EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Gibson	**- V -**	SAM Investment Holdings Ltd

Heard at: London Central

On: 21-26 March 2018, 3-12 and 14 September 2018 (17-19 September 2018 in chambers)

Before: Employment Judge Baty
Mr T Robinson
Dr V Weerasinghe

Representation:

For the Claimant: Ms S McKie QC (Solicitor)
For the Respondent: Mr P Nicholls QC (Counsel)

RESERVED JUDGMENT

1. The Claimant's complaints of unfair dismissal, discrimination arising from disability in relation to the UK role (issue 13.1); discrimination arising from disability in relation to the claimant's dismissal (issue 13.6); and one of the claimant's reasonable adjustments complaints in relation to her dismissal (issue 22.5.1) all succeed.

2. The tribunal has jurisdiction to hear all of the above complaints: all of them were presented in time save for the complaint at issue 13.1; however, it was just and equitable to extend time in relation to the complaint at issue 13.1.

3. The claimant's remaining complaints of disability discrimination (direct discrimination, indirect discrimination, discrimination arising from disability, and for a failure to make reasonable adjustments) and her complaint of victimisation all fail.

4. The claimant's role of Head of Global Compliance would have been made redundant no later than 31 December 2017.

5. The claimant would have been dismissed fairly in any event no later than 30 September 2017 as a result of her having made covert recordings.

6. Subject to the above, and subject also to the final paragraph of this judgment, the tribunal makes no adjustments to compensation either for contributory conduct or as a result of the principles in Polkey v AE Dayton.

7. The tribunal makes an uplift of 10% to the unfair dismissal compensatory award as a result of unreasonable failures by the respondent to follow the ACAS Code 2015 on Disciplinary and Grievance Procedures.

8. The above decisions are unanimous.

9. By a majority, Dr Weerasinghe dissenting, the tribunal finds that: but for the discrimination that we found, the claimant had a 40% chance of being appointed to the UK role in 2015; and, had there been an open selection competition, the claimant had a 40% chance of being appointed to the UK role in 2017.

10. The parties' attention is drawn to the directions set out in the penultimate paragraph of the reasons below.

REASONS

The Complaints

1. By a claim form presented to the Employment Tribunal on 7 September 2017, the Claimant brought complaints of unfair dismissal, disability discrimination (direct discrimination, indirect discrimination, discrimination arising from disability, and for a failure to make reasonable adjustments) and victimisation. The Respondent defended the complaints.

2. The full merits hearing of the claim had originally been listed for 10 days from 21 March - 5 April 2018. Following discussion with the representatives of various matters relating to the scope of the case and the structure of the hearing (some of which are referred to below), the tribunal spent the first two days reading into the case and on the third day, the claimant's evidence commenced. The hearing then adjourned for the weekend. However, Dr Weerasinghe, the tribunal member from the employee panel, became unwell over the weekend and informed the tribunal that he would not be able to attend at all the following week. When the parties attended on the Monday of that week, there was discussion between the representatives and the remaining two members of the tribunal as to how to proceed. The details of that discussion are set out in the note dated 26 March 2018 sent out by the tribunal, which we do not repeat in full here;

however, in short, it was agreed between the tribunal and the representatives that the hearing should be adjourned and relisted, on liability only, before the same tribunal on 3-7, 10-12, 14 and 17-18 September 2018. A timetable for the relisted hearing was also agreed between the tribunal and the representatives.

The Issues

3. The parties produced an agreed list of issues at the start of the original hearing. Although it was agreed that the hearing would be on liability only, it was also agreed that the tribunal should nonetheless at the liability stage consider certain issues relating to remedy, for example contributory conduct, reductions in accordance with the principles in Polkey v AE Dayton, and adjustments to compensation through any unreasonable failure to follow the ACAS Code 2015 on Disciplinary and Grievance Procedures. There was some discussion as to whether the entirety of issue 31, which included the issue of whether the claimant would have been dismissed in any event by reason of redundancy and if so when, should be considered at this stage, on the basis that the respondent was not prepared for this. As it turned out, however, this became academic because, when the hearing was adjourned due to Dr Weerasinghe's illness, the tribunal agreed orders with the representatives for production of relevant documents and supplementary witness statements in relation to this issue, which orders were duly complied with. Therefore, at the reconvened hearing, it was agreed that all of these remedy points (those at paragraphs 31, 32 and 33 of the list of issues) would be determined at the liability stage.

4. At the reconvened hearing, a couple of typographical errors were corrected on the list of issues at the start of the hearing and that list of issues was agreed. The tribunal made clear, both at the start of the original hearing and at the reconvened hearing, that it would be determining that list of issues and no others.

5. Mr Nicholls confirmed at the start of the original hearing that the respondent accepted that the claimant was at all material times a disabled person for the purposes of the Equality Act 2010 by reason of Type I Diabetes and by reason of cancer.

6. The agreed list of issues for determination was therefore as follows:

All numbers in square brackets refer to the Claimant's Particulars of Claim presented on 7 September 2017.

Jurisdiction: Limitation Period (s123 Equality Act 2010)

1 Was early conciliation commenced more than 3 months after any of the conduct complained of (i.e. 12 May 2017)?

2 If so, did that conduct form part of a chain of continuous conduct which ended on or after 12 May 2017?

3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred prior to 12 May 2017?

Direct Disability Discrimination (s13 Equality Act 2010)

4 Was C subjected to less favourable treatment because of her disability in connection with the following matters:-

4.1 appointment to the role of UK Director of Risk and Compliance [17, 18, 19, 20 and 21]. The comparator is Mr Rajiv Vyas;

4.2 consideration for and appointment to the role of Interim Global Head of Risk and Compliance. [25, 26, 17 and 28]. The comparator is Mr Alex Earp;

4.3 appointment to the role Global Head of Risk and Compliance [31 and 32]. The comparator is Mr Jorge De La Vega;

4.4 in relation to the bonus payment paid to C in March 2017. [33];

4.5 by being suspended on 20 January 2017 [34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48];

4.6 by being dismissed on 12 May 2017 [53-54].

5 C relies upon on a hypothetical comparator in the alternative to the individuals named above and in relation to paragraphs 4.4, 4.5 and 4.6.

Indirect Discrimination (s19 Equality Act 2010)

6 Do any of the matters in 7.1, 7.2, 7.3, 7.4 and/or 7.5 amount to PCPs for the purposes of s.19 Equality Act 2010?

7 If the answer to the above is yes, did R apply any of the alleged PCPs set out below:

7.1 In relation to the process for the appointment for the role of UK Director of Risk and Compliance [17, 18, 19, 20 and 21];

7.1.1 insisting on an interview with Egon Zehnder;

7.1.2 insisting that the interview had to take place in London;

7.1.3 by only allowing C one chance to impress in a telephone interview; and/or

7.1.4 by insisting that the candidate not be temporarily indisposed due to illness.

7.2 In relation to the appointment to the role of Interim Global Head of Risk and Compliance [25, 26, 17, 28 and 29];

7.2.1 by failing to consider C for the role;

7.2.2 by not undertaking a formal recruitment process.

7.3 In relation to the payment of a higher bonus in March 2017 [33];

7.3.1 by requiring employees to work in the office and be "fit and able" as a condition for a proper bonus payment.

7.4 In relation to C's suspension by R on 20 January 2017 [47, 48];

7.4.1 by requiring where a person who worked from home to display greater evidence of commitment to the role whereby any time away from work in the middle of the day would be looked upon much more suspiciously than those working at their desk.

7.5 In relation to C's dismissal by R on 12 May 2017 [50];

7.5.1 by deciding that R would not obtain expert advice when advised by the C that she was having a hypoglycaemic attack when giving her answers.

8 If R applied any of the above alleged PCPs, did R apply that PCP to C?

9 If R applied any of the above alleged PCPs, did R apply it or would R have applied it to persons who did not share C's disability?

10 If so, did or would that PCP put persons with whom C shares the same disability, at a particular disadvantage when compared with persons who do not share it?

11 If so, did or would that PCP put C at that particular disadvantage?

12 If so, can R show that the PCP was a proportionate means of achieving a legitimate aim?

Discrimination arising from Disability (s15 Equality Act 2010)

13 Was C treated unfavourably because of something arising in consequence from C's disability in relation to the following matters:-

13.1 by not being appointed to the role of UK Director of Risk and Compliance [17, 18, 19, 20 and 21];

13.2 by not being considered for or appointed to the role of Interim Global Head of Risk and Compliance. [25, 26, 17 and 28];

13.3 by not being appointed to the role of Global Head of Risk and Compliance following the departure of Mr Alex Earp.[31 and 32];

13.4 by not being paid a higher bonus in March 2017. [33];

13.5 by being suspended on 20 January 2017 [34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48];

13.6 by being dismissed on 12 May 2017 [53-54].

14 In each of the above cases, was C treated unfavourably and by whom?

15 If C was treated unfavourably, what was the reason or reasons (including that which had significant influence) for the treatment

16 What is the "something" arising in consequence from C's disability?

17 Was the "something" the reason or one of the reasons for the treatment (where significant influence is sufficient)?

18 If so, can R show that the treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (s20 Equality Act 2010)

19 In relation to each of the matters below, did R impose any or all of the PCPs set out below:

19.1 In relation to the process for the appointment for the role of UK Director of Risk and Compliance [17, 18, 19, 20 and 21];

19.1.1 insisting on an interview with Egon Zehnder;

19.1.2 insisting that the interview had to take place in London;

19.1.3 by only allowing C one chance to impress in a telephone interview; and/or

19.1.4 by insisting that the candidate not be temporarily indisposed due to illness.

19.2 In relation to the appointment to the role of Interim Global Head of Risk and Compliance [25, 26, 17, 28 and 29;

19.2.1 by failing to consider C for the role;

19.2.2 by not undertaking a formal recruitment process.

19.3 In relation to C's suspension by R on 20 January 2017 [46];

19.3.1 By requiring that C be judged based on her immediate answers in the suspension meeting.

19.4 In relation to C's dismissal by R on 12 May 2017 [50];

19.4.1 by deciding that R would not obtain expert advice when advised by C that she was having a hypoglycaemic attack when giving her answers.

19.4.2 By relying on the answers C gave in the suspension meeting.

20 If R imposed or applied any of the above PCPs, did that PCP place C at a substantial disadvantage compared with persons who are not disabled?

21 If so, did R know (or should R ought to have known) that C was placed at a substantial disadvantage with persons who are not disabled?

22 If so, was it reasonable for R to have made any or all of the following adjustments:-

22.1 In relation to the process for the appointment for the role of UK Director of Risk and Compliance [17, 18, 19, 20 and 21]:-

22.1.1 dispensing with consideration of external candidates;

22.1.2 judging C on her past performance;

22.1.3 allowing C a chance to digest interview questions in advance of an interview and prepare a presentation with extra time afforded to her;

22.1.4 allowing her a chance to re-take her interview;

22.1.5 dispensing with the interview with Egon Zehnder or have it take place near C's home. [22, 23 and 24].

22.2 In relation to the appointment to the role of Interim Global Head of Risk and Compliance:-

22.2.1 by implementing a proper recruitment process;

22.2.2 by alerting C to the existence of the vacancy and considering her for it; or

22.2.3 by creating a very short interim role for Mr Earp until the end of January 2016 when C was due to revisit her home working arrangement [29 and 30].

22.3 In relation to the appointment to the role of Global Head of Risk and Compliance:-

22.3.1 by implementing a proper recruitment process [31 and 32].

22.4 In relation to C's suspension on 20 January 2017:-

22.4.1 by stopping or suspending the meeting when those present noted that C said that her blood sugar level was low and she was having a hypoglycaemic attack [46 and 47].

22.5 In relation to C's dismissal by R on 12 May 2017:-

22.5.1 by not dismissing her;

22.5.2 by disregarding the C's answers during the meeting on 20 January 2017 when those present noted that C said that her blood sugar level was low and she was having a hypoglycaemic attack;

22.5.3 by obtaining proper medical advice. [51].

Victimisation (s.27 Equality Act 2010)

23 Do any of the following matters amount to a Protected Act for the purposes of s.27(2) Equality Act 2010?

23.1 C alleging in a letter dated 24 January 2017 from her solicitor to R that she was disabled and that R had a duty not to subject her to "further discriminatory acts and to make appropriate reasonable adjustments" [58];

23.2 C allegedly saying in a meeting between herself and Jesus Ruiz dated 14 February 2017. "managers should not discriminate against employees and this has been done to me"' [58];

23.3 C alleging (in a letter dated 2 May 2017 to Antonio Faz) that both her suspension and the disciplinary process amounted to disability discrimination and/or a failure to make reasonable adjustments [58].

24 If any or all of the above matters amounted to a Protected Act, did R subject C to a detriment (being her dismissal) because either:-

24.1 C had done a Protected Act; or

24.2 R believed that C had done or may do a Protected Act?

25 What is the detriment?

Unfair Dismissal (s94 Employment Rights Act 1996)

26 What was the reason for C's dismissal?

27 Was the reason a reason that falls within s.98(2) Employment Rights Act 1996?

28 If so, did R act reasonably (in accordance with s.98(4) Employment Rights Act 1996 in treating the reason as a sufficient reason for dismissing C?

Remedy (section 124 Equality Act 2010)

29 Is the Claimant entitled to:

29.1 any recommendations and if so, what?

29.2 compensation in respect of injured feelings?

29.3 compensation for financial losses?

30 If so, how much compensation is the Claimant entitled to?

31 Alternatively, would the Claimant have been dismissed in any event by reason of misconduct or redundancy and if so, when?

32 Alternatively, should any award be reduced in accordance with the principles in *Polkey v AE Dayton Services Limited* or to reflect contributory fault on the part of C (if any) and if so, how much?

33 Alternatively, should any award be increased to reflect any failures on the part of R to follow the ACAS Code of Practice on Disciplinary and Grievance Procedure? If so, what are the alleged failures and what uplift should be awarded to the Claimant's compensation?

7. In her submissions, Ms McKie withdrew all of the complaints relating to the bonus and these were dismissed by the tribunal. The issues set out above relating to the bonus have not therefore been determined.

Adjustments

8. At the start of the original hearing, the judge discussed any adjustments that might be needed in relation to the hearing, in particular with Ms McKie in relation to the claimant, who is Type I diabetic. The judge explained how a typical tribunal day would normally run in terms of timing and breaks. Ms McKie explained that the claimant would need to check her blood sugar levels regularly when giving evidence (which she duly did) and have Lucozade with her when giving evidence (which she did). She explained that the tribunal may need to adjourn if the claimant's blood sugar level went below 4 on the scale, but that otherwise no breaks beyond the usual were required. The tribunal afforded the claimant these adjustments throughout her evidence.

9. On one occasion, at the reconvened hearing, on the third day of the claimant's evidence, the claimant had an episode, which she later informed the tribunal was a panic attack and a hyperglycaemic episode (one where her blood sugar levels went excessively high, as opposed to a hypoglycaemic episode, where blood sugar levels go excessively low). The claimant needed assistance from her husband, who was present, and left the room and the hearing adjourned. It was agreed that an early lunch should be taken and that a view could be taken about the claimant's ability to continue after lunch. The representatives kept the tribunal informed. When the hearing reconvened, the judge asked the claimant whether she felt well enough to continue, reassuring her that there was absolutely no pressure on her to do so and that the hearing could adjourn if she wanted an adjournment (he had also communicated this via her representative previously when the claimant had been absent). The claimant however said that, whilst her blood sugar levels remained higher than normal, she was okay to continue and chose to do so. The hearing continued. The claimant then required a further break. As Ms McKie later reported to the tribunal, those around the claimant were seeking to persuade her, notwithstanding that she wished to continue, that she should adjourn for the day. In the light of that information, the tribunal agreed with both representatives that it should adjourn for the rest of that day and that the claimant's evidence should be completed the following morning (which it duly was).

The Evidence

10. Witness evidence was heard from the following:

For the Claimant:

The Claimant herself;

Ms Clare Bourne, a friend of the claimant's; and

Mr Ross MacLean, the claimant's husband.

For the Respondent:

Ms Rebecca Strudwick, formerly an assistant HR Manager at the respondent;

Ms Fiona Herbert, formerly the respondent's Head of HR;

Mr Ian Annand, formerly employed by the respondent as Head of Product UK;

Mr Jeff Scott, formerly the UK CEO of Santander Asset Management UK Ltd ("SAM UK"), a regulated subsidiary of the respondent;

Mr Jorge de la Vega, who from January 2017 was the Global Head of Risk & Compliance at the respondent but is now CEO of Aquanima, a company in another part of the Santander group;

Mr Jesús Ruiz, currently the Global Head of Risk & Compliance for the respondent, and who carried out an investigation in relation to the claimant following her suspension in January 2017;

Mr Antonio Faz, who was formerly employed by the respondent as Global Head of Legal and Company Secretary, and who held the disciplinary hearing in respect of the claimant which resulted in her dismissal;

Ms Lola Ybarra Castano, who is employed by the respondent as Head of Global Product and Business Development and who in 2017 conducted an investigation in relation to the claimant's grievance;

Mr Luis Garcia-Izquierdo, who is employed by the respondent and was at the relevant time Global CFO, and who adjudicated on the claimant's grievance;

Mr Javier Seirul-Lo, who is employed by the respondent, and was at the relevant time Global Head of Product, and who heard the claimant's grievance appeal;

Ms Mikala Aboorashtchi, currently an HR Manager at the respondent who, at the relevant time, was an HR Coordinator; and

Mr Mehdi Khadim, the current UK CEO of SAM UK, who heard the claimant's appeal against dismissal.

