouting' as well, but Ms Johnson who was also present then denied that he 'shouted' and we find it implausible that Mr Foote would *"shout"* on a video call with HR, especially in the context of denying that he did not *"shout"* previously. In our judgment, the Claimant is wrongly interpreting irritation and a firm change of tone as 'shouting'.

61. On 13 September 2019 itself, Mr Foote then went for lunch and later that day the Claimant sent an email setting out her view on the audit issue (434). After this the Claimant felt that she was allocated only very junior level work, such as retrieving invoices, and was only once assigned a small piece of audit work. We do not accept this as the Claimant's general complaint was that the work she was given on her return from maternity leave was 'junior', but it evidently was not as if it was so junior the Claimant would not have had difficulties with it.

62. On or around 19 October the Claimant had her last one to one with Mr Foote. They talked through her goals for the year and he said he was happy with her work and thought she was meeting all her goals apart from the one related to ACCA membership. The Claimant still had one exam left to do and they agreed it was achievable within the timeframe.

63. On 8 November 2019, the Claimant had her first one-to-one with Ms Vasyk ahead of her second maternity leave. They discussed keeping in touch and the Claimant's wish to return on a full-time role and Ms Vasyk indicated that she saw no problem with that.

64. On 15 November 2019 the Claimant spoke to Ms Singh in HR about the issues she had had with Mr Foote during her first pregnancy and maternity leave and Ms Singh told her that she had similar experience with her previous employer and she recommended that the Claimant search for a new role outside Blackberry and use the company's counselling services. The Claimant took up the option of counselling. The Claimant also raised concerns about her appraisal for the year and HR advised that the Claimant could send her review to HR to add to the system or the Claimant could do it herself once the system was open.

<u>November 2019 - Claimant commences second period of maternity leave</u>

65. In November 2019 the Claimant commenced her second period of maternity leave. She gave birth on 5 January 2020.

<u>May 2020 performance review</u>

66. In January 2020, while on her second maternity leave, the Claimant completed the 'employee evaluation' elements of her performance review on receiving email prompts to do so. She assumed it would be *"just a formality"*

given that she was on leave and had only been back for a short period between leaves. She marked all her goals as completed and (so far as the system was concerned) 'submitted' goals on 22 January 2020. These Ms Vasyk 'sent back' on (so far as the system was concerned) 2 March 2020 with the message *"The goals will be set up upon [the Claimant's] return from MAT leave to see what fits her workload best in that time"*.

67. In March 2020 Ms Vasyk contacted Ms Johnson (HR) for advice on what to do about the Claimant's performance review as the system was notifying her that she needed to complete it. Ms Johnson advised that because the Claimant had been at work for most of the review year, her performance review would need to be completed and asked her to work with Mr Foote to *"ask for his input to get her form closed out"* (156). Ms Vasyk did not query this as her own performance review was done while she was on maternity leave.

68. The Claimant's financial year 2019-2020 performance review was then completed by Ms Vasyk in collaboration with Mr Foote and released to the Claimant through the WorkDay system as a complete and final review on 1 May 2020. This was what HR had advised them to do, and is what happened the previous year when the Claimant was similarly on maternity leave. They did not have a conversation with the Claimant as would normally have been the process because she was on leave. The Claimant was rated as Needs Development / Improvement (the middle grade). 10.7% of the employee population at the Respondent are given this middle rating. The reasons for that as set out in the appraisal were (in short summary) that the Claimant had made it clear that she was less interested in statutory accounts work than the FP&A analysis work she performed previously, required more guidance than others and that she had got *"too deep into details of some areas",* not appreciating the concept of materiality and that this had resulted in challenging interactions with other team members. The review did, however, note that she had taken the initiative on re-evaluating the month-end accounting accrual journals and in working with Mr Green and that her error rate was much lower than it had been previously. It was not therefore all negative.

69. The Claimant also considered that her self-identified goals had been rejected by the system. Her view was that her FY 2020 goals had been rejected and her evaluation not done against these because when she viewed her goals in the system in May 2020 they were marked as 'pending approval'. However, this was because Ms Vasyk had rejected them on the system in January 2020 because the Claimant should not have entered them at that point as she already had goals for FY 2020 and new goals would not be set until her return from leave. The Claimant misunderstood this. It was clear from the Performance Review itself that her goals for FY 2020 had been accepted as completed in the same way as happened in previous years.

70. The Claimant accessed some files on the Respondent's system when trying to refresh her memory about the matters in her appraisal and Ms Vasyk

messaged her to find out if it was her, and how she and the kids were doing (201).

71. We also record here that around this time (May 2020), the Respondent's payroll system was migrated and Ms Rizk ceased to have responsibility for it, thereafter concentrating on month end, statutory accounts and project work.

Informal grievance

72. On 7 May 2020, the Claimant informally raised concerns about the FY 2020 performance review with Ms Vasyk and her line manager Mr Wagler (Senior Director, Accounting Operations), Mr Foote and Ms Adam (HR Director) (158). She complained that she had been provided with negative feedback and a poor rating without being given the chance to discuss and clarify and without concerns having been raised in her last 1-2-1 with Mr Foote. She set out how she had completed her goals. In the attachment, she provided a detailed commentary on the managers' review (162). The main issue related to the influence that the issue with BlackBerry Germany Fixed Assets had had on her review. She maintained that she was fully competent and qualified with statutory accounts and that the point she had made about the furniture was a correct one, that she was seeking to have constructive discussions to get a point corrected, but that instead of collaboration the attitude *"became a defensive one, by denigrating my work, experience and knowledge"*.

73. On 13 May 2020, Ms Vasyk replied and offered to meet with the Claimant and Mr Foote. She explained that normally when an employee was on maternity leave the discussion would take place on the employee's return, but that she was happy to have a discussion now.

74. On 15 May 2020 the Claimant responded, requesting that Ms Adam, Mr Wagler and Mr Foote be kept 'in the loop' as well as Ms Vasyk, and raising specific complaints about whether the maternity policy had been followed. Mr Foote replied to Ms Johnson, Ms Adam, Ms Vasyk and Mr Wagler, commenting on the Claimant's emails (169): *"I suggest we have another call next week. I do not feel comfortable with the tone of these emails. I think we need to reassess the approach"*. We infer that by 'reassess the approach' he meant that there had previously been a discussion about approach which led to Ms Vasyk making the relatively informal offer to meet with the Claimant that she did in her email of 13 May 2020, but that the Claimant's further email appeared more combative and Mr Foote therefore considered a more formal handling of the matter was required.

75. On 27 May 2020 a conference call took place between the Claimant, Ms Vasyk, Mr Wagler, Ms Adam and Ms Johnson. The Respondent's witnesses were concerned about this meeting and agreed a script for it in advance (draft 176ff; final 188ff). The Respondent maintains that no notes were taken of the meeting, but the Claimant argues that there must be notes which support her version of events which the Respondent has destroyed or failed to disclose. She says this is supported by the fact that at the meeting Mr Foote asked Ms

Johnson to make a note that he denied shouting at the Claimant on 13 September 2019. However, the fact that Mr Foote asked for a note to be taken does not mean anyone was actually taking notes. We find that there were no minutes taken of this meeting. We accept the Respondent's evidence on this. A script had been prepared so the Respondent's witnesses knew what they were planning to say (presenting a united front) in response to her questions, and as it was not a formal meeting there was no need for minutes to be taken. It is also implausible that the Respondent would have taken minutes but then destroyed them and lied about that, given the relatively limited importance of this meeting to the whole case and the absence of any evidence that the Respondent has done anything like this at any other point.

76. At this meeting it was explained to the Claimant (188) that performance review gradings are not provided prior to moderation and that the performance review was not scheduled to take place until she got back to work. It was pointed out that the same thing happened during her previous maternity leave. Further justification/explanation for the performance grading was given.

77. During this meeting the Claimant alleges that she complained that she had been discriminated against and Ms Johnson told her not to use that word. Ms Johnson believes this incident was on the 28 May not 27 May 2020, but the date does not matter. She recalls that the Claimant did use the words discrimination and unfairness and that she considered she was mis-using the word and explained to her what discrimination meant. As such, there is no real dispute between the Claimant and Ms Johnson about what was said, as we infer that Ms Johnson's purpose in explaining to the Claimant what discrimination meant was to make clear that she thought it was the wrong word to use in this context and thus that the Claimant should not use it. The discrepancy in recollection as to the date on which this exchange happened does not matter for the purposes of these proceedings.

78. The Claimant says that at the meeting she mentioned her previous complaint to Mr Partington and Ms Johnson said there was no record of that, although the HR notes at 145-146 show Ms Johnson was involved in discussion with Mr Partington at that time. When questioned about this in oral evidence, Ms Johnson accepted that she had said something like this to the Claimant during the call on 27 May 2020 as she did not that at time recall any previous discussion with Mr Partington. As the Claimant's previous complaint in January 2018 was over two years' previously and a relatively minor informal complaint that was quickly closed so far as HR was concerned (as is apparent from the notes at the time), we accept that Ms Johnson had forgotten about it by May 2020 and was not *"lying"* to the Claimant as the Claimant contends in these proceedings.

79. The Claimant says that in this meeting when she tried to describe what had happened on 13 September 2019, Mr Foote shouted, *"it is a lie, this is a lie"* and *"write down what she's saying".* Ms Johnson said that this was not what the meeting was about and asked the Claimant if she wanted a separate call

to discuss it. The meeting then quickly ended. In follow-up messages (195-196) Ms Johnson acknowledged the Claimant had been upset and offered to talk to her whenever was convenient including early morning or in the evening after the children were in bed. Mr Laughton-Brown in an email of 12 August 2020 (327) noted that Ms Johnson subsequently told him that Mr Foote did not raise his voice during the call but did 'very firmly refute' the accusation that he had shouted previously and asked for a note of that to be made. In oral evidence, Ms Johnson recalled that Mr Foote did ask firmly for his denial to be noted. She did not make a note, however, as she was not taking notes. For the reasons we have already given above when considering the 13 September 2019 incident itself, we find that Mr Foote did not *"shout"* during this call, but he did firmly deny the Claimant's account in a way that she perceived to be shouting. Mr Foote also denies saying that the Claimant was *"lying"*. He was not cross-examined on this particular part of his evidence. We note that the first time that the Claimant raised this allegation was when adding to the notes of the Grievance Meeting on 27 May 2020. In our judgment, this is another aspect of the Claimant's evidence about what was said orally that is unreliable. We find that although Mr Foote firmly denied having shouted at the Claimant previously 13 September 2019, he did not accuse her of lying.

80. In a private conversation with an HR colleague afterwards (197) Ms Johnson relayed that it had been a "*pretty tense call"* and communicated the essence of the Claimant's complaint as being that she had been given an unfair performance review because she is on maternity leave and Mr Foote wants to get rid of her. Ms Johnson expressed the view that the Claimant did not have 'a case' because she had no 'tangible evidence' to show that Mr Foote had treated her differently.

81. In messages between the Claimant and Ms Johnson (195), the Claimant complained that the call had an emotional impact on her *"especially when he tries to intimidate me"*. Ms Johnson did not contradict her as she accepted this was how the Claimant felt.

