



THE EMPLOYMENT TRIBUNALS

Claimant **Ms J Rajput**

Respondent **Commerzbank AG**

HELD AT: **London Central**

ON: **7-14 March 2018**
Chambers 15 and 16 March 2018

EMPLOYMENT JUDGE: **Mr J Tayler**

Members: Mr G Harker
Mr S Soskin

Appearances

For Claimant: **Ms E Banton, Counsel**

For Respondent: **Mr S Gorton, Queen's Counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims of sex discrimination, maternity discrimination and harassment succeed to the extent set out in the Reasons.
2. The remaining complaints are dismissed.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 12 September 2017 the Claimant brought complaints of sex discrimination, maternity discrimination, harassment, victimisation and public interest disclosure. The public interest disclosure claim was withdrawn shortly before the hearing.

Issues

2. The issues were set out in an agreed List of Issues.

Evidence

3. The Claimant gave evidence.
4. The Claimant called:
 - 4.1 Janine von Pickartz, Senior Compliance Adviser
5. The Respondents called:
 - 5.1 Jon Dyos, Head of Markets Compliance
 - 5.2 Stephan Niermann, Head of Regional, Compliance UK and Asia at the relevant time
 - 5.3 Julia Burch, Compliance Advisor
 - 5.4 Kevin Whittern, Senior Compliance Adviser
 - 5.5 Anthony Lowther, UK Regional Head of Compliance
 - 5.6 Dennis Rogalla, Head of Compliance for Western and Eastern Europe
 - 5.7 Stephen Walsh, UK Head of Central Compliance
 - 5.8 Dr Jessica James, Managing Director, Senior Quantitative Researcher
6. We were provided with an agreed bundle of documents. References to page numbers in this judgement are to the page number in the agreed bundle of documents.

Findings of fact

7. The Respondent is a company incorporated under the laws of Germany engaged in the business of investment banking, amongst other things. The Respondent has a branch in London
8. The Claimant applied to join the Markets Compliance Team of the Respondent's London Branch in 2012. The Claimant attended a competency based assessment on 19 June 2012.
9. On 11 July 2012 Silvana Allday, a HR Business Partner, provided interview feed-back to Nawshad Jooma, Head of Markets Advisory Compliance, about the Claimant (p219):
 - Jagruti would like to join Commerzbank as she feels that we are an organisation which values diversity and experience / loyalty. She also feels that she will be offered good training and development opportunities within the Bank.
 - In 2 years time Jagruti would like to have developed within her role and built relationships with her business areas. Further down the line she would like to manage a team or do an international assignment.
 - Strengths: very precise and detailed in her work; solution-driven / collaborative approach; personable.
 - Weakness: sometimes too detailed and needs to look at the bigger picture.

10. This shows that the Claimant had ambitions to develop her management skills.
11. On 12 July 2012 Anthony Lowther, UK Regional Head of Compliance wrote in an email that he and Mr Jooma wished to appoint the Claimant (p221).
12. The Claimant was offered employment by the Respondent by letter dated 26 July 2012 (p222).
13. On 1 November 2012 the Claimant commenced employment with the Respondent as a Senior Compliance Advisor with the corporate title of Vice President.
14. The Claimant was designated to work in the Markets Compliance Department, providing regulatory advice to the Equity Markets and Commodities business. The Head of Markets Compliance was Mr Jooma.
15. The Claimant's job description (p221) included the provisions that the Claimant had management responsibility for one or more Compliance Officer and would deputise for the Head of Market Compliance when appropriate.
16. Mr Niermann accurately describes the structure the UK Markets Compliance team in his witness statement at paragraph 8:

8. The UK Markets Compliance team covers Fixed Income and Currencies ("**FIC**"), Corporate Finance ("**CF**") and Equities Markets and Commodities ("**EMC**"). Jagruti is a Senior Compliance Adviser who covers EMC. Historically, the Markets Compliance team has consisted of approximately seven people:

- a. a Head of UK Markets Compliance;
- b. a Senior Compliance Adviser (a Vice President ("**VP**")) for each of EMC, FIC and CF; and
- c. a Compliance Adviser (an Assistant Vice President ("**AVP**")) for each of EMC, FIC and CF,

17. On 1 May 2013 the Claimant's permanent employment was confirmed at the conclusion of her probationary period.
18. Janine von Pickartz joined the Respondent in November 2013 as VP in Corporate Finance. She describes the situation in the department when she joined at paragraph 6 of her witness statement:

"Before joining the bank, I had been told that the Head of Markets, Nawshad Jooma (NJ), was very difficult to work with and I was advised not to join, however after making enquiries, I was reassured that there would not be any issues and so I accepted their offer of employment. Upon joining the Respondent, I quickly realised that the markets team had serious problems. There were several staff disputes involving the Head of Markets, Nash Jooma who I experienced to be an aggressive bully and quite Machiavellian in his approach. The atmosphere was tense and toxic

and turnover in the team was high. The loss of my junior member was a direct result of NJ's bullying and I discovered that this had been persistent for some years. I was aware that the Claimant was also experiencing NJ's bullying and aggressive conduct"