11. Both the claimant and Ms Herbert gave evidence by reference to 2 witness statements, each of them having also produced a supplemental witness statement pursuant to the tribunal's orders made when the original hearing was adjourned.

12. A Spanish-speaking interpreter was present for three days to assist in relation to those witnesses of the respondent whose first language is Spanish.

13. An agreed bundle in five volumes numbered pages 1-2129 was produced to the tribunal. By consent, a small number of pages were added during the hearing. In addition, an agreed supplemental bundle (in relation to issue 31) numbered pages 1-142 was produced when the hearing reconvened.

14. The tribunal read in advance the witness statements, any documents in the bundle to which they referred, and any other documents which the representatives specifically asked them to read. At the beginning of the reconvened hearing, the tribunal also had the first day to read back into this material and read the new material.

15. In addition, Mr Nicholls produced a "skeleton argument", which the tribunal read in advance. He also produced a basic chronology (not agreed).

16. As noted, a timetable for cross-examination and submissions had been agreed when the original hearing was adjourned. This was for the most part adhered to save that it slipped by roughly half a day, for understandable reasons, as a result of the episode during the claimant's evidence described above.

17. Both representatives produced written submissions and supplemented these with oral submissions.

18. The tribunal reserved its decision.

Findings of Fact

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

20. Dr Weerasinghe, who has dissented in a few areas from the conclusions of the majority in the conclusions section, has also added certain observations/findings amongst the findings of fact below. These are not the findings of/observations of the majority. To delineate them from the findings of the majority, they are set out in italics and sometimes also have the initials "VW" next to them; they represent only the minority view of Dr Weerasinge.

Overview

21. We start off by setting out a brief overview of the facts, before going into further details in the subsequent sections.

22. The respondent, SAM Investment Holdings Ltd ("SAM" being an acronym for "Santander Asset Management"), is part of the Banco Santander group. It provides investment management and asset management products and solutions to private investors, intermediaries and institutional clients. It operates in 10 countries around the world and manages around £180 billion in assets.

The respondent, also referred to as "TOPCO", is the unregulated holding company of each of the local Santander investment management entities, hence it is also referred to as the "global entity". Beneath it are the various local regulated SAM entities (which have variously existed in the UK, Brazil, Spain, Portugal, Chile, Argentina, Mexico, Luxembourg, Poland, Puerto Rico and (until 2016) the US). These entities are regulated.

23. Santander Asset Management was originally owned by Banco Santander but in December 2013 50% of the business was sold to Warburg Pincus and General Atlantic and the respondent entity was created as a vehicle for that. Throughout 2014 to 2016 the business was in the process of acquiring the entire operation of another investment business, Pioneer, from Unicredit (a process referred to as "Project Uno"); however that deal fell through and in December 2017, Banco Santander subsequently reacquired the 50% share of the business owned by Warburg Pincus and General Atlantic and the whole business was reabsorbed into the Banco Santander group, with the respondent from then on primarily being based in Madrid rather than in the UK.

24. The claimant had been working in the asset management industry as a compliance professional since 1993 and, in that time, had held numerous senior roles. The claimant joined the respondent as Global Head of Compliance on 9 June 2014 and was employed by it in this role until her dismissal with effect from 12 May 2017. She initially reported to Mr Amadeo Reynes, the Global Head of Risk and Compliance, who was her line manager.

25. The claimant was formally diagnosed with breast cancer on 12 May 2015. She had a mastectomy operation on 19 May 2015. She was signed off work for two weeks following the operation while she recovered from the surgery. Thereafter she returned to work on a "working from home" basis initially. She then went through a course of chemotherapy, which began on 23 June 2015, and then radiotherapy.

26. Around this period, the claimant had applied for the role of UK Director of Risk and Compliance (the "UK role"), a role based in the regulated UK subsidiary of the respondent, SAM UK. She was not successful. This application forms the basis of one set of her complaints before this tribunal.

27. In November 2015, Mr Reynes informed the respondent that he would be leaving, which created a vacancy for Global Head of Risk and Compliance. Mr Alex Earp was appointed to this role on an interim basis (the "interim global role") without an open application process. This forms the basis of the second set of the claimant's complaints.

28. In December 2016/January 2017, Mr Jorge de la Vega was appointed to the role of Global Head of Risk and Compliance on a full-time basis (the "permanent global role"), again without an open application process. This forms the basis of the third set of the claimant's complaints.

29. On Wednesday 18 January 2017, a day when the claimant was working at home, the claimant participated in a dressage event. Two days later, at a

meeting with HR, the claimant was suspended. An investigation followed, carried out by Mr Jesus Ruiz. Disciplinary action was then taken against the claimant, including a hearing before Mr Antonio Faz, which resulted in the claimant's dismissal with effect from 12 May 2017. The claimant appealed. The appeal was heard by Mr Mehdi Khadim. Her appeal against dismissal was dismissed on 21 July 2017. The claimant's suspension and dismissal are the basis of the fourth and fifth set of the complaints.

30. Prior to her dismissal, the claimant raised a grievance on 27 April 2017, which included allegations of discrimination in relation to the appointments to both the UK role and the global role. Her grievance was investigated by Ms Lola Ybarra. It was turned down on 11 August 2017 by Mr Luis Garcia. The claimant appealed. Her appeal was heard by Mr Javier Seirul-Lo and, in October 2017, was not upheld.

31. The claimant's employment tribunal claim was presented on 7 September 2017.

32. The claimant was at all times and remains a Type 1 diabetic. She has had hypoglycaemic attacks in the workplace before, which have been witnessed by her colleagues.

Detailed findings of fact

33. The claimant had a difficult relationship with her manager, Mr Reynes. Both were strong characters. The claimant was prepared to challenge Mr Reynes in her role as Global Head of Compliance. Mr Reynes' dealings with the claimant were often robust, as they were with other employees too. Other employees also found Mr Reynes difficult to work with. The difficulties which the claimant had with Mr Reynes existed prior to her cancer diagnosis in May 2015.

UK role

34. At some point in early 2015, the then incumbent of the UK role, Ms Gail Glenn, resigned from her role, albeit that resignation would not take effect until much later in the year (October/November).

35. SAM UK was using a head hunter, Engage PSG, to source potential external candidates for the UK role. They would screen the candidates and produce a shortlist to interview. An initial screening interview was to be carried out by Mr Rob Askham, the Commercial Director, which was designed to produce two or maybe three final round candidates who would be interviewed by Mr Jeff Scott (the then CEO of SAM UK, to whom the UK role reported) and Ms Fiona Herbert (the Head of HR).

36. The claimant (who on 5 May 2015 had been asked as Global Head of Compliance for her input on the job description that was being put together for applications for the UK role) decided to put herself forward for the UK role and told Mr Scott of her intention to do so. It is not entirely clear when she first spoke to Mr Scott about her interest in the UK role. The claimant maintained she first

spoke to him in March/April 2015, before her cancer diagnosis. Mr Scott's evidence suggests she first mentioned it to him shortly after her cancer diagnosis. Mr Scott refers in his witness statement to an email of 15 May 2015 from Engage PSG to him which references arranging meetings with "Fiona/Claire", which indicates that at that point Engage PSG were still of the opinion that the claimant might be involved in the interviewing panel for the UK role as a technical expert, which she would clearly not be able to do if she was a candidate. This is indicative that, up until at least shortly before the date of that email, Mr Scott was unaware that she wished to be a candidate for the UK role, as is the fact that she was giving input on the job description for the UK role as recently as 6 May 2015. In the light of that, we find that on the balance of probabilities the claimant informed Mr Scott of her desire to be a candidate for the UK role at or around the time of her cancer diagnosis.

37. At that point, Mr Scott had not envisaged the claimant as a potential candidate for the role; this was not because he didn't think she was capable but because he did not think she would want to do it, as her then current role as Global Head of Compliance was theoretically bigger in terms of reach and profile and he considered that moving from that global role to a local role might be seen by some as, at best, a sideways move. He also considered that one possible motivation for the claimant seeking the move was to get away from Mr Reynes. He was aware that their relationship was difficult, considered both of them to be tough characters and considered that the claimant could be "quite prickly". Mr Scott was also conscious that he would, in his words, be "robbing Peter to pay Paul" in that, if he appointed the claimant to the UK role, that would give Global a problem because they would then have to backfill the claimant's role.

38. [VW] [It is to be noted that the Claimant, at paragraph 82 of her statement states: "Getting the UK role was incredibly important to me and would have given me both longer term job security and a role that would provide the challenge I needed to boost me emotionally and make me feel like I were still part of the human race." She correctly sensed at the time that her Global role was not secure and the UK role was secure because of the regulated element in it. Furthermore, upon questioning, she said that the security of the UK role would have been clear to Mr Scott too.]

39. The claimant met a cancer specialist on Friday, 8 May 2015, who advised her that clinically it was very likely that she had breast cancer, albeit the formal results would be available the following Tuesday, 12 May 2015 (on which date the claimant was formally diagnosed with breast cancer).

40. Notwithstanding this, the claimant went into the office on Monday, 11 May 2015. Shortly after 9 am that morning, she told Mr Reynes that she had been diagnosed with what was almost certainly breast cancer.

41. On the same day, the claimant also told Mr Scott about this likely diagnosis. Mr Scott was sympathetic. He arranged for his daughter, who worked for Macmillan, to provide some information and support, which he then forwarded to the claimant.

42. The claimant also told Mr Scott that she wished to be considered for the UK role. For the reasons set out above, we find that this is likely to have been the first time she informed him of this.

43. The claimant's main work task on 11 May 2015 was the production of a board risk committee pack. She sent this to Mr Reynes at around 11:30 am that morning, stating in a covering email that, as discussed, the formatting may need to be revisited. Shortly before 8 pm the same day, Mr Reynes replied to this email stating "Ups! Why didn't you use the February report as a template? It was already formatted….". Emails of this style are typical of Mr Reynes and indeed we have seen in the bundle another example to a different employee which begins with the same expression "Ups!". However, the claimant, in the light of the fact that she had informed him earlier that morning of her likely cancer diagnosis, was very upset by this email.

44. The following day, 12 May 2015, the claimant received formal confirmation that she had cancer. She was told that she would need a mastectomy and that it would take place within a couple of weeks. She had the operation on 19 May 2015. Thereafter, she was absent from work for two weeks. After that, although she then went through a course of chemotherapy (beginning on 23 June 2015) and then radiotherapy, the claimant was at her own volition not signed off sick but it was agreed that she could work from home. The claimant told the respondent the arrangements she wanted and the respondent agreed to them. The respondent did not check up on her in terms of the amount of work she was doing. Notwithstanding that she was working from home, there were several references over the following months in documentation by various individuals at the respondent to the claimant, for example, being "off sick" or "on medical leave".

45. On 4 June 2015, the claimant met Mr Scott. She recorded that meeting without telling him that she was doing so. He was unaware that she had done so until she submitted a transcript of part of that conversation as part of her grievance in early 2017. They discussed the process for the UK role. Mr Scott emphasised that the most important thing was her health and that he did not want to put any pressure on her but said he wanted her to be included in the process in relation to the UK role. The claimant indicated that she would say if she felt that she couldn't cope with anything. Part of the transcript of the claimant's recording reads as follows, with Mr Scott saying:

"So listen so let's keep in touch then because we are going to go through the process and I want to put you in that process, I don't want to put any more pressure than needs to be but I want you to think that you are included. I'm going to say that you are going through the same process because we are going to be looking externally for the recruitment but clearly from my perspective if you are fit and well and able to do a role then why wouldn't I want to make use of that skill set you know, but I also need to be also balanced about that pressure and you feel like you do something different than the most important thing which is being well and working through that."

46. Ms Herbert carried out a home visit to the claimant on 22 July 2015. She was accompanied by Mr Dan Richardson of HR. Unbeknown to them, the claimant recorded the conversation (she only disclosed that recording during her grievance in 2017, and even then she disclosed only an extract of it). The

recording reveals Ms Herbert being empathetic and supportive towards the claimant. At one point during what appears from the transcript of the recording to have been a lengthy conversation, when they are discussing chemotherapy, the claimant states that there is something called "chemo fog" and refers to the political editor, Nick Robinson, having talked about suffering from chemo fog so that it makes you feel like you've woken from a Sunday afternoon doze. She does not say that she has or is suffering from "chemo fog" and, as noted, it is one small extract in an otherwise lengthy conversation. She did not use the expression "post chemotherapy cognitive impairment" or "PCCI" or "chemo brain", terms which have been used at this tribunal to denote the same phenomenon.

47. During the visit, Ms Herbert and the claimant also discussed the logistics for her to be interviewed for the UK role. The claimant was not required to go through an initial screening interview with Mr Askham, as the external candidates were, but was put forward straight to the second interview stage. The claimant explained to Ms Herbert that it would be inadvisable for her to travel into London for that interview because of her immune system. It was agreed that her interview (with Mr Scott and Ms Herbert) would therefore be a telephone interview. This was an adjustment for her benefit, because ordinarily such interviews would be conducted in person (as indeed was the interview with the other candidate at the final interview stage, Mr Rajiv Vyas). The claimant did not request any other adjustments to the process.

48. Mr Vyas was interviewed by Mr Scott and Ms Herbert on 13 July 2015.

49. We were taken to an email dated 13 July 2015 from Darren Duporte of Engage PSG to Ms Herbert, copied to Mr Scott. This stated:

"As discussed on Friday, Rajeev felt his meeting with Jeff was very positive and this has further solidified his interest in the UK head of compliance and risk opportunity. He sees this as an opportunity to build a risk and compliance function that is best-in-class, whilst having the opportunity to sit on the UK board of SAM.

Rajiv is keen to move forward to an additional stage with Egon Zehnder and will need a week's notice in order to take a half day out of the office. Please let me know once we have a date in mind for this to take place and I will get this booked in.

Rajiv is on a three-month notice period, so even if we get a contract signed next week it is likely to be an end of October start date. Please let me know if there is anything that I can do on my side to accelerate the process as I know Jeff was ideally hoping for a September start date?"

50. It has been suggested that this email indicates that, by this stage, Mr Vyas has already been offered the job. We do not accept this. The email comes from a recruitment consultant who, as Mr Scott stated in evidence, is keen to push things forward in relation to his candidate, the appointment of whom would generate the recruitment consultant's fee. The email is certainly pushing for a decision in relation to Mr Vyas as soon as possible and sets out the practicalities if he were to be offered the job; however, we do not consider that it is indicative that he had already been given the job and find that, in accordance with the evidence given by Ms Herbert and Mr Scott, Mr Vyas had not been offered the job at this stage.

51. Egon Zehnder, referred to in that email, is an external consultancy which the respondent wanted to engage to assess the strengths and development areas of the candidate or candidates, particularly as the UK role was a regulated one, subject to approval by the FCA, and a board role. The intention was for Egon Zehnder to assist the respondent by benchmarking the candidate/candidates. The documentation which we have seen is in totality unclear about whether or not Egon Zehnder were part of the recruitment process itself (in other words, whether or not the decision to offer the UK role depended on the results of the Egon Zehnder process) or whether this was something which would take place after the decision to offer the role had been made. Indeed, the reference in the email above to Egon Zehnder and in various communications from the respondent to the claimant even as late as August 2015 are ambiguous at best on this issue. Furthermore, the account given by Mr Scott in his interview with Ms Ybarra at the investigation stage of the claimant's grievance in 2017 shows that his recollection at that point (2017) was that Egon Zehnder was part of the appointment process. However, what is uncontroversial from the documents is that the time at which Mr Vyas was offered the role (see below) was before the respondent actually got Egon Zehnder involved and therefore the decision to appoint him was made before any assessment by Egon Zehnder. Egon Zehnder was not, therefore, part of the appointment process.

52. Ms Herbert's evidence to the tribunal was that, while she could not remember exactly, she thought that initially they had intended Egon Zehnder to be part of the process before offering the role and that explained Mr Scott's confusion, almost 2 years on, when he was asked about it in the grievance process. However, at some point they decided to dispense with this requirement, although they still sent Mr Vyas for an Egon Zehnder assessment after he had been offered the role anyway (in particular to assist with the FCA approval process) and offered the claimant the opportunity for an Egon Zehnder assessment to assist as part of her continuing professional development.

53. This was not, however, made clear to the claimant and she was, and remained so at this tribunal, under the impression that Egon Zehnder was part of the appointment process itself.

54. Ms Herbert suggested to the claimant that her telephone interview with her and Mr Scott might take place on 14 or 15 July 2015. This was not practicable because of the claimant's second chemotherapy session. Eventually, the interview was arranged for the morning of 24 July 2015.

55. We have not seen any of the notes of the interviews of either the claimant or Mr Vyas and, notwithstanding that they took place almost 2 years before the claimant raised a grievance about the decision in relation to the UK role, there is a marked absence of documentation relating to the appointment and interview process.

56. The evidence of Ms Herbert and Mr Scott was that the claimant was asked the same questions as Mr Vyas was asked. The claimant maintains that not all of the questions which were said to have been asked were indeed asked. There

is clearly a discrepancy in recollection but we do not have any compelling reason to suggest that Ms Herbert and Mr Scott are not being truthful in their recollection.

57. [VW] [Notably, Ms Herbert's list of questions did not include a question about achievements in current employment.]