82. On 28 May 2020, the Claimant and Ms Johnson had a follow-up call during which the Claimant discussed the problems she considered she had had with Mr Foote since her first pregnancy. They also discussed the performance review and Ms Johnson explained to the Claimant that she could put in her response to the performance review into the system on her return to work. Ms Johnson reiterated this by email of 4 June, but the Claimant did not think this sufficient because the review had still been finalised before she had had any input. At this point the Respondent did indeed regard the performance review as finalised as is confirmed by Ms Johnson's email to Mr Foote, Ms Vasyk and Ms Adam of 3 June (208).

83. The next day the Claimant wrote to Mr Wagler to thank him for being on the call and asking him to take her word that she was not *"the black sheep"* of the team (199).

84. On 1 June 2020 the Claimant sent a follow-up email to those at the meeting setting out her position regarding the performance review (203). Her principal complaint was that it had been finalised and marked as complete without discussion with her in breach of the Respondent's policy, but she also set out why she challenged the assessment, and the unfairness of focusing on the Ms Guo incident.

85. Ms Vasyk responded to the Claimant's email of 1 June 2020 on 25 June 2020 with comments in green (220). Ms Vasyk did not understand the Claimant to be claiming that her goals had been rejected because the Claimant's email did not clearly say that (it said *"My goals have been sent back and the performance review had its base on some comments that haven't been raised as a concern in any of the 1-to-1s nor portray the contribution I had during the year. Furthermore, my goals were considered successfully completed before commencing mat leave"* (sic)). Ms Vasyk sought to explain why the Claimant was given the performance rating she was given, noting positives and negatives. She also explained that she and Mr Foote were not aware that the Claimant had completed her ACCA studies because the Claimant had not told them, despite Mr Foote (they thought) being named as the person who had to sign off her work experience for the qualification. At the hearing, the Claimant explained she had gone outside the normal process to obtain sign off by getting Mr Green rather than Mr Foote to sign off her work experience and had not notified Mr Foote and Ms Vasyk that she had completed her ACCA qualification other than by ticking it as completed in her performance review. She had also submitted her membership expense to Ms Vasyk for approval, along with her normal annual ACCA subscriptions, and she thought that this ought to have been enough to have alerted Mr Foote and Ms Vasyk to the fact that she had obtained the qualification. However, Mr Foote and Ms Vasyk did not realise this, and we find that it was reasonable for them not to have done so. Given that Mr Foote had been expecting to have to sign off the qualification, and both of them could reasonably have expected the Claimant to inform them that she had successfully completed such an important step in her professional development, we do not consider that they were at fault in not noticing from the Claimant's expenses claim for the ACCA Membership Admission Fee (428) in January 2020 that she had obtained the qualification, especially given that the Respondent's policy is to approve all ACCA-related expenses so Ms Vasyk approved this without even opening the receipt on the Respondent's system.

86. On 1 and 2 July 2020 the Claimant complained again to Ms Vasyk (213 and 215). She provided more detail and justification. We observe that in broad terms, aside from her conviction that she was right about the furniture audit issue in relation to the Germany accounts, the Claimant's position was not that her work had been perfect, but that there were reasons why her work had not been so good, including that she had not understood on return from maternity leave that statutory accounts was to be a core activity for her (although we note that 'ownership of stat packs' was the fourth bullet point on the list of duties Mr Foote allocated her on return from maternity leave), she wrote that she thought she was just providing Ms Guo with a 'helping hand' over a difficult period and that her focus was on 'closing the month';

that on the Germany accounts she 'started from scratch, without any assistance', that Tim had spotted the issue with the currency, that she had been slow because it was new to her, was *"tired and had lost focus"* because of her pregnancy (216), that she had taken holidays, that Mr Foote had pointed out an error on a legal accrual sign which she maintained was a small correction not reflective of a lack of knowledge; that the type of work is *"susceptible to human error and I am sure this happens to everyone"* (217), that her workings on the UK statutory pack had been unclear, but she could have provided the details if Ms Guo had asked.

87. Ms Vasyk replied on 21 July 2020 (230), saying that the Claimant's additional responses were noted and she understood the Claimant would be following up with HR.

August 2020 Claimant's formal grievance

88. On 5 August 2020, the Claimant raised a formal grievance about her performance review (233).

89. On 25 August 2020 Ms Johnson appointed Mr Merton (Director, Alliances and Business Development) as investigation manager and sent him the relevant documents. The Claimant has suggested that Ms Johnson did not send Mr Merton the FY20 review itself, even though this had been attached to the Claimant's grievance which was forwarded to him. She bases this on his later email of 20 October 2020 in which he asks Ms Johnson to confirm that *"the areas of improvement have been clearly captured in the review"*. We did not receive any evidence from Mr Merton, but it is clear from the outcome letter that he signed that he had seen the review, it was attached to the Claimant's grievance and it is inconceivable that someone might have investigated a grievance about a performance review without looking at the review – even if he did have considerable assistance from Ms Johnson with considering the grievance and drafting the outcome letter and did not include detail from the review itself in his own draft outcome letter.

90. Mr Merton met with the Claimant on 11 September 2020 to discuss her grievance. It took some time for the notes of that meeting to be prepared. They were only sent to Mr Merton on 2 October and then shared with the Claimant on 8 October. The Claimant was concerned about the number of errors and sent proposed corrections on 11 October (273).

91. Mr Merton then held grievance investigation meetings with Ms Vasyk and Mr Foote on 1 October 2020 and Ms Guo on 8 October 2020.

92. Mr Merton prepared a draft outcome letter dated 9 October 2020. The Claimant did not see this at the time. In the draft, Mr Merton recommended that the Claimant should focus on the areas identified as needing development/improvement when she returned from maternity leave *"and show that you can be very good at them!"* (272). The Claimant complains that this *"fails to grapple with the complaints the Claimant raised and lacks*

objectivity and balance". However, Mr Merton received advice from Ms Johnson on his draft letter, and she prepared for him a much more detailed draft which she sent to him on 5 November 2020. Ms Johnson apologised for her delay, but said that the letter now needed to go out without delay (295). There is no record of Mr Merton engaging in any exchange with Ms Johnson about the draft, but he signed it, so he clearly adopted and approved it.

93. The letter that then went to the Claimant as the formal outcome on 6 November 2020 was essentially Ms Johnson's response to the Claimant's grievance, albeit adopted and signed off by Mr Merton. The letter to the Claimant rejected her grievance, but made some recommendations for the future about handling of performance reviews for individuals on maternity leave, specifically that there should be discussion and agreement with employees before they go on leave as to how the process should work. The letter offered the Claimant the right to appeal.

Redundancy situation identified

94. In the meantime, on 30 October 2020 Ms Roberts (HR Director, Canada) emailed Ms Johnson (294) asking to book some time in with her next week to discuss the Claimant's return from leave, following a call with Mr Chai (Vice President and Corporate Controller, Canada) where he had some questions. Ms Johnson did not deal with this email in her witness statement, or give any evidence about conversations with Ms Roberts, save in cross-examination to say that the only conversation she had with Ms Roberts was about the redundancy process and how in the UK the statutory process would be followed.

95. On 10 November 2020, Mr Chai emailed Ms Roberts, Mr Wagler, Ms Vasyk and Mr Rai (303) as follows:

> [Ms Roberts] — as discussed last week, I have confirmed with [Mr Wagler] today that the team believes it is appropriate to go ahead and terminate [the Claimant] assuming there are no negative legal implications of doing so under the circumstances. Please work with [Ms Johnson] and [Ms Vasyk] to process this termination request.
>
> In summary:
> - [the Claimant] is returning from leave
> - Given the current business environment and needs, there is no longer a need for the extra FTE
> - Given [the Claimant's] performance prior to her leave, as documented in WorkDay, she is the appropriate candidate to terminate
> - This is supported by [Mr Wagler], [Ms Vasyk] and [Ms Vasyk's] predecessor [Mr Foote]

96. Ms Vasyk did not reply to Jay's email as she felt he was not following process and that Mr Chai should have no input into the process in the UK. She says she spoke to her line manager Mr Wagler about it (who is also based in Canada) and told him that it was not up to Mr Chai who is made redundant,

there is a process to be followed in the UK. Ms Vasyk also spoke to Ms Johnson about it and Ms Johnson says she in turn spoke to Ms Roberts to explain the process that needs to be followed in the UK to ensure compliance with UK legal obligations. Mr Foote was not copied in on Mr Chai's email and in evidence said he had not spoken to Mr Chai at all about it, but he said that he thought *"we are seeing this email" "because things are very different here in America and Mr Chai is not aware of how things work in the UK … here I have seen boxes land on people's tables and that's it, they are out the door"*.

97. The Claimant invites us not to accept Mr Foote's, Ms Vasyk's and Ms Johnson's evidence in this respect, but to find there was a conspiracy to dismiss the Claimant to which all these people were party. However, we do accept the evidence of the Respondent's witnesses as we find there is a cultural difference in approach as between US/Canada and the UK regarding employee redundancies and dismissals and it is plausible that events unfolded as Ms Johnson, Ms Vasyk and Mr Foote say they did. While we take it from Mr Chai's email that he did have a conversation with Mr Wagler (also based in Canada) as he describes in his email of 10 November, that they agreed the team did not need an 'additional' FTE at this point and that, based on the Claimant's performance grade as it appeared in WorkDay (which was a grade below that of Mr Burton and Ms Rizk), they decided that the Claimant was the one to be dismissed. Mr Chai's assertion that a decision 'to terminate' was supported by Ms Vasyk and Mr Foote was incorrect as they had not been spoken to about redundancies at this point, but it was not wholly wrong as it was the case that the assessment of the Claimant's performance relative to her peers was 'supported' by Ms Vasyk and Mr Foote. We add that we do not find it odd that no one replied to Mr Chai's email to make clear that his instruction was not going to be followed; not everyone thinks ahead to how evidence will look at Tribunal, and it is plausible that the email created an 'awkward moment' that its recipients spoke to each other about rather than replying. What the Respondent's witnesses could, and did, do in the UK was to set Mr Chai's email to one side and proceed with a redundancy process in accordance with their normal UK policy.

Grievance appeal

98. On 11 November 2020, the Claimant appealed against the grievance outcome (305). In her appeal she repeated the points she had made previously critiquing the basis for the review. She complained that she had provided facts and supporting evidence to prove the unfair treatment she had received, and that it was wrong for her performance review to have been marked as completed before there had been a discussion. She also complained that the review had failed to take into account that she had completed her goal of becoming ACCA-qualified.

99. The Claimant's second period of maternity leave ended on 16 November 2020, but she still had annual leave to take so remained off work.

100. Ms Park (Senior Director of Marketing) was appointed to hear the Claimant's grievance appeal, and she met with the Claimant on 7 December 2020. Mr Laughton-Brown attended as HR support.

101. Mr Laughton-Brown emailed Ms Park after the meeting to provide guidance (318). He noted that the question of whether the Claimant received insufficient feedback on her performance during the year and so did not know the areas of concern was *"difficult to prove either way"*.

102. On 7 December 2020 Ms Vasyk emailed the Claimant to welcome her back (350), prompted by Ms Singh (312-313). The Claimant suggested that Ms Singh had prompted Ms Vasyk in October and Ms Vasyk had deliberately delayed until December, but in fact what happened is that Ms Singh in October had written *"it may be useful to touch base with her nearer to the time or this side of 2020)"* and Ms Vasyk replied that she would touch base close to end of December 2020. On 1 December, Ms Singh sent a further email reminder and on 7 December Ms Vasyk contacted the Claimant.