19. A review of Private Banking Sales ("PBS") started in March 2014. During the review the Claimant alleged that she made protected disclosure which resulted in various detriments. The public interest disclosure claim was withdrawn just before the hearing. The detriments she complained of are still relied upon as detriments in her discrimination claims.
20. As of 9 December 2013 Ivan Mukadam was recorded as Mr Jooma's Functional Deputy on the Respondent's structure as (p229).
21. The Claimant received an appraisal to 31 December 2013 which was largely positive (p230).
22. Mr Mukadam left the Respondent on 1 April 2014.
23. In May 2014, the Claimant was designated as Deputy to the Head of Markets by Mr Jooma (pp244, 246). The Respondent procedure provided for the termination of deputising arrangements once the principal left, although not of the relevant witnesses were aware of this at the time.
24. On 11 August 2014 the Claimant attended the Compliance Management Committee meeting as Mr Jooma's deputy. The Claimant explained that there was a delay in the PSB report being written up and she was yet to commence drafting the report (p296).
25. In September 2014 Kevin Whittern was appointed to the department as Fixed Income and Currencies (FIC) Vice President. Mr Whittern states at paragraph 9 and 10 of his witness statement that:

"One of my concerns before I started at Commerzbank was that **I had heard some things about Nash being a micromanager**¹. I found out about this because, before I accepted the role, I requested to meet a couple of members of the team, and so I met with Fergus Clinch (who at that time was Compliance Advisor and AVP assigned to FIC) ("Fergus") and Jagruti. **During our conversation it was apparent that there was an underlying issue with Nash. I then spoke to the recruitment agent involved and learned that the issue may be due to Nash's management style.** To address my concerns before accepting the role, I contacted Nash again and spoke to him about this as I wanted to make sure that we were not going to clash as I did not want to be in a position of being micromanaged (having experienced it in previous jobs). Nash promised me that he would not try to control my work. True to his word, Nash never tried to micromanage me and we got on very well during his remaining time at Commerzbank."

¹ Emphasis added

26. In October 2014 Mr Jooma completed talent ratings for the Claimant and Miss Von Pickartz. In respect of the Claimant he recorded (p314A)

Development for the candidate	
Target position:	Head of Markets Compliance
Successor for (name):	Nash Jooma
Readiness (in years):	2
Proposed development measures:	More exposure to project management

Notes

Strengths of the candidate:

1. *Tenacious and tireless*
2. *Flexibility to change*
3. *Able to shoulder responsibility*

Development needs of the candidate:

1. *To see the bigger picture - detail vs expedience*
2. *To see the bigger picture - team goals*

Development for the candidate	
Target position:	Head of Markets Compliance
Successor for (name):	Nash Jooma
Readiness (in years):	2
Proposed development measures:	More exposure to project management

27. He recorded for Miss Von Pickartz:

Development for the candidate	
Target position:	Head of Market Compliance
Successor for (name):	Nash Jooma
Readiness (in years):	1
Proposed development measures:	Exposure to sharing management of team responsibilities

28. The document showed that the Claimant and Miss Von Pickartz were seen as possible candidate for promotion to Head of Markets Compliance.

29. On 3 December 2014 Stephan Niermann was appointed Head of Regional Compliance UK, based in London.

30. On 18 February 2015, the PBS Review was published (pp365-9, 334-357).

31. On 9 March 2015 the Claimant objected to her 2014 appraisal alleging that it was not conducted in a transparent and open way by Mr Jooma and that she fundamentally disagreed with the scores (p 377, 382). There was a particular issues about Mr Jooma suggesting that the Claimant had spent too long on the PBS review and had been too detailed in her analysis.

32. In April 2015 Julia Burch joined the Respondent as Equity Markets and Commodities (EMC) Assistant VP. In her witness statement she states that there was a tense atmosphere between the Claimant and Mr Jooma.
33. On 30 March 2015 the Claimant and Mr Jooma met to discuss the Claimant's 2014 appraisal (p407).
34. On 2 April 2015 the Claimant rejected her appraisal (p407).
35. In or around April 2015, Mr Jooma informed senior management that he was leaving Commerzbank.
36. On 11 May 2015 the Claimant gave his comments on the Claimant's complaints about the appraisal alleging that the Claimant had subjected him to an angry and insulting tirade (p409 – 415).
37. On 20 May 2015 Mr Jooma stated when discussing the way forward with human resources that while he stood by his appraisal he had no appetite to go through the process of seeking to agree it with the Claimant. He referred to the situation as uncomfortable and being demotivating and possibly career limiting for the Claimant (p416).
38. In June 2015 the Head of Markets Compliance role was advertised (p422). The London recruitment policy at the relevant time provided the Respondent wished to encourage internal progression:
39. On 22 June 2015 the Claimant attended the LCMM meeting acting in her role as deputy (p421).
40. On 23 June 2015 Kavita Bhalla, a HR Business Partner, chased the Claimant for her application for the Head of Markets Compliance role (p422).
41. On 24 June 2015 the Claimant applied for the role of Head of Markets Compliance by submitting her CV (p422). There was no formal application form. The other two VPs also applied.
42. In the lead up to Mr Jooma's departure Mr Niermann had one-on-one meetings with each team member (including the three VPs). At paragraph 17a of his witness statement he states:

