Employment and Discrimination Tribunal

Form ET3

Case No ED025/21

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: **Jessica Lee HOWSE**
Represented by: Mr. D. Read

Respondent: **Game Theory Limited**
Represented by: Mr. R. Sheldon

Tribunal Members: Advocate J. Hill (Chair)
Mr. R. Brookfield
Mrs. K. Ferneyhough

Hearing dates: 7, 8, 9, 10 February and 27, 28, 29 March 2023

Decision of the Tribunal

Having considered all the evidence presented, whether recorded in this judgment or not, the Tribunal unanimously:

1. Dismissed the Applicant's claim for discrimination on the grounds of sex.
2. Dismissed the Applicant's claim for discrimination on the grounds of maternity leave.
3. Upheld the Applicant's claim for unfair dismissal and awarded her £139,811.11 in respect of the same.
4. Made no order as to costs.

.....
Signature of the Chair

.....
Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal's Decision (Form ET3A) are available on application to the Secretary to the Tribunal, The Secretary to the Tribunal, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.
(Telephone: 01481 220025)
Email: e&dt@gov.gg.

Form ET3A

The legislation referred to in this document is as follows:
The Employment Protection (Guernsey) Law, 1998, as amended ('the Law')
The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005
The Employment Protection (Recoverable Costs) Order, 2006
Equality Act 2010
Sex Discrimination Act 1975
The Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016

The authorities referred to in this document are as follows:
Shamoon v. Chief Constable of the RUC [2003] IRLR 285
Nagarajan v. London Regional Transport [1999] IRLR 572
Webb v. EMO Air Cargo (UK) Ltd [1995] ICR 1021
Renouf v. States of Guernsey ED0015/16
Commissioner of the City of London Police v. Geldart [2021] IRLR 749
O'Neill v. Governors of St Thomas More RC Voluntary Aided Upper School [1996] IRLR 371
Barton v. Investec Henderson Crosthwaite Securities [2003] ICR 1205
Igen Ltd. v. Wong and ors. [2005] IRLR 258 (CA)
Thompson v. Scancrown Ltd. (Case No. 22051999/2019)
Streeter v. Sandpiper C.I. Ltd. (ED033/19)

Extended Reasons

1.0 Introduction

1.1 Documents within the hearing bundle shall be referred to like this: either "**[E;*x*;*y*]**" (which means "**E**vidence bundle; page ***x***; paragraph ***y***"); or "**[A;*x*;*y*]**" (which means "**A**uthorities bundle; page ***x***; paragraph ***y***").

1.2 It is agreed that the Respondent employed the Applicant as Chief People Officer from 1 October 2019 to 2 July 2021. The contract of employment and job description is at **[E;E32-47]**; it is undated, but presumably must have been executed on or soon after the offer of employment made on 30 September 2019 (see **[E;D2;6]**) and is described by one of the Respondent's witnesses as "*effective 1 October 2019*" (see **[E;D17;11]**). The Applicant's relevant basic earnings are agreed, subject to liability. There is an agreed Chronology (**[E;B1-B6]**) and a List of Issues (**[E;B7-B10]**).

1.3 The Applicant complains that she was:
- (a) unfairly dismissed; and/or
- (b) discriminated against by reason of:
  - (i) her sex; and
  - (ii) taking maternity leave and returning to work after a period of maternity leave.

1.4 The Respondent denies that the Applicant was dismissed or discriminated against in any way.

1.5 The Tribunal, consisting of three members, sat on 7, 8, 9, 10 February and 27, 28, 29 March 2023 to hear and determine the Applicant's claim. All of the material submitted by the parties in the joint bundles has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.

2.0 Background

2.1 The parties summarised what each saw as the relevant background facts in their respective skeleton arguments; the Applicant at **[E;C1;4]-[E;C5;19]** and the Respondent at **[E;C17;1]-[E;C20;9]**.

2.2 A distillation of the particularly important parts of those accounts is as follows although, as has already been explained, all of the parties' submissions have been taken into account whether referred to or not. On 3 July 2020 the Applicant's husband sent an email to Mr Pragnell (the Respondent's CEO) explaining that the Applicant was pregnant (**[E;F68]**) and asked for an opportunity to discuss pregnancy and maternity issues. That discussion took place on 7 July 2020 and the Applicant emailed a summary to Mr Pragnell on 14 July 2020, to which Mr Pragnell responded by email on 15 July 2020 and agreed its accuracy (**[E;F70]**). Two elements of the discussion are of particular importance: (1) that the Applicant and her husband would return to Australia and be permitted to work remotely; and (2) that Mr Pragnell "*mentioned that if* [the Applicant] *needs a short extension to maternity leave period, then this would be fine (approx. 1 – 2 months as necessary)*". An anonymous complaint was made to the Respondent in November 2020 about why some people were being allowed to work remotely. Consequently, a "script" (or aide memoir) for Mr Pragnell to use at a "town hall meeting" (essentially a company staff meeting) was prepared in which made explicit reference to the Applicant and her husband (**[E;F100x]**).

2.3 Correspondence dated 14 December 2020 (**[E;F104-105]** and **[E;F106]**) confirmed that the Applicant's period of maternity leave was to be 1 January to 2 July 2021, with a "*return to the office*" expected on 5 July 2021. The Applicant gave birth to her son on 4 February 2021.

2.4 Things appeared to start to go wrong between the parties in April 2021 when the possibility of extending maternity leave was intimated. On 17 April 2021 the Applicant's husband emailed Mr Pragnell and asked for the Applicant to be given an extra two months of maternity leave in accordance with the email exchange on 14 and 15 July 2020 (**[E;F73-74]**). Mr Pragnell responded by email on 17 April 2021 (**[E;F72-73]**) and said that reference to maternity leave extension was only in the context of "*if you aren't sure you want to return to work after having had a babe*"; he concluded that there were three options for the Applicant – extended maternity leave (but only if there was a very real chance, ">50%", that the Applicant will not return to work for the Respondent), sabbatical or unpaid leave.

2.5 The Applicant and Mr Pragnell had a telephone discussion on 22 April 2021 about the Applicant's request and the Respondent's reply. The Applicant's note of the conversation is at **[E;F126]**; Mr Pragnell's is at **[E;F127]**.

2.6 On 30 April 2021 Mr Kyle (the Respondent's Chief Legal Officer) emailed the Applicant and set out four options for the Applicant to consider. The Applicant specifically relies upon the absence from Mr Kyle's email of any of the options contained in Mr Pragnell's email of 17 April 2021. Over the following few days there was an exchange of further emails seeking clarification (**[E;F135-136]**), but no agreement could be reached. The Applicant then resigned by email on 6 May 2021 (**[E;F134-135]**). Mr Kyle acknowledged and responded to that resignation email by letter on 12 July 2021 (**[E;F148]**).