103. The Claimant then emailed Ms Vasyk on 11 December 2020 to enquire as to the work she would be doing on return. Not having had a reply, she followed up on 22 December 2020 asking whether she would be returning on a part-time or full-time basis (350). Ms Vasyk did not provide a substantive response until 6 January (see below). She accepted in oral evidence that the reason for the delay was partly because of the ongoing grievance and partly because of her knowledge that a redundancy was being considered and it may be the Claimant who was selected and thus she felt an awkwardness about replying.

104. Ms Park concluded the Claimant's grievance appeal by 21 December 2020, but the letter was not sent to the Claimant until 4 January 2021 (331). Ms Park did not as part of the appeal even see the interview notes of interviews with Ms Vasyk and Mr Foote and did not know Mr Merton had spoken to Ms Guo. She considered that it was unnecessary for her to see these as she could see from the Claimant's own communications that she had been aware prior to her performance review of general issues with her performance (in the sense that she was aware of where she had made mistakes and been provided with assistance). Ms Park was also focused on what she saw as the appropriate outcome of the appeal, being the reopening of the Claimant's performance review so that her comments could be taken into account before it was finalised. The question of whether the issues had been properly raised with the Claimant prior to the performance review therefore seemed less important to her.

105. We observe that it is not good practice for someone dealing with a grievance appeal not to be provided with the notes of interviews with witnesses. All sorts of things can go wrong in a grievance process and although employers do not generally approach appeals as re-hearings, an appeal manager cannot conduct a review of whether the grievance has been handled reasonably at first instance without looking at the notes of interviews. What if, for example, Mr Merton had simply failed to ask witnesses the relevant questions and put

something in the outcome letter that was unsupported by the evidence? Ms Park could not properly have carried out her role without seeing the witness interviews.

106. As it was, it is evident that it was Mr Laughton-Brown who did 'the leg work' on the Claimant's appeal, reviewing the documentary evidence and drafting the outcome letter. However, Ms Park was adamant that Mr Laughton-Brown had only drafted the outcome letter after a discussion with her and she 'disagreed completely' with the proposition that Mr Laughton-Brown was a co-decision-maker, she said it was all her decision. Mr Laughton-Brown was equally adamant in agreeing with Ms Park on that. We accept their evidence as to who was responsible for the decision on the grievance appeal, but it does not follow that Mr Laughton-Brown did not make a material contribution to the decision reached – he plainly did.

107. Ms Park partly upheld the appeal on the basis that the FY20 performance review should not have been marked as complete and that there should be a discussion before the rating is marked as complete. She recommended that this should now happen. She also recommended that HR provide clearer guidance to managers on the process of conducting performance reviews for employees on maternity leave. She did not find evidence to support the other concerns raised and considered that other concerns could be discussed on return from maternity leave.

108. Regarding, the issue of whether the Claimant received feedback on concerns or issues prior to the end of year review, the letter stated, *"The original grievance has already addressed this issue and concluded that there were regular discussions on your work output, including regular 1:1s and daily meetings during your work on the statutory accounts and I have no basis to contradict this conclusion"*. The Claimant points out that this was drafted by Mr Laughton-Brown despite him having previously noted that this part of the grievance was 'difficult to prove either way', but not having done any further investigation since. We infer that this is because after further consideration Mr Laughton-Brown concluded (as he reasonably could given not only Mr Foote's and Ms Guo's evidence, but also the Claimant's own comments about what happened with her work and the discussions she had with Mr Foote and Ms Guo) that there <u>was</u> sufficient evidence on the point so that further investigation was unnecessary.

109. On 6 January, Ms Park followed up (336) to check that the recommendations she had made were being implemented, and Mr Laughton-Brown confirmed that they had been, with the performance review being 're-opened' and sent back to Ms Vasyk for her to hold a conversation with the Claimant before finalising it (347).

<u>January 2021 return to work and redundancy</u>

110. On 6 January 2021 Ms Vasyk emailed the Claimant with a proposal to discuss a definitive list of activities on return to work (349). The Claimant had by this

time agreed with Ms Johnson that she would return to work part-time. Ms Vasyk highlighted that 2020 was a difficult year for BlackBerry and that the business had changed, with no indication of role content. The Claimant took this as an indication that she was not going to be brought back into the team.

111. Between 11 and 13 January 2021, there was discussion between the Claimant and Ms Vasyk regarding, among other things, a meeting to discuss the performance review in the light of the grievance appeal outcome and what the Claimant's duties should be on return.

112. On 11 January 2021 Ms Johnson, Mr Wagler, Mr Foote and Ms Vasyk had a conference call to discuss the redundancy process (338), which Ms Johnson confirmed in an email following the meeting. The process was to begin with the Claimant's return to work meeting and performance review discussion on 15 January, with the notification of potential redundancies being sent to the team on 18 January, scoring then to be undertaken by Mr Wagler and Ms Vasyk, and then notification to the individual who continued 'at risk' on 22 January, followed by individual consultation meetings and termination on 10 February if no redeployment had been identified. Ms Johnson noted that Mr Wagler would provide in writing a business rationale for the redundancy situation.

113. Mr Wagler then by email (339) set out the business case for redundancies. This was the first time this was set out in writing. Ms Johnson said it was based on his conversations with Mr Chai. Mr Wagler's email identified the business justification for staff reductions as being that Project Mini had closed many redundant entities thus reducing the amount of work required for day to day accounting as well as statutory audits, and the Respondent's overall directive for cost savings at all times.

114. Mr Foote then proposed redundancy selection criteria on 12 January 2021. Ms Johnson removed 'performance rating' as a criterion because of the concerns that the Claimant had raised about her most recent performance rating. Mr Foote proposed criteria as follows:

    a. Experience in independently preparing statutory accounts and facilitation audit process and filing;
    b. Experience in preparing complex accounting journal entries;
    c. Experience in independently undertaking bespoke project work.

115. At this time, Mr Foote had not had responsibility for the finance team for over a year, but he was involved in the process because he still had oversight of the team's work, and because of his long involvement in managing the Claimant, which Ms Vasyk had not had as a result of the Claimant's second maternity leave.

116. On 15 January 2021, the Claimant returned to work. The team was remote working because of Covid-19. She had a meeting with Ms Vasyk at 2pm to discuss her performance review which was also attended by Mr Laughton-Brown, which the Claimant was not expecting. Ms Johnson had arranged for

him to attend because he had done the grievance appeal and she explained to Ms Vasyk in an electronic chat: *"He will also be able to close [the Claimant] down if she tries to bring up things that are not relevant"* and that they have 'chatted and are on the same page about the meeting' (357-358). Ms Johnson then messaged Ms Vasyk at 3.08pm to ask how the meeting went, to which Ms Vasyk replied *"still here"* and then *"Its awful!"* The Claimant also on this day started rewriting her part of the performance review but did not have time to finish it.

117. The Claimant understood from this meeting that Ms Vasyk had criticised her conduct towards Ms Rizk and Mr Burton and after the meeting on 18 January she emailed them to apologise (375). Ms Rizk was puzzled by the email and forwarded it to Ms Vasyk asking if she knew what it was about. Ms Vasyk did not as she could not remember mentioning anything to the Claimant about Ms Rizk and Mr Burton.

118. The Claimant, Ms Rizk and Mr Burton were put at risk of redundancy on 18 January 2021. Mr Wagler informed the employees (following the script at 374), and Ms Johnson confirmed the position by email (379), giving the Claimant and others 48 hours to provide comments on the redundancy selection criteria. The Claimant has complained about this timescale in these proceedings on the basis that it was insufficient time for a mother of two young children to take legal advice, but at the time she made no complaint. 48 hours is the standard timescale used at the Respondent.

119. The Claimant immediately considered that the redundancy was aimed at her and this was why there had been no KIT days or preparation for her return. The Claimant told her colleagues this and asked Ms Johnson if she could take voluntary redundancy (381) to relieve them of the stress of the process, but Ms Johnson replied that the Respondent does not operate a voluntary redundancy programme so could not accommodate her request.

<u>The redundancy pool</u>

120. The three Senior Accountants (the Claimant, Mr Burton and Ms Rizk) were included in the pool, but Ms Guo (Finance Manager) was not included in the pool. The Respondent's witnesses did not give express consideration to whether or not to include Ms Guo in the pool, but in these proceedings justify their decision not to on the basis that Ms Guo was doing a more senior job that required a different skillset. We have already accepted the Respondent's evidence about the difference in jobs for reasons set out above and we deal with the question of whether it was lawful for the Respondent to exclude Ms Guo from the pool as part of our conclusions.

121. In her email of 21 January 2021 (390) Ms Vasyk asked whether the Grade column in the scoring matrix for the redundancies should be left blank. The Claimant's counsel has sought to place some weight on this in her reply submissions (paragraph 11), but this is a point that was not explored in evidence and appears to be a misunderstanding on her part as the scoring

matrix does not show 'the role they were applying for in the pool' but on the face of it ought to have contained the current grades for each employee in the pool. The empty column is not of any significance in our judgment.

The redundancy scoring

122. Each of the employees in the pool was scored by Ms Vasyk against the criteria that Mr Foote had suggested. For each of the criteria more detailed descriptors had been developed (392) and a five-step scale of numerical scores devised as follows: 0 for "does not demonstrate skills of role"; 2 for "sometimes demonstrates skills of role"; 4 for "consistently demonstrates skills of role"; 6 for "often exceeds skills of role"; and 9 for "consistently exceeds skills of role".

123. Ms Vasyk sent Mr Wagler and Ms Johnson the redundancy scores and comments/rationale for the scores on 21 January 2021 (391-393). The Claimant's colleagues scored totals of 12 and 18 respectively, while the Claimant scored 6.

124. During her employment and appeal the Claimant was provided only with the scores of other employees and not the accompanying comments/rationale. She did, however, have the opportunity at the individual 'at risk' meeting on 22 January 2021 to discuss her scoring with Mr Wagler in general terms, as the management script instructed Mr Wagler to *"review the scoring"* with the Claimant and *"provide the rationale for the scores"*, *"to provide evidence/facts/details around his/her scoring"* and *"listen to feedback and input from the employee and give it your full consideration"* (385, 387, 404).

125. The Claimant was scored 0 for "independently undertaking bespoke project work". During the consultation that followed, and in these proceedings, the Claimant has argued that this score was unfair because of the length of time she was out of the business on maternity leave, that she had been absent from the business when project work opportunities came up and that there had been a failure to take into account projects she did before her maternity leaves. In particular, the Claimant argues that Mr Burton was unfairly awarded points for acting as key person on the transition to use of NetSuite (393) but the Claimant was not, despite she having recorded in her 2017 performance review that she had 'assisted' with the transition to NetSuite (71). However, we observe that the criterion required 'independent' undertaking of project work and the Claimant's own evidence was that she only 'assisted' whereas Mr Burton was the 'key person'. The Claimant argues that the ADP transition project on which Ms Rizk worked took place while the Claimant was on maternity leave. The Claimant bases this on Mr Foote's email of 26 January 2018 but that does not actually set out the timescale for that project, and both Ms Vasyk and Mr Foote were clear (and we accept) that the project actually happened between the Claimant's two maternity leaves and she could have been involved if she wanted to be. The Claimant also argues that Mr Burton's performance review shows that he put in time outside working hours on project work which the Claimant as a woman would not be able to do, but the performance review in question (634) is actually Ms

Rizk's performance assessment. We observe that while Ms Rizk is recorded as working to 2am on a project in her performance review, that did not feature specifically in Ms Vasyk's redundancy scoring and there is no evidence that any weight was put on employee's willingness to work outside their contracted hours (whatever they were) in the redundancy scoring.