58. Furthermore, their recollection is that the claimant was clear and confident in her replies. The claimant maintains that at one point during the interview she stated that her memory was "shot to pieces" in relation to one question. Ms Herbert could not recall that. We accept the claimant may have said that. However, one comment in the course of the interview does not detract from the fact that the claimant may have been clear and confident in general throughout that interview and we accept that she did come over as clear and confident. Indeed, the claimant's own account is that her performance at the interview was good.

59. Mr Scott and Ms Herbert met later in the middle of the day on 24 July 2015. They decided to offer the UK role to Mr Vyas and not the claimant. Discussions between Ms Herbert and the recruitment consultant then took place that afternoon and the contract was sent out later that afternoon. Mr Vyas subsequently emailed Ms Herbert and Mr Scott on 28 July 2015 to confirm that he had now tendered his resignation to his existing employer.

60. It has been suggested that the course of events on 24 July 2015 happened so quickly that it is not credible that a decision was made and the contract sent out so soon afterwards on the same day. We accept that this chain of events was a swift one. However, whilst contract negotiations might have taken longer, we do not consider it impossible for them to have taken place in this timeframe nor do we find it exceptional that, as Ms Herbert maintained, any discussions with the recruitment consultant about terms would be likely to have taken place over the phone. We do not, therefore, as has been submitted, accept that the decision to offer Mr Vyas the UK role was taken before the claimant's interview.

61. The outcome was not, however, communicated to the claimant straightaway and, as noted, the decision to use Egon Zehnder in the way that the respondent had since decided to do was also not communicated clearly to the claimant. Egon Zehnder were duly contacted in late July 2015 about doing two assessments. They liaised with the claimant on 3 August 2015 about setting up her assessment. Egon Zehnder suggested the assessment be at their offices in London. The claimant told them that she couldn't do that because it put her at too much of a risk of infection (again due to her lower immunity levels). Ultimately, the claimant did not do the assessment with Egon Zehnder.

62. In addition, Ms Herbert inadvertently copied in the claimant on an email to Egon Zehnder of 3 August 2015 which set out the names of both candidates, in other words Mr Vyas and the claimant. When she subsequently apologised by email to the claimant for sending that in error and confirmed that the email had not been sent to Mr Vyas, she also stated that she confirmed that Mr Vyas was in

the same process. However, she did not state that a decision in relation to the appointment had already been taken by that stage. The claimant, understandably, thought that the application process was ongoing.

63. Mr Scott asked Ms Herbert to set out a summary of her feedback from the interview in relation to the claimant so that he could speak to her. Ms Herbert sent an email to him on 4 August 2015 setting out a number of points as to why the claimant did not get the role. Without going through them all, the points were not criticisms of the claimant's technical ability, but were about strategy, for example articulating structures for the department, 30/60/90 day plans for the department and issues about bringing leadership to the team and new ideas. In a contemporaneous email of 5 August 2015 to Mr Reynes, Mr Scott states that he considered the decision to appoint Mr Vyas over the claimant was a close decision and that both candidates were very strong and that they wanted them both in the business, and confirmed that the Egon Zehnder assessment was not part of the selection process.

64. On 10 August 2015, the claimant had email correspondence with Mr Ian Annand, who from the documents in the bundle appears to be someone at the respondent whom she confided in at the time. She told him that she had put herself forward for the UK role. In the course of this correspondence, Mr Annand wrote at 11 am:

"I honestly think that Jeff really rates you but was concerned that your health meant that he didn't want to burden you with the role as it were but I also felt that you should put yourself forward for it."

65. Mr Annand was cross-examined about this email. He accepted that what was written in it was his opinion and not Mr Scott's. He acknowledged that he had had an earlier conversation with Mr Scott about the claimant and the UK role. When asked about what he meant, and whether he meant that he thought that Mr Scott felt that the role would be a burden or that the application process would be a burden or something else, he indicated that he meant the application process (which coincided with a time when the claimant was undergoing chemotherapy and was recovering from surgery).

66. Shortly after Mr Annand wrote that email, Mr Scott spoke to the claimant and informed her that she had not been given the UK role. He did not go through all of the items on Ms Herbert's 4 August 2015 email, but said that Mr Vyas had been the better candidate because of his experience and gravitas. He also made clear that the purpose of the Egon Zehnder process was developmental and that the claimant could wait until she felt up for it, after Christmas if she wanted. As noted, the claimant did not in the end do an Egon Zehnder assessment.

67. Following that conversation, the claimant reverted to Mr Annand in an email in which she indicated to him that she considered that the decision not to appoint her to the UK role was discriminatory because of her cancer.

68. Mr Scott was interviewed by Ms Ybarra in or around May 2017 as part of her investigation of the claimant's grievance. He was asked questions about the

process for appointment to the UK role and the claimant's candidacy. Answers which he gave include the following:

"My sense was she wasn't up for it. She didn't want to work for Amadeo so it was a good get out for her, but she wasn't really interested. It was up to her and in the end she didn't go through with the process as she never did the testing, we had the initial evaluation and we couldn't wait around forever so we made the appointment."

69. As noted, Mr Scott is confused about the issue of whether or not Egon Zehnder were part of the appointment process, as is evident from this passage; however, as we found above, Egon Zehnder were not even contacted until the decision to appoint Mr Vyas had already been made.

70. Mr Scott's answers go on:

"I wanted to give her the opportunity to contend in the process. She wasn't working for me directly. You don't get to her position without the technical capabilities. Why wouldn't I consider her for the process? Which is what the HR and Egon Zehnder process was to measure. But when you looked at the outputs of her delivery there was a question mark. When someone has cancer you don't want to tell them they don't have the job, you worry. I wanted to make sure she was on the list. Her illness and the review process showed she was not the right person…

She was from a personality view always difficult to deal with. She didn't draw lines between the global or local role and she didn't help clarify. One competency issue was that she didn't show that link and communicate with the business. She was sitting on her own a lot in the office, introverted activity, didn't engage with the business. She didn't have a terrible relationship with the UK team but neither did she has a significant one…

Certainly it was the case and it was a big concern for me that she hadn't gone through the whole process to know how well she was to do any role and it was a challenge to know even if she was the most capable and physically able and even if she wanted to do it. If we were to take her from that role we would have created a gap in the global business. In reality that was what was going on in my head but never came to that as some of those bits didn't fall into place. She didn't say it was the right for job she didn't put any urgency or pressure on to do the role. Surely, if you can't come into the office for one day to do testing, it shows she was not ready. I was concerned about her but it wasn't everything…

So for me, you clearly can do some types of work from home and I would have encouraged that she did. But to be effective you need to be here with people, with the traders, with this atmosphere and see what's going on. When I look at her output and things that she achieved during this period it didn't feel like someone was doing a full time job. I thought she was doing it to keep up a sense of appearances but I'm local and not global so do not have a full understanding but it didn't feel like someone was there. There was not a great deal of day to day activity going on. But you need to be here to do that. I was very surprised that she is saying she was working full time."

71. Mr Scott's responses when he was interviewed later on at the grievance appeal stage did not include the sorts of references set out above in his grievance interview to the claimant's illness, the fact that she wasn't in the office or the fact she could not come in for testing. By that stage, however, the claimant had already issued her claim in the employment tribunal.

72. Notwithstanding the lack of contemporaneous documentation in relation to Mr Vyas, Mr Scott gave evidence at this tribunal that he considered that, although both candidates were strong, Mr Vyas had the edge in terms of expertise, gravitas and breadth of experience; had useful contacts with

government; and, in particular, had a good understanding of the business, a plan for what he would do if he took up the appointment, an understanding of the management of stakeholders in a board role and some forward thinking views on compliance and risk management and that he had a real vision for the role and how the team should look. Mr Scott considered that whilst the claimant was technically strong, she was not as strong on these strategic and communication issues. Ms Herbert's evidence corroborated this. Some of this thinking is also borne out in the section quoted above from Mr Scott's grievance investigation interview regarding not showing the link between global and local or communicating with the business or engaging with the business. Mr Scott thought that the claimant would be less good at these relationships than Mr Vyas.

73. In addition, Mr Annand gave evidence at this tribunal that he thought that Mr Vyas was very good in the UK role. Whilst that in itself does not relate to the motivation of Mr Scott in appointing Mr Vyas, it is indicative that Mr Scott appointed a candidate who, in the eyes of other workers, was a very good candidate for the role.

74. We find, therefore, that Mr Scott was genuinely very impressed with Mr Vyas.

75. Finally, during cross-examination much was made of the CVs of the claimant and Mr Vyas. However, we accept the evidence given by Mr Seirul-Lo that, when interviewing for jobs of this nature, very little weight is given to CVs. We find it unsurprising that that is the case with appointments to senior positions of this nature. Both CVs showed that the candidates had relevant experience for a job of this kind; beyond that, we accept that a detailed comparison between the two was not what the respondent would ordinarily take into account when making the decision as to who to appoint and nor did it do so in this case.

<u>Interim global role</u>

76. In November 2015, Mr Reynes, the then Global Head of Risk and Compliance, decided to leave, creating a vacancy for that role. He was replaced on an interim basis by Mr Alex Earp. No formal recruitment process was conducted.

77. Whilst the claimant has referred to the respondent's recruitment policy, which refers to recruitment processes being conducted, that policy only applies to posts graded at S1-5; the Global Head of Risk and Compliance was above that range of grades and so not subject to the policy. There was therefore no obligation to carry out a formal recruitment process.

78. Mr Earp was appointed because of a number of factors connected with him, none of which are disputed. He was employed in the respondent's US office which was about to close; that would mean that he would not therefore have a job and the respondent wished to retain his skills. The respondent was particularly keen to retain his skills because he had detailed knowledge of the Volcker rules, which were US rules, and which knowledge the respondent wanted to retain. Furthermore, this was only an interim appointment and for that

reason it was a convenient means of not losing Mr Earp or his skills. (The claimant accepted that Mr Earp had detailed knowledge of Volcker, which was better than hers, and that the US office was closing and that the respondent wished to keep Mr Earp.)

79. The decision was taken by Mr Michael Grealy, the Global Head of HR, and Mr Juan Alcaraz, the CEO. This rationale is evidenced in contemporaneous emails, for example an email of 1 December 2015 from Mr Reynes to Mr Grealy. Furthermore, this rationale for the decision is backed up by both Mr Grealy and Ms Herbert in their interviews for the purposes of the claimant's grievance.

80. At the time when this decision was taken, the claimant was working from home and not in the office.

81. When the claimant learned of the appointment, she wrote in an email to Mr Reynes:

"Disappointed to learn of this by email to report to someone with less experience than me"

82. It was not correct that Mr Earp had less experience than the claimant. Furthermore, it was also not correct, as the claimant has asserted at this tribunal, that Mr Earp had a dotted reporting line to her prior to his appointment; rather, he reported to Mr Reynes.

83. Mr Reynes forwarded this email to Mr Grealy who replied to Mr Reynes:

"Unbelievable! How can CG make such assertions under the recent circumstances. She does. Not have a track record at SAM. Alex does not carry himself with less seniority than Claire! This is one aspect you won't regret!"

84. The claimant asserts that the reference to "recent circumstances" is to her cancer. However, whilst admittedly Mr Grealy was not a witness before the tribunal and was not therefore questioned about the email, it is not clear that that is what is meant. The context of the email, when taken with the email above which the claimant wrote, is clearly annoyance at the claimant's assertion that Mr Earp has less experience than her, which undoubtedly came across to Mr Reynes and Mr Grealy as untrue, unwarranted and rude in the circumstances.

85. Following Mr Earp's appointment to the interim global role, the claimant reported to him. She had a good relationship with him.

86. The claimant had been working from home for the rest of 2015. She had a particularly difficult time towards the end of 2015/beginning of 2016, including suffering severely from depression.

87. In January 2016, various members of the claimant's team had not heard from her for some time. Ms Herbert therefore also sent an email to her on 22 January 2016. There was no response. Ms Herbert and others were therefore worried. Ms Herbert telephoned the claimant on 27 January 2016 to find out if she was okay. There is a discrepancy of accounts between the claimant and Ms Herbert as to what took place on that call. The claimant suggests that Ms

Herbert accused her of "swinging the lead" in terms of taking advantage of the respondent by remaining at home. However, we do not accept this. It became clear in cross-examination that various of the things which the claimant maintained Ms Herbert said were not said. Furthermore, in other documents where there is a transcript (because the claimant covertly recorded it), Ms Herbert appears sympathetic and supportive of the claimant and there is no indication that she made any accusations that the claimant was taking advantage. We find therefore that these allegations are more reflective of the claimant's perception and are not reflective of what actually happened.

88. However, the claimant, who was by her own admission in a very depressed state at this point, became upset on that call. It was a relatively short call. Ms Herbert suggested that instead they meet the following day, 28 January 2016, in the office. They duly met. The claimant recorded that meeting without Ms Herbert's knowledge. She subsequently supplied a transcript of part of the recording in support of her grievance over a year later.

89. At her own volition, the claimant arranged with Mr Earp to increase her time in the office during 2016. Her first day back in the office was 1 March 2016. She returned working generally Tuesdays and Thursdays in the office and working at home every other day (albeit the days were not fixed). By May 2016, she had returned to the office on a four day a week basis, working at home one day a week (normally on Wednesdays to break up the commuting week). These arrangements between the claimant and Mr Earp were not formally documented.

Permanent global role

90. Mr Earp's interim global position came to an end around December 2016. The respondent appointed Mr Jorge de la Vega as permanent Global Head of Risk and Compliance with effect from January 2017. No recruitment process was conducted. The decision was made in Madrid and not in London.

91. Mr de la Vega was a senior executive. As the claimant accepted, he had been the Transformation Director for Project Uno (referred to above), the proposed acquisition of Pioneer, which ultimately fell through. That plan having come to an end, Mr de la Vega had no role. He was a senior person and a member of the board. The respondent wished to retain him despite the loss of his role. As had happened on previous occasions, the decision was made to move across a senior person whom the respondent would otherwise have lost. The reason was everything to do with a desire to retain Mr de la Vega; it was nothing to do with anyone else, including the claimant.

The claimant's suspension

92. The claimant owns horses and competes in dressage events. Colleagues in the office were aware of this. Furthermore, she was encouraged by her medical advisers to spend time with and ride her horses, to assist in her recovery from stress and depression. Furthermore, we have seen medical evidence in the bundle which confirms that it is recognised that exercise has a positive effect on patients undergoing or recovering from chemotherapy treatment for cancer and

that, in the claimant's case, she was advised that continuing to exercise her horses would provide benefits in coping with her treatment.

93. Whatever the claimant believed, she had no agreement with Mr Earp that the claimant could take time off during the working day to participate in dressage or otherwise. When Mr Earp was later questioned in the subsequent disciplinary investigation, he stated that he knew that the claimant rode horses but thought that she did it in her own (i.e. non-work) time.

94. The claimant entered a dressage event which was to take place at around lunchtime on 18 January 2017 at Quainton Stud, not far from where she lives. That day was a Wednesday when the claimant was due to be working at home. Her plan was to do two events, which would normally run at lunchtime, each test taking around five minutes. This would allow her to work in the morning, compete at lunchtime and return home to work afterwards. The test times are published two days before the event. When she checked her allocated times before the event, she noticed that the two tests that she planned to do were one hour apart which would have meant that she would have been spending more time that she thought away from home were she to do both tests. She therefore sent an email to Quainton Stud from her work email account advising them that she wished to withdraw from one of the tests because of time constraints. She had also put the event in her work calendar and discussed it with her colleagues.

95. [VW] [Evidence of the calendar entry was not disclosed by the Respondent.]

96. The claimant's main work task that day, following on from a meeting the previous day, was to develop an action plan for risk and compliance; this was something that she knew she was able to do from home and she knew that it was a priority for Mr de la Vega, her recently appointed new manager.

97. On the morning of 18 January 2017, the claimant worked from 7 am until 11 am, reading the notes of the previous day's meeting and compiling a list of actions and issues to be presented to Mr de la Vega. She did not log onto the firm's remote system as she had all the materials with her in hardcopy form. She left home just after 11 am, collected her horse from the stables, drove to Quainton Stud, warmed the horse up, competed and drove back to the stables. Unfortunately, she was delayed at that point by approximately 30 minutes because the person who was supposed to help her unload her horse and equipment had been delayed and wasn't able to help. She returned home by 1:45 pm. She had therefore been away for two hours and 45 minutes. This account is the claimant's, but was not challenged either during the internal proceedings or before the tribunal; we have no reason to doubt it and we therefore accept it.

98. She continued working on the notes from the meeting and the reading materials. Having finished the review, she logged onto the work system at around 4 pm. She picked up an email from Mr de la Vega seeking to speak to her sometime after 3 pm that day and a further email from Mr de la Vega's PA stating that she had sent an invite to the claimant for 12 o'clock the following day.

At about 4.30 pm, the claimant emailed Mr de la Vega. This included the following:

"I'm working at home today (I agreed with Alex that I could work from home when I suffer from fatigue) but I can go through this with you when we meet tomorrow."

The reference to fatigue is to the fact that the purpose of the claimant working at home, in particular on Wednesdays in the middle of the week, was to break up the commute which contributed to the fatigue she suffered as a consequence of her cancer.