3.0 Evidence Summary

<u>The evidence on behalf of the Applicant</u>

3.1 The Applicant gave evidence on her own behalf (**[E;D1-14]** and **[E;D50-54]**) and also called Eoin Fleming (**[E;D47-49]**). It should be noted that the Applicant gave her evidence by video link from Australia and Mr Fleming gave his by a similar mechanism from the Republic of Ireland. The Tribunal was assured that there were no diplomatic issues with these arrangements.

The Applicant

3.2 The Applicant explained her background and qualifications, and then explained how she was recruited by the Respondent who had already employed her husband in a senior role. Initially, the Applicant worked as a consultant for the Respondent and was able to do so remotely from Australia as well as other parts of the World. The Applicant and her husband moved to Guernsey in August 2019 and the following month the Applicant was appointed as the Respondent's "Chief People Officer" – a new role designed to take over the Respondent's senior human resource functions. She made it clear to Mr Pragnell that retaining flexibility to see her family was a key part of her deciding to accept the offer of employment. She also gave evidence about a number of company initiatives and how the Respondent's Board members were not united on these ideas; she went so far as to call some of the Board members "*dysfunctional, distrusting, volatile, condescending and sometimes unethical towards staff*" and gave a number of examples of incidents and behaviour that she said supported this analysis. She also had particular criticism for Mr Pragnell and alleged that he "*had a habit of going back on his word or being unclear on conversation recollections*"; again, she gave evidence of behaviour that she maintained supported her view.

3.3 A central issue in this case turned out to be what the Applicant described as the Respondent's "anti-policy" attitude to employment relations. This can best be succinctly described as a preference for a "light touch" approach to written processes, perhaps clearly illustrated by the email exchange at **[E;F81-84]** and the messages at **[E;F88]**. There appeared to be a reluctance by the Respondent to circulate or publicise the existence of the professionally prepared Equal Opportunities Policy and the Anti-Bullying and Harassment Policy as well as a disinclination to have a diversity and inclusion policy.

3.4 The Applicant told the Tribunal that she discovered that she was pregnant in early June 2020 and how she communicated that fact to Mr Pragnell. She went on to explain that she had a meeting with Mr. Pragnell a week later and that she was "*pleasantly surprised*" by his reaction. She specifically recalled that he told her that she and her husband could take six months' paid maternity leave, travel back to Australia as soon as it was possible (probably during September 2020) and then work remotely until her maternity leave began. According to the Applicant, Mr Pragnell then acknowledged, unprompted, that there might be some "*complexities*" for the Applicant returning to Guernsey after her maternity leave as a result of the Covid travel restrictions; he said to the Applicant that if she "*needed more time come June, that he would be relaxed about it and happy to offer [the Applicant] a short extension to [the Applicant's] leave*". On inquiry by the Applicant, Mr Pragnell told her that "short" meant another one to two months. Mr Pragnell also mentioned the possibility of the Applicant not returning at the end of "*this period*"; he said that he would be understanding if that were her choice and that they would agree a "*transition out of the business across the course of 2021*". This meeting was summarised by an exchange of emails on 14 and 15 July 2020 (**[E;F75-77]**). Mr Pragnell informed the Leadership Team of the essence of the arrangement (although he said that the Applicant and her husband would be returning at the "*start of next summer*") in an email dated 17 August 2020 (**[E;F78]**).

3.5 The Applicant and her husband flew back to Australia at the end of September 2020 and

she received written confirmation of her maternity leave on 15 December 2020 (**[E;F104-105]**). She worked remotely up to 18 December 2020, took leave until 31 December and then began her maternity leave on 1 January 2021. Perhaps significantly, the Applicant oversaw the drafting of the letter confirming her own maternity leave, although she encouraged others to finalise it (**[E;F69-71, F85-86, F101]**). She was not concerned that the letter did not mention the "*discretionary 2 months offer*" because she thought that Mr Pragnell was perhaps trying to keep that private. The Applicant maintains that the proposed extension to her maternity leave was a "*binding offer*".

3.6 The Applicant's son was born in February 2021 and she had no contact with anyone from the Respondent between 18 December 2020 and 17 April 2021 (although her husband was still working remotely during that period and having regular virtual meetings with Mr Pragnell). In early April 2021 it became apparent, however, that Mr Pragnell had raised with the Applicant's husband the question of his and the Applicant's return to Guernsey. The Applicant was concerned that her maternity leave was not being discussed directly with her but with her husband, particularly because of her husband's personal circumstances at that time. Consequently, the Applicant's husband (with the knowledge and participation of the Applicant) emailed Mr Pragnell on 17 April 2021 (**[E;F73-74]**) and asked for the additional two months of maternity leave as offered. Discussions between the Applicant and her husband at the same time resulted in a plan for the Applicant to take the remainder of her maternity leave plus the extra two months in Australia, but that her husband would return to Guernsey ahead of her.

3.7 Mr Pragnell's response came by email the same day (**[E;F72-73]**). It contained some discussion concerning the Applicant's visa and Covid issues, and set out three options for the Applicant to consider: (1) extend her maternity leave, but only if "*there is a very real chance (>50%) that [she] will choose not to return to work*"; (2) a sabbatical under a new scheme; or (3) unpaid leave. The Applicant told the Tribunal that she was upset and concerned that Mr Pragnell was attempting to vary the earlier agreement (*i.e.* the extra maternity leave of one to two months) with no reason other than it was now going to be unfair on her colleagues.

3.8 The Applicant then had a telephone discussion with Mr Pragnell on 22 April 2021, in the course of which she asked for additional maternity leave. The parties' notes of this conversation appear at **[E;F126]** and **[E;F127]**. Mr Pragnell refused to extend the Applicant's maternity leave, but said that if the Applicant resigned that day (*i.e.* 22 April 2021) she would be paid her contractual notice period up to 22 July 2021. The respective notes of that conversation, and the Applicant's witness statement (see **[E;D10;30]**), reveal that there is a dispute about whether Mr Pragnell and the Applicant discussed some sort of enhanced severance package (according to Mr Pragnell's notes they did). The Applicant became aware after her resignation that the Respondent had, during her maternity leave, introduced an "Opt Out Scheme" that was not offered to her, even though she maintained that she would have been eligible for it.

3.9 The Applicant's husband resigned on 27 April 2021 in potentially unusual circumstances and following private discussions between him and Mr Pragnell. She was worried that Mr Pragnell had accepted that resignation knowing, as she thought he did, of her husband's personal situation. It was as a result of her husband's resignation and her treatment at the hands of Mr Pragnell that she began to think that her position with the Respondent was untenable.