126. The Claimant also felt she was not given an opportunity to show her skills in other ways, for example by participation in the mentorship program with Mr Green, or the certificates she had gained in Project Management. However, these did not fit within the agreed criteria.

127. The Claimant scored 2 for "preparing statutory accounts and facilitating audit process and filing independently". The Claimant complains this was unfair/discriminatory because she had been out of the business for long periods on maternity leave, she had not done statutory accounting for the Respondent prior to returning from her first maternity leave and on her return she had been placed in a support role and only had seven months to show she could do that work, while working part-time. She also felt that she was being largely judged based on the negative feedback she had already received from Mr Foote in her performance review which she felt had been tainted by his attitude to her taking maternity leave. The Claimant's counsel submitted that a fairer approach to assessment would have been for the Respondent to set an exam for those in the pool, but the Respondent's witnesses to whom this suggestion was put all considered it was impracticable and not a good way of assessing the necessary skills.

128. The Respondent maintains the score was appropriate as the score of 2 equated on the scoring matrix to *"sometimes demonstrates skills of role"* and was justified in the light of the matters identified in her performance review, in particular the errors in her preparation of statutory accounts and the level of guidance she had required from Ms Guo and Mr Foote, which contrasted with the stronger performance of Mr Burton and Ms Rizk, as reflected in their performance reviews. The Respondent further maintains that the Claimant had adequate time in the business to fairly demonstrate the skills in question, and that it was through the Claimant's own choice that she had not done statutory accounting prior to her first maternity leave. Mr Foote's evidence was that the Claimant had only been involved with four sets of statutory accounts (only two of which she completed independently) because of the slow pace of her work and difficulties she encountered with it, rather than because of the short time that she was back at work between maternity leaves, or the fact that she was working part-time. We accept the Respondent's evidence as to the facts here as it is in line with the evidence we have heard about the Claimant's performance.

129. On "preparing complex accounting journal entries" the Claimant scored 4, which she accepted *"reflected that this type of work had been much of my work throughout my time at Blackberry and I was competent at it"*. The Claimant does not complain about this score.

Redundancy consultation meetings

130. As a result of the scoring, the Claimant was identified as the sole employee at risk of redundancy. Meetings took place on 22 January 2021 at which Ms Rizk and Mr Burton were informed that they were no longer 'at risk' and the Claimant was informed that she was. Mr Wagler and Ms Johnson were at that meeting. Mr Wagler had discussed the scoring with Ms Vasyk in advance (385) and the script for the meeting (387) indicates that Mr Wagler provided the Claimant with her scores and the rationale for it and Ms Johnson outlined the process going forward. Ms Johnson followed up by email on the same date (22 January 2021) inviting the Claimant to a first individual consultation meeting on 27 January (395). The Claimant was informed of her right to be accompanied.

131. On 26 January 2021, Ms Vasyk emailed someone in IT advising him that the Claimant would be leaving the business and asking him to remove her NetSuite access (399). The Claimant argues this shows the decision to dismiss had already been made, but Ms Vasyk denied this explaining that she did this because the Claimant was only the employee at risk of redundancy and as there was no requirement for that role in the finance department going forward and at that point no expectation that redeployment would be found, the Claimant's NetSuite access needed to be removed. We accept this explanation. It is in our experience relatively common for employers to take such security measures where employees are being given notice either of dismissal or risk of dismissal. It does not signify predetermination.

132. The first redundancy consultation meeting took place on 27 January 2021 and was attended by Ms Johnson and the Claimant (395, 404). The focus of the meeting was to explore redeployment opportunities and the Claimant was provided with details of current vacancies, but none were suitable as they were not related to accounting. The Claimant did not raise any particular queries about the business justification or scoring process.

133. In February 2021 the Claimant developed severe eczema which she attributes to stress.

134. The second redundancy consultation meeting took place on 3 February 2021. The Claimant was offered a settlement agreement in return for an enhanced redundancy payment, but did not accept that (410). The Claimant again confirmed that no suitable vacancies were available. A final consultation meeting was scheduled for 9 February 2021.

135. On 8 February 2021 the Claimant emailed Ms Johnson to set out why she felt the way she had been evaluated and selected for redundancy was unfair (423). In this email, she argued that statutory accounting work had only reduced because Ms Guo had been appointed specifically to deal with this, and also asked what opportunities she had missed while away to take part in bespoke project work, suggesting she had been disadvantaged by her absence from the business.

136. On 9 February, the Claimant sent yet further emails to Ms Johnson about other points on which she felt she had been unfairly criticised, including going back over the performance review and the issue with the furniture on the Blackberry Germany accounts (429, 435, 443). Ms Johnson considered that as the final redundancy meeting was scheduled for 9 February, it was too late in the process for her to deal with these emails and so she forwarded them to Mr Laughton-Brown. She did not postpone the final consultation meeting, or respond directly to the Claimant.

137. In an email timed at 14.51 on 9 February 2021 (442), Mr Laughton-Brown emailed the Claimant acknowledging her emails, reminding her that the grievance and appeal processes were complete and that she had confirmed during the appeal process that she 'felt listened to'. He expressed regret that despite the time and effort that had been put into listening to her complaints she was still unhappy, but made clear that the process was at an end. It was suggested to Mr Laughton-Brown that it was unreasonable for him to take this stance because the redundancy process was still ongoing and the same issues had arisen in that and it was wrong for him to 'shut her down'. We agree with the Respondent that it could reasonably have appeared to Mr Laughton-Brown from this correspondence that the Claimant was seeking to re-open the grievance and appeal, and indeed we observe that the Claimant effectively confirmed that in her reply to Mr Laughton-Brown's email (442) when she stated that she had wanted to bring the grievance about the review up again because *"The same outcome … now affects my redundancy evaluation"* (442). In so saying, however, she could reasonably be understood to be confirming that she was not raising anything new, just renewing her grievance of the previous year because the same issues had now infected the decision to select her for redundancy. What she did not do at this point, but would have needed to do in our judgment if she wanted her specific points about the redundancy selection criteria addressed before dismissal, would have been to clarify that she <u>was</u> raising new points about the redundancy process that needed a response, rather than confirming that she was just reiterating points she had raised previously (albeit that they had acquired a new relevance).

138. The final redundancy consultation meeting took place on 9 February 2021. At this meeting, Ms Johnson confirmed that as no alternative employment had been identified, the Claimant would be dismissed by reason of redundancy. She explained the payments that would be made to her and her right of appeal. The Claimant was duly sent a letter confirming the termination of her employment by reason of redundancy with effect from 10 February 2021 (449). She was offered a right of appeal.

<u>Dismissal appeal</u>

139. By email of 9 February 2021, the Claimant appealed the decision to dismiss (456), asking that the emails she had sent previously be taken into account (453).

140. At the beginning of March 2021, Ms Johnson advised Ms Vasyk to now complete the Claimant's FY20 performance review. Although the Claimant had not had time because of the redundancy process to input additional material, Ms Johnson recommended that Ms Vasyk update it to reflect that the Claimant had completed ACCA qualification and to add some of the additional information which was raised in the subsequent discussions but not included in the original form, and the review could then be 'submitted and closed out' in the system (469).

141. Mr Thorne (Senior Manager of EMEA Business Development Team) was appointed to hear the Claimant's appeal against redundancy and a meeting with the Claimant took place on 19 March 2021. Mr Laughton-Brown was also present. The Claimant raised the points she had made previously. Minutes were taken and all present provided comments on them. The Claimant said that she had the scores but not the reasoning behind the scores.

142. Mr Laughton-Brown provided guidance to Mr Thorne on the appeal by email both before and after the meeting (477, 483, 507). Mr Thorne did not reply by email to this guidance but discussed it orally with Mr Laughton-Brown by telephone or in person. Likewise, he maintained that Mr Laughton-Brown had shared with him all the relevant documentation (including all the emails mentioned at paragraph 9 of Mr Thorne's witness statement) and that the decision was his despite the lack of email trails showing him actively contributing to or instructing Mr Laughton-Brown in relation to the appeal. We accept the evidence of Mr Laughton-Brown and Mr Thorne in relation to the decision-making process, and thus find that Mr Thorne fully participated in the process, saw all the relevant documents and took responsibility for the final decision. However, we observe that the advice provided by Mr Laughton-Brown was significant and constituted a material contribution to the decision.

143. Mr Thorne met with Ms Vasyk to discuss the Claimant's appeal on 29 March 2021 (the notes of the meeting are wrongly dated: 502). Ms Vasyk expressed surprise that someone who volunteered for redundancy was now appealing the decision and queried whether the Claimant was expecting there to be a monetary pay out. Ms Vasyk said that she did not know why the Claimant thought the outcome was predetermined. Ms Vasyk explained that the redundancy scoring had taken into account the whole period of each employee's employment, so the Claimant with longer service than Ms Rizk (who started in 2018) had in fact been in the business for longer. She confirmed that the Claimant had been in the office at the time that the bespoke project opportunities arose as they had happened between the Claimant's maternity leaves (503). Ms Vasyk did not know about the Claimant's Project Management certificate, but she said that would not have changed her mind. Regarding statutory accounts, Ms Vasyk repeated the material that had been rehearsed as part of the performance review process. She was clear that the Claimant could have done more between maternity leaves if she had wanted to, but that the Claimant's work in the seven months between maternity leaves had been of *"poor quality … compared to the same*

time frame of [Ms Rizk and Mr Burton]. Maybe she wasn't interested in doing more" (505).

144. The Claimant has sought to rely on Mr Thorne's suggestion (505) that if he personally had performance concerns about an employee, he would have a 1-2-1 and then follow up by email, and Mr Laughton-Brown's response that he would look at the documentation from the Claimant's grievance and appeal in 2020 as it was *"look[ed] at intensively then"* (we read those words as including the typographical error we indicate). We observe at this juncture that the Respondent's reasonable conclusion as a result of the 2020 grievance and appeal was that the Claimant had been made aware at the time of the perceived shortcomings in her work (and, to an extent, accepted them, but did not consider they warranted a 'needs improvement' rating).

145. The Claimant has also criticised Mr Thorne for not following up on Ms Vasyk's suggestion at 504 that if he needed more evidence of whether the Claimant was aware of opportunities for bespoke project work he could *"ask the team"*. However, in context, it was in our judgment reasonable for the Respondent not to follow up on this thread as Ms Vasyk had already given him the evidence that the Claimant was present in the office when the opportunities arose and he did not therefore necessarily need to investigate that further.

146. By email of 14 April 2021 (510), Mr Thorne informed the Claimant that her appeal had not been upheld. The letter gave reasons for his conclusion on each substantial point. In particular, Mr Thorne concluded that 48 hours had been sufficient for consultation on the proposed redundancy criteria, that the criteria were reasonable and had been reasonably applied, that the Claimant's time out of the office on maternity leave had been a relatively small proportion of her overall length of employment with the Respondent and that it was reasonable for the Claimant's Project Management certificate and professional services work not to have been taken into account in the scoring because these were not relevant to the requirements of the role going forward.