99. Mr de la Vega replied: "okay let's discuss tomorrow".

100. The claimant completed her task for the day.

101. On 18 January 2017, Ms Herbert was informed by Mr Vyas that the claimant was working from home and partaking in a dressage event. *[VW] [He had overheard the Claimant's two direct reports discussing the matter.]* Ms Herbert's evidence to the tribunal was that this was not the first time that she had been aware this type of allegation as previously people had made comments about the claimant riding when supposedly she was working from home. Ms Herbert decided to search in Google for dressage events near where the claimant lived. She discovered that the claimant was partaking in the event at Quainton Stud that day. She then went to see Mr de la Vega and asked if he knew that the claimant was working from home and if he knew that she was attending the dressage event. Mr de la Vega, who had only become the claimant's manager three days previously, said that he was not aware of either situation. Mr de la Vega then sent the email to the claimant referred to above and received the response quoted above.

102. Ms Herbert considered that there appeared to be a situation where a senior employee had stated that she was working from home that day, but was uncontactable for several hours during the day and there was publicly available evidence that appeared to show that she was in fact attending a dressage event during that period of time and that, therefore, she said that she had been working but wasn't.

103. Ms Herbert told Mr de la Vega not to mention anything to the claimant at their meeting the following day on 19 January 2017 but to continue the meeting with work activities.

104. Ms Herbert then had discussions with Mr de la Vega, Mr Grealy and Ms Georgina Bale, another senior HR manager. They decided that they should challenge the claimant on what she had in fact been doing. They agreed that they should ask two HR colleagues, Mr William Thomson and Ms Rebecca Strudwick, to meet the claimant and ask if she'd been competing and see what she said; if she admitted competing, they would simply seek to gather more information on the matter and on other occasions when she might have been competing whilst supposedly working from home but, if she didn't tell the truth about her attendance, they would suspend her. This was the instruction given to

to Mr Thomson and Ms Strudwick. Mr Thomson put together a script for the meeting and a draft suspension letter, to be used if the claimant didn't tell the truth about her attendance.

105. The claimant was called to a meeting with Mr Thomson and Ms Strudwick at 4.30 pm on Friday, 20 January 2017. As noted, the claimant is Type I diabetic. Somewhat unwisely for a diabetic (as she herself admitted in evidence), the claimant had skipped lunch that day due to work commitments and nausea caused by treatment she had had and attempted to supplement the sugar with cereal bars. Her blood sugar had therefore been low for most of the day. At 4.30 pm, she was called to the meeting by Ms Strudwick, which was up on the 11th floor. She was not told the purpose of the meeting and began to feel very alarmed (we accept that being called without prior warning to a meeting by HR at 4.30 pm on a Friday afternoon is likely to cause alarm) *[VW] [thinking that she was going to be told she had lost her job by way of redundancy]*.

106. There are some discrepancies between the handwritten notes of the meeting taken by Ms Strudwick and the typed notes which she typed up immediately after the meeting. In particular, her handwritten notes do not set out the question which Mr Thomson first asked the claimant, relating to what she had been doing on 18 January 2017. Her evidence to the tribunal, which we have no reason to doubt and therefore accept, was that the typed notes set out her recollection of what was asked by Mr Thomson at the start of the meeting and are also based on the script which Mr Thomson had. The typed notes read as follows:

"WT outlines the background and basis for the investigation, namely that on 18 January 2017, CG had said that she was working from home, but that SAM had reason to believe that she had in fact taken part in an equestrian dressage competition. The line manager, Jorge de la Vega (JDV) had sent her an email requesting she join a call that afternoon, to which she had responded to say that she was working from home due to suffering from fatigue. The email response was sent three hours after the original request.

CG: I didn't go. The plan was that I was supposed to be there but I didn't go.

How did this information come to light? Have you been looking through my diary?"

107. The section where the claimant states that she didn't go is contained in the handwritten notes as well. We accept that, in response to Mr Thomson's question as set out in Ms Strudwick's typed notes, the claimant's response, as it was said, was a denial of attending the event, which was untrue.

108. In light of this denial, Mr Thomson suspended the claimant and handed her the pre-prepared suspension letter, together with copies of the results of the dressage competition at Quainton Stud. The claimant was, therefore, suspended as a result of making this specific untrue statement. However, this was not clear to the claimant as the suspension letter, which had been prepared in advance of the meeting, did not refer to what was said at the meeting of 20 January 2017 but rather referred to what the claimant did by attending the dressage event itself on 18 January 2017 as being potential dishonesty and gross misconduct.

109. The claimant began halting her sentences and said that her blood sugar levels were low. The meeting was paused whilst reception provided a glass of Coca-Cola.

110. When it reconvened, the claimant explained that there were two classes, one which she withdrew from so that she could work from home in the afternoon and an earlier one in which she competed. She also stated that she had agreed with Mr Earp that she would compete in dressage competitions when they spoke back in 2016. Mr Thomson later suggested that she had taken unauthorised leave and the claimant stated "this was leave". It is not clear from the very brief notes taken whether this is a reference to her suggesting that that day was leave (which seems unlikely given that she was working for large parts of the working day) or a suggestion that she was taking part in the dressage during her lunch hour, albeit an extended lunch hour; on balance, therefore, we find it likely to have been the latter.

111. As we will return to, the claimant's case during the internal proceedings and at this tribunal is that she was suffering from a hypoglycaemic attack at the meeting due to her low blood sugar levels, and that that was what caused any inaccuracy in the answers which she gave.

112. Mr Thompson's sister has Type I diabetes so he has some familiarity with the condition and its effects.

113. At the end of the meeting the claimant was escorted from the building by Ms Strudwick. The meeting itself, including the break in the middle, was in total around 20 minutes.

114. In a letter of 24 January 2017 to the respondent, the claimant's solicitor stated that she was disabled and that the respondent had a duty not to subject her to:

"further discriminatory acts and to make appropriate reasonable adjustments".

Dismissal

115. A disciplinary investigation was then conducted by Mr Ruiz. He is based in Madrid. Although he knew who the claimant was, they did not work together as their roles did not overlap.

116. Mr Ruiz's investigation did involve speaking to a number of potentially relevant individuals, including Mr de la Vega, Ms Herbert and Mr Earp. However, his investigation focused on issues of whether what the claimant did in attending the dressage event on 18 January 2017 was misconduct, rather than on the alleged lie that she told at the meeting on 20 January 2017, which was the reason why she was suspended. Specifically, Mr Ruiz never put the accusation that the claimant lied in the meeting to her during his investigation.

117. At her investigatory meeting with Mr Ruiz, on 14 February 2017, the claimant stated that she was going to record the meeting. Mr Thomson, who

attended that meeting with Mr Ruiz, told her that he did not want her to do so. The claimant did not therefore record that meeting.

118. During that meeting, Mr Thomson asked the claimant if she wanted to pause for a break and she replied:

"No I will take insulin shortly. I don't want to do it in here and have a hypo like last time"

This was a reference to her allegedly having had a hypoglycaemic attack (or "hypo") at the meeting of 20 January 2017. This sentence occurs in the agreed minutes of the meeting. However, it does not occur in some of the other versions of the meeting minutes. Mr Ruiz later mistakenly suggested that the claimant had not mentioned having had a hypo at the investigatory meeting; he accepted at this tribunal that she did say that as the correct version of the minutes records it. We do not accept the suggestion that somehow there was an attempt to doctor the minutes to exclude this reference; without going into the details, it was clear to us from the evidence at the tribunal that this was simply an error.

119. At one point in the meeting the claimant stated:

"Managers shouldn't discriminate against employees and this has been done to me."

120. Mr Ruiz produced an investigation report. In that report, he set out a number of conclusions. One of these was that he considered that, when questioned by HR about her attendance at the dressage event, she was not honest in her response, initially denying her attendance until evidence was presented to suggest otherwise.

121. In his report, he also concluded that the claimant genuinely thought that she had an arrangement with Mr Earp that she could attend dressage events of this nature.

122. The claimant was then invited to a disciplinary meeting by letter of 31 March 2017. The letter was from Mr Antonio Faz, the Global Head of Legal, who was to chair the meeting. The allegation set out in the letter is that:

"you acted dishonestly when being questioned by HR representatives in relation to your attendance at a dressage event at Quainton Stud on 18 January 2017".

123. The letter indicated that, if the matter was proven, it fell within the gross misconduct section of the respondent's disciplinary policy.

124. Inviting the claimant to a disciplinary meeting at this stage was impermissible under the respondent's policy as the claimant was not questioned about the "lie" of 20 January 2017 in the investigation.

125. Mr Faz did know the claimant previously as there was some overlap in the work which compliance and legal did. His evidence was that they had a normal working relationship; this has not been disputed and we accept that. During his cross-examination at this tribunal, Mr Faz accepted that the claimant was regarded by some in the organisation as an "irritant"; it was not however put to

him as to whether or not this view was based on people's perception of her character generally or whether, as the claimant has argued at this hearing, she was viewed as an irritant because of her absence from the office which was due to her cancer. Several other witnesses also gave evidence that they considered that the claimant was a difficult person. One example set out above is Mr Scott's view that from a personality point of view she was difficult to deal with. In the light of the fact that it was not specifically put to Mr Faz, we are not prepared to accept that his description of her as being regarded by some as an "irritant" was because of her absence from the office and consequently her cancer; rather, we are only prepared to accept that this description is in line with the views of others who attended this tribunal, namely that personality wise she was difficult to deal with.

126. The disciplinary meeting took place on 21 April 2017. Mr Ruiz attended it by conference call. The claimant, without the knowledge of Mr Faz, recorded the meeting.

127. At the meeting, the claimant stated that she had had a hypoglycaemic attack on 20 January 2017. She produced evidence of the symptoms of such attacks, and stated that these included difficulty speaking and slurred speech and confusion, and that it can take 20 minutes for cognitive functions to recover from such an attack. There was considerable discussion at the meeting about hypoglycaemic attacks and the claimant's assertion that that was what happened to her on 20 January 2017.

128. As regards 18 January 2017, she mentioned other employees who went out for long lunch hours either for lunch or for squash matches or running. She also said, in relation to Mr Earp, that he had said that she should do such activities out of working hours and that that is what happened on 18 January, stating that, in the same way as people go out for a run at lunchtime, she rides her horses, which are a minute from her house.

129. On 2 May 2017, the claimant sent a lengthy letter to Mr Faz. It contained a number of points she wanted him to take into account. It also stated, in the third paragraph:

"I believe both my suspension and the disciplinary process constitute disability discrimination and/or a failure to make reasonable adjustments."

130. Mr Faz, rightly in view of the lack of investigation at the investigation stage about the issue which ultimately formed the basis of the charge against the claimant, carried out further investigations, specifically in relation to the suggestion that the claimant had had a hypoglycaemic attack. These included separate interviews with Mr Thomson and Ms Strudwick, who were the other two present at the meeting of 20 January 2017, and getting medical advice from a Dr Carter from Rood Lane Medical Practice (a GP as opposed to a specialist on diabetes).

131. In her interview, Ms Strudwick stated that, at the point when Mr Thomson had presented her with the suspension letter and the documents recording that

she had competed in the equestrian competition, the claimant very suddenly became confused and started to stumble on her words; she then expressed that her sugar levels were too low and that she needed to stop; and that then they had the break when it was agreed that Coca-Cola be brought. As regards the alleged lie at the beginning of the meeting, Ms Strudwick said that her impression at that point was that the claimant was perfectly fine and clear and said that she didn't go to the event and there was nothing that indicated to her that there was a problem at that point. Mr Faz asked Ms Strudwick if she thought that the claimant could have been confused when she said no, specifically that initially there were two competitions and that she only attended one and perhaps the question she understood was "did you go to 2 events"? Ms Strudwick said that, to be honest, she didn't recall if they said specifically that there were two events or if they asked her explicitly "did you attend 2 events?". She said her recollection was that they had outlined that she had advised that she was working from home but she had in fact been competing; that she didn't recall them saying two events but couldn't be 100% sure. Ms Strudwick also said that she thought that there was an instant reaction by the claimant as soon as Mr Thomson presented her with the information showing the record that she had competed in the dressage event and that there was a change in her demeanour from that point.

132. In his interview, Mr Thomson was asked if there was a clear question before the claimant's alleged lie. Mr Thompson said that off the top of his head, it would be in the minutes and that he may have asked if she had attended. He said that she came back straightaway and said that she had not attended. He said that following his giving her the printout showing she attended the dressage event, she had quite a strong reaction. He said she seemed to be quite shocked and taken aback; that she got noticeably uncomfortable and that she wasn't stringing her words together properly; that she started shaking to the point where he asked if she was okay; that she then said that she suffered with diabetes and had low sugar levels; that they then got a can of Coke, she drank it and started to settle down and that they then proceeded with the meeting; he said that in his opinion she recovered in about five minutes. When questioned further, he said that at the start of the meeting, in his opinion, she seemed fine and there were no indicators to show that she was not in any way feeling well but that she did look anxious, because there was a meeting with two HR people, but she came across quite well, as far as Mr Thomson could tell. He reiterated that he saw a noticeable difference only once they handed over the evidence and that there was a very strong reaction to this.

133. The notes of Mr Faz's meeting with Dr Carter were in the bundle. Mr Faz gave some background. He then asked Dr Carter generally how a hypoglycaemic attack might affect/impair the abilities of an individual. His replies included:

"With type 1 diabetes you can experience very high sugar levels or very low sugar levels. Type 1 diabetes sufferers will inject insulin to regulate. If the sufferer has not eaten in a long time or sometimes even a short time a low blood sugar level can occur and with it a hypo attack.

During a hypo attack sufferers will experience effects such as decreased concentration, fatigue, confusion and in severe cases tunnel vision, seizures and extreme lack of concentration.

Generally, a diabetes sufferer will have several minutes to correct the situation.

It can go away in a matter of minutes, sometimes faster. Correcting via a sugar source."

134. He was then asked by Mr Faz how quickly a hypo attack could take place and whether the side effects were gradual or instant on any individual. He replied:

"Hypos are a slow process because sugar levels drop slowly not quickly. An individual generally picks up that they are having a hypo several minutes before, it won't be a surprise.

Essentially it does not happen in an instant you have several minutes to detect that you are having a hypo."

135. Mr Faz then asked him if these effects such as the loss of concentration or ability to think clearly could be increased as a consequence of a stressful moment, for example a combination of someone with low blood sugar and a stressful moment or situation. He replied:

"A good question, probably yes. When you get stressed our bodies metabolise sugar faster and if someone already has a low blood sugar level and a particularly stressful situation is presented a hypo could take place much quicker. Sometimes in a few minutes, yes it's possible.

I would say 20-30 seconds is the minimum time you could have a hypo take place if under intense stress, although it's more likely to be minutes."

136. Mr Faz then asked him if an individual, if affected by a hypo attack, can lose and recover the ability to answer questions accurately and concisely, in a very short period of time (seconds); or conversely, when affected severely by the hypo attack, whether it would take typically some time (as well as the intake of some sugar) to restore complete mental control without confusion. He replied:

"If someone has a hypo and has lost the ability to be coherent it's very unlikely that someone can recover quickly. In my experience it would not reverse until sugar has been given and time.

A hypo attack is very serious. Most diabetics would correct the situation with sugar."

137. Mr Faz then asked him if it would be unlikely for someone to show clarity then a loss of control or vice versa within a matter of seconds. He replied:

"Yes it would be unlikely. It can't go up and down. When the control is lost then it's lost unless corrected by sugar. You would not be able to be lucid for one moment and then suffer from a hypo and then go back to being lucid in a matter of seconds."

138. Mr Faz then asked him how long hypo attacks typically last. He replied:

"Hypos can last minutes or up to an hour to correct, I had one patient who took up to an hour and had several glucose packs. It depends on the severity and the individual. The shortest time is typically minutes if they take sugar quickly."

139. One of the allegations made by the claimant at this tribunal is that Mr Faz should have obtained a diabetes specialist report rather than advice from a GP. A specialist report was provided for the purposes of this tribunal hearing.

Essentially, however, the only additional significant piece of information it contains which is not covered by what Dr Carter said is that those who have been Type I diabetic for a long time, such as the claimant, can lose their "hypo awareness", in other words can lose their awareness that a hypo is coming on. However, that piece of information was not in fact applicable in relation to the hypo which the claimant alleged she had on 20 January 2017 because her own evidence was that, even as she was going up to the 11th floor in the lift, she was already aware that she was having a hypo. The question of losing hypo awareness did not therefore apply.

140. Mr Faz sent the notes of the meetings with Mr Thomson and Ms Strudwick and the notes of his interview with Dr Carter to the claimant on 7 May 2017, asking for any comments that she might have. The claimant duly replied by email of 10 May 2017.

141. Mr Faz then put together his outcome report, which included his decision that the claimant should be dismissed without notice.

142. Although the charge had been that the claimant "acted dishonestly when being questioned by HR representatives", the only act of alleged dishonesty focused on in the report is what is described as "the negative statement", that being her initial response to the opening question when she said "I didn't go". There is no focus on two further alleged points of dishonesty, namely her apparent suggestion in the notes of the 20 January 2017 meeting that Mr Earp had agreed that she could go to dressage events and her apparent assertion that this was "leave". Although those assertions have been focused on by Mr Nicholls at this hearing, they were not addressed by Mr Faz. We conclude, therefore, that they were not something he considered as being part of his remit and not part of the reason for which he dismissed the claimant.

143. In any event, as we have found above, Mr Ruiz concluded that the claimant genuinely believed that she had such an arrangement with Mr Earp; we accept that and it therefore follows that the claimant was not lying when she made that assertion. Furthermore, as set out above, we have accepted that it is more likely that the reference to "leave", rather than being a reference to taking a day's leave, was to an extended lunch hour, the position the claimant continues to maintain at this tribunal. Her reference to "leave" was also not therefore a lie.