3.10 Following a text message from the Applicant to Mr Pragnell on 27 April 2021 (**[E;F133]**) concerning payment arrangements for her notice period, Mr Pragnell told her to deal with Mr Kyle in future. That prompted a telephone call between the Applicant and Mr Kyle on

28 April 2021 (the Applicant's notes of which are at **[E;F130-131]**) that resulted in Mr Kyle saying that he would email options to the Applicant. That email arrived on 30 April 2021 (**[E;F144-147]**) and contained four options for the Applicant to choose from: (1) confirm by email by the end of 31 May 2021 that she will return to work in Guernsey on 5 July 2021; (2) confirm by email by the end of 31 May 2021 that she will not be returning to work in Guernsey on 5 July – in which case she would be treated as resigning with effect from 2 July 2021; (3) confirm by email by 2 May 2021 that she will not return to work in Guernsey - in which case there would be a four-point full and final settlement offer (set out at **[E;F146]**); or (4) if none of the other options were accepted and she failed to return to work in Guernsey on 5 July 2021 she would be treated as resigning from 2 July 2021. An email exchange later that same day confirmed that no other options were now available and there would be no extension to the times for acceptance of any of the offers. The Applicant rejected option (3) by email on 2 May 2021.

3.11 After issuing her claim with the Tribunal, the Applicant received information concerning other employees who had asked for and received unpaid leave (see **[E;G1-1a]**). She observes that only two asked for unpaid leave for reasons other than having exhausted their annual leave allocation, that both of those employees were male, and that neither request was documented formally.

3.12 The Applicant resigned by email on 6 May 2021 to Mr Kyle (**[E;F134-135]**) giving reasons for her decision. Mr Kyle acknowledged and responded to that resignation email by letter on 12 July 2021 (**[E;F148]**). The Applicant drew the Tribunal's attention to other emails passing within the Respondent's organisation that she considered insulting and demonstrative of the Respondent's attitudes towards staff (see **[E;F134, F149, F148a]**).

3.13 The Applicant also presented a supplementary witness statement (**[E;D50-54]**). She explained that the Respondent had never, during her employment, discussed with her potential reasons for exercising its discretion not to allow an extension to her maternity leave. She went into some detail to refute the allegation in the amended ET2 that she had made up her mind not to return to Guernsey before her resignation. She explained that she had not "*championed and implemented*" the "Opt Out Scheme"; she had only floated the concept and discussed it with Mr Pragnell.

3.14 The Applicant was very clear in her evidence that her decision to issue proceedings against the Respondent had nothing to do with what happened to her husband on 7 May 2021; that happened after her resignation. She went on to dispute that she had engineered a settlement from her previous employer over and above a normal resignation package, and that she had accused Mr Pragnell of blackmail. She addressed further matters concerning other employees that the Tribunal takes into account, but does not repeat here.

3.15 The Applicant was subjected to a lengthy cross-examination over two days. There was a good deal of questioning focused on the Applicant's visa status and application; the Tribunal did not find that to be particularly relevant or helpful in the context of the case. Similarly, she was asked much about the "no policy" approach of the Respondent to employment relations; apart from confirming the Tribunal's view that there was strong resistance by the Respondent to comprehensive written policies and procedures, that seemed to be as far as it went. More questions explored the apparently dysfunctional nature of the office environment and the personalities within it, without addressing the essential elements of the claim.

3.16 Some helpful evidence came in response to questions directed at the nature of the conversation between the Applicant and Mr Pragnell in which the potential for an extension to maternity leave was discussed. The Applicant confirmed that for the

purposes of clause 21 of her employment contract (**[E;E42]**) – the "Entire Agreement" clause - she considers the email exchange of 14 and 15 July 2020 to satisfy the requirement that any alteration be in writing executed by the parties.

3.17 Apart from these few matters, the Applicant stuck very much to her written evidence and did not appear to make any material concessions during cross-examination. Following Mr Pragnell's evidence, the Applicant was recalled by the Tribunal exercising its powers under paragraphs 2(g) and 2(m)(i) of *The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005* to give further evidence by way of cross-examination; this related primarily to the issue of whether she had received any sort of settlement from her previous employer.

Eoin FLEMING

3.18 Mr Fleming explained his experience in the information technology industry and told the Tribunal that he had been employed by the Respondent from 21 February to 2 July 2020. His employment was terminated within his probationary period with no specific reason being given.

3.19 He explained that it was not unusual for employees to be granted extended leave to work abroad. His contact with the Applicant was as a result of her human resources function and his working relationship with her was cordial. He has not been in contact with the Applicant since his departure from the Respondent until he learned of this claim from the Applicant.

3.20 Mr Fleming's evidence dealt mainly with the behaviour and impact of a senior member of the Respondent's technology team, particularly with regard to one other individual. His conclusion was that none of the Respondent's senior staff were interested or capable of dealing with this problem. He also corroborated the Applicant's account of the Respondent displaying a reluctance to implement certain policies, structures and standards that he regarded as usual and desirable. He explained that the culture within the Respondent's organisation was not one of "open communication" and that there was a high degree of employee surveillance, of which employees were unaware. After his departure he wrote to the Applicant in her capacity as Chief People Officer giving his observations on the organisation (**[E;F155-157]**).

3.21 During cross-examination he stuck very much to his written evidence and did not appear to make any material concessions.

The Respondent's evidence

3.22 The witnesses called on behalf of the Respondent were: Steve Pragnell (**[E;D15-35]** and **[E;D58-60]**); Tim Kyle (**[E;D36-44]**); and Anne Jacob (**[E;D45-46]** and **[E;D55-57]**).

Steve PRAGNELL

3.23 Mr Pragnell explained his experience, his previous knowledge of the Applicant and her husband, and his time with the Respondent as CEO. It appears that the Respondent used to be entirely based in Australia, but because of the Respondent's type of business and a change in legislation, in 2017 a decision was made to move the international operations out of Australia. A consequence of this move was that the Respondent did not want to have any permanent presence or permanent staff members in Australia; in fact, in order to trade in the manner in which it wished, it would not have been possible for the Respondent to have either a presence or staff in Australia.

3.24 Mr Pragnell described the recruitment of the Applicant and her husband and went on to explain how the Respondent offered support with immigration applications for members of staff (including, if necessary, legal advice). He drew the Tribunal's attention to clauses 5(a) (primary place of work), 3(f) (staff warrant they are permitted to work in Guernsey), and 16.2(a)(viii) (ability to terminate contract immediately if employee not eligible to live or work in Guernsey) of the Applicant's employment contract.