Subsequent events

147. There was a period of ACAS early conciliation between 10 March 2021 and 21 April 2021.

148. These proceedings were commenced on 1 June 2021.

149. The Respondent has not recruited anyone to the finance department since the Claimant left.

Conclusions

Detriments/discrimination because of maternity leave/pregnancy

The law

150. Section 18 of the Equality Act 2010, read together with section 39, makes it unlawful to discriminate against a woman by dismissing her or subjecting her to any other detriment in certain circumstances. By s 18(2), a person discriminates against a woman "if in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy". By s 18(4), a person discriminates against a woman if he treats her unfavourably "because she is exercising or seeking to exercise or has exercised or sought to exercise the right to ordinary or additional maternity leave because of her pregnancy". The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends, if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy. Section 13 (direct discrimination), so far as relating to sex discrimination, does not apply to treatment of a woman in so far as it falls within s 18.

151. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

152. So far as the reasons for alleged detrimental treatment under s 18 are concerned, the Tribunal must determine "what, consciously or unconsciously, was the reason" for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (cf *Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (cf *King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

153. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at [33] per Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only

an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual's actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated (see per Underhill LJ at [36]). However, in that case the Court of Appeal also observed, that where a decision is taken jointly by more than one decision-maker, a discriminatory motivation on the part of one decision-maker will taint the whole decision: ibid at [32].

154. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

155. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at [32]), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 per Mummery J at 874C-H and 875C-H.

156. Finally section 47C of the Employment Rights Act provides that an employee may not be subjected to a detriment where the principal reason for the detriment is a prescribed reason. Regulation 19 of the Maternity and Parental Leave Regulations 1999 (the MPLR) contains the reasons so prescribed which must relate to, among others, pregnancy, childbirth or maternity leave (whether ordinary or additional). The same considerations apply as for the discrimination claims in determining the reasons for the treatment

Conclusions

157. We have reached the following conclusions in relation to the alleged detriments relied on by the Claimant for these claims under their various statutory provisions. The detriments are those identified at paragraph (11) of the List of Issues at the start of this judgment, but in the list of issues agreed by the parties, and used by them in Closing Submissions, the detriments were set out at paragraph 14. We therefore retain the parties' numbering for the

detriments below. We add that in some respects the detriments below overlap both with each other and with the Claimant's other claims and the parties should therefore read together our reasons in relation to all the claims.

14.1. The redundancy process (18 January 2021 — 9 February 2021) conducted by Ms Johnson and Mr Wagler

158. We accept that being selected for, and ultimately dismissed, by reason of redundancy constituted a detriment to the Claimant. However, for the reasons set out below in the section where we deal with the Claimant's unfair dismissal claim, we consider that the Claimant's pregnancy and/or maternity leave had nothing to do with her selection for redundancy or her dismissal. Not only were those protected characteristics not the sole or main reason for the dismissal, in our judgment they had no material influence on the process or dismissal for the reasons we have set out below.

14.2. Loss of promotion opportunities from around January 2018.

159. From the Claimant's closing submissions, it appears that this alleged detriment relates to the alleged potential promotion to the Finance Business Partner (FBP) role discussed with Mr Foote in 2017, and the revenue recognition opportunity discussed around the same time, together with the failure to promote the Claimant to the team leader role to which Ms Vasyk was promoted in September 2019, or to offer the Claimant the Finance Manager role to which Ms Guo was promoted in May 2019. As to the first two matters (FBP role and revenue recognition opportunity), these were not as we found them to be opportunities for promotion and the Claimant has been denied nothing. The Claimant's ambitions to pursue a Finance Business Partner role were advanced by Mr Foote by way of him supporting her to be mentored by Mr Green. The Claimant did not argue in her claim form, witness statement, or through cross-examination of witnesses at the hearing that she should have been promoted to Ms Guo's role or Ms Vasyk's role. This suggestion is made for the first time in closing submissions and is without any factual foundation as there is no evidence that anyone other than those individuals was considered for appointment to those roles. In the circumstances, we do not accept that the Claimant could reasonably have regarded any of these matters as detriments, and we further find that the fact that the Claimant had taken maternity leave had nothing to do with any of her treatment by the Respondent regarding these matters. This is because, as explained in the course of our findings of fact above, and further in our other conclusions below, we reject the Claimant's contention that Mr Foote reacted negatively to her first pregnancy or her taking maternity leave.

14.3. Poor performance review (April to 1 May 2020) conducted by Mr Foote and line manager, Ms Vasyk

160. We accept that the Claimant could reasonably regard the "needs development/improvement" rating that she received in the April/May 2020 performance review as a detriment given that in all previous performance reviews she had been graded as "meeting expectations". In our judgment,

however, the grading of the Claimant as "needs development/improvement" in that performance review was justified and explained by the specific concerns identified in it. The basis for a majority of those concerns were factually confirmed by the Claimant in her own subsequent commentary on the performance review (i.e. in her subsequent emails complaining about it), as in those emails she broadly accepted that mistakes had been made, but sought to justify them or to contend that she had made no more mistakes than other people. However, we have found as a fact that both Mr Foote and Ms Guo who were working directly with the Claimant at that time felt the Claimant's standard of work was below what would be expected and that she required more support than others. Those views were reasonable in the light of the evidence before them and before us. Ms Vasyk's views were based on Mr Foote's. We find that the fact that the Claimant's pregnancy and maternity leave had nothing whatsoever to do with the grading, which was based on her performance while at work. The lack of connection between the grading and her having taken maternity leave is reinforced by the fact that Mr Foote graded her as "meeting expectations" in the performance review that took place while she was on her first maternity leave. We add that the fact Mr Burton and Ms Rizk were graded as "meeting expectations" despite some concerns being raised in their reviews is neither here nor there. The same thing happened for the Claimant in 2018 when she was on maternity leave: there were concerns about the Claimant's work in prior years, but not sufficient to justify anything below a "meets expectations" grade. However, the Claimant's standard of work between her two maternity leaves was not as good as her work previously. The Claimant has sought to argue that it was wrong to place such emphasis on the statutory accounts work as she was only 'helping out' and it was not really her role, but her role had changed in that respect on her return from her first maternity leave, and Mr Foote's email to her on her return made clear that statutory accounts was now very much part of her role. The Claimant had also had an altercation with Ms Guo, and irritated Mr Foote, by her approach to the furniture issue with the Blackberry Germany accounts and we found as a fact that the Claimant ought not to have pursued that issue to the extent that she did (whatever the merits of her argument). Again, it was reasonable for this to be counted against her in the performance review. None of the reasons why the Claimant was graded as "needs development/improvement" had anything to do with her pregnancy or maternity leave.

<u>14.4. Ignoring or dismissing the Claimant's concerns raised in her grievance made on 7 May 2020 in the meeting of 27 May 2020 and shouting at her in relation to the same</u>

161. In our judgment, the Respondent's response to the Claimant's informal grievance of 7 May cannot properly be characterised as 'ignoring' her concerns. On the contrary, the Respondent prepared a detailed response to the concerns that the Claimant had raised in her email in the script for her meeting on 27 May 2020 and there was a discussion at the meeting, which was (as the Claimant requested) attended by senior HR and managers (Ms Adam, Mr Wagler and Ms Johnson) as well Ms Vasyk and Mr Foote. The Claimant then pursued the matter further by email, beginning with her email

of 1 June. The Claimant got responses to all the key points of her complaint. The Claimant was not happy with the responses, which did in substance amount to 'dismissing' her complaints, but she was given detailed reasons for that. In the premises, we are only just persuaded that the handling of the Claimant's concerns by the Respondent can reasonably be regarded as a detriment. The Respondent actually put collectively a lot of time and effort into dealing with her concerns about her performance review. However, in any event, we find no evidence that the handling of the Claimant's complaints about the performance review process had anything to do with her taking maternity leave. The Respondent's response was to explain and further justify the grading decision by reference to the Claimant's performance, which had nothing to do with her pregnancy or maternity leave.

162. The only aspect of her complaint that did have something to do with her taking maternity leave was her complaint about the Respondent's process for employees on maternity leave of 'finalising' reviews before sending them to employees. This was, as we have found, because that is the way that the Respondent's computer system operates if the actual review is to be made visible to an employee. The same thing happens for employees not on maternity leave, in that in order for them to have a copy of the review available for discussion at the meeting with their manager, it needed to have been 'submitted' on the system with the result that it would appear to be marked as 'complete'. However, an employee in the office would have the discussion with the manager either at or shortly after the time that the review was 'submitted' so that the employee in the office would not have an apparently completed review 'hanging over' them for months before they had an opportunity to discuss it with their manager. There was thus a difference in treatment between employees on maternity leave and employees not on maternity leave in relation to performance reviews and the reason for that difference in treatment was the maternity leave. Whether or not that difference in treatment could reasonably be regarded as a detriment, or amounted to unfavourable treatment, though, would depend on the circumstances of the individual. Some employees would consider it detrimental if their line manager wrote their evaluation and did not share it with the employee during maternity leave; others would find it detrimental to have to wait for the performance discussion. In the Claimant's case, she complained about her review and as a result she had the discussion with her line manager on 27 May 2020 (albeit that, at her request, the meeting included four other individuals). In the Claimant's case, therefore, we find that she could not reasonably regard the WorkDay process as a detriment, and nor was there unfavourable treatment because as a matter of fact her review and performance discussion at her request took place within the sort of timescale that would have been normal for an employee not on maternity leave. The Claimant's real complaint was that she did not like the grade she had received, but that was not linked in any way to her having taken maternity leave, for the reasons we have already set out.

163. Another difference that would often arise between employees on maternity leave and employees not on maternity leave is that an employee on maternity leave would not in most cases have completed the employee evaluation

before the manager completed the manager's evaluation, but in the Claimant's case she had chosen to complete the employee's evaluation in January 2020 while on maternity leave. She did so somewhat cursorily because she thought it would be "just a formality", but she should have been aware of the process as a result of what happened with her review when she was on maternity leave in 2018 and if she was in any doubt she could have asked. As it is, the Claimant did in fact have, and took, the opportunity to complete the employee evaluation before Ms Vasyk completed the manager evaluation, so she did not suffer the detriment that might sometimes be suffered by employees on maternity leave under the Respondent's process of not having that opportunity.

164. Although we have not ultimately concluded that the Respondent acted unlawfully towards the Claimant in relation to the process for performance reviews that it adopts for employees on maternity leave, we observe that there is scope for the system to operate in a way that treats women on maternity leave unfavourably. The Respondent essentially recognised that at the grievance appeal stage in the Claimant's case and will no doubt wish to take care in future that its performance review process for employees on maternity leave is set out more clearly and arrangements for the review explained to, and preferably agreed with, each individual employee in advance of her going on maternity leave.

165. We deal with the shouting allegation separately below.

<u>14.5. Ms Vasyk criticising the Claimant via email after the grievance meeting on 27 May 2020</u>

166. This alleged detriment concerns the email exchange at pp 215-226, and particularly the green text that Ms Vasyk inserted on 25 June 2020 by way of commentary on the Claimant's original email of 1 June 2020. It is correct that in this email Ms Vasyk expanded on the content of the appraisal in order to provide more detail and explanation for why the Claimant had been graded as "needs improvement/development". She did this because the Claimant had challenged the content of the appraisal and asked a number of questions about it. Ms Vasyk's email is measured and detailed and, on the basis of the evidence we have heard, we accept that it represented her genuine views of the Claimant's performance and the reasons for the performance grading. We are prepared to accept that this email constituted a detriment because it was (like the appraisal itself) mildly critical of the Claimant and thus she could reasonably regard it as a detriment – but only just. The Claimant had asked for clarity, and Ms Vasyk provided it in a reasonable way. In any event, even if it does amount to a detriment, it plainly had nothing to do with the Claimant being on maternity leave, but only with her performance as Ms Vasyk genuinely perceived it to be.