“There was a lot of tension between the VPs (as well as some of the AVPs) around how the Team was managed. In particular Jagruti and Janine made **tendentious**² complaints to me that they had been micromanaged by Nash and that they had not received a fair reflection of their performance in their appraisals by Nash. The tension had been building within the Team in London over the last few years, largely due to the strong personalities involved.”

² Emphasis added

43. On 3 July 2015 Mr Niermann interviewed an external candidates, Florent Palaysi (p 432) for the role of Head of Markets Compliance, but decided he was not suitable.
44. On 7 July 2015 the Claimant was interviewed by Mr Niermann for the Head of Markets Compliance role (p 434). The other VPs were interviewed by Mr Niermann at about this time. No record was kept of the interviews with the Claimant or the other VPs.
45. At paragraph 19 Mr Niermann states:

“However, having seen the state of the Team by this point, which was after all internal applications had been submitted and gone through their first round of interviews, I decided that the most important of the two criteria I was looking for when recruiting for the Head of UK Markets Compliance role (as set out at paragraph 14 above) had to be the Leadership and Management skills and, **specifically, that the candidate was sufficiently removed from the current politics and tensions within the Team to enable them to effectively run the department and get it working together again. It was from this point that I seriously doubted whether any of the VPs could carry out the Head of UK Markets Compliance role – in my opinion, the environment in the Team was toxic and appointing someone from within would have just made it even worse.**”³

46. Mr Jooma left the bank on 10 July 2015.
47. After Mr Jooma left the Claimant reported directly to Stephan Niermann, pending the appointment of a new Head of Markets.
48. Following Mr Jooma’s resignation Mr Niermann states that he appointed Mr Whittern as “point person”. From paragraph 23 of his statement he states:

“23. I chose Kevin for this point person role for multiple reasons:

a. Kevin was an expert in FIC and at the time there was a lot of movement in the FIC business (i.e. business lines were being reassembled and were moving to Frankfurt and Poland). I needed someone to be able to report to me on not only the day-to-day running of ordinary business operations, but who was also engaged with the changes happening within the business more widely;

b. Kevin had the best managerial experience of the three VPs, which he had gained in his previous jobs and which I knew about from my conversations with him and from feedback I received about Kevin from Nash;

c. Kevin was the most available to take on the position in terms of workload. Jagruti and Janine were very busy in EMC and CF respectively and FIC had the most experienced AVP, capable of

³ Emphasis added

supporting the work in FIC at the time himself. Therefore, I assessed Kevin as having the most time to fulfil the point person role; and

d. I saw Kevin as the most removed from the internal politics within the Team. I knew Jagruti and Janine were both very divisive personalities and Kevin seemed the most innocuous⁴.”

49. When Mr Niermann was asked in cross examination what the Claimant and Miss Von Pickartz had done that was divisive by Mr Niermann stated that that: “after the departure of Mr Jooma they were coming into my office to put forward their positions, they were both intrusive, I had to say that this was going to be a normal recruitment process.” He later stated that: “they were trying to forward their own interests giving the impression that things needed to be done immediately”. In assessing Mr Niermann we have taken into account that his first language is not English and made sure that he had a full opportunity to explain his meaning when he gave evidence.

50. We consider that Dr James accurately described the situation in her grievance outcome (p1154):

“It is however clear that Kevin was at this stage being treated as a senior of the three ... officers in the team. The records of the attendance at the Compliance Management Meeting show that Kevin attended 15 out of the next 16 meetings, with Jagruti attending only 1.”

51. In 13 July 2015 the Claimant sent an email to human resources about Ms Burch being removed as her direct report (p438). She was informed that the system had been updated.

52. In August 2015 Mr Niermann told the team that Mr Whittern was his “point person”.

53. On 12 August 2015 Mr Niermann sent an email to human resources stating (p445):

“After my MTA I want to catch up with you on the status of the hiring process for the Head of Markets Compliance.

Could you please let me know whether further candidates are in the pipeline.”