144. Mr Faz did address many of the relevant factors in determining whether or not the claimant had been dishonest in making the "negative statement", albeit as it reads his reasoning is somewhat confused in places. However, when weighing the evidence as to whether or not the claimant was undergoing a hypoglycaemic attack during the meeting, his conclusion appears to be that the factor "did not exist to such an extent that would entail an alleviation of the above qualification of the employee's conduct at the relevant meeting". He concluded that, at the time she made the "negative statement", she was knowingly dishonest and not mentally confused or impaired to such a degree as she maintained.

145. Having concluded that she had been dishonest, he considered that dismissal without notice was the appropriate sanction; he took into account that,

not only had she in his opinion been dishonest but that she held the role of Head of Global Compliance in a financial services business, which he considered made the situation worse for her as such a role required the maximum level of integrity, honesty and reliability.

146. In his evidence to the tribunal, Mr Faz stated that he did not think the claimant was under any confusion at the point when she made the "negative statement" and could not say one way or another whether or not the claimant had a hypoglycaemic attack after that.

147. Mr Faz's decision was communicated to the claimant by letter of 12 May 2017 (sent by Mr Thomson).

148. The claimant appealed against the decision, setting out her grounds of appeal in a document dated 25 May 2017. Amongst the 13 separate grounds of appeal, she alleged that dismissing her because of a confused statement which she made when suffering from a hypoglycaemic attack is a clear example of discrimination arising from disability.

149. Her appeal was heard by Mr Mehdi Khadim, the new UK CEO of SAM UK since March 2017. As he only joined then, he had had no involvement with any of the matters which the claimant complains about in her tribunal claim other than hearing her appeal against dismissal.

150. As noted, the claimant had, prior to the disciplinary hearing, submitted a grievance and as part of the evidence in support of that grievance, she had submitted extracts from transcripts of some of the covert recordings which she had made. These were recordings of the meetings with Mr Scott in June 2015 and with Ms Herbert in January 2016, both of which had been made without Mr Scott or Ms Herbert being aware of the fact. Mr Khadim found it unusual to say the least that an employee would engage in covertly recording conversations with their colleagues and felt that that behaviour could impact on the level of trust between that individual and the organisation. Given that he was being asked by the claimant to overturn the decision to dismiss her, which would mean reinstating her in the business, he wanted to understand the reasons for making the recordings and how that might impact on her relationship with colleagues if he decided that the appeal should be upheld. He felt that it was only fair to forewarn the claimant that he would want to discuss this issue with her and therefore he made reference to it in a letter sent by him to her dated 12 June 2017.

151. The claimant, however, sent Mr Khadim an email on 19 June 2017 in which she referred to the issue of the recordings as being a "further campaign against me".

152. The appeal took place later on 19 June 2017. As well as Mr Khadim and the claimant being present, Mr Thomson attended from HR and Ms Strudwick acted as notetaker. Given that they were the two key witnesses to the meeting of 20 January 2017, their presence at the appeal was surprising to say the least (as

was Mr Thomson's presence at the earlier investigation meeting with the claimant).

153. At the start of the meeting, Mr Khadim, Mr Thomson and Ms Strudwick put their phones on the table so that the claimant could see them switch them off. The claimant said that she hadn't got her phone with her and Mr Khadim took her word for that.

154. Mr Khadim went through the various grounds of appeal with the claimant. In addition he raised the issues about the covert recordings.

155. Following the appeal, Mr Khadim decided to interview Mr Thomson again in relation to what happened at the 20 January 2017 meeting. Notes were taken of that interview. Mr Thomson reiterated that, in his opinion, the claimant had been in control at the start of the meeting and that her demeanour changed when he showed her the evidence of her attending the dressage event. He stated:

"So it was at that point she paused for a moment where it appeared that she was trying to process what I had just shown her. My intention was to ask more questions but what happened next was that she started to react physically in terms of shaking, looking panicked, stuttering and halting her sentences. At the time I can remember feeling that this looked like more of a panicked reaction rather than what has been suggested was a hypoglycaemic attack. It was so instantaneous, as soon as she saw the evidence."

156. Mr Thomson also suggested that the claimant's reaction when he handed her the evidence was very similar to an instance in the appeal hearing when she had been questioned quite extensively by Mr Khadim about covertly recording meetings and the rationale for it, specifically that she started to look panicked and stuttered a little and at that point demonstrated the same behaviours as in the suspension meeting, in particular stuttering, looking panicked and mixing up words and that the only difference was that in the appeal meeting she checked her glucose levels and they were fine; he considered that what he saw at the appeal meeting was the same type of reaction that he saw on 20 January 2017 when he showed her the evidence of her competing.

157. However, the notes of the appeal meeting do not indicate that the claimant demonstrated the behaviours described by Mr Thomson and set out in the paragraph above.

158. The notes of this interview with Mr Thomson were not shown to the claimant before Mr Khadim made his decision on the appeal.

159. Furthermore, during the discussion in the appeal meeting regarding the recordings, the claimant had referred to a conversation that she had had with Mr Peter Chambers (who had been a non-executive director of SAM UK) in which, she said, he had warned her to protect herself whilst working for the organisation. She raised this as a part justification for recording the various conversations. Mr Khadim sought Mr Chambers' views. Mr Chambers did not, however, back up what the claimant had said and did not recall ever advising her to protect herself while working for the organisation.

160. Mr Khadim considered the evidence before him. He put together a detailed outcome report, which addressed all of the different grounds of appeal. In particular, looking at the evidence of Mr Thomson and Ms Strudwick about the events of 20 January 2017, he concluded that he did not believe, at the time the "negative statement" was made, that the claimant was mentally confused nor did he believe that she was suffering from a hypoglycaemic episode. He accepted that, at the time of the "negative statement", the claimant was thinking clearly and knew what she was saying was untrue. Without going into details, he also doubted that the claimant had had a hypoglycaemic episode at any stage of the meeting of 20 January 2017.

161. He concluded that, given that this was an allegation of dishonesty, dismissal was the appropriate sanction.

162. Furthermore, he considered that, even if he had been otherwise minded to reduce the sanction (which he was not), he would not have reduced it because of the issue of the covert recordings. The claimant had justified her position on recording meetings on two grounds. Firstly she had said that, because of her cancer diagnosis, she couldn't concentrate and that having a recording helped to make sure that she could recall what she had said and what had been said to her. Mr Khadim had asked her in the meeting, on at least two occasions, if that was the case, why she hadn't just asked people if she could record the conversations and he never got a straight answer from her. The second justification was on the basis of what she had alleged Mr Chambers had said to her. However, Mr Chambers denied saying this and Mr Khadim saw no reason to doubt him. He considered that covertly recording conversations fundamentally called into question both the claimant's honesty and her integrity, not to mention the respondent's trust and confidence in her. He further concluded that, had the fact that she had been covertly recording meetings been discovered at an earlier point, he had no doubt that disciplinary action would have been taken against the claimant regarding this conduct, the outcome of which would have likely to have been her dismissal.

163. He did not therefore uphold the claimant's appeal. His decision and the very detailed reasons given for it were forwarded to the claimant on 21 July 2017.

164. The claimant's grievance (which, as noted, included raising issues about the earlier appointment processes for the UK and global roles) had been heard on 7 July 2017. The outcome of the claimant's grievance was given on 11 August 2017. Her grievance was not upheld. She appealed the grievance outcome on 23 August 2017. The outcome of the grievance appeal was that the claimant's grievance appeal was not upheld. This was communicated in October 2017.

Changes in the organisation

165. As already noted, following the collapse of Project Uno, Banco Santander took the strategic decision to reacquire the 50% share of the business owned by Warburg Pincus and General Atlantic and to bring the whole operation back into Banco Santander. This was not completed until 31 December 2017.

166. As a result, many of the global roles at the respondent were either surplus to requirements or would in future be resourced from within Banco Santander's operations in Madrid (as opposed to the UK). One example of these was the claimant's own role of Global Head of Compliance. As a result, after the claimant's dismissal in May 2017, her UK based Global Head of Compliance role was not filled because the respondent knew that this was one of the roles that would be made redundant. Two of the claimant's indirect reports, Sally Springer and Paul Simmons, also left the business at this time and their roles were not replaced in the UK. They left in September and October 2017 respectively. In the light of this, we accept Ms Herbert's evidence that, had the claimant not been dismissed for misconduct, the respondent would have entered into discussions with her with a view to serving notice on her on 1 September 2017 and her role of Global Head of Compliance would therefore have come to an end by 31 December 2017 at the latest.

167. There were no UK based global roles into which to redeploy employees. The claimant has given no indication that she would have been prepared to relocate to Madrid and we therefore find on the balance of probabilities that she would not have been.

168. In terms of SAM UK, there were two organisational due diligence roles available; they, however, commanded a salary of around £50,000 compared to the claimant's basic salary of £175,000. The claimant has not indicated that she would have taken these roles and, given the salary and status discrepancy, we find that on the balance of probabilities she would not have done so.

169. The only other vacancy around that time in SAM UK was a role as Compliance Manager. An offer to a candidate (CD) for that vacancy was made in July 2017 at a salary of £90,000. The role would have been a backwards career step for the claimant. The respondent had a salary protection policy which lasted for three years and which could have added 30% to that salary of £90,000. Notwithstanding that, that is a significant salary discrepancy between this role and the claimant's original role which commanded a basic salary of £175,000. We do not, therefore, accept Ms Mckie's submission that the claimant would have been likely to have taken this role. We find, on the contrary, that given the pay gap and the fact that it would have been a backwards career step, the claimant would on the balance of probabilities not have taken this role.

170. Mr de la Vega remained in post as Global Head of Risk and Compliance throughout 2017, based in London, leaving the respondent on 31 December 2017. The role was then repatriated to Madrid (again, there was no open recruitment process, which was normal for senior appointments of this nature). It is currently held by Mr Ruiz.

171. The UK role still remains at the respondent and remains based in London. Mr Vyas resigned from that role, tendering his resignation on 28 March 2017, with that resignation being effective from 30 May 2017. At the point when he handed in his resignation, the claimant was suspended. Mr Vyas took a couple of members of his team with him.

172. At the start of his tenure in the UK role, Mr Vyas had brought in a contractor called Mr Huw Price as his number two. By the time of Mr Vyas' resignation, Mr Price had been working in the business for 16 months closely with Mr Vyas and had a good understanding of the business and the function and what needed to be done to drive it forward. Following Mr Vyas' tendering his resignation, therefore, the respondent held discussions with Mr Price as to whether he was interested in taking on the role; he confirmed that he was and a formal offer was made to him on 24 May 2017 with a formal start date of 1 June 2017. There was no open recruitment process.

The Law

Direct Discrimination

173. Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination. Disability is a protected characteristic in relation to direct discrimination.

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

Discrimination arising from disability

175. Section 15 of the Act provides that a person (A) discriminates against a disabled person (B) if:

1. A treats B unfavourably because of something arising in consequence of B's disability; and

2. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

176. However, A does not discriminate if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Indirect Disability Discrimination

177. Under section 19(1) of the Act, a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory to a relevant protected characteristic of B's. Disability is a relevant protected characteristic.

178. Section 19(2) provides that a PCP is discriminatory in relation to a relevant protected characteristic of B's if:

1. A applies, or would apply, it to persons with whom B does not share the characteristic;

2. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

3. It puts, or would put, B at that disadvantage; and

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

Reasonable adjustments

179. The Act imposes a duty on employers to make reasonable adjustments in certain circumstances in connection with any of three requirements. The requirement relevant in this case is the requirement, where a provision criterion or practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

180. A failure to comply with such a requirement is a failure to comply with the duty to make reasonable adjustments. If the employer fails to comply with that duty in relation to a disabled person, the employer discriminates against that person. However, the employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to.

Victimisation

181. Section 27 of the Act provides that a person (A) discriminates against another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act. Protected acts include the bringing of proceedings under the Act or making an allegation, whether express or not, that A or another person has contravened the Act. Under section 39(4)(c) of the Act, an employer must not victimise an employee of his by dismissing that employee.

182. In respect of the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide in the absence of any other explanation that the employer did contravene this provision. To do so the employee must show something more than merely that she was subjected to detrimental treatment by the employer and that she had the relevant protected characteristic/did a protected act as the case may be. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so we must hold that the provision was contravened. However, where the tribunal is able to make clear positive findings one way or another, it is not obliged to adopt the burden of proof set out above.

Time extensions and continuing acts

183. The Act provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (subject to any adjustments as a result of ACAS early conciliation) or such other period as the tribunal thinks just and equitable.

184. It further provides that conduct extending over a period is to be treated as done at the end of the period and that a failure to do something is to be treated as occurring when the person in question decided on it.

185. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

186. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA. This is, however, the exercise of a wide, general discretion.

Unfair Dismissal

187. The tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(1) and (2) of the Employment Rights Act 1996 ("ERA") and whether it had a genuine belief in that reason. Conduct is such a potentially fair reason. The burden of proof here rests on the employer who must persuade the tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal.

188. The tribunal refers itself to the principles, in relation to conduct dismissals, in British Home Stores v Burchell [1978] IRLR 379, namely that the employer must have a genuine and reasonably held belief that the relevant misconduct took place, following such investigation as was reasonable.

189. The tribunal has to decide whether it is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating the potentially fair reason as a sufficient

reason to dismiss the employee. The tribunal refers itself here to s 98(4) of the ERA and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. It is useful to regard this matter as consisting of two separate issues, namely:

> 1. Whether the employer adopted a fair procedure. This will include a reasonable investigation with, almost invariably, a hearing at which the employee, knowing in advance (so as to be able to come suitably prepared) the charges or problems which are to be dealt with, has the opportunity to put their case and to answer the evidence obtained by the employer; and
>
> 2. Whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. The tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. However, it sits as an industrial jury to provide, partly from its own knowledge, an objective consideration of what is or is not reasonable in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee's point of view: on the facts of the case, has the employee objectively suffered an injustice? It is trite law that a reasonable employer will bear in mind, when making a decision, factors such as the employee's length of service, previous disciplinary record, declared intentions in respect of reform and so on.

190. In respect of these issues, the tribunal must also bear in mind the provisions of the relevant ACAS Code of Practice 2015 on Disciplinary and Grievance Procedures to take into account any relevant provision thereof. Failure to follow any provisions of the Code does not, in itself, render a dismissal unfair, but it is something the tribunal will take into account in respect of both liability and any compensation. If the claimant succeeds, the compensatory award may be increased by 0-25% for any failures by the employer or decreased by 0-25% for any failures on the claimant's part.

191. Where there is a suggestion that the employee has by her conduct caused or contributed to her dismissal, further and different matters arise for consideration. In particular, the tribunal must be satisfied on the balance of probabilities that the employee did commit the act of misconduct relied upon by the employer. Thereafter issues as to the percentage of such contribution must be determined.

192. Under the case of Polkey v AE Dayton [1987] IRLR 503 HL, where the dismissal is unfair due to a procedural reason but the tribunal considers that an employee would still have been dismissed, even if a fair procedure had been followed, it may reduce the normal amount of compensation by a percentage representing the chance that the employee would still have lost her employment.

Conclusions on the issues

193. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

194. In some areas, Dr Weerasinghe dissents from the majority opinion. In order to make clear what is the majority and what the minority opinion, Dr Weerasinghe's minority opinions and reasons for those opinions are set out in italics, with the majority view in normal type. In relation to issues where there are no sections in italics, the opinion of the tribunal is unanimous.

UK role

Sections 13 and 15

195. Ms McKie indicated during her submissions that this was likely to be a section 15 case rather than a section 13 case. We agree. We also feel that we are in a position to make clear positive findings about the motivation for not selecting the claimant for the UK role without needing to apply the burden of proof. This is because of the very candid remarks made by Mr Scott in his grievance interview with Ms Ybarra. It is clear from those remarks that part of his motivation as decision-maker were concerns regarding the claimant's illness and ability to come into the office and his emphasis that to be effective, one needed to be in the office. It is clear from those remarks that his motivation was not because she had cancer per se, but because of his knowledge that she could not come into the office at that point and ongoing concerns that this may remain the case going into the future.

196. The complaint under section 13 therefore fails; the respondent not appointing the claimant to the role was not in any way because of her cancer per se.

197. However, part of the reason for not appointing her was the fact that she could not come into the office at that point and Mr Scott's concerns that this would apply going forward. The fact that she couldn't come into the office was in consequence of her cancer; similarly, Mr Scott's concerns that she would not be able to come into the office going forwards were because of the uncertainty of what the consequences of her illness would be for her and that too was in consequence of the fact that she had cancer.

198. It is not argued that this unfavourable treatment was a proportionate means of achieving a legitimate aim and no justification defence is either argued or made out. This section 15 complaint therefore succeeds.