<u>14.6. Flawed review processes (completed by 1 May 2020); conducted by line manager, Ms Vasyk</u>

167. This alleged detriment concerns the issue of the handling of the performance review process while employees are on maternity leave. For the reasons set out above, we do not find that this constituted unlawful conduct in the Claimant's case.

14.7. The handling of her grievance raised on 3 August 2020 (completed by 6 November 2020) conducted by Mr Merten

168. The Claimant's closing submissions on this issue focus on the draft grievance outcome letter prepared by Mr Merten himself which she did not see at the time. The contents of that document therefore cannot have constituted a detriment to her during her employment. The actual outcome letter of 6 November 2020 does 'grapple' with the point that the Claimant submits in closing submissions was not dealt with, specifically finding (p 300, third paragraph) that Mr Foote had "regular, ongoing dialogue" with the Claimant about the issues of concern with her work, including on a daily basis in relation to the German statutory accounts.

169. The Claimant has sought to make much of the involvement of HR in the various grievance and appeal decisions made in her case. We accept that members of HR (Ms Johnson in relation to the grievance; Mr Laughton-Brown on the other matters) had a significant involvement in the decisions made, and provided managers with considerable support and guidance. The managers remained, however, the responsible decision-makers from the Respondent's perspective and fully adopted as their own the decisions that were made in each case. If the Claimant by raising this argument is suggesting that there was something improper in HR's involvement, or that her grievances/appeals were decided by the wrong people, we therefore reject that argument. However, insofar as the Claimant's argument is merely that for the purposes of the EA 2010 and/or s 47C ERA 1996, the actions of the HR individuals should also be considered so that if a member of HR were improperly influenced by her pregnancy or maternity leave this could amount to an unlawful detriment for the purposes of those statutory provisions, then we agree in principle that they could. This is because in this case we find that the HR personnel played a material part in the decision-making process. The Respondent has objected that if this was the Claimant's case it needed to be pleaded and/or identified in the List of Issues. We do not agree. The claimed detriments, properly pleaded and identified in the List of Issues, are the grievance/appeal decisions themselves (albeit by reference to the named decision-makers). In this particular case, therefore, we consider it is a question of fact for us whether any person who materially contributed to those decisions was unlawfully discriminating in doing so, so that the whole decision becomes a discriminatory one, adhering to the guidance given by the Court of Appeal in *CLFIS*.

170. In this case, we have therefore considered whether either Ms Johnson or Mr Merton were materially influenced by the Claimant's pregnancy or maternity leave in handling her grievance. We conclude that they were not. There is no evidence from which we could reach such a conclusion. The decision reached is wholly explained and justified by the content of the outcome letter.

171. In reaching this decision, we have considered carefully the matters that the Claimant relies on at paragraph 19 of her counsel's closing submissions as providing the basis of an inference of discrimination against Ms Johnson. We do not find that any of these matters provide a basis for an inference of discrimination. First, even if we had ultimately concluded that the redundancy selection criteria had a discriminatory impact, it would not follow that Ms Johnson's failure to identify this at the time indicated she was discriminating against the Claimant. Indirect discrimination is not straightforward and can reasonably be missed at the time. In this particular case, however, there was no indirect discrimination and so there is no possible basis for an inference. Likewise, the redundancy selection criteria did not disadvantage the Claimant in any discriminatory way. As a matter of fact, it was Ms Johnson who 'stood up for' the Claimant by insisting that the performance appraisal grade not be used as the basis for selection (contrary to the position initially taken by Mr Chai and Mr Wagler). The Claimant did not in her emails of 8 and 9 February 2021 about the redundancy selection criteria allege that the impact on her was discriminatory. She asserted it was unfair. Ms Johnson, however, reasonably in our judgment took the view that these points had been raised too late to deal with them before the final meeting on 9 February 2021, especially as the Claimant had not objected to the selection criteria when she was given the opportunity to do so, and given that on their face they appeared to be repetition of the issues that had been dealt with at length as part of the Claimant's grievance the previous year. As to Ms Johnson's actions on 27/28 May 2020 in explaining to the Claimant what discrimination was and why Ms Johnson considered the Claimant was mis-using the term in that context, that is what is to be expected of an HR professional: they <u>should</u> provide employees with guidance on legal principles where relevant. We found as a fact that Ms Johnson had forgotten the Claimant's January 2018 complaints by May 2020 and that she was not being 'dishonest' in what she said to the Claimant about them at that point. The Claimant was not provided with redundancy scoring comments, but on the evidence we have heard this was standard practice at the Respondent (and is not unusual amongst employers) as the script for Mr Wagler instructed him to discuss the basis for the scoring in general terms with the employee and did not mention actually providing the written comments. None of this provides any basis for an inference of discrimination against Ms Johnson.

<u>14.8. The handling of her grievance appeal (completed by 4 January 2021) conducted by Ms Park;</u>

172. The observations we have made above about the involvement of HR in the decision-making process in respect of the grievance appeal apply equally here. We therefore consider whether either Mr Laughton-Brown or Ms Park were influenced by the Claimant's pregnancy or maternity leave in their approach to her grievance.

173. The Claimant's grievance appeal was in significant part upheld, so we do not accept that the outcome could reasonably be regarded as a detriment. So far as the process is concerned, the Claimant complains about Mr Laughton-

Brown's failure to investigate matters, but we found as a fact that there was no unreasonable failure to investigate. The Claimant is incorrect that the performance review was 'based on' the incident with Ms Guo, as although that had been a significant element of the reason for the grading, it was not the whole picture. It was not good practice for Ms Park not to be provided with the grievance interview notes, but as the Claimant's case is that Mr Laughton-Brown was a joint decision-maker, and he had read those notes, there is no real detriment to her. There could be no basis for suggesting that there would have been a different outcome if Ms Park had read the notes as the conclusion reached in our judgement was reasonable and the obvious conclusion on the evidence.

174. The Claimant has not suggested that Ms Park was influenced by any protected characteristic and we agree there would be no basis for any such argument. As to Mr Laughton-Brown, we have considered carefully the matters set out at paragraph 21 of the Claimant's closing submissions that she relies on as facts supporting an inference of discrimination against him. We do not consider that they provide the basis for any such inference. As to his email of 9 February 2021, this was reasonable for the reasons we identified in our findings of facts above, i.e. the Claimant did appear to be going over 'old ground' and acknowledged as much in her own reply to him. The fact that he was a member of HR and thus 'associated' with Ms Johnson and Mr Chai is immaterial as there is no basis for an inference of discrimination against Ms Johnson or Mr Chai. (As regards Mr Chai, we have only the evidence of the email at 303 and on the face of that his reasons for acting were solely that the Respondent had one too many Senior Accountants and the Claimant should be dismissed because she had the lowest performance review grade. Her maternity/pregnancy had nothing to do with either of those matters.) Mr Laughton-Brown's failure to investigate whether there was any documentary evidence supporting Mr Foote's and Ms Vasyk's assertion that issues identified in the performance review had been raised with the Claimant was reasonable for the reasons we have set out in our findings of fact. The failure to provide the Claimant with the redundancy scoring comments in writing provides no basis for an inference of discrimination for the same reasons as we have set out above in relation to Ms Johnson. Finally, we found as a fact that Mr Laughton-Brown did share all the relevant documents with Mr Thorne.

14.9. Hostile inter-personal treatment, in particular:

14.9.1. Mr Foote raising his voice to the Claimant and shouting "enough is enough" on 13 September 2019.

175. We found as a fact that Mr Foote did not shout and that the reason why he used the words "enough is enough" to the Claimant was because he was irritated that she had continued raising concerns about the furniture issue in relation to the Blackberry Germany statutory accounts even after he had made a management decision about how they would handle the matter. We accept this constituted a detriment, but the Claimant's pregnancy/maternity leave had nothing to do with it.

14.9.2. Mr Foote raising his voice to the Claimant and telling her she was lying and what she said was a lie on 27 May 2020.

176. We found as a fact that Mr Foote did not raise his voice/shout at the Claimant in the video call meeting on 27 May 2020. Nor did he accuse her of lying, although he did firmly deny having shouted at her previously as well. This claim fails on the facts.

14.9.3. Ms Johnson telling the Claimant not to use the word "discrimination" because what had happened was not discrimination on 27 May 2020.

177. We have already found that it was reasonable for Ms Johnson to explain to the Claimant what discrimination is and why it was not the right word in the context in which the Claimant used it. We further have found that there is no basis in any event for an inference of discrimination against Ms Johnson.

14.9.4. The email from Mr Laughton-Brown regarding the grievance appeal on 9 February 2021.

178. This did not constitute a detriment, but was a reasonable response to the Claimant's emails, as her own email in response made clear at the time. There is in any event no basis for an inference of discrimination against Mr Laughton-Brown.

14.10. Ms Vasyk failing to keep in touch with the Claimant during her maternity leave

179. This claim is withdrawn.

14.11. Ms Vasyk failing to inform the Claimant of her work details on return

180. We found as a fact that Ms Vasyk did delay in informing the Claimant of her work details prior to her return to work in January 2020. However, she did so because she was aware of the ongoing grievance and pending redundancy. Although it could reasonably be regarded as a detriment, the delay was not related to the fact that the Claimant was on maternity leave. In reaching this conclusion, we have considered the Claimant's submissions at paragraph 20 as to the reasons why we should draw an inference of discrimination against Ms Vasyk. We do not find that there is any basis for an inference of discrimination against Ms Vasyk. First, it is not correct that the FY20 performance review raised issues that had not been discussed with the Claimant previously for the reasons we have identified in our findings of fact, i.e. the Claimant herself acknowledged that many issues about statutory accounts had been raised with her. Even if the matters had not been discussed previously, that would not be a basis for an inference of discrimination, provided that (as is the case here) the concerns raised were genuine and justified. The issue that arose on 15 January 2021 about the Claimant believing that Ms Vasyk had criticised her interactions with Ms Rizk and Mr Burton was an inconsequential misunderstanding. We have found

that Ms Vasyk's redundancy scoring was fair and non-discriminatory (see below). Removing the Claimant from NetSuite at the point she was to be informed that she was at risk of redundancy was a standard security measure.

14.12. Selecting the Claimant to be placed in the redundancy pool

181. We find that the Respondent's choice of pool was a reasonable one. The Claimant was one of three Senior Accountants. The Respondent had identified a reduced need for employees to carry out the work of the kind done by the Senior Accountants (in particular statutory accounts) and the Respondent decided to include in the pool for redundancy all the Senior Accountants. Although it would have been open to the Respondent to choose to widen the pool to include Ms Guo, it was reasonable for the Respondent not to do so because Ms Guo was in a more senior role which required a different skillset, for the reasons set out in our findings of fact. We further find that these were indeed the reasons why the Claimant was included in the pool and Ms Guo was not. It had nothing to do with the Claimant's pregnancy/maternity. For the avoidance of doubt, we accept that including the Claimant in the redundancy pool constituted a detriment.