54. At a meeting, organised at Miss Von Pickartz behest, on 12 August 2015 Mr Niermann was asked to explain the structure in the team and whether Mr Whittern had been elevated. He said that pending the appointment of a new Head of Markets, Mr Whittern would be the first point of contact in the Markets department. At that meeting, and thereafter, he persistently played down the significance of Mr Whittern’s acting role under which he was treated as senior member of the team.

⁴ Emphasis Added

55. In a chart dated 21 September 2015 Mr Whittern was recorded as acting head of the Markets Compliance Department. The document was created for a project called Team Excellence, under which the team was reviewed to see if its working could be improved.
56. On 22 September 2015 the Claimant spoke to Mr Niermann about Mr Whittern's designation as first point of contact. She told Mr Niermann that she was Deputy to the Head of Markets and queried whether there was any point in her continuing with her application for the Head of Markets role. Mr Niermann said he was not aware that there was a designated Deputy to the Head of Markets and said that being first point of contact was an informal designation; and was not deputy head or acting head. In reality Mr Whittern was treated as the acting head of the department and so the role was more senior than the deputy role that had been given to the Claimant by Mr Jooma.
57. The Claimant attended at second interview for Head of Markets Compliance with Mr Rock on 2 October 2015. Miss von Pickartz and Mr Whittern also had interviews with Mr Rock.
58. In Mid October 2015 Mr Dyos had an informal meeting with Mr Niermann the about Head of Markets role.
59. The external candidates were interviewed by Mr Niermann, Mr Walsh, Andrew Readinger, Head of Institutional Sales for FIC, Jorge Masalles, Head of Financial Institutions Marketing and Private Banking Sales and Kavita Bhalla of human resources and Dereck Rock, Branch Manager London. They gave feedback to Mr Nierman who made the appointment decision. The much more extensive interview process for the external candidates illustrates that the internal applicant were not treated as serious candidates for the role.
60. Mr Walsh interviewed two external candidates on 6 November 2015 and reported that he preferred Mr Dyos. He proffered the view that he felt that the Claimant was the best of the internal candidates and stated that he thought that Miss von Pickartz would be "divisive". Mr Walsh stated in his evidence that he considered that the Claimant had the skills to undertake the role and he would have liked to see her appointed to it. Mr Walsh could give no rational explanation of why he referred to Miss von Pickartz as divisive, suggesting, unconvincingly, that her advice could divide opinion.
61. On 13 November 2015 the Claimant announced that she was pregnant (p563).
62. At about this time there was a Team Excellence meeting at which there was an exercise whereby the team were asked to pick, from pictures provided by the trainer, those that represented traits such as good and bad management, where the team was and where it should move to. The Claimant picked a picture of a snake. Mr Whittern thought that it was a veiled reference to him. The Claimant in her evidence said that it was designed to depict poor management and she had Mr Jooma in mind. We accept that at this time relations in the team would deteriorating quickly in the light of the fact that Mr Whittern was being treated as a senior member of the team as a result of which he genuinely felt that the picture of the snake was a reference to him.

63. In an internal form dated 16 November 2015 the Claimant was recorded as functional deputy:
64. On 27 November 2015 Mr Niermann asking that Mr Whittern be recorded as deputy (p584A). Thus was reflected in the next chart on 27 November 2015:
65. On 1 December 2015 the Claimant submitted a Maternity Leave Notification Form (p579).
66. On 2 December 2015 Mr Whittern had a one to one with Mr Niermann and discussed his status in the team and the tension being recreated by him being an informally appointed "point person". It was agreed that he would be fomally appointed as acting head.
67. On 2 December 2015 the Claimant complained to Mr Niermann about him treating Mr Whittern as de facto Head of Markets. Mr Niermann sent an email that day suggesting that if it had not already be done Mr Whittern should not be shown as acting head.
68. On 10 December 2015 Mr Niermann and Mr Whittern exchanged emails (p594). Mr Whittern stated that he was to acting head until a formal appointment was made.
69. To which Mr Niermann replied "You are the acting head. Jagruti is deputy to the acting head. It is as simple as that".
70. On 15 December 2015 Mr Dyos was offered role of Head of Markets Compliance. He accepted on 18 December 2015.
71. On 26 December 2015 the Claimant had a series of text exchanges with Ms Burch about Mr Whittern in which she referred to him as a "f*wit" and "a first class chump". The demonstrates the deteriorating relationship in the team after Mr Whittern was appointed point person/acting head.
72. The Claimant's waters broke at work on 4 March 2016. She attended hospital and then returned to work for a short time to try to finish off some work before leaving on maternity leave.
73. On 7 March 2016, the Claimants baby was born and her maternity leave began.
74. In early March 2016 Mr Dyos met with Ms Burch and discussed how the Claimant maternity absence wold be dealt with. Mr Dyos already knew Ms Burch and was on friendly terms with her. Ms Burch complained to Mr Dyos about the Claimant returning to work after attending hospital once her waters had broken. Mr Dyos said in his evidence he thought that this was an example of the Claimant being "controlling".
75. At paragraph 50.2 of the response the Respondent plead their case as to the position of Ms Burch's and why there was no handover on the Claimant's return from maternity leave:

50.2. Ms Burch was formally designated "Cover Person" for the Claimant, and so Ms Bailey was not technically covering the Claimant's work but simply assisting Ms Burch in doing so. Due to the nature of Ms Bailey's role in supporting Ms Burch, no formal handover was necessary. The practical implication was that the Claimant's workload had been split between Ms Bailey and Ms Burch.