199. We turn to the issue of whether the claimant would have been appointed to the UK role had she not had cancer and consequently not been absent from the office. We refer to our findings of fact above and note that Mr Scott's motivation for not appointing the claimant and for instead appointing Mr Vyas was a mixed one and that many of the other reasons given came out in the same grievance interview with Ms Ybarra that the discriminatory motivations came

from. There were numerous reasons: Mr Scott didn't think that the claimant wanted the role and that she was trying to get away from Mr Reynes; by appointing her to it he would be, as he put it, "robbing Peter to pay Paul" in terms of removing the claimant from her role in the global business; importantly, he regarded her as being, from a personality point of view, difficult to deal with (this is evident from the grievance interview and his witness evidence before this tribunal); he regarded her as someone who, whilst technically able, sat in the office and didn't engage with the business (again this is in the grievance interview), which he considered problematic in relation to what he wanted from the incumbent of the UK role; he felt that she did not perform as well as Mr Vyas, particularly in relation to the strategic issues, which he regarded as important for the UK role; he clearly rated Mr Vyas, as we have found above; and Mr Vyas was, as is evident from Mr Annand's evidence, a good candidate.

200. Therefore, we do not consider that, but for the cancer and its consequences, the claimant would have been appointed to the UK role over Mr Vyas. Whilst predicting the percentage likelihood of whether she would have been appointed is inevitably an inexact science, in the light of the findings which we have referred to in the paragraph above, we consider that, absent the cancer and its consequences, the claimant had only a 40% chance of being appointed to the UK role.

201. [Dr Weerasinghe dissents from the decision of the majority regarding this percentage chance. Dr Weerasinghe first considers, but for the discriminatory thoughts (as found above) which were foremost in Mr Scott's mind, what would have been done differently:
** Physiological and psychological impact of chemotherapy is common knowledge or it can be said that the Respondent had constructive knowledge. In consideration, the questions for the interview would have been given in advance to both candidates. If this was done, the Claimant, in Dr Weerasinghe's view, would have outshone Mr Vyas in all of the questions asked. The basis for this view is that whereas it is possible to get a sense of the Claimant's capability from her stated achievements, from her unblemished work record, from complimentary comments made of her by her colleague Mr Annand and from her evidently conscientious work ethic, there was no evidence of Mr Vyas' achievements. By way of an example, much weight was given to Mr Vyas' links with Government but there was no evidence of what he had achieved with those Government links.*
** Mr Scott states that Mr Vyas had the edge in terms of expertise, gravitas and breadth of experience. However, even a cursory look at both CVs clearly show that the Claimant had a greater breadth of experience. Moreover, the Claimant at paragraph 89 of her statement points out that unlike her own work experience, Mr Vyas' work experience was not relevant to the UK Role stating: "Rajiv's experience seems to be limited only to Regulatory Risk (Compliance) as opposed to Operational or Investment Risk". It is to be noted that this aspect was not contested by the Respondent. But for the discrimination, the Claimant's past experience and her CV would have been given closer consideration.*
** But for the discrimination, the Claimant's potential to 'step up' to the new role and new responsibilities would have been considered instead of applying an abstract unspecified criterion which was lacking 'gravitas' compared to Mr Vyas.*

In addition to the above, Dr Weerasinghe also considers Mr Scott's non-discriminatory statement; "robbing Peter to pay Paul" and concludes, but for the discrimination, a 70% chance of the Claimant being appointed to the UK Role.]

Section 19

202. We turn now to the various allegations of indirect discrimination, set out at issue 7.1 of the list of issues. Four PCPs are relied on in relation to the process for the appointment to the UK role.

203. The respondent did not insist on an interview with Egon Zender. This PCP (7.1.1) is not therefore made out and this indirect discrimination complaint therefore fails.

204. It follows that the respondent did not insist that that interview took place in London. This PCP (7.1.2) is not therefore made out and this indirect discrimination complaint therefore fails.

205. The respondent, in relation to the appointment, did only allow the claimant one chance to impress in a telephone interview (7.1.3). This was of course an adjustment made at her request. However, this is not a PCP which the respondent applied or would apply generally to persons with whom the claimant does not share her protected characteristic of disability; specifically, it was not applied to the other candidate, Mr Vyas, who was an external candidate and who went through the screening interview and whose interview with Mr Scott was conducted face-to-face and not by telephone. Therefore, the fact that the claimant was given one chance to impress in a telephone interview cannot amount to a PCP for the purposes of section 19. This indirect discrimination complaint therefore fails.

206. The respondent did not insist that the candidate not be temporarily indisposed due to illness. This PCP (7.1.4) is not therefore made out and this indirect discrimination complaint therefore fails.

207. In summary, all of these indirect discrimination complaints fail.

Section 20

208. We turn now to the reasonable adjustments complaints under section 20 in relation to the UK role.

209. As noted in the section above relating to indirect discrimination, the alleged PCPs at 19.1.1, 19.1.2, and 19.1.4 are not made out and these reasonable adjustments complaints therefore fail.

210. The PCP alleged at 19.1.3, only allowing the claimant one chance to impress in a telephone interview, is established (there being no requirement in relation to reasonable adjustments, as opposed to indirect discrimination, for the PCP to be applied generally).

211. However, in relation to that PCP, we do not find that it put the claimant at a substantial disadvantage. First, the fact that the claimant didn't have the first screening interview with Mr Askham, which the external candidates had, was to her benefit; she automatically went through to the second stage without having to do that interview. Secondly, she was not at a disadvantage because Mr Scott knew her already, and much of the information about her ability and aptitudes was, in contrast to external candidates, already in his possession. Thirdly, and most importantly, the telephone interview was arranged for the claimant's benefit at her request, as opposed to her having to come in for a face-to-face interview, and again, the fact that she was interviewed by telephone as opposed to face-to-face would be more than made up for by the fact that Mr Scott knew her already as an existing employee. The telephone interview was therefore a benefit to her; it did not put her at a disadvantage, let alone a substantial disadvantage. The reasonable adjustment complaint based on this PCP therefore also fails.

212. As the complaint has failed, it is not strictly necessary to look at the suggested adjustments which the claimant maintains would be reasonable in relation to this PCP. However, for completeness, we do so.

213. We do not consider the dispensing with consideration of external candidates would be a reasonable adjustment (22.1.1). It would not be reasonable to expect the respondent to limit the pool of available candidates for the role.

214. To some extent, Mr Scott did judge the claimant on her past performance and what he knew of her (22.1.2), as was evident from his answers in the grievance investigation interview.

215. We do not consider that allowing the claimant a chance to digest the interview questions in advance of the interview and prepare a presentation with extra time afforded to her (22.1.3) would be a reasonable adjustment. Very little was made of this at the hearing, albeit it is in the list of issues. However, first, adjustments were discussed with the claimant and the only one which the claimant wanted was to have the telephone interview (because of her immune system and the risks which travel posed). The adjustment at 22.1.3 was never suggested. Whilst the duty is on the respondent to make adjustments, in the case of a senior employee such as the claimant, albeit one who was diagnosed with cancer recently, we do not consider it was unreasonable not to make such an adjustment or not to impose it on the claimant in the absence of some discussion or indication from her of its necessity. In any event, making such an adjustment would be likely to give far too great an advantage to the candidate if she had knowledge of the questions in advance and, for that reason, we do not consider it reasonable.

216. We do not consider that allowing the claimant a chance to retake her interview (22.1.4) would be a reasonable adjustment. Firstly, there was no discussion about this at the time; again, for the same reasons given in relation to 22.1.3, with a senior employee where adjustments have been discussed and granted (the telephone interview), we do not consider that it was unreasonable

not to suggest after the interview that the claimant should retake it. This is particularly so given that, according to both Mr Scott and the claimant, the claimant performed well at the interview (it was just that, in the opinion of Mr Scott, she did not perform as well as Mr Vyas).

217. The interview with Egon Zehnder was dispensed with (22.1.5), so this adjustment was made, albeit not for the purposes of assisting the claimant.

218. In summary, therefore, all of the reasonable adjustment complaints in relation to the UK role fail.

Interim global role

Sections 13 and 15

219. Ms McKie has submitted that Mr Earp had fewer relevant qualifications and less experience than the claimant. However, we refer to our findings about the lack of importance placed on CVs and comparisons of CVs here. In any event, the point is not relevant here as there was no comparison of candidates, let alone of CVs, as Mr Earp was simply appointed to the role. Ms McKie also made points about not following recruitment processes having an impact on diversity and hampering equal opportunities and asked us to draw an inference from the fact that Mr Grealy, who was present at the tribunal for part of the hearing, did not give a witness statement as he was one of the decision-makers. She asked us to draw an inference that the fact that the claimant was at this point spending a considerable amount of time working from home made her less visible to the decision-makers and that a lack of clarity around her health and when she would return to working in the office had an impact. However, we do not consider that any of these suggestions are in themselves cumulatively enough to shift the burden of proof.

220. In any event, we again consider that we are able to make clear positive findings of fact as to the reason for the discrimination without needing to use the burden of proof. In this case, the reason given by the respondent at the tribunal for the appointment of Mr Earp was the reason expressed contemporaneously and was based on admittedly true facts such as the closure of the US office and the desire to retain a person with knowledge of the Volcker rules. It was not made with reference to anyone else, be it the claimant or any other employee; it was made by reference to Mr Earp's situation. We accept that reason.

221. Whatever the meaning was of the reference to "recent circumstances" in Mr Grealy's email of 1 December 2015 quoted in our findings of fact above, the decision to appoint Mr Earp had been taken by the time of that email; and the decision was taken by reference to the desire to retain him, rather than any considerations about the claimant or any other employees.

222. The reason for the appointment of Mr Earp was therefore as set out above; it was nothing whatsoever to do with the claimant's disability or anything arising from the claimant's disability; therefore, both the section 13 and section 15 complaints fail.

Section 19

223. As to the indirect discrimination complaints, both alleged PCPs are substantiated, namely that, in relation to the interim global role, the respondent failed to consider the claimant for the role (7.2.1) and did not undertake a formal recruitment process (7.2.2).

224. These PCPs disadvantaged the claimant. However, they also disadvantaged everyone else apart from Mr Earp, regardless of whether those persons shared the claimant's disability or not. The application of the PCPs did not therefore put persons with whom the claimant shared the same disability at a particular disadvantage when compared with persons who did not share it; all persons were disadvantaged, whether they shared the disability or not. For this reason, these indirect discrimination complaints both fail.

Section 20

225. The same PCPs pleaded in relation to the indirect discrimination complaints above are pleaded in relation to the reasonable adjustment complaints (19.2.1 and 19.2.2) and, as set out above in relation to indirect discrimination, were applied. However, the application of them did not put the claimant at a substantial disadvantage in comparison with persons who did not have her disability, as everyone was disadvantaged (unless they were Mr Earp).

226. The reasonable adjustments complaints therefore fail. It is not therefore necessary to go through all of the alleged reasonable adjustments at paragraph 22.2; given that these complaints so clearly fail at the "substantial disadvantage" stage, we do not propose to do so.

<u>Permanent global role</u>

Sections 13 and 15

227. Ms McKie made similar submissions as to why the burden of proof should shift as she did with the interim global role. As set out above in our conclusions regarding the interim global role, we do not accept that the burden of proof does shift.

228. Furthermore, we are again in a position to make clear positive findings as to the reason for the decision to appoint Mr de la Vega. The decision was made in Madrid by persons unknown to the claimant. It was done by reference to the desire to retain Mr de la Vega; it was nothing to do with anyone else, including the claimant, and it follows that it could not have been because of her cancer or absence from the office.

229. The claimant's direct discrimination complaint in relation to the permanent global role therefore fails, as does her discrimination arising from disability complaint; the decision was not because of the cancer or anything arising in consequence of it.

Section 19

230. There is no claim of indirect discrimination in the list of issues.

Section 20

231. In the list of issues, there is no alleged PCP set out in relation to any potential reasonable adjustments complaint in relation to the permanent global role. On that basis, therefore, there is no reasonable adjustments complaint as one of its core constituent elements is not pleaded and that is the end of the matter.

232. However, curiously, we note that suggested reasonable adjustments are set out in the list of issues in relation to the global role (namely implementing a proper recruitment process (22.3.1)). However, on the assumption that a PCP of not undertaking a formal recruitment process was intended to be pleaded, the complaint would nonetheless fail for the same reasons set out in relation to the similar reasonable adjustments complaints in relation to the interim global role. The application of such a PCP would not have put the claimant at a substantial disadvantage in comparison with those who did not share her disability because all potential candidates for the role (other than Mr de la Vega) were disadvantaged, regardless of whether or not they shared the claimant's disability of cancer.

<u>Suspension</u>

Sections 13 and 15

233. In terms of the decision to suspend the claimant, we note that the decision to set up the meeting of 20 January 2017 was taken by four individuals, Mr Grealy, Ms Herbert, Mr de la Vega and Ms Bale. This followed Ms Herbert having learned that the claimant had attended a dressage event on a day when she was supposed to be working at home and where her manager had not been able to contact her during the day; it was coupled with (albeit unsubstantiated) rumours that Ms Herbert had heard previously that the claimant attended dressage events on days when she was due to be working. There also seemed to be a greater suspicion on their part because of the reference in the claimant's email of 18 January 2017 to Mr de la Vega that she had agreed with Mr Earp that she could work from home when suffering from fatigue (there seemed from the evidence to be a lack of appreciation, particularly on Mr de la Vega's part, that the fact that she worked at home on Wednesdays was indeed connected with her cancer-related fatigue, as this broke up the weekly commute which was one cause of that fatigue; furthermore there seemed to be no consideration of the fact that exercise can be beneficial both in relation to fatigue and depression; rather, there seems to be an assumption at the time that it was incompatible that one should have fatigue and yet be conducting exercise (by riding horses or otherwise)).

234. In the light of the information before them, it is not unreasonable for the four managers to have decided to take some action to explore what had actually happened. The question is whether or not it would have been more reasonable simply for Mr de la Vega to speak to the claimant at the meeting he was due to have with her anyway on the following day, 19 January 2017, or to opt for the course of action which they did, which was more heavy-handed and appeared designed to catch the claimant out if she didn't tell the truth. Whilst both options were open to them, we consider that the decision to set up the HR meeting rather than have a one-to-one conversation with her manager was not reasonable in the circumstances; this was a senior manager with a clean disciplinary record and one whose periods working from home were because of serious illness. The obvious thing was for her new manager, who didn't know much about her personal circumstances anyway, to speak to her and ask her what happened.

235. Ms Herbert and the others were suspicious in the as yet unexplored circumstances of the claimant appearing to be unavailable for a much longer chunk of a working day than she actually was unavailable (because she was not logged on for much of the day) and considered that the HR meeting was therefore the appropriate way forward; the question is whether there was any motivation beyond that suspicion in their decision. Mr de la Vega did not really know the claimant at this point; we do not know anything about Ms Bale; Mr Grealy was involved in the decision on the interim global role, which we found was not discriminatory; and Ms Herbert was involved on the decision on the UK role, which we have found was discriminatory, but other than that, the evidence we have seen does not indicate any particular animus on her part against the claimant (the claimant's recordings of meetings with her not only do not indicate anything malevolent on Ms Herbert's part against the claimant but indicate a caring and concerned attitude). Having said all that, we do consider, for the reasons above, that taking the HR meeting option rather than a chat with Mr de la Vega was unreasonable in the circumstances and that unreasonableness on its own would be enough to reverse the burden of proof.

236. Having said that, that decision is not the issue before us in the list of issues; the issue is not about the reason why the meeting of 20 January 2017 was set up, but about why the claimant was suspended. The instruction given to Mr Thomson and Ms Strudwick was only to suspend the claimant if she denied being at the dressage event. The claimant initially denied being at the dressage event in the meeting of 20 January 2017; as a result of that denial, Mr Thomson suspended her. The reason for the suspension was therefore the untrue statement which she made at that meeting ("I didn't go").

237. The claimant was not therefore suspended because of her cancer or because of anything arising in consequence of her cancer (which is the disability relied on for the purposes of this allegation); she was suspended because she made the untrue statement. The section 13 and section 15 complaints therefore fail.

Section 19

238. The alleged PCP in relation to the claimant's suspension was that the respondent required a person who worked from home to display greater evidence of commitment to the role whereby any time away from work in the middle of the day would be looked upon much more suspiciously than those working at their desk (7.4.1). However, we do not find that this PCP was applied. Even in terms of the decision to set up the meeting with HR, the respondent was faced with a situation where it appeared that the claimant was unavailable for a much larger part of the day (not just the time around lunchtime). Furthermore, there is no evidence that the respondent did require someone working at home to display greater evidence of commitment to the role; quite the contrary, the respondent specifically did not check up on the claimant's work. This PCP is not therefore made out on the facts.

239. In any case, even if it had been applied, it would not have put the claimant at a particular disadvantage when compared to others without a disability in relation to her suspension; that is because the reason for her suspension was not because she was working at home but because her initial response in the 20 January 2017 meeting was untrue.

240. The indirect discrimination complaint therefore fails.

Section 20

241. The alleged PCP for the purposes of the reasonable adjustments complaint in relation to the claimant's suspension is that the respondent required that the claimant be judged based on her immediate answers in the suspension meeting (19.3.1). However, there was no judgment. The claimant was suspended, which is a neutral action, with any judgment left pending until the disciplinary stage, as was the case here. The PCP is not therefore made out and this complaint therefore fails.

242. Even if it can be said that the suspension was a form of "judgment" and that the PCP is established, whether or not it put the claimant at a substantial disadvantage in comparison with those who did not share her disability (in this case Type 1 diabetes) depends upon whether or not the claimant was having a hypoglycaemic attack and whether her answer to the initial question was affected by that (an issue that we come to later). However, what is clear is that Mr Thompson, who suspended her, was certainly not aware at the point when he suspended her (after her initial answer) that she was having a hypoglycaemic attack or that it impacted on her answer. Therefore, he did not know nor is there any reason why he ought to have known (if the claimant was indeed placed at that substantial disadvantage) that she was placed at such a disadvantage. Therefore, on the knowledge point, this complaint also fails.