3.25 He took issue with the Applicant's assertion that the Respondent had a "*no policy rule*", and was a "*sophisticated*" and "*well-resourced*" employer. He explained that the Respondent was a relatively young company and had grown from only eight employees in Guernsey in March 2018 to over ninety by the time that the Applicant left her employment in September 2020. Following experience with some policies prepared by a local law firm in late 2018 or early 2019, the Respondent decided that it did not want "*off the shelf policies drafted by lawyers for lawyers*" and started to use the phrase "*anti-policy*", which he said meant "*I employ adults. They shouldn't need to sign a form confirming they have read a document which explains what they should do if they are going to be 20 minutes late to the office*". He went on to say that the business culture in the Respondent was as a start-up business and was about "*challenging the norm*". It was as a result of not having customers or external stakeholders that gave the Respondent a greater degree of freedom than most other businesses when it comes to non-mandatory policies. The end product of this approach was the preparation of policies in the form of infographics or flowcharts that better suit the culture within the Respondent. In addition, there was what was loosely described as an operational staff handbook, referred to as a "playbook" within the business.

3.26 Mr Pragnell went on to describe incidents in mid to late March 2020 that led him to believe that the Applicant had formed a desire to return to Australia because of the Covid pandemic. It appears that travel arrangements had already been booked and it was only after an emotionally charged debate with her husband that the Applicant decided to remain in Guernsey.

3.27 His description of the announcement of the Applicant's pregnancy was broadly in line with the Applicant's account. He did, however, go into more detail about the potential for extending maternity leave. He explained that his concern was that after having had her baby, the Applicant might decide not to return to work immediately; if she was at all unsure about returning, she should call him to discuss it. He agreed that he said he was "*entirely open to having a conversation about extending her maternity leave for a short while if it was mutually agreeable*" but emphasised that this was left loosely as "*maybe a month or two*". He said that he was clear that he did not state that the Applicant could unilaterally extend her maternity leave without any subsequent approval, and that there was no discussion about whether any extension would be paid or that the Applicant could remain in Australia during any extension. He accepted that he had confirmed the content of the Applicant's email summary of their conversation (**[E;F70]**), but he explained that his was a "*broad reply to the email, and in fact I did not identify at the time that the point in the email to consider a request for an extension had been phrased by [the Applicant] in this way*". He did not accept that his email was a binding commitment to the Applicant that she was free to extend her maternity leave; this is consistent, he said, with the way in which the maternity leave confirmation letter dated 14 December 2020 (**[E;F104-105]**) was phrased.

3.28 He denied the Applicant's allegations that he and other members of the senior management team were untrustworthy and unethical. He went into some detail to deny the specific allegations made in paragraph 5 of the ET1 and said that none of them had

been raised with him at the relevant times.

3.29 Mr Pragnell then went on to address the Applicant's working remotely from Australia. He said that whilst it had worked, there had been issues surrounding the Applicant's responsiveness and availability. He also described an issue with her lack of response to a request for help from the Respondent's office in Japan.

3.30 A potential problem began to arise in April 2021. On 13 April 2021 the Applicant's husband contacted Mr Pragnell and explained that whilst he wanted to return to Guernsey, the Applicant had shown no interest and he was considering returning on his own. This rang alarm bells with Mr Pragnell, especially when he received an email on 17 April 2021 from the Applicant's husband confirming these arrangements (**[E;F73-74]**). This left Mr Pragnell "*taken aback*"; he replied to the email and urged caution (**[E;F72-73]**). There were a number of follow-up conversations between Mr Pragnell and the Applicant's husband, culminating with the discussion on 22 April 2021 (**[E;F125]**).

3.31 Mr Pragnell then gave his account of what happened during the conversation with the Applicant on 22 April 2021 (see respective notes at **[E;F126-128]** and the Additions and Amendments to the ET1 at **[E;I2;12]**). The Tribunal has read each party's account of this conversation with care and will make appropriate findings in due course. The remainder of Mr Pragnell's first witness statement consists of general background information touching upon his relationship with the Applicant and her husband, and material addressing the availability of unpaid leave and the sabbatical scheme to employees.

3.32 Mr Pragnell's second witness statement dealt with matters surrounding how the Applicant came to work in the Respondent's office in Japan for a short period in 2019 (this coincided with the Applicant's previously booked journey to visit her family and watch the rugby World Cup), the Respondent's response to the Covid pandemic, and parental leave policy. He also stated that he would treat anyone who confirmed they were not coming back to work in the same way; that the Applicant was on maternity leave made no difference.

3.33 Mr Pragnell was subjected to a lengthy cross-examination. The Tribunal listened very carefully to all that was said, but only the relevant parts are reproduced in this summary.

3.34 Mr Pragnell explained that the phrase "anti-policy" describes a sentiment or a culture within the business. He said that they prefer a one-page document to anything else and that the business wanted policies that were relevant to them. It amounts to having a minimum number of policies with minimum content. A policy for him is a document that sets out rules; the business wasn't going to do a thing for the sake of it, but they would have policies where mandatory. He said that he was unsure if the Respondent had an equal opportunities policy or a discrimination training policy. During cross-examination he largely stuck very much to his written evidence and did not appear to make any material concessions.

Anne JACOB

3.35 Ms Jacob's evidence (**[E;D45-46]** and **[E;D55-57]**) essentially deals with, and contradicts, Mr Fleming's evidence concerning the behaviour of a senior member of the Respondent's technology team. It appears to be the case that these two witnesses have very different recollections of a particular incident. The Tribunal listened carefully to her cross-examination; she stuck very much to her written evidence and did not appear to make any material concessions.

Tim KYLE

3.36 Mr Kyle has worked for the Respondent since February 2018 and is the Chief Legal Officer. He only becomes involved with the more sensitive employment law matters, such as where an employee makes demands or threats against the Respondent. Apart from during the Applicant's maternity leave, he worked regularly with her and got on well with her and her husband.

3.37 He recalled a specific incident on 20 March 2020 when Mr Pragnell contacted him and recounted a conversation with the Applicant who had accused Mr Pragnell of "blackmailing" her. He considered this expression to be inappropriate because of the consistent management position that no employees could work remotely due to Covid, and because the Applicant had been heavily involved in disseminating that view.

3.38 He explained that the Applicant's responsiveness had "dropped off" when she moved to Australia and that this was not due entirely to the time difference. Although he supported her ability to move to Australia for her maternity leave, he did not regard the period leading up to it when she was working remotely as a success.

3.39 He addresses in some detail the Applicant's allegation that the Respondent is a sophisticated employer with significant resources. The Tribunal had the benefit of hearing about the Respondent's turnover from Mr Pragnell and during submissions, as well as the number of people employed by the Respondent, and will come to a conclusion about those allegations in due course.