76. Once the Claimant left on maternity leave her role was, in reality, taken over by Ms Burch.

77. On 14 March 2016 the Claimant asked to join a whiteboard meeting by remote access. The Claimant thought this would be a good opportunity to speak to the team and update them on the birth of her baby and would be an opportunity to clarify any issues with the handover. Before the meeting the Claimant found that she could not access the Respondent's computer system.

78. We accept what Ms von Pickartz states at paragraph 21 of her witness statement :

"I was attending a whiteboard meeting with Kevin and Julia when I received a call from the Claimant. The Claimant phoned to let me know that she had delivered her baby. I was delighted to hear the news. I told the Claimant that I was in a meeting with Kevin and Julia and asked if she'd like to join the meeting. The Claimant wanted to join the meeting and was excited to share the good news. I told her to stand by whilst I dialed her in to the meeting. I went back to the meeting to let the others know the happy news and to tell them that the Claimant would be joining the meeting. I was taken aback by the immediate disinterested reaction of both Kevin and Julia. They insisted that there was no need for the Claimant to be at the meeting, that the meeting was over, and there was no need to dial her in. It was an awkward uncomfortable moment and I did not know how to relay this to the Claimant. I called the Claimant back and let her know that the meeting was over and therefore no point in her joining. She knew of course that the real purpose of her joining the meeting was to share her news with the team and that her colleagues had essentially snubbed her. It was so embarrassing that I later sent a text to the Claimant to apologise."

79. Mr Niermann states at paragraph 52:

52. I do not know what conversations Jon had with Jagruti about working during maternity leave but I do remember hearing through Jon that Jagruti had tried to stay very closely involved with her work even at a very early stage of her maternity leave. I appreciate Jagruti for all her subject matter expertise and judgement, but I put this down to Jagruti's unhealthy obsession with work which I had come to notice during the time I was covering the Team.

80. Shortly thereafter Mr Niermann's PA contacted HR for advice about the Claimant's maternity leave email access and remote working (p711).

81. The Claimant alleges that on 15 March 2016 her husband informed her that Ms von Pickartz had been in touch with him and told him that Mr Niermann had expressed the sentiment that I should “back off” or “he would look to have my access disconnected”. In fact internet access was already cut off before this discussion, the most likely reason being that HR when inputting the Claimant’s maternity leave click the pop-up to treat the first two weeks of compulsory maternity leave as MTA. During her oral evidence the Claimant accept that she lost access for approximately two weeks which would accord with this explanation.
82. On 16 March 2016 Ms Burch sent an email to Danny Baldwin about the Claimant seeking to call in for the whiteboard meeting (p713) stating “I wonder if Jaggs will try and call in for the whiteboard meeting today!!!”.
83. On 23 March 2016 the Claimant sent an email to Mr Dyos about the possible appointment of Sheralee Bailey as maternity cover, stating that she would be a good choice (p714).
84. On 4 April 2016 Mr Dyos commenced work as Head of Markets Compliance. Mr Dyos continued with the arrangement whereby Mr Whittern was treated as point person. We agree with the finding that Dr James made in the grievance outcome that Mr Whittern continued to be treated as the senior member of the team (p1154).
85. 11 April 2016 Ms Bailley started work. Mr Dyos accepted in cross examination that Ms Burch continued to cover the Claimant’s work with Ms Bailley providing supervision and assistance. Ms Bailley did not have a traditional maternity cover role in that she did not primarily cover the Claimant’s role but provided support to Ms Burch who carried out the majority of the Claimant’s duties.
86. On 12 April 2016 Mr Niermann sent an email about a discussion with Mr Dyos about a flat structure for the Market compliance team (p716). Mr Dyos stated that he believed that this meant that the Claimant would effectively cease managing Ms Burch. This is effectively what occurred on the Claimant’s return from maternity leave.
87. On 29 April 2016 the Claimant met with Jon Dyos for the first time since having her baby. Mr Dyos told the Claimant that the reporting structure would remain the same and that the Claimant would continue to line manage Ms Burch. In reality that was not the case.
88. On the 20 May 2016 the Claimant sent an email to Mr Dyos about the next Quarterly Review Meeting. She was expecting to attend the meeting (p747). Mr Dyos strongly discouraged the Claimant from attending the meeting. Mr Dyos insisted that Ms Burch was attending with him and the Claimant was not required. This underlines the fact that Ms Burch was essentially carrying out the Claimant’s role rather than Ms Bailley. We accept that Mr Dyos actively discouraged the Claimant from attending rather than merely wishing to avoid putting any pressure on her to attend as he suggests at paragraph 55 of the statement in which he states “being a father myself, I know what the early days of having a newborn baby involves”.