243. Finally, the suggested adjustment in relation to this complaint is that Mr Thompson and Ms Strudwick should have stopped or suspended the meeting when they notice that the claimant said that her blood sugar level was low and that she was having a hypoglycaemic attack (22.4.1). However, firstly the

claimant didn't say that she was having a hypoglycaemic attack at the meeting (although she did say that her blood sugars were low and a Coke was brought for her). Secondly, by that stage, she had already been suspended, so such an adjustment would have been ineffective anyway. This would not, therefore, have been a reasonable adjustment and the complaint fails for that reason too.

Dismissal

Core finding of fact

244. We turn now to the key finding of fact in relation to the dismissal issues, which is the question of whether or not the claimant did have a hypoglycaemic attack in the meeting of 20 January 2017 and whether that influenced the answer she gave to the initial question asked by Mr Thomson (the "negative statement", as it has been referred to by the parties).

245. We consider first the evidence suggesting that the claimant did not have a hypoglycaemic attack:

1. Both Mr Thomson and Ms Strudwick gave consistent evidence (in their statements at the disciplinary stage; Mr Thomson's statement at the appeal stage; and Ms Strudwick's evidence before this tribunal) that the claimant's answers in response to the initial question were clear and that they saw no indication that she was in difficulties until the point after she gave the negative statement when Mr Thomson presented her with the evidence that she attended the dressage event.

2. The claimant's answers came quickly one after another, for example stating that she didn't attend and then asking whether the respondent knew because it had looked in her diary, which appeared to those present to indicate lucidity. *[VW] [Yes, if the two questions about how the information came to light and about looking through the claimant's diary are taken in isolation it appears to be lucid. However, if considered together with the 'negative statement', there is a clear disjoint between the two.]*

3. In his interview following the appeal meeting, Mr Thomson suggested that the sort of symptoms which she displayed in the 20 January 2017 meeting after she was handed the evidence were similar to those she displayed in the appeal meeting when questioned by Mr Khadim at length about the covert recordings but that, in the latter meeting, her blood sugar levels were fine. In other words, it is suggested that the claimant reacted in this way in a potentially stressful situation in any event, even when not affected by low blood sugar levels.

4. The claimant's reaction to the initial question could simply be her giving a panicked reaction to a question suddenly put to her about what she was doing on 18 January 2017 and giving an untrue answer on the spur of the moment.

5. It would be a convenient truth for the claimant to say that she had a hypoglycaemic attack, as this could excuse her for the untrue answer and be the difference between her being found to have been honest or dishonest and therefore keeping her job.

6. Her blood sugar was not tested at that meeting so there is no confirmation that it was at level 4 or below.

7. The claimant could have said something at the start of the meeting if (as is her evidence) she already knew that she was having a hypoglycaemic attack. Having said that, all the evidence we have seen of the claimant's approach is that she is someone who, whatever her health difficulties, struggles on without letting them stop her (for example, returning to work so soon after her cancer operation and, at this hearing, endeavouring to carry on despite being in difficulties towards the end of her cross-examination until those with her persuaded her to break for the day). *[VW] [At the point she received the call from HR, foremost in her mind would have been to find out whether she was being made redundant.]*

246. We now consider the evidence suggesting that the claimant did have a hypoglycaemic attack:

1. It is very odd that the claimant would lie about attending the dressage event at all given how open she had been about attending the event. It was in her work diary; she had told her colleagues; and she had communicated with Quainton Stud on her work email address. If this was something she thought she shouldn't have been doing and was trying to hide from the respondent, why would she be so open about it?

2. In his investigation report, Mr Ruiz concluded that the claimant genuinely thought that she had an arrangement with Mr Earp that she could attend dressage events of this nature. If so, why would she lie?

3. The claimant did mention in her investigatory interview with Mr Ruiz that she had had a hypoglycaemic attack. It was not the case, as was suggested by the respondent in the internal proceedings, that she brought this up at a late stage. Furthermore, a reference to it in the investigatory stage in passing rather than going into full details was because, at that stage, she was being asked about whether she should have been going to the event on 18 January 2017 rather than about her answer at the meeting of 20 January 2017 (for which she was ultimately disciplined).

4. The claimant had had hypoglycaemic attacks in the workplace before, which had been witnessed by her colleagues.

5. The claimant is Type I diabetic and therefore suffers from both low and high blood sugar levels, including hypoglycaemic attacks. The medical evidence of Dr Carter is key in this respect. He confirms that decreased concentration, fatigue and confusion are symptoms of a

hypoglycaemic attack. He explains that if a sufferer has not eaten in a long time or sometimes even a short time, a low blood sugar level can occur and with it a hypoglycaemic attack; the claimant had not had lunch that day. A hypo can go away in a matter of minutes, sometimes faster. Crucially, they are a slow process because sugar levels drop slowly and not quickly; this means that the claimant could indeed have had a hypoglycaemic attack starting at the beginning of the meeting or even beforehand (as she herself maintains). He confirmed that a particularly stressful situation could mean that the hypoglycaemic attack could take place much quicker; being called up to a meeting with HR late on a Friday afternoon is unquestionably a stressful situation. He confirmed that hypoglycaemic attacks are likely to take place over the course of minutes but could take up to an hour to correct; the meeting itself was relatively short, being no more than 20 minutes including the break. He also stated that where someone has a hypo and has lost the ability to be coherent, it is unlikely that they could recover quickly and, in his experience, it would not reverse until sugar had been given plus time. Therefore, on the medical evidence, it is certainly possible that the claimant was having a hypoglycaemic attack before she arrived at the meeting and that it continued (and certainly the effects of it continued) throughout the meeting. It is certainly possible that, due to her already low blood sugars, through not having eaten, and the stressful event of being called up to HR at that time, that a hypoglycaemic attack was triggered *[VW] [consistent with the medical evidence]* and was impacting upon her mental state before she even went into the meeting.

6. The claimant's own evidence is that she was indeed having a hypoglycaemic attack; as a Type I diabetes sufferer who has had such attacks before, she is well placed to know.

7. In the meeting itself, the claimant asked for Coke and said that her blood sugars were low.

8. In the answers given in their interviews, both Mr Thomson and Ms Strudwick give examples of symptoms which the claimant suffered from which are consistent with a hypoglycaemic attack (albeit they say that they only emerged after the initial answer had been given); however, it is quite possible, on the medical evidence, that the cognitive effects such as confusion and lack of concentration caused by a hypoglycaemic attack could be taking place even before more visible symptoms were obvious to Mr Thomson and Ms Strudwick.

9. In relation to her notes of the question asked, Ms Strudwick accepted that she wasn't sure if they asked whether the claimant attended two events or just whether she attended the dressage competition; if it was the former, it is quite possible that, if the claimant was somewhat confused, whether as a result of a hypoglycaemic attack or otherwise, that she might have said "I didn't go", when what she meant to say was that she didn't go to both events because of the unreasonable amount of time

both would take and therefore limited her attendance to one event (which was true).

10. Even if the question had been clear and the claimant had simply been asked if she attended the event, it is quite possible, knowing that she originally intended to do two tests but in the end cancelled one and only did one test, that the claimant attempted to say this but what came out was simply the statement "I didn't go".

247. We appreciate that the answer to this question is neither easy nor straightforward. However, having balanced the evidence above, we consider that, on the balance of probabilities, the claimant did have a hypoglycaemic attack on 20 January 2017; it started before she even went into the meeting; it continued throughout the meeting (or at least its effects did); and it affected her in such a way that the answer that she gave to the initial question, which was untrue on the face of it, was not what she intended to say; rather, she intended to indicate that she had not attended for both tests (which would have taken up an unreasonable amount of time) rather than denying that she had been at the dressage event at all. The claimant did not therefore lie in making the "negative statement" nor was she wilfully dishonest.

248. In concluding this, we are particularly swayed by the medical evidence set out above and the lack of motivation the claimant had for not telling the truth given that she was so open about her attendance at dressage events.

Sections 13 and 15

249. We do not consider that the decisions of Mr Faz and Mr Khadim were in any way motivated by either of the claimant's disabilities. Both of them carried out the exercise before them in a thorough manner, conducting appropriate investigation where necessary and addressing the issues before them. Neither of them had any reason to be prejudiced against the claimant; Mr Faz did not have a bad working relationship with the claimant and Mr Khadim hardly knew her as he was new to the job; neither were involved in any way with the previous decisions relating to the appointments to the UK or global roles. We have no doubt that they genuinely addressed their minds to the question of whether or not the claimant had been dishonest in making the "negative statement" and whether she suffered a hypoglycaemic attack; we simply disagree with their conclusions in this respect.

250. For these reasons, we do not find that the decision to dismiss the claimant was in any way because of either of her disabilities. The section 13 complaint therefore fails.

251. As to the section 15 complaint, the claimant was dismissed because she made the "negative statement". However, that statement was made in consequence of her being confused and unclear in what she was saying; that was in consequence of her suffering from a hypoglycaemic attack at the time; and that was duly in consequence of her Type I diabetes. The representatives agree that the additional stages in the causal link set out in this paragraph (that

the action was in consequence of one thing which was in consequence of another thing which was in consequence of the disability) do not prevent this situation falling within section 15.

252. No justification defence has been put forward nor can we see that there could be one.

253. The claimant was, therefore, dismissed because of something arising in consequence of her disability and this section 15 complaint therefore succeeds.

Section 19

254. The alleged PCP in relation to the indirect discrimination complaint is that the respondent decided that it would not obtain expert advice when advised by the claimant that she was having a hypoglycaemic attack when giving her answers (7.5.1). This PCP was applied in respect of the claimant; Mr Faz decided to rely on the GP advice from Dr Carter and not to instruct a diabetes specialist. Whilst the circumstances are somewhat hard to imagine, we have no reason to doubt that Mr Faz would have done the same thing in similar circumstances in relation to others who did not have the claimant's disability of Type I diabetes (for example someone who maintained that they had had an attack of a similar nature but did not turn out to be someone who had Type I diabetes); we therefore accept that the PCP would have been applied by the respondent generally and not just specifically to the claimant, which is part of the first requirement (establishing the PCP) for establishing a successful indirect discrimination complaint.

255. However, not instructing an expert did not put the claimant at a disadvantage. As set out above, the only difference of significance between the later expert's report and what Dr Carter had to say was the reference to those who have had Type I diabetes for a long time, such as the claimant, losing their awareness of having a hypoglycaemic attack; however, this was not an issue in this case because, on the claimant's own evidence, she was indeed aware that she was having such an attack even before the meeting on 20 January 2017 started.

256. There was therefore no disadvantage to the claimant and the indirect discrimination complaint therefore fails.

Section 20

257. The PCPs said to have been applied to the claimant were the respondent deciding that it would not obtain expert advice when advised by the claimant that she was having a hypoglycaemic attack when giving her answers (19.4.1) and the respondent relying on the answers the claimant gave in the suspension meeting (19.4.2). The respondent did both of these things; both of these PCPs were applied to the claimant.

258. The first PCP did not, however, put the claimant at a substantial disadvantage, or indeed any disadvantage at all, for the same reasons given

above; namely that the only difference of significance in the expert report was the issue about losing awareness of having a hypoglycaemic attack, which did not apply in this case because the claimant was aware that she was having such an attack. This reasonable adjustments complaint therefore fails.

259. As to the second PCP, the claimant was put at a substantial disadvantage because, as a result of relying on the answers given by the claimant at the suspension meeting (or more accurately, relying on the first of those answers, the "negative statement"), the respondent dismissed the claimant.

260. We turn to the three suggested reasonable adjustments (in relation to this second PCP only).

261. First, we consider that it would have been a reasonable adjustment not to have dismissed the claimant in the circumstances (22.5.1). This is because, in the light of the totality of the evidence, as we have set out above, the claimant did have a hypoglycaemic attack, which impacted on the clarity of her answers and meant that the answer which she did give was a confused one but not a dishonest one. In those circumstances, it would be a reasonable adjustment not to rely on the wording of the answer given. This reasonable adjustments complaint therefore succeeds.

262. The second alleged reasonable adjustment (22.5.2) was that the respondent should have disregarded "the claimant's answers during the meeting on 20 January 2017 when those present noted that the claimant said that her blood sugar level was low and she was having a hypoglycaemic attack". Firstly, we reiterate that the claimant did not say at the meeting that she was having a hypoglycaemic attack. She did say that her blood sugar levels were low. However, the suggested adjustment is something which is said should have been done at the suspension stage before the matter was fully investigated and before she was even invited to a disciplinary meeting with the risk of dismissal; we do not consider it was appropriate or a reasonable adjustment that Mr Thomson and Ms Strudwick should have suddenly disregarded what was said at that stage prior to any investigation. However, that is irrelevant, as this is put forward as a reasonable adjustment in relation to the dismissal and the decision in relation to the dismissal took place long after the meeting at which the claimant was suspended. This reasonable adjustments complaint therefore fails.

263. The final proposed reasonable adjustment is that the respondent should have obtained "proper" medical advice (22.5.3). However, as already indicated above, expert advice when it came did not add anything material to the medical advice obtained from Dr Carter. Such advice would not have altered the decision. It was just that, notwithstanding the medical advice, Mr Faz and Mr Khadim considered that the claimant knew what she was saying when she gave the "negative statement" and knowingly said something that was untrue. This reasonable adjustments complaint therefore also fails.

Victimisation

264. All three of the alleged protected acts, set out at 23.1 - 23.3 of the list of issues, were done. The statements, as set out in the list of issues, were made and are recorded in our findings of fact above. Furthermore, all of them allege that the respondent did something which contravened the Act. All are therefore protected acts.

265. The detriment relied on by the claimant in relation to her victimisation complaint is that she was dismissed. However, for the same reasons that we dismissed the section 13 complaint in relation to dismissal, we also find that the reasons for the claimant's dismissal had nothing whatsoever to do with the fact that she had made allegations that the respondent had breached the Act. We reiterate that neither Mr Faz nor Mr Khadim had any reason to be prejudiced against the claimant, that they were not involved in any of the alleged earlier acts of discrimination, that they carried out the task before them thoroughly and that they genuinely, albeit in our opinion mistakenly, concluded that the claimant made the untrue statement knowing it to be untrue and that that was why they respectively dismissed her and did not uphold her appeal against dismissal.

266. The victimisation complaint therefore fails.

Unfair dismissal

267. The claimant was dismissed for misconduct. As we have set out above, we consider that both Mr Faz and Mr Khadim genuinely considered that she had lied to Mr Thomson and Ms Strudwick in the 20 January 2017 meeting.

268. In terms of investigation, we accept that there were a number of inadequacies in relation to the investigation. These include: Mr Ruiz not investigating the alleged lie or putting that to the claimant in his investigatory meeting with her; not making the allegation against the claimant clear in the suspension letter or letters calling her to investigatory meetings; not getting witness statements from Mr Thomson or Ms Strudwick at the investigatory stage. These were failings, albeit ones which were remedied because Mr Faz took it upon himself to carry out further investigations, including interviewing Mr Thomson and Ms Strudwick and getting medical advice. Furthermore, by the time of the disciplinary hearing, the claimant was well aware of the charge against her because it was set out in the letter inviting her to the disciplinary meeting.

269. Furthermore, we do not accept that not obtaining an expert medical report from a diabetes specialist rendered the investigation unfair. Whilst it may have been preferable to do so, the medical advice from Dr Carter was in fact adequate in relation to the circumstances of the case, for the reasons which we have on more than one occasion set out above.

270. Ms Mckie has suggested that there was some ambiguity at the appeal stage as to whether additional allegations regarding other alleged untruths told by the claimant at the 20 January 2017 meeting were added as a charge.

However, Mr Faz dismissed the claimant solely for the initial "negative statement" and that was never overturned on appeal; we do not consider that there was any procedural unfairness here which renders the dismissal unfair.

271. The only issue of procedural unfairness which we do consider renders the dismissal unfair is the failure by Mr Khadim to provide the claimant with the further notes of the meeting with Mr Thomson prior to making his decision on appeal, with their reference to the claimant's behaviour at the appeal when she was questioned regarding the covert recordings being similar to that at the 20 January 2017 meeting when she was shown the evidence that she attended the dressage event. That is an important piece of further evidence which should have been disclosed to the claimant prior to the decision being taken on appeal and was not; that failure therefore, in our opinion, renders the dismissal unfair. However, we do not consider that, even if the claimant had seen that evidence, it would have made any difference to the decision; what was in that document may have been a further reason for Mr Khadim not to uphold the appeal but, even without that, his analysis was such that he would not have upheld it based on the other evidence anyway.

272. In short, in terms of reasonableness of investigation, notwithstanding the early failures, and with the exception of the paragraph above, the investigation in the process as a whole was reasonable.

273. However, whilst we consider that it was genuinely held, we do not consider that the belief that the claimant had committed the misconduct was one which was reasonably held. We are very aware that, just because, as a matter of fact, we have found that the claimant did suffer a hypoglycaemic attack such that she was confused in her answer but not lying, it does not follow that Mr Faz or Mr Khadim's belief that she did not suffer such an attack (at least at the point when she made the "negative statement") was unreasonably held. We further acknowledge that it was not an easy decision one way or another. However, we refer back to the analysis that we went through above in coming to our decision and we find that, had that analysis been carried out in that way, taking into account the totality of the factors *[VW] [particularly Dr Carter's evidence that stress is likely to cause the onset of a 'hypo']*, Mr Faz and Mr Khadim could not have reasonably come to the conclusion, on the balance of probabilities, that the claimant did not have a hypoglycaemic attack and that she was therefore not confused in the answer she gave but lied.