3.40 Mr Kyle then dealt with the report from Mr Pragnell of the conversation with the Applicant on 22 April 2021. It was as a result of Mr Pragnell feeling uncomfortable with having further discussions and negotiations with the Applicant about her leaving her employment with the Respondent that Mr Kyle took over. He agrees that this was broadly consistent with his role described by the Applicant at **[E;A9;21]**. He recalls that at about the same time the Applicant's husband had been discussing his own future with the Respondent, resulting in his resignation on 27 April 2021. He formed the view, as a result of communications from the Applicant and her husband, that the Applicant was not going to return to Guernsey. This led to a telephone call with the Applicant on 28 April 2021, the outcome of which was his suggestion to the Applicant that he would send her an email outlining her options. He reiterated that he had, by now, come to the conclusion that the Applicant would not be returning to Guernsey, and that by being deliberately ambiguous she was trying to secure the maximum possible financial benefit. He denied that Mr Pragnell expected the Applicant to resign and he acknowledged her right to return to work if she wished.

3.41 He went on to describe why he did not feel that an extension of time to consider the options he had put forward was appropriate and told the Tribunal about receiving the Applicant's resignation on 6 May 2021 (**[E;F142-143]**) and replying to it on 10 May 2021 (**[E;F139-142]**). He explained in detail the reasons for his comments in his reply.

3.42 Mr Kyle was cross-examined over the course of two days. The Tribunal listened carefully to his answers; he stuck very much to his written evidence and did not appear to make any material concessions.

4.0 Summary of closing submissions

On behalf of the Respondent

4.1 In addition to a lengthy skeleton argument (**[E;C17-65]**) the Respondent also submitted 56 pages of written closing submissions. The Tribunal agreed to accept these further written submissions in an effort to curtail the need for protracted oral submissions. As with matters of evidence, what follows is only a summary of the parties' respective legal submissions; the Tribunal listened with care to all arguments and took them all into account, whether expressly referred to or not.

4.2 The Respondent submits that the material events took place between 13 April and 6 May 2021, with particular emphasis on the conversations between the Applicant and Mr Pragnell (on 22 April 2021) and the Applicant and Mr Kyle (on 28 April 2021). The case is put on the basis that although it was agreed that the Applicant could return to Australia for the birth of her child, at all material times the Applicant had no intention to return to work for the Respondent in Guernsey, and the Respondent believed that to be the case.

4.3 So far as the claim of constructive dismissal is concerned, the Respondent submits that in order for this to succeed, it must be the case that over the course of two particular weeks Mr Pragnell and Mr Kyle destroyed the relationship of trust and confidence that existed between the Applicant and the Respondent. The key question must be what happened for the Respondent to change its position. The Respondent goes on to say that something did change, but that the Applicant was the catalyst for it (namely, manipulating the situation to her advantage and forming the intention not to return to work in Guernsey), and that the Respondent was entitled to act as it did in response to that change. It is submitted that the Applicant has not succeeded in proving a *prima facie* case and/or the Respondent has demonstrated that it did not discriminate against the Applicant.

4.4 The Respondent analyses the claim for discrimination on the grounds of sex and/or maternity leave as having, in the alternative, an assertion that the management team were untrustworthy, consistently going back on their word and had created an atmosphere such that people were too afraid of their jobs to complain. The Respondent submits that it did not commit a fundamental breach of contract and/or the Applicant did not resign in response to the Respondent's actions.

4.5 The Respondent starts from the definition of discrimination against women contained in s.1(1)(a) of *The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005* ("the 2005 Ordinance") (**[A;143]**). It then identifies the three alleged acts of discrimination, namely the extension of maternity leave, the sabbatical programme, and unpaid leave. These acts then lead on to three issues that must be determined: (1) was any less favourable treatment accorded to the Applicant on the grounds of her sex?; (2) insofar as the treatment relates to the question of maternity, is a comparator required?; and (3) what are the characteristics of an appropriate comparator?

4.6 The Respondent denies that the treatment of the Applicant was on the grounds of sex, but because of the grounds expressed in Mr Kyle's email of 30 April 2021 (**[E;F144]**), *i.e.* the Respondent reasonably believed that the Applicant had no intention of returning to work in Guernsey. Reliance is placed upon the possibility of extended maternity leave, a sabbatical or unpaid leave raised in Mr Pragnell's email of 17 April 2021 (**[E;F72-74]**).

4.7 A point was raised about the Applicant's husband. The Respondent submits that his reliability did not change during discussions between him and Mr Pragnell simply by virtue of his personal circumstances and that he was not called by the Respondent for obvious reasons.

4.8 Following the authority of ***Shamoon v. Chief Constable of the RUC*** [2003] IRLR 285

([**A;477**]) the Respondent submits that the correct approach, in relation to a hypothetical comparator, is to consider the Respondent receiving a similar request made by a man, in similar circumstances, such as the comparator having taken a period of adoption leave or extended support leave overseas, and that their partner, who was also a senior employee, had resigned for the same family reasons as the Applicant's husband, and that the Respondent had reached the same conclusions that the individual had no intention of returning to work.

4.9 The Respondent also relies upon ***Nagarajan v. London Regional Transport*** [1999] IRLR 572 ([**A;404**]). It argues that what matters is the Respondent's conscious or unconscious reason for treating the Applicant less favourably. This means that what matters is not whether the Applicant actually had any intention to return to work, but whether the Respondent believed that to be the case.

4.10 Issue is taken with the Applicant's assertion that no comparator is required for a claim based upon discrimination on the grounds of sex. The Applicant's argument follows the sequence of cases culminating with the House of Lords decision in ***Webb v. EMO Air Cargo (UK) Ltd*** [1995] ICR 1021 ([**A;378**]). The House of Lords followed a ruling by the European Court of Justice in relation to Directive 76/207, which was the source of the English sex discrimination regime, and felt itself obliged to construe the English statute in accordance with the European directive and ruling. The Respondent argues that this does not even have persuasive authority in Guernsey, since Guernsey's erstwhile membership of the European Union was only to the extent as required by Protocol 3 to the treaty of accession, which did not include matters relating to employment law. What is required is clearly set out in s.1(1)(a) of the 2005 Ordinance and clearly refers to comparison with a man. Cases such as ***Renouf v. States of Guernsey*** ED0015/16 ([**A;283**]), ***Commissioner of the City of London Police v. Geldart*** [2021] IRLR 749, and ***O'Neill v. Governors of St Thomas More RC Voluntary Aided Upper School*** [1996] IRLR 371 ([**A;383**]) do not assist, since they were based upon the decision of the House of Lords in ***Webb***, were reached after the English legislation was amended, or did not consider the point. In any event, the States of Deliberation introduced s.10A into the 2005 Ordinance to provide protection against discrimination on the grounds of pregnancy, which does not require a comparator.

4.11 The Respondent submits that the burden of proof is as set out in s.44(2) of the 2005 Ordinance ([**A;192**]). Care must be taken when considering English authorities which were decided following the amendment introduced by ss.136(2) and (3) of the *Equality Act 2010*. It submits that the relevant authorities are ***Barton v. Investec Henderson Crosthwaite Securities*** [2003] ICR 1205 ([**A;460**]) as finessed by ***Igen Ltd. v. Wong and ors.*** [2005] IRLR 258 (CA) ([**A;531**]). The resulting guidance is set out in paragraph 46 of the Respondent's closing submissions and its application is analysed in paragraphs 49 to 58.