- 89. On 2 June 2016 the Claimant met with Mr Niermann and discussed her return to work. The Claimant requested feedback on her application for the Head of Markets role. Mr Niermann stated he wanted someone who would “hit the ground running”. Mr Niermann did not mention that the role required more management experience than she had, and that Mr Dyos was selected for this reason.
- 90. On 19 August 2016 Ms Bailey left the Respondent’s employment. From then until the Claimant’s returned from maternity leave Ms Burch undertook the entirety of the Claimant’s duties.
- 91. The Claimant met with Mr Dyos and the team on 19 August 2016. The Claimant expected there would be a formal handover and update of ongoing work but was told by Mr Dyos that all matters had been overseen by Ms Burch and that no handover was required. The reality is that Ms Burch had effectively performed the Claimant’s role during her maternity absence, with some support from Ms Bailey, and was not willing to return to being in a supporting role.
- 92. The Claimant returned to work on 7 September 2016.
- 93. In September 2016 entries were made on Talent Development Discussion re succession planning chart after informal discussion between Mr Dyos, Mr Niermann, Danny Key and Stephen Walsh. For the Claimant it was recorded (p833):

26	Talent-Grid rating		↑ Potential ↓ ← Performance →
27	Classification in box:	B1	
28	comment:		
29			
30			
31			
32			
33	Development for the candidate		
34	Target position:	Head of Markets Compliance - london	
35	Successor for (name):	Jon Dyos	
36	Readiness (in years):	2-3 years	
37	Proposed development		
38	measures:		
39			

- 94. The following was recorded for Ms von Pickartz:

Talent-Grid rating		↑ Potential ↓ ← Performance →
Classification in box:	B1	
comment:		
Development for the candidate		
Target position:	Head of Markets Compliance - london	
Successor for (name):	Jon Dyos	
Readiness (in years):	2-3 years	
Proposed development		
measures:		

95. This compares with Mr Whittern:

Talent-Grid rating	
Classification in box:	A2
comment:	

↑ Potential ↓	C1	B1	A1
	C2	B2	A2
	C3	B3	A3
	← Performance →		

Development for the candidate	
Target position:	Head of Markets Compliance - london
Successor for (name):	Jon Dyos
Readiness (in years):	1-2 years
Proposed development measures:	

96. It is notable that in a period of a year the talent development discussion forms had changed for the Claimant who was now shown as 2-3 years away from being ready for promotion whereas the year before she had been shown as 2 years away. Ms von Pickartz had changed from being 1 year away from being ready for promotion to 2 to 3 years. This contrasts with Mr Whittern who was shown as being 1 to 2 years away from being ready for promotion. Mr Dyos accepted in cross examination that in considering readiness for promotion potential was perhaps more important than performance. Although Mr Whittern was shown as having less potential than the Claimant and Ms von Pickartz, he was shown as being closer to being ready for promotion. The document demonstrates the real advantages Mr Whittern was gaining from having been made point person/acting head.

97. Mr Dyos states at paragraph 68 of his witness statement:

“The reason Kevin was set a year closer in terms of “readiness” is because Kevin’s personality (being easy to get along with and being a good communicator) made him more ready than either Jagruti or Janine.

98. Implicit in this comment is the suggestion that the Claimant and Ms von Pickartz are not easy to get along with and are poor communicators. This is not supported by the evidence. To the extent that there was tension in the team this was caused by the fact that Mr Whittern had been made point person/acting head and given seniority over his female colleagues without consultation or a proper process being followed.

99. On 4 October 2016 The Claimant asked Mr Dyos to revise Ms Burch’s reporting line back her. Mr Dyos agreed but did not do so until reminded (p844).

100. On 12 October 2016 the Claimant started flexible working on a trial period (p845). Mr Dyos supported her application to do so by email of 5 October 2016.

101. On 11 November 2016 the Claimant sent an email Mr Dyos about not being invited to a NPP meeting on 10 November 2016 (p849). Mr Dyos responded suggesting it was an oversight. Mr Whittern continued to be the most frequent deputy for Mr Dyos at management meetings.