14.13. Adopting unfair redundancy selection criteria

182. We do not consider that the Respondent adopted 'unfair' redundancy selection criteria. The Respondent deliberately did not proceed on the basis of the criterion originally proposed by Mr Chai of performance appraisal grading, which would automatically have resulted in the Claimant being selected. The Respondent chose three criteria which were, we accept, criteria that the Claimant, during her time at work, had the opportunity of demonstrating. Although she had had substantial periods off for maternity leave, her service was longer than at least Ms Rizk's, so she had had more time in the business in which to demonstrate the requisite skills. The Claimant had as a matter of fact been present when the opportunities to undertake bespoke project work had arisen. She was also in principle better placed than Ms Rizk to demonstrate skills with statutory accounts as she was fully qualified (or further along with her qualification) whereas Ms Rizk was not. It is correct that the Claimant had spent most of her time on professional services work prior to her first maternity leave, but on return from that maternity leave, statutory accounts work was identified by Mr Foote in his email on her return as one of her 'core' duties going forward (and we find the Claimant was wrong to 'downplay' it as 'assisting Ms Guo'). Although she only had seven months of concentrated work on statutory accounts between her two maternity leaves, if she had performed well during that period she would have demonstrated the necessary skills. The criteria were not based on what might be termed 'number games', they were focused on the quality and nature of work done in the three areas in question. So far as the nature of the work was concerned, the criteria about which the Claimant complained were particularly focused on independent working and taking the initiative in the areas in question, qualities that the Claimant had had opportunity to demonstrate during her time in employment, but had not demonstrated as

the evidence from Mr Foote and Ms Guo was that she had generally needed more support than other employees. Although we have heard evidence referring to the numbers of statutory packs that each employee dealt with, the criteria did not award points for numbers of statutory packs completed, but for the quality and nature of the work done on statutory packs. While a 'numbers game' might have disadvantaged a part-time worker who had not been at work so much in recent years, the criteria were not designed like that. They were designed in a way that made them in principle criteria that all three employees in the pool could have satisfied, including the Claimant.

183. We further consider that it was reasonable for the Respondent not to have considered setting a statutory accounting 'exam' for the employees in the pool. We agree that would have been an unrealistic and impractical exercise. There was also no reason why the Respondent should have adopted criteria relevant to professional services work as it had no need for any Senior Accountant to carry out that work going forward. Finally, we find no evidence from which we could infer that the adoption of the redundancy criteria was adversely influenced by the fact that the Claimant had taken maternity leave, given that we have rejected the other claims for the reasons we have given.

14.14. Unfairly applying the redundancy selection criteria to the Claimant

184. We find that the redundancy selection criteria were properly and fairly applied to the Claimant by Ms Vasyk. Ms Vasyk has been able to explain the rationale for each of the scores that she awarded and we find that rationale represents her genuinely held view and was based on reasonable evidence in the specific examples of shortcomings in the Claimant's statutory accounting work that identified in the May 2020 review (and, to a certain extent, in previous reviews as we have noted in our findings of facts). The overall picture of the Claimant's performance has been a consistent one, and Ms Vasyk's scoring on the redundancy reflects that. It was also fair for Ms Vasyk to score the Claimant 0 for "independently undertaking bespoke project work" as she had not taken the opportunities that the other employees had to do that, despite being at work at the time (we having accepted the Respondent's evidence on that point). The criteria did not take account of qualifications of any sort (including the Claimant's ACCA Qualifications, Project Management certificate) and we consider that was a reasonable approach. An employer is entitled to focus on an employee's skills as demonstrated 'on the job'. There is no evidence that it was deliberately decided not to take account of qualifications in order to disadvantage the Claimant, and no evidence from which we could infer that for the reasons set out elsewhere, and we find that the Claimant's maternity leave/pregnancy did not influence the scores in any way.

14.15. Failing to adapt the redundancy scoring criteria and the Claimant's redundancy score to take in to account the Claimant's absence on maternity leave.

185. This claim fails because we have found as a fact that the Claimant was not disadvantaged by the redundancy scoring criteria and so there was no need

to adjust them. The failure to do so had nothing to with the Claimant's pregnancy/maternity.

Indirect sex discrimination

The law

186. By s 19(1) EA 2010 2010 a respondent discriminates against a claimant if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of the claimant's. By s 19(2) a PCP is discriminatory if: (a) the respondent applies, or would apply, it to persons with whom the claimant does not share the characteristic, (b) it puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with person with whom the claimant does not share it, and (c) it puts, or would put, the claimant at that disadvantage. It is a defence (under s 19(2)(d)) for the respondent to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

187. The burden of proof is on the claimant initially under s 136(1) EA 2010 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. In an indirect discrimination case, this means that the claimant must prove the application of the PCP, the particular disadvantage in comparison to others and that the claimant was put at that disadvantage. The burden then passes to the respondent under s 136(3) to show that the treatment was justified.

188. Further guidance on the matters which the claimant has to prove was given by the Supreme Court in *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343. The Supreme Court held that the EA 2010 2010 s 19 did not require a claimant alleging indirect discrimination to prove the reason why a PCP put the affected group at a disadvantage. The causal link that must be established is between the PCP and the disadvantage. The proportion of those with the protected characteristic who can comply with the PCP must be significantly smaller than the proportion of those without the protected characteristic. It does not matter, in this respect, that the PCP does not disadvantage all those who share the protected characteristic.

189. As to the question of justification, a respondent must normally produce cogent evidence of justification: see *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] IRLR 471. What needs to be justified is the rule itself (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704). The Tribunal must focus on the proportionality of having a rule at all, rather than the question of reasonableness of applying the rule to the particular claimant (*The City of Oxford Bus Services Limited t/a Oxford Bus Company v Mr L Harvey* UKEAT/0171/18/JOJ).

190. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 the Supreme Court (see Lord Reed at para 74, with whom the other members of

the Court agreed on this issue: see Lord Sumption, para 20) reviewed the domestic and European case law and reformulated the justification test as follows: (1) whether the objective of the PCP (the alleged legitimate aim) is sufficiently important to justify the limitation of a protected right, (2) whether the PCP is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether the impact of the right's infringement is disproportionate to the likely benefit of the PCP. (We have adjusted the language used by the Supreme Court to fit with that used in the EA 2010 2010.)

191. In other cases, the question of whether a particular aim is legitimate has been expressed as being whether it 'corresponds to a real need' of the employer: see *Bilka-Kaufhau GmbH v Weber von Hartz* (case 170/84) [1984] IRLR 317. While a tribunal must take account of the reasonable needs of a respondent's business, it is for the tribunal to assess for itself both whether or not an aim is legitimate, and whether it is proportionate. It is not a 'range of reasonable responses' test: *Hardy and Hansons plc v Lax* [2005] IRLR 726, followed in *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334 at paragraphs 10-12.

192. In *Eversheds Legal Services Ltd v De Belin* [2011] IRLR 448, The EAT found that an employer had discriminated against a male employee on the grounds sex when, in a redundancy selection exercise, it inflated the score of a female colleague who was on maternity leave throughout the whole assessment period for one particular selection criterion. The EAT found that there were less discriminatory alternatives available but the best alternative would have been to measure both employees' actual performance at the point just before the female employee started her maternity leave (i.e. as at the last date that the female employee was at work). This was considered to be the best measure. The Tribunal stated that the female employee was entitled to be scored on her performance "on a basis that reflected her performance/capability"; assessment based on actual performance at an earlier date would have achieved that (ibid at [31]).

193. At [30] in that case, the EAT considered the ECJ decision of *Thibault* which addressed the question of fairness of assessment periods for women who have been absent on maternity leave. In *Thibault* the Advocate General opined that an assessment period of 152 days (less than six months) was proportionate to avoid any disadvantage that a woman might suffer due to her absence caused by maternity leave; the EAT, when discussing this decision, considered that if an assessment period of one week had been used, the position might have been different.

194. In *Shackletons Garden Centre ltd v Lowe* (UKEAT/0161/10), the EAT did not criticise the Tribunal's finding that a PCP requiring employees to work a rotational shift pattern which included weekends placed women as a group at a disadvantage. The Tribunal noted that "it is well recognised that significantly more women than men are primarily responsible for the care of their children.'' On appeal the EAT observed that the Tribunal had been

entitled to find that women are primarily responsible for childcare "based on what is now well recognised in industrial and employment circles." See also Choudhury J's remarks in *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] IRLR 729, where he observed that whilst men do now bear a greater proportion of child-caring responsibility than they did decades ago, the position is still far from equal. Accordingly, the EAT held that an employment tribunal had erred when it failed to take judicial notice of the fact that women bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours.

Conclusions

195. The PCPs relied on by the Claimant in relation to this claim are the two redundancy criteria that she contends disadvantaged her as a woman. We do not accept that the Claimant has shown that these criteria put women as a group at a disadvantage. In the (very small) pool in question, for example, only the Claimant was 'disadvantaged', the other woman in the pool was not. There is nothing in the criteria that would inherently be likely to be more disadvantageous to women. As we have observed above, the criteria were concerned with the nature and quality of the employees' work rather than the quantity of it, so the fact that the Claimant had recently taken maternity leaves did not disadvantage her, and the criteria would not inherently have been disadvantageous to women who had taken maternity leave. If the bespoke project work had only come up when the Claimant was on maternity leave, there might have been disadvantage to her, but it would still not have followed that women generally would have been disadvantaged by the criterion. In any event, in this case, we found as a fact that the Claimant <u>was</u> at work when the bespoke project work opportunities came up and so was not disadvantaged. On the facts of this case, therefore we have concluded that the criteria did not disadvantage the Claimant as a woman who had taken maternity leave, so there is simply no basis on which we could conclude that these PCPs disadvantaged women generally in comparison to men. Even if we did so conclude, and accepted that the Claimant was herself put at that disadvantage (depending on the extent of that disadvantage) we may well have concluded that the use of these criteria were justified. They were carefully chosen in place of the obvious starting point (that adopted by Mr Chai) of just selecting by reference to performance appraisal grade in order to give the Claimant a fair chance to be assessed afresh, along with her colleagues by reference to the skills that the Respondent identified would be most important for the Senior Accountant role going forward. They were reasonable criteria, with sufficient objective elements for the reasons we set out below. The Respondent was justified in adopting them.

<u>Unfair dismissal (including automatic unfair dismissal)</u>

The law

196. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996 (ERA 1996). Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that

it is a potentially fair reason falling within subsection (2), i.e. in this case redundancy, or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at [44]). There are exceptions to that approach, as identified in *Jhuti*, which we have borne in mind in case they appeared to be relevant here.

197. Section 99 of the Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason or principal reason for the dismissal is of a prescribed kind. Regulation 20 of the Maternity and Parental Leave Regulations 1999 (the MPLR) contains the reasons so prescribed which must relate to, among other things, pregnancy, childbirth or maternity.

198. If the sole or principal reason for dismissal does not relate to the Claimant's pregnancy, childbirth or maternity, then we must consider whether the Respondent has proved that the definition of 'redundancy' in s 139(1)(b)(i) ERA 1996 is satisfied, i.e. whether the requirements of the Respondent *"for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish"* and whether the dismissal is *"wholly or mainly attributable"* to that state of affairs. The House of Lords in *Murray and ors v Foyle Meats Ltd* [2000] 1 AC 51 made clear that these are questions of fact for us as a Tribunal.

199. In deciding what the requirements of the business are for the purposes of s 139, Tribunals are not to investigate the commercial and economic reasons behind an employer's actions: *James W Cook and Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716 and *Moon v Homeworthy Furniture* [1977] ICR 117.

200. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

201. As this is a redundancy dismissal, the principles in *Williams v Compair Maxam* [1982] ICR 156 apply. As adjusted to dismissals where there is not union involvement, they are as follows:

(1) The employer must give as much warning as possible of impending redundancies so as to enable alternative solutions to be considered;

(2) The employer must consult as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible;

(3) The employer must establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service;

(4) The employer must seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection;

(5) The employer must see whether instead of dismissing an employee he could offer him alternative employment."

202. We note that although selection criteria must not depend solely on the opinion of the person making the selection, there is no rule of law that they must be exclusively objective: see *Nicholls v Rockwell Automation Ltd* UKEAT/0540/11/SM at §§31-32: *"…it is not the law that every aspect of a marking scheme has to be objectively verifiable (by which we mean verifiable independently of the judgment of management) as fair and accurate. If overall the redundancy criteria were reasonable… then the fact that some items were not capable of objective verification is not fatal to the scheme… Selection criteria are not to be limited to those which can be the subject of box-ticking exercises"*.

203. The question of which employees should be pooled is primarily a question for the employer, subject to the test of whether the choice is within the range of reasonable responses: *Capita Hartshead Ltd v Byard* [2012] ICR 1256 at [31].

204. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at [48].

205. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. This is particularly the case in a redundancy dismissal where the *ACAS Code of Practice on Disciplinary and Grievance Procedures* does not apply. The Court of Appeal has recently confirmed that in such cases the

absence of an appeal or review procedure does not of itself make a dismissal for redundancy unfair and it would be wrong to find a redundancy dismissal unfair *only* because there was no appeal procedure, although it is one of many factors to be considered in applying a test of overall fairness: *Gwynedd Council v Barratt* [2021] EWCA Civ 1322 at [38].

206. There is also no right for the employee to be permitted to bring a companion to redundancy consultation/dismissal meetings. Section 10 of the Employment Relations Act 1999 does not apply in redundancy cases: see *Heathmill Multimedia ASP Ltd v Jones and Jones* [2003] IRLR 856 and *London Underground v Ferenc Batchelor* [2003] ICR 656.

Conclusions

207. First, we find that a redundancy situation had arisen within the meaning of ERA 1996, s 139. That requires us to consider whether the requirements of the Respondent *"for **employees** to carry out **work of a particular kind** … have ceased or diminished or are expected to cease or diminish"* and whether the dismissal is *"wholly or mainly attributable"* to that state of affairs. The Claimant in paragraph 7 of her Closing Submissions has missed out a vital element of the definition of redundancy, specifically that the reduction must be in the requirement for employees, not just the amount of work. The 'kind of work' that the Claimant was doing was in our judgment the work of a Senior Accountant, which encompassed all the activities that she and her colleagues were doing in those jobs. The work of a Senior Accountant was a different kind of work to that done by the Finance Manager, which was a more senior role, requiring a more specific skillset and with responsibility for checking the work of more junior employees in the Senior Accountant role. The requirements of the Respondent for employees to carry out work of the kind done by Senior Accountants had diminished because it required one fewer employees going forward from January 2020. The Respondent has not recruited anyone else to the finance department since the Claimant's dismissal, so there can be no question that there was genuinely a redundancy situation here. We are further satisfied that the Claimant's dismissal was *"wholly or mainly attributable"* to that state of affairs because had a redundancy situation not arisen there is nothing to suggest that she would not have continued in employment. Contrary to the argument she has run in these proceedings, the Respondent was in our judgment not seeking to dismiss her for having taken maternity leave. If that had been so, it would have dismissed her during or on return from her first maternity leave rather than having her back into her job at that point. It follows that the 'sole or principal reason' for the Claimant's dismissal was not her pregnancy or maternity leave, but redundancy. The dismissal was not therefore automatically unfair.

208. We further find that the Claimant's sex, maternity or pregnancy played no material role in the decision to dismiss. We have rejected all the Claimant's claims of detriment in respect of those matters and it follows for the same reasons that those protected characteristics played no material role (and certainly not a principal role) in the decision to dismiss. The selection criteria

were suggested by Mr Foote, but we have found he was not influenced by the Claimant's pregnancy/maternity. The scoring was done by Ms Vasyk, and we have found she was not influenced by the Claimant's pregnancy/maternity. The actual decision to dismiss was taken by Ms Johnson and we have also already concluded that there are no grounds for inferring she was influenced by the Claimant's sex, maternity or pregnancy.

209. In reaching this decision, we have carefully considered the Claimant's submissions, in particular at paragraph 8 of the closing submissions. With regards to the matters relied on there, we found that Mr Foote did not react negatively to the Claimant's first pregnancy and did not treat her unfavourably in the ways that she has alleged. The reason HR did not investigate at that point was because the Claimant did not put forward what they described as 'tangible evidence' of less favourable treatment and so the case was closed (and reasonably so in our judgment because there was no 'tangible evidence' of less favourable treatment: the Claimant's perception of negativity from Mr Foote was based on her own insecurities rather than anything he had done). Ms Johnson was, we found, not dishonest. We do not find Mr Foote's involvement in the redundancy process to have been inappropriate given the length of time for which he was managing the team and the fact that Ms Vasyk had only recently taken over the team when the Claimant went on her second maternity leave. We found the redundancy selection criteria and scoring were reasonable and non-discriminatory. As to voluntary redundancy, we are surprised that the Claimant seeks to rely on this (paragraph 8.7 closing submissions): if the Respondent wanted to dismiss the Claimant, the Respondent could simply have accepted her request for voluntary redundancy when she asked for it. However, not having a policy on it, they did not, and that is obviously the reason why it was not offered to anyone else either.

210. We do not consider that 48 hours was an unreasonable length of time to allow for employees to comment on three proposed redundancy criteria. There are good reasons to move relatively swiftly in a redundancy process so that employees do not have uncertainty about their employment hanging over their heads for long periods. 48 hours was the Respondent's standard time frame and the Claimant raised no objection at the time. There is certainly no need to allow time for employees to get legal advice about criteria for redundancy selection (unless, possibly, if they specifically request it) as the employees themselves will be best placed to consider whether criteria are unfair in their particular circumstances. It was reasonable for Ms Johnson not to deal with the Claimant's emails of 8 and 9 February 2021 prior to concluding the redundancy process for the reasons we have already set out.

211. We now consider whether the Claimant's dismissal was fair in all the circumstances, having regard to the size and administrative resources of the organisation. We consider it was. We have dealt with most of the Claimant's submissions about procedural unfairness as part of considering her other claims. For the reasons we have given there, we find that the Respondent adopted a procedure that was within the range of reasonable responses and fair to the Claimant in respect of the redundancy criteria, scoring, and

consultation process. The criteria were not wholly subjective, they were reasonable criteria with descriptors and scoring framework that introduced an objective element and the scoring rationale as it appears from the notes was based for the most part on objective facts about work that had been done by the employees in question. We add in relation to the Respondent's failure to give the Claimant the reasoning behind in the scoring in writing that we do not consider the Claimant needed to see this reasoning for the dismissal to be fair. She had the 'at risk' and consultation meetings in which the rationale behind the scoring was (or could have been) discussed. We also do not accept that it would have made any difference if she had the written reasoning at the time, because she has had it now and for the reasons we have found, it has not made any difference. We further find that, to the extent that the Claimant's complaints about the redundancy criteria and scoring were not considered prior to the dismissal decision, that was remedied by the appeal at which the issues the Claimant raised were in our judgment considered in sufficient detail and rejected for reasons that in our judgment were reasonable.

212. We have considered carefully the implications of Mr Chai's email of 10 November 2020 with its apparent directive to dismiss the Claimant. The Claimant was not aware of this at the time, but obviously it was disclosed in the course of these proceedings and we have heard evidence about it from the Respondent's witnesses, albeit no evidence from Mr Chai, Mr Wagler or Ms Roberts. There is no doubt that, on first impression, this email makes the Claimant's dismissal look predetermined. Had we concluded that what followed in terms of redundancy process was just a charade to implement Mr Chai's directive, we would have concluded that the Claimant's dismissal was unfair. However, on the facts of this case as we find them to be, that is not what happened. We find that those who played a material part in carrying out the redundancy process and appeal in the UK (i.e. Mr Foote, Ms Vasyk, Ms Johnson, Mr Laughton-Brown and Mr Thorne) genuinely put Mr Chai's email of 10 November 2020 to one side and carried out a reasonable process that fairly resulted in the Claimant being selected for redundancy. The same goes for Mr Wagler. Although he had decided with Mr Chai that, based on the Claimant's performance grading, she should be the one selected for redundancy, we find that he did not thereafter play a material part in the redundancy process, despite being the 'figurehead' who informed the employees they were at risk and who was tasked with explaining the scoring rationale to the Claimant at her individual 'at risk' meeting. We see no evidence that he made a material contribution either to deciding the criteria, or carrying out the scoring or the search for alternative employment (such as it was). In any event, on the evidence before us (the emails in the bundle where he expresses intent to understand from Ms Vasyk the basis of the scoring) it appears that he too genuinely put his original view about who should be selected to one side and started afresh with the criteria suggested by Mr Foote. The fact that the Claimant had been the poorest performer of the three on the kind of work that the Senior Accountants were now doing of course meant that it was highly likely that she would be the one selected against any criteria that assessed skills for the job, but it does not follow that her dismissal was 'predetermined' or unfair. The Claimant had had more than

ample opportunity to challenge Ms Vasyk's and Mr Foote's views of her performance through the informal grievance, grievance and grievance appeal in 2020, as well as again through the redundancy appeal. In the circumstances, despite initial appearances, Mr Chai's email of 10 November 2020 (and the views it represents) did not render the Claimant's dismissal unfair.

213. Finally, we have considered whether the fact that, as we noted in our findings above, Mr Foote's decision in 2018 to recruit a permanent FTE during the Claimant's first maternity leave rather than a maternity cover, makes any difference to our analysis of the position as it stood in 2021. We consider it does not. What happened in 2018 was, by the time the redundancy situation arose at the end of 2020, past history. As we observed in our factual findings, if the Claimant had not been offered a job back after her first maternity leave, the Respondent might have been in some difficulty as a result of Mr Foote's recruitment decision in 2018, but that did not happen. The Claimant did get her job back and what happened in 2021 falls to be analysed against the background of the 'new' status quo, which was that there had since 2018 been three Senior Accountants in post and now there was a requirement for only two.

Other matters

214. As we have found that all the claims fail on liability we do not have to consider *Polkey* or time limits or compliance with the ACAS Code of Practice and we do not do so.

Overall conclusion

215. The unanimous judgment of the Tribunal is:-

(1) The Claimant's claim of unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996) is not well founded and is dismissed.
(2) The Claimant's claim that she was subjected to detriments contrary to section 47(c) ERA 1996 and regulation 19 of the Maternity and Parental Leave Regulations (MPLR 1999) is not well-founded and is dismissed.
(3) The Respondent did not contravene the Equality Act 2010 (EA 2010) by directly discriminating against the Claimant contrary to ss 18(2), (4) and 39 and that claim is dismissed.
(4) The Respondent did not contravene the EA 2010 by indirectly discriminating against the Claimant because of her sex contrary to s 19 and 39 EA 2010.

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Employment Judge Stout

Date: 27/01/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

27/01/2023

FOR THE TRIBUNAL OFFICE