4.12 S.10A of the 2005 Ordinance ([**A;159**]) sets out the test for discrimination relating to maternity leave. It is agreed that for the purposes of this section, no comparator is necessary. The Respondent urges caution when considering English authorities because there are material differences between the provisions of the 2005 Ordinance and the *Equality Act 2010* and its predecessor, the *Sex Discrimination Act 1975*. The main difference is that the 2005 Ordinance uses the phrase "*in relation to*", whereas the *Equality Act 2010* uses "*because*" and the *Sex Discrimination Act 1975* uses "*on the ground of*" when describing the appropriate nexus test (*i.e.* the link between the discrimination and the protected maternity grounds). Furthermore, it is agreed between the parties that when interpreting s.10A it must be read as requiring that the discrimination be "*in relation to*" the protected maternity grounds, and not as part of a sub-clause that is expressly and only attached to the employment rather than the discrimination.

4.13 The Respondent submits that the relevant request by the Applicant for consideration by the Tribunal was in relation to an extension of maternity leave and does not amount to notice pursuant to *The Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016*. This means that it is not covered by s.10A(b) of the 2005 Ordinance. Furthermore, the scope of s.10A(c) is limited to employees "*returning to work at the end of a period of maternity leave*" and the Respondent submits that, on the Applicant's own admission, she would only have been returning (which is, in any event, denied) at some future date after her statutory maternity leave.

4.14 The Respondent seeks to derive practical assistance from the first instance decision of the UK Tribunal in ***Thompson v. Scancrown Ltd.*** (Case No. 22051999/2019) (**[A;748]**) and in particular the discussion in paragraph 63 relating to direct maternity related discrimination (acknowledging that the words "*in relation to*" should replace "*because*" in the first sentence of that paragraph). The subjective thought processes of the Respondent are the central issue.

4.15 When analysing the proposition of whether the Applicant has the benefit of protection under s.10A(c), since the Respondent argues that she did not intend to return to work after her maternity leave, the starting point is the normal meaning of the words in s.10A(c). The Respondent argues that if someone falls within the group of women who are protected, but they are then subject to discrimination for reasons that are not in relation to the protected maternity grounds, then whilst they might have other remedies, the provisions of s.10A(c) do not apply. A number of hypothetical illustrative examples of the consequences of the contrary position are set out in paragraph 88 of the Respondent's closing submissions.

4.16 The issue of constructive dismissal is subject to the statement of the law set out a number of times by the Tribunal; a particular and recent example being that in ***Streeter v. Sandpiper C.I. Ltd.*** (ED033/19) at paragraph 4. The Respondent identifies five separate potential ways in which the Applicant could realistically argue that she was constructively dismissed: (1) if any of the complaints of discrimination are upheld; (2) a breach of the contractual entitlement to take an additional one to two months of maternity leave; (3) a refusal to allow the Applicant to take unpaid leave and/or use the sabbatical scheme; (4) breach of the implied term of trust and confidence if some of the options contained in Mr Kyle's email of 30 April 2021 had been accepted by the Applicant; and (5) any or all of the previous conditions and/or any of those in paragraph 32 of the ET1 (**[E;A11]**). The Respondent summarises its arguments in relation to each potential ground in paragraphs 100 to 178 of its closing submissions.

4.17 If the question of remedy falls to be considered, the Respondent accepts that the basic six-months' pay is £75,000; it goes on to argue that any bonus figure should not be included as it is not payable "*pursuant to the contract of employment*" as required by s.34 of the Law. If this argument is successful, it would reduce the relevant pay from £102,149.11 (as set out in the ET1 at **[E;A3]**).

4.18 It is further argued that the Tribunal should, if an award is made, make a reduction in the award pursuant to s.23(2) of the Law. The detailed submissions are set out in paragraphs 193 to 201 of the Respondent's closing submissions.

<u>On behalf of the Applicant</u>

4.19 Oral closing submissions were made on behalf of the Applicant and started by incorporating the skeleton argument at **[E;C1-16]**. It was submitted that Mr Kyle's evidence, to the effect that the Applicant was "playing a game", jarred and the Applicant

kept coming back to the point that someone in her scenario was seeking an extension to her maternity leave having been told that there was a policy for that. Why not give the Applicant the opportunity to extend her maternity leave? Why was the Respondent so adamant that only the Applicant had to be back in Guernsey at the end of her maternity leave? There was an attempt at "character assassination" when the Applicant's position was described as a contrivance and a charade. Mr Kyle was evasive when he was asked if he was accusing the Applicant of lying.

4.20 One thing upon which the Applicant and the Respondent agree is the need for the Tribunal to make findings on credibility, in particular, with regard to the conversations that the Applicant had on 22 and 28 April 2021. To make findings of fact will require findings about credibility. It was submitted that the Applicant was an excellent witness – she was calm and clear; she did not speculate; she had a good level of recall; and if she was unable to answer a question she was clear about it. It should be remembered that the Applicant gave evidence for three days, often during her night-time, and still came across well. Contrast this with the Respondent's witnesses – Mr Pragnell was argumentative and could be flippant and evasive.

4.21 The Applicant urged the Tribunal to pay close attention to Mr Kyle's evidence. It was submitted that there was an attempt to introduce hearsay evidence in relation to the issue of specific disclosure; there was a volume of pure speculation (particularly in relation to the conclusion that the Applicant was not going to return to Guernsey); he was incredibly evasive; he was dogmatic; he sought to suggest that the inequality relationship in Mr Pragnell's email of 17 April (**[E;F72]**) was the wrong way round; and he did not retain his own metadata, so it is not possible to interrogate the origin of **[E;F132]** (compare this with the Applicant's exemplary knowledge of the documents).

4.22 It was submitted that Mr Fleming's recollection of the meeting he described was accurate and Ms Jacob's recollection was pure speculation. Furthermore, Ms Jacob's reference to "*resilience and mentoring*" in her witness statement (**[E;F100h]**) was taken directly from Mr Pragnell's documentation.

4.23 The Applicant then dealt with the competing notes of the conversations. It had been suggested that her notes were not reliable because they were not sent to Mr Pragnell for review. The Tribunal was invited to look at the timing of when the respective notes were written; the Applicant is a meticulous note-taker and her note that was sent to herself was made almost contemporaneously. Compare that with Mr Pragnell's notes that were prepared after the Applicant had already rejected the third option put to her. A similar approach should be taken with the notes prepared by the Applicant and Mr Kyle (**[E;F130-131]**).