102. On 15 November 2016 the Claimant met with Mr Dyos. The Claimant argued that her previous position and status had been eroded since her pregnancy and maternity leave. Mr Dyos said that he had not yet contacted HR to confirm that the reporting line for Ms Burch had changed back to the Claimant on her return from maternity leave. The Claimant spoke about her previous role as deputy head and Mr Dyos said he had heard that “some people were a little sensitive about this”.
103. On 16 November 2016 Mr Dyos asked HR to change Ms Burch’s reporting line back to the Claimant (p1097).
104. The Claimant attended a further meeting with Mr Dyos on 21 November 2016. We accept the Claimant’s evidence that Mr Dyos said that he had expected some difficulties on her return from maternity leave because Julia Burch had been “running it on her own” during the Claimant’s maternity absence
105. In the Claimant appraisal up to the end of 2016 Mr Dyos gave the Claimant a score of 111% but recorded management training as a development requirement (p859):
106. On 1 February 2017 a new organisation structure was produced that included a new role of Head of Eastern and Western Europe Compliance (p883).
107. In a meeting on the 2 February 2017, Mr Dyos advised the Claimant that Ms Bailey worked very differently from her and that the maternity cover “ just let Julia get on with it”.
108. The Claimant’s flexible working was made permanent by email dated 2 February 2017 (p909).
109. On 7 February 2017 the Claimant told Mr Dyos that he was still shown as the Functional and Disciplinary manager for Ms Burch in the formal charts. Mr Dyos claimed not to know that she the Claimant was formally designated as deputy. Mr Dyos said that he was told by Mr Niermann on his appointment that Mr Whittern was the deputy head and he had no reason to challenge this.
110. On 20 February 2017, the Claimant spoke with Mr Dyos about feeling marginalised since her return from maternity leave. Mr Dyos apologised but did not propose any specific remedial action. He suggested that any disparity in work allocation was simply accidental.
111. On 10 March 2017 the Claimant discovered that Mr Dyos had added “commodities” as a developmental plan for Mr Whittern. On 13 March 2017 the Claimant complained to Mr Dyos (p981). It was only after her complaint that the Claimant was allowed to include cross-coverage as part of her developmental plan (p983).
112. On 30 March 2017 the Claimant lodged her first grievance (p1017-22).
113. On 26 April 2017 the Claimant attended a grievance hearing (p1082-86)

114. In May 2017 Dennis Rogalla expresses interest in the new post of Head of Eastern and Western Europe Compliance. Mr Rogalla was assistant to Armin Barthel, Head of Group Compliance, and had been involved in the decision that such a role should be created and in defining its scope.
115. On 3 May 2017 the Claimant mentioned to the team that she was feeling unwell. Mr Whittern said word to the effect: "What have you been up to? Maybe a sibling for Sia?".
116. On 31 May 2017 the Claimant sent an email to Mr Dyos about the alleged decrease in her role (p1138).
117. On 2 June 2017 the Claimant was informed that she was now recorded on the Respondent's system as Mr Dyos' deputy (p1281).
118. Mr Dyos sent an email that day questioning when he had agreed that the Claimant was his deputy (p1160).
119. On 5 June 2017 the Claimant attend a meeting and was given the grievance outcome (p1149-59). Although Dr James considered that there are a number of respects in which management had not dealt with things well she did not find that there had been any discrimination.
120. On 10 June 2017 the Claimant's Solicitor wrote challenging the grievance outcome suggesting possible resolutions including the possibility of being slotted into the new regional post (p1171).
121. On 16 June 20 17 the Respondent replied. The Claimant was told that she was entitled to apply for Head of Eastern and Western Compliance (p1173).
122. At her request the Claimant was shown as functional manager for Ms Burch from 21 June 2017she (p1180).
123. On 23 June 2017 the Claimant expresses as interest in Head of Eastern and Western Europe Compliance post to Anthony Lowther who sought to persuade her against applying (p1314).
124. On 24 July 2017 Mr Barthel told human resources that he wished to second Mr Rogalla to the Head of Eastern and Western Europe Compliance (p1393). He was told that it would have to be advertised.
125. On 24 July the Claimant complained that she was not being included in correspondence.
126. Towards end of July 2017 Head of Eastern and Western Europe Compliance was advertised for 7 days, the minimum period under the London Recruitment policy provided. The usual period is 21 days.
127. On 28 July 2016 new role was advertised for 7 days (p1390- 1260). The Claimant did not see the advertisement. Her email notification that would have alerted her to the role was off but the Claimant had not noticed.