274. As there was no reasonable belief that the misconduct took place, the dismissal was substantively unfair.

275. The claimant's complaint of unfair dismissal therefore succeeds.

276. In terms of sanction, had there been a reasonable belief that the claimant lied, we do not find that the decision to dismiss would have been outside the band of reasonable responses. The issue was about honesty; furthermore, the claimant as Global Head of Compliance held a role with the respondent which was not only senior but was one where honesty was paramount.

ACAS Code

277. Ms McKie has made various allegations that the respondent, in the course of the investigation and disciplinary proceedings, breached the ACAS Code 2015 on Disciplinary and Grievance Procedures. Whilst she has not specified the precise provisions of the Code, it appears from the allegations she has made that they are of paragraph 5 of the Code and, particularly, paragraph 9, which states that:

"9 If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

278. Ms McKie alleges that the failure at the investigation meeting to investigate the 20 January 2017 "lie" was a breach; as was the failure to provide the claimant with relevant documentation in advance of the disciplinary meeting (including the statements of Mr Thomson and Ms Strudwick and the medical evidence of Dr Carter, which should have been obtained at the investigation stage); as was the failure of Mr Khadim to provide her with the notes of his interview with Mr Thomson subsequent to his appeal meeting with the claimant. We accept that these are all breaches of either paragraph 5 or, for the most part, paragraph 9 of the ACAS Code. We consider that they were all unreasonable in the sense that there is no reason why a large organisation with the resources of the respondent could not have dealt with these matters in accordance with the Code. However, we also note that the majority of them were remedied, principally by Mr Faz, albeit the failure to provide Mr Thomson's interview notes at the appeal stage was not remedied. Taking all that into account, we consider that this is not a case where there has been a complete failure to abide by the Code such that a maximum 25% increase in any award should be made; rather, we consider that the appropriate uplift should be 10%.

279. We therefore make an uplift of 10% to the unfair dismissal compensatory award as a result of these unreasonable failures to follow the ACAS Code.

Contributory conduct

280. In the light of the findings that we have made, specifically that the claimant did not lie at the 20 January 2017 meeting, we do not find that, in terms of the reasons for which she was dismissed, the claimant contributed to her own dismissal and we do not therefore make any reduction to compensation for unfair dismissal because of contributory conduct.

281. To be clear, this is a separate matter from the conclusions which we make in relation to the issue of the covert recordings, which we refer to below.

Polkey

282. Furthermore, whilst we have identified procedural failings in the investigation and dismissal process which were not remedied at a later stage of

the process, we do not consider that, had they been remedied, it would have made any difference to the fairness of the dismissal. This is because we found that, the respondent not having a reasonable belief that the claimant carried out the misconduct for which she was dismissed, the dismissal was substantively unfair.

283. Again, our conclusions here relate only to the dismissal process and are separate from the conclusions which we make below in relation to limits on compensation for other reasons such as the restructuring at the respondent.

Covert recordings

284. The claimant made covert recordings of conversations which she had with numerous different senior employees of the respondent. These included: her conversation with Mr Scott in early June 2015; the home visit carried out in July 2015 by Ms Herbert and Mr Richardson; her meeting in January 2016 with Ms Herbert; and the disciplinary meeting in April 2017 with Mr Faz. Noticeably, she started doing this before any of the decisions which she has maintained were discriminatory in the list of issues for this hearing took place.

285. The reasons she gave to Mr Khadim for recording these meetings were, as indeed he considered himself, not convincing. If the claimant had made those recordings, particularly the early ones, because she genuinely had concerns about her memory, there is no reason why she could not have said that to Mr Scott or Ms Herbert; that would have been a perfectly understandable reason for asking to record and one which, in the circumstances of her undergoing chemotherapy, they would almost certainly have had no problem with. The other reason the claimant gave was that Mr Chambers had warned her to protect herself. First, even on her own evidence, Mr Chambers did not suggest that she make covert recordings of conversations with senior members of staff. Secondly, when this was put to him, Mr Chambers denied that he had told her to protect herself. There was, therefore, no good reason for the claimant to make these recordings.

286. The real reason, we therefore infer, was that the claimant wanted to protect her own position and wanted to catch out the various other parties to these conversations in case they said something which might be useful to her at a later stage (and indeed it was only at that later stage, when she was being disciplined, that she decided to release the material which she had built up over the years; and even then, she only released parts of it).

287. Making these recordings without asking the permission of the people who were being recorded was underhand and dishonest. We accept Mr Nicholls' submission that individuals such as Mr Scott, who were recorded, were entitled to feel that this was an invasion of their privacy and deceit because the claimant failed to declare it. Furthermore, what is particularly striking, is that having asked whether she could record the investigatory meeting and been told that she could not do so, the claimant then decided not to ask permission at the subsequent disciplinary hearing but recorded it covertly nonetheless. Having been told at the previous meeting that she was not to record it, her decision to covertly record at

the subsequent disciplinary meeting was therefore particularly underhand and dishonest.

288. Mr Khadim's evidence, and his finding in the appeal, was that had the claimant not been dismissed in relation to the events of 20 January 2017, she would have been dismissed for making the covert recordings. Given our findings that this behaviour was underhand and dishonest, we accept that that would have happened and that the claimant would have been fairly dismissed in due course as a result of having made these covert recordings. We do not accept Ms McKie's submission that the worst the claimant would have received would have been a final written warning; the conduct is too serious for that. We accept that, in the light of what the claimant had done, the respondent could have no confidence that she would not in future carry out similar underhand activities. In this conjunction, the fact that the claimant held the senior role of Head of Global Compliance, which was a role where trust and honesty was of the utmost importance, is only further indicative that dismissal would have been the result.

289. The fact that the ICO does not prohibit covert recordings and that no policy of the respondent covers them, which Ms McKie submits, makes no difference to this. Regardless of that, the issue was about trust and honesty amongst senior employees and the claimant's actions breached that. Furthermore, in relation to another of Ms McKie's submissions, whether or not the four individuals who decided to set up the HR meeting on 20 January 2017 rather than deal with the matter via a conversation between Mr de la Vega and the claimant did so to try and entrap the claimant does not impact on the likelihood of the respondent dismissing the claimant for the covert recordings and the likelihood or otherwise that that dismissal would be fair; and that is the issue which we have to deal with here, not the behaviour of those individuals at the respondent prior to the 20 January 2017 meeting.

290. The covert recordings were made known to the respondent at the grievance stage. We accept that, thereafter, there would have been an investigation and disciplinary procedure and that would have taken time, potentially a couple of months. However, we consider therefore that the claimant would have been fairly dismissed without notice as a result of having made the covert recordings by 30 September 2017 at the latest. Any losses she claims by way of loss of earnings in relation to any of her successful complaints are therefore limited to the period up to and including that date.

291. One point which arose towards the end of the submissions and which the judge mentioned to the representatives was whether it was argued by the claimant that the covert recordings would, absent earlier discriminatory decisions, have come to light at all. Whilst Ms McKie acknowledged that it was an unattractive argument from the claimant's point of view, it is one which she acknowledged, whilst not being the claimant's primary argument on this point, was one that could be considered.

292. We acknowledge that the argument is speculative and that addressing it requires a high degree of speculation on the part of the tribunal. However, we feel we are obliged to do so.

293. The only successful complaint which arose from an event prior to the claimant's decision to reveal some of her covert recordings when she raised her grievance in 2017 was the section 15 complaint in relation to the UK role, which arose in July 2015. However, firstly, the majority of the tribunal also found that the claimant, absent the discrimination, had only a 40% chance of securing that role in 2015 anyway; on the balance of probabilities, therefore, she would not have been in the UK role anyway and so nothing would have changed. Secondly, the events which led to her suspension and which caused her to issue the grievance and reveal the covert recordings came about as a result of her actions following her attending a dressage event on a day when she was working from home. Those arrangements were in place because of her cancer. There is no indication before us that, even if she had been doing the UK role, she would not have been working on a one day at home basis and attending dressage events as she did, for the benefit of her health or otherwise. In other words, there is no evidence to suggest that the same or a similar train of events which led to her disclosing the covert recordings would not have occurred anyway. In short, therefore, this argument makes no difference to the finding that we have made above that the claimant would have been dismissed by 30 September 2017 as a result of having made the covert recordings.

Changes in the organisation - would the claimant have been dismissed in any event?

294. We turn now to the various arguments made as to whether the claimant would have been dismissed in any event, due to the various restructurings at the respondent.

295. First, as we have found, the claimant's existing role of Global Head of Compliance would have been made redundant no later than 31 December 2017. Furthermore, we found that she would not have transferred to Madrid to carry out such a role or any other role in any event.

296. Secondly, we found that there was no other alternative employment that would have been accepted by her when her existing role became redundant. In particular, she would not have taken the UK Compliance Manager role which was offered to CD.

297. Therefore, subject to the paragraphs below, the claimant would have been made redundant fairly by no later than 31 December 2017.

298. The majority of the tribunal has found that, but for the discrimination, the claimant had a 40% chance of having been appointed to the UK role back in July 2015. That role was at no stage made redundant. This begs the question as to what would have happened when Mr Vyas resigned from this role and whether, absent any discrimination, the claimant would have been appointed to this role.

299. First, we note that the claimant was suspended pending disciplinary proceedings at the point when Mr Vyas tendered his resignation on 28 March 2017. In relation to the suspension and dismissal allegations, no act of

discrimination had occurred by that point. The formal offer of the UK role was made to Mr Price on 24 May 2017, 12 days after the claimant's dismissal. However, whilst we have not heard evidence as to precisely when discussions about the possibility of Mr Price taking up this role began, Ms Herbert's evidence was that they took place following Mr Vyas tendering his resignation. We therefore consider that it is fair to assume that, given the length of time since Mr Vyas tendered his resignation, the discussions with Mr Price were underway long before the decision to dismiss the claimant was made by Mr Faz on 12 May 2017. On the balance of probabilities, therefore, the decision to appoint Mr Price would have been made regardless of the outcome of the disciplinary proceedings involving the claimant.

300. Having said that, had the disciplinary proceedings against the claimant been dropped, the next question is whether or not the claimant would have sought to apply for the UK role following Mr Vyas's resignation. One factor to indicate that she would not have done so is that she had long since ceased to be managed by Mr Reynes, which is one reason why Mr Scott felt she had applied for the UK role back in 2015. Having said that, by that stage, the claimant would be likely to have been aware that her existing role was likely to be made redundant in the near future. Therefore, on the balance of probabilities, we accept that she would have explored the possibility of taking on the UK role.

301. As to whether she would have been offered the UK role over Mr Price, we accept that Mr Price was engaged as a consultant whereas the claimant was an employee and that ordinarily an employer might look more favourably at an existing employee rather than a consultant when considering whom to appoint. However, the evidence is that Mr Price had a good understanding of the business and the function and what needed to be done to drive it forward. He had been working in that part of the business for a significant period of time (16 months). SAM UK clearly considered that he was a good candidate for the role, particularly as, unlike on the previous occasion when the UK role was vacant, it decided to make the appointment without a formal recruitment process. By contrast, the claimant had not been successful on the previous occasion and (in the view of the majority) would not have been successful on the previous occasion even if there had been no discrimination. There is no evidence that any of the concerns which Mr Scott had regarding the claimant in 2015 (for example the strategic and personality issues) did not remain.

302. Therefore, the majority of the tribunal (Dr Weerasinghe dissenting) consider that, on the balance of probabilities, had there been an open competition between the claimant and Mr Price for the UK role in 2017, the claimant had only a 40% chance of being appointed to it.

303. [VW] Dr Weerasinghe's dissenting view is that in an open competition, the claimant would have had a 70% chance of being appointed for the following reasons: Even a cursory look at both CVs clearly show that the Claimant had a greater breadth of experience than Mr Price. For example, at paragraph 10 of her supplemental statement, the Claimant states that she had held 17 FCA Approved Person roles in major companies compared to Mr Price who had held only 6 such roles in comparatively smaller companies. This aspect was not contested by Ms

Herbert; Whilst Dr Weerasinghe do not wish to comment on the specific technical aspects, it is to be noted that the term 'operational/investment risk' is not mentioned in Mr Price's CV. It seems, as with Mr Vyas, Mr Price's experience has been in Regulatory Risk and not in the required Operational Risk. The Claimant states that she had "considerable relevant Operational Risk experience" with two previous employers; Moreover, whereas the Claimant has a BA in Law which was one of the preferred educational qualifications, Mr Price's educational qualification is an incomplete BA in English and History which was not one of the preferred degrees; In the event of redundancy of the Global Role, the UK Role would have been a suitable alternative employment for the Claimant whereas Mr Price did not have employment rights.]

304. Had the claimant been appointed to the UK role, her employment would not have terminated by reason of redundancy as a result of the redundancy of her Global Head of Compliance role as detailed above in this section. However, the fact that she may have been appointed to the UK role would have made no difference to our findings in relation to the covert recordings and the fact that she would have been fairly dismissed no later than 30 September 2017 for that reason.

Jurisdiction

305. There is no dispute that the claimant's unfair dismissal complaint was brought in time. The tribunal therefore has jurisdiction to hear that complaint.

306. Three of the claimant's discrimination complaints succeed: her section 15 complaint in relation to the UK role; her section 15 complaint in relation to her dismissal; and one reasonable adjustments complaint (22.5.1) in relation her dismissal.

307. Two of these related to the claimant's dismissal and it is therefore agreed that they were presented in time. The tribunal therefore has jurisdiction to hear those.

308. The remaining successful discrimination complaint, which is prima facie out of time, is the section 15 complaint in relation to the UK role, which dates from July 2015. We therefore need to determine whether or not that complaint forms part of conduct extending over a period with an in time successful discrimination complaint such that the earlier complaint is in itself in time; and, if not, whether it is just and equitable to extend time.

309. First, we do not accept Mr Nicholls' submission that we should be determining issues of jurisdiction before determining the substantive success of the complaints as we have done above. To carry out the exercise of considering whether any complaint forms part of conduct extending over a period with a successful discrimination complaint which is in time involves first working out which discrimination complaints are (but for any jurisdictional issues) successful.

310. Turning to the issue of whether the section 15 complaint in relation to the UK role forms part of conduct extending over a period with the successful

dismissal complaints, we note the following. There is a large gap between these successful complaints of nearly 2 years. Furthermore, the decision taken in 2015 in relation to the UK role was taken by Mr Scott and Ms Herbert. Neither of them took the decision to dismiss the claimant and Ms Herbert in fact took a back seat after the claimant was suspended. The individuals who took the decision to dismiss and not to uphold the claimant's appeal were different individuals from those who took the decision in 2015, namely Mr Faz and Mr Khadim. In the light of all this, we do not consider that this amounts to conduct extending over a period. The section 15 complaint in relation to the UK role was therefore presented out of time.

311. We therefore turn to the question of whether it would be just and equitable to extend time. We note that the burden of proof is on the claimant to establish that it is just and equitable to do so. However, there are a number of reasons why we consider that she has discharged that burden and that it would be just and equitable to extend time.

312. First, the claimant was seriously ill, in particular around the time that the decision was made in 2015 and for a long time thereafter. She had cancer and had had to go through surgery, chemotherapy and radiotherapy. This had a significant impact on her. Furthermore, she suffered from depression, most particularly in the period towards the end of 2015 and the beginning of 2016. Even during 2016, she was not in the office on a full-time basis, working from home and gradually increasing the number of days per week which she spent in the office. All these are good reasons for not putting in a tribunal claim at that time. Furthermore, the claimant has maintained that in general terms she did not make the accusations of discrimination because of fear of reprisals. Whilst we accept that the claimant is someone who is more than capable of speaking her mind and does so, it is a major step to push the button and make allegations of discrimination whilst one remains in post, particularly at a time when one is ill. Furthermore, and significantly, the claimant thought at the time that the fact that she was not appointed to the UK role was to do with her cancer; however, she did not have clear evidence of this beyond her suspicions. After she brought her grievance in 2017, the most compelling evidence of discrimination, namely the investigatory interview of Ms Ybarra with Mr Scott, became available. It is therefore very understandable that she did not bring proceedings prior to that. By contrast, armed with that evidence, she did bring proceedings, and indeed has been successful in relation to that complaint.

313. Therefore, for these reasons, we consider that it is just and equitable to extend time in relation to the section 15 complaint concerning the UK role.

314. The tribunal does, therefore, have jurisdiction to hear that complaint too.

Next steps

315. The claimant has been successful in three of her complaints. The matter will need to be set down for a remedies hearing.

316. In the light of the findings which the tribunal has made, the tribunal suggests that one day will suffice for such a remedies hearing. That is to include time for the tribunal to deliberate and give its decision.

317. If the parties consider that a longer remedies hearing will be required, they must inform the tribunal within 14 days of this decision being sent to the parties, stating how long they consider the remedies hearing should be listed for and their reasons why. They should also in any case within that deadline provide their dates to avoid for such a remedies hearing over the next 9 months.

318. If the parties are able to come to a settlement such that a remedies hearing is no longer required, the tribunal would be grateful if the parties could inform it of that as soon as possible.

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Employment Judge Baty

Dated:. 29 November 2018

Judgment and Reasons sent to the parties on:

29 November 2018

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For the Tribunal Office