4.24 Matters that are hearsay are really a question of how much weight should the Tribunal attach to them. It is better to rely upon direct evidence.

4.25 The Applicant suggests that it is significant that the Respondent is a business that has a limited number of policies – no more than absolutely necessary. There is no guidance for employees on how such policies as do exist work and they are, in any event, defensive. The Respondent wants to avoid policies becoming a "noose". The Respondent failed to have or to implement an equal opportunities policy and provided no training to staff generally.

4.26 When considering the question of constructive dismissal, it does not matter if it is implausible; the question is did it happen.

4.27 The Applicant submitted that the phrase "*in relation to*" used in s.10A of the 2005 Ordinance does not mean "*because of*" or "*on the grounds of*"; it applies to the concept of employment and not just the three necessary factors. Similarly, "*is returning*" means that there is a presumption of return unless and until there is a clear statement to the contrary.

4.28 The law does not require a comparator for discrimination on the grounds of sex, but simply to consider whether there has been less favourable treatment of the Applicant. There cannot be a male comparator for questions of discrimination on the grounds of pregnancy.

4.29 The Tribunal should not take too narrow an approach to a comparator. There is a need to determine the relevant features of a comparator. A subjective post-facto scenario from Mr Pragnell is not relevant. The Applicant drew particular attention to the guidance in ***Barton*** at **[A;472;25]** and in ***Nagarajan*** at **[A;404]** (particularly paragraphs 9, 12 – 23, and 37).

4.30 The question of the request for an extension to maternity leave cannot be divorced from the maternity leave itself; there could not be a request for an extension without the maternity leave existing in the first place. The Applicant submits that the Tribunal should look closely at Mr Pragnell's insistence that the Applicant must return to Guernsey after her maternity leave; such an insistence cannot be divorced from the question of the Applicant's sex.

5.0 Legal Framework

Constructive dismissal

5.1 The Tribunal proposes to follow the analysis set out in ***Streeter v. Sandpiper C.I. Ltd.*** (ED033/19) in paragraphs 4.1 to 4.9. The basic framework is that since the Respondent denied that the Applicant was dismissed, it was for the Applicant to prove, on the balance of probabilities, that she had terminated her contract of employment, with or without notice, in circumstances such that she was entitled to terminate it without notice by reason of the Respondent's conduct (see section 5(2)(c) of the Law). In order for the Applicant to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the Respondent. This may be either an actual breach or an anticipatory breach.

(2) That breach must be sufficiently important to justify the Applicant resigning, or else it must be the last in a series of incidents which justify her leaving.

(3) She must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the Respondent's breach, otherwise she may be deemed to have waived the breach and agreed to vary the contract.

5.2 Questions of constructive dismissal should be determined according to the terms of the contractual employment relationship and not in accordance with a test of 'reasonable conduct by the employer'. Lawful conduct is not capable of constituting a repudiation even though it may be unwise or unreasonable in industrial relations terms. When deciding whether there has been a breach of contract, the Tribunal must reach its own conclusion on

this question. The test is not whether a reasonable employer might have concluded that there was no breach: it is whether on the evidence adduced before it the Tribunal considers that there was.

5.3 The implied term of trust and confidence (often referred to as 'the T&C term') to behave reasonably towards employees means that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The T&C term is of potentially wide scope; it can extend to extremely inconsiderate or thoughtless behaviour.

Discrimination on the grounds of sex

5.4 The Tribunal considered both direct and indirect discrimination against the Applicant. Pursuant to s.6(2)(b) of the 2005 Ordinance, a person shall not discriminate against a woman employed by him at an establishment in Guernsey by dismissing her, or subjecting her to any other detriment. Pursuant to s.1(1) of the 2005 Ordinance a person discriminates against a woman if:

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man but -

(i) which is such that it would be to the detriment of a considerably larger proportion of women than of men,

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment.

Discrimination on the grounds of maternity

5.5 Pursuant to s.10A of the 2005 Ordinance, a person shall not, in relation to employment by him at an establishment in Guernsey, discriminate against a woman who:

(1) has given birth to a living child,

(2) has given notice to her employer of her intention to be absent from work on maternity leave, or

(3) is returning to work at the end of a period of maternity leave.

5.6 Section 2(1) of the 2005 Ordinance provides that s.1 and the provisions of Part II (which includes ss.6 and 10A) of the 2005 Ordinance relating to sex discrimination against women are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as re requisite. Section 2(2) of the 2005 Ordinance goes on to provide that in the application of s.2(1) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth.

The burden of proof

5.7 Pursuant to s.44(2) of the 2005 Ordinance, where, on the hearing of a complaint brought under ss.6 or 10A, the complainant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an explanation that the respondent has committed an act of discrimination against the complainant which is prohibited by any provision of Part II (which includes ss.6 and 10A) of the 2005 Ordinance, the Tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

6.0 Facts Found

6.1 The Tribunal found that the management ethos and working environment operating at the material time was high pressure and geared towards revenue generation. The impression was that the Respondent tried to mimic the working practices of billionaire entrepreneurs from America. Sometimes this meant that the office atmosphere could be emotionally brutal and sometimes unpleasant. It reminded the Tribunal, for better or worse, very strongly of the Objectivism philosophy of Ayn Rand. The practical effect appeared to manifest itself as "get on or get out". Furthermore, notwithstanding the Respondent's protestations to the contrary, the Tribunal found that, for the purposes of this analysis, it was a sophisticated employer: it had 90 employees in Guernsey and about 10 in Japan, it had a dedicated human resources function and was able to take advice from an in-house lawyer and external Advocates.

Discrimination on the grounds of sex

6.2 The Tribunal finds that when considering an allegation of discrimination contrary to s.6 of the 2005 Ordinance there must be a suitable comparator, either real or hypothetical. In this case there is no real comparator and so in relation to the appropriate hypothetical comparator, the Tribunal is to consider the Respondent receiving a similar request made by a man, in similar circumstances, such as the comparator having taken a period of leave overseas to which they were entitled, and that their partner, who was also a senior employee, had resigned for the same reasons as the Applicant's husband, and that the Respondent had reached the same conclusions that the individual had no intention of returning to work. That might be a somewhat convoluted and involved comparator, but that is what the Tribunal considers it necessary to use as the appropriate hypothetical comparator.

6.3 When considering the burden of proof, the Tribunal must consider, first, whether the Applicant has proved facts from which the Tribunal could, apart from s.44 of the 2005 Ordinance, conclude in the absence of an explanation that the Respondent has committed a prohibited act of discrimination against the Applicant. In particular, has the Applicant proved facts from which the Tribunal could conclude (in the absence of an explanation from the Respondent) that she suffered direct or indirect discrimination on the grounds of her sex arising from the failure to offer the option of the sabbatical programme or a period of unpaid leave? The question of an extension to maternity leave falls to be considered under the heading of maternity leave discrimination and which is discussed below.

6.4 Simply looking at the change between the email dated 17 April 2021 from Mr Pragnell to the Applicant (**[E;F72-73]**) and the email dated 30 April 2021 from Mr Kyle to the Applicant (**[E;F144-147]**) there is evidence to support a finding that in the space of 13 days an offer including access to the sabbatical programme and unpaid leave were withdrawn. Such a withdrawal could enable the Tribunal to conclude in the absence of an explanation that the Respondent has committed an act of discrimination against the Applicant based upon her sex. In such circumstances, the burden of proof then switches to the Respondent to prove,

on the balance of probabilities, that it did not commit that act of discrimination.

6.5 The Tribunal finds as a fact that the Respondent genuinely believed that the Applicant was reluctant to return to work in Guernsey. That conclusion is justified by the evidence of Mr Pragnell and Mr Kyle, and also by the assertions in Mr Kyle's email dated 30 April 2021 that went unchallenged in the Applicant's reply. Using the hypothetical comparator identified above, the Tribunal concludes that the Respondent's change of attitude towards the Applicant arose because of that genuinely held belief and not because of the Applicant's sex. The company ethos was made very clear during the course of the evidence, both oral and documentary, in that total commitment to the business was required from an employee regardless of sex. The Respondent was a commercial organisation with an expectation that high salaries would be repaid by dedicated service. In circumstances where the Respondent genuinely believed that such service was not forthcoming, the Tribunal finds that it would have treated employees in exactly the same way regardless of their sex. Accordingly, the claim for discrimination on the grounds of sex is dismissed.

Discrimination on the grounds of maternity

6.6 Under s.10A of the 2005 Ordinance, the Tribunal finds that no comparator is necessary. This follows from the fact that only a woman can take maternity leave and the express provision in s.2(2) of that Ordinance.

6.7 The conditions set out in s.10A(a), (b) and (c) are disjunctive, not conjunctive. In other words, the Applicant only needs to satisfy one of them to obtain the protection against discrimination. The Applicant obviously satisfies conditions (a) and (b), so it is unnecessary for the Tribunal to decide whether the Applicant was "*returning to work at the end of a period of maternity leave*".

6.8 The Tribunal finds, subject to the special provision relating to the burden of proof discussed above, that in order to succeed with a claim of discrimination relating to maternity leave under s.10A of the 2005 Ordinance, the Applicant must demonstrate that the discrimination (*i.e.* treatment to her detriment) must be as a result of one of the conditions is (a), (b) or (c) of s.10A. This must be the correct interpretation of S.10A given that the Tribunal has concluded that no comparator is necessary. The discrimination is not as a result of the complainant's sex, but arises as a result of the specified conditions.

6.9 The Applicant has the burden of showing, initially, that she has proved facts from which the Tribunal could, apart from s.44 of the 2005 Ordinance, conclude in the absence of an explanation that the Respondent has committed a prohibited act of discrimination against the Applicant. There is, as before, a clear change between Mr Pragnell's email of 17 April 2021and Mr Kyle's email of 30 April 2021; that could, in the absence of explanation from the Respondent, amount to an act of discrimination against the Applicant. In those circumstances the burden of proof then switches to the Respondent.

6.10 The Tribunal finds that the Respondent's change of attitude towards the Applicant arose because of the Respondent's genuinely held belief that the Applicant did not intend to return to work in Guernsey. It was not as a result of any of the conditions set out in (a), (b) or (c) of s.10A. The Respondent took a very calculated view of the value of the Applicant to its business and the Tribunal finds that the Respondent concluded that whilst it was prepared to honour the Applicant's statutory maternity leave it was not prepared to extend it beyond the statutory limit. That was something that the Respondent was perfectly entitled to do; the Applicant's statutory maternity leave is protected, but a discretionary extension to it is not protected under the same provisions. In the circumstances, the Tribunal dismisses the Applicant's claim for discrimination relating to

maternity leave.

Constructive dismissal

6.11 The Tribunal finds that the discussion between the Applicant and Mr Kyle (subsequently evidenced by the emails dated 14 and 15 July 2020 (**[E;F74-77]**)) concerning the possibility of extending the Applicant's maternity leave by one to two months does not amount to a variation of the contract of employment. That finding is based upon the uncertainty of the alleged variation to the contract; there is no ascertainable mechanism for determining how long any extension would be or how the decision to extend or not would be made.

6.12 The matter does not end there. The implied term of trust and confidence to behave reasonably towards employees means that the Respondent shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The Tribunal finds that the discussion between the Applicant and Mr Pragnell is well recorded by the exchange of emails on 14 and 15 July 2020 and that there clearly was some discussion touching upon the possibility of an extension to the Applicant's maternity leave. Quite how that was to be implemented remains unclear, but there was, in the Tribunal's view, a commitment to consider the possibility. Furthermore, an unreasonable refusal to consider that possibility amounts to a breach (either actual or anticipatory) of the implied term of trust and confidence. Breach of this implied term is a wholly separate issue to that of discrimination on the grounds of sex, and the Respondent's genuine belief that the Applicant was not going to return to work in Guernsey is no defence to that allegation of breach of contract.

6.13 The Tribunal finds that the breach of the implied term of trust and confidence was sufficiently important to justify the Applicant's resignation; that the Applicant did, in fact, resign in response to that breach; and that the Applicant did not delay too long before she resigned. In those circumstances, the Tribunal finds that the Applicant was constructively dismissed.

6.14 When considering the appropriate award for constructive dismissal, the Tribunal finds that the Applicant's average bonus, as calculated in the ET1, should be included as part of the Applicant's relevant "pay". The bonus, although discretionary, was paid as a result of the existence of the contract of employment. If that were not the case, one wonders upon what basis the bonus was paid. The Tribunal has considered the Respondent's arguments for reducing the award pursuant to s.23(2) of the Law. On reflection, the Tribunal does not think that it would be just to exercise its discretion to reduce the award and accordingly awards the Applicant the sum of £139,811.11 as pleaded at **[E;A3]** (this being the figure based upon her pre-maternity leave bonus, which the Tribunal considers to be a fairer reflection of the Applicant's true earning capacity, in accordance with s.22(2)(b) of the Law).

7.0 Conclusion

7.1 The Tribunal dismisses the Applicant's claims for discrimination on the grounds of sex and in relation to maternity leave. The Tribunal upholds the claim for constructive dismissal and awards the Applicant the sum of £139,811.11.

8.0 Costs

8.1 The Tribunal's power to awards costs is discretionary and governed by paragraph 6 of the Schedule to *The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005* and *The Employment Protection (Recoverable Costs) Order, 2006*.

8.2 Having taken into account all of the material before it, the Tribunal has decided not to award costs to either party.

.....
Signature of the Chair

.....
Date