128. On 31 July 2017 Mr Rogalla was told by a friend that the Head of Eastern and Western Europe Compliance had been advertised (p1250).
129. On 1 August 2017 Mr Rogalla applied for Head of Eastern and Western Europe Compliance.
130. Colleen Lally enquired about the role of Head of Eastern and Western Europe Compliance. She was dissuaded by Mr Lowther from applying. She was also led to believe the role had already been filled prior to interviews and, as a result, withdrew her application.
131. On 28 August 2017 Mr Whittern was shown as Mr Dyos's back up during Mr Dyos's annual leave (p1279).
132. On 31 August 2017, Ms Burch refused to sign her appraisal complaining about the way in which she was being managed by the Claimant (p1300).
133. On 20 September 2017 Mr Rogalla was appointed to Head of Eastern and Western Europe Compliance post (p1314):
134. On 24 October 2017 the Claimant lodged her second grievance about the Head of Eastern and Western Europe Compliance role (p1331-2).
135. On 6 November 2017 a grievance hearing was held with the Claimant (p1341-1343).
136. On 17 November 2017 a grievance meeting was held with Anthony Lowther and Alison Jenkins (p1371-2).
137. On 1 December 2017 Lucy Parkinson confirmed that Armin Barthel had wanted to second Mr Rogalla into role of Head of Eastern and Western Europe Compliance from in October 2017 (p1390).
138. On 15 December 2017 the Claimant was sent the second grievance outcome (p1394-7) rejecting the grievance.

The Law

139. Sex is a protected characteristic for the purposes of the Equality Act 2010 ("EqA").
140. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

"It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".
141. The provisions are designed to combat discrimination. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals

should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

142. Direct discrimination is defined by Section 13 EQA:

13 Direct discrimination

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

143. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

144. Since exact comparators within the meaning of section 23 EQA are rare, it is may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

145. Harassment is precluded by Section 26 EqA:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

146. In **Richmond Pharmacology v. Dhaliwal** [2009] ICR 74 the Underhill P held when considering harassment claims:

“while it is very important that employers, and tribunals, are sensitive to the comments or conduct on other grounds covered by ...the legislation, it

is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase”

147. Section 39 EQA provides that an employer must not victimise or discriminate against an employee by subjecting her to a detriment (section 39(4)(d) and section 39(2)(d).

148. Section 27 EqA provides that:

27(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, ...

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act; ...

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

149. The protection against victimisation is an important aspect of ensuring that individuals can assert their right not to be subject to unlawful discrimination.

150. Section 18 EqA provides EqA:

18 Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

(a) because of the pregnancy, or

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

- (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
 - (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
 - (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
 - (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
 - (b) it is for a reason mentioned in subsection (3) or (4).
- 151. The liability inquiry for s18 cases “unfavourable treatment because of” involves the same liability inquiry as for direct discrimination i.e. what is the ground on which the act was taken: see **Indigo Design Build and Management Ltd v Martinez** UKEAT 0020/14.
- 152. Section 19 of the Equality Act 2010 provides:
 - 19. Indirect discrimination
 - (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.
 - (2) For the purpose of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) It puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- 153. The Supreme Court held in **Essop and others v Home Office (UK Border Agency): Naeem v Secretary of State for Justice** [2017] IRLR 558 that there is no requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. It is enough that it does. Indirect discrimination, unlike direct discrimination, does not require a causal link between the characteristic and the treatment but does require a causal link between the PCP and the particular disadvantage suffered.

154. The distinction between direct and indirect discrimination was considered by Lady Hale in **R (On the application of E) v Governing Body of JFS** [2010] IRLR 136 held para 56-57:

"The basic difference between direct and indirect discrimination is plain: see Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA 1293, [2006] 1 WLR 3213, para 119. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.

Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in *Elias* at para 117 "the conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim."

155. In **Essop** it was held at para [25]:

"Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

156. The case concerned the use of a test, the CSA, that disproportionately affected BAME candidates. Lady Hale held at paragraph 32:

"in any event, it must be open to the respondent to show that the particular claimant was not put at a disadvantage by the requirement. There was no causal link between the PCP and the disadvantage suffered by the individual: he failed because he did not prepare, or did not show up at the right time or in the right place to take the test, or did not finish the task. A second answer is that a candidate who fails for reasons such as that is not in the same position as a candidate who diligently prepares for the test, turns up in the right place at the right time, and finishes the tasks he was set. In such a situation there would be a "material difference between the circumstances relating to each case", contrary to section 23(1) (para 4 above)."

157. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision is now made by Section 136 EQA:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

But subsection (2) does not apply if A shows that A did not contravene the provision.

158. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867⁵. The guidance may be summarised in two stages: (a) the Claimant must establish on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatever on the grounds of race or gender.
159. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.
160. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on section 136 EqA: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

⁵ The Court of Appeal confirmed in **Ayodele v Citlink Ltd v Napier** [2017] EWCA Civ 1913 that **Efobi v Royal Mail** UKEAT/0203/16/DA was wrongly decided on the section 136 issue.

161. The tribunal's focus "must at all times be the question whether or not they can properly and fairly infer... discrimination.": **Laing v Manchester City Council**, EAT at paragraph 75.
162. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must "see both the wood and the trees": **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.
163. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA:
- “(1) ... proceedings on a complaint ... may not be brought after the end of—
- the period of 3 months starting with the date of the act to which the complaint relates, or
- such other period as the Employment Tribunal thinks just and equitable.
- ...
(3) For the purposes of this section—
- conduct extending over a period is to be treated as done at the end of the period;”
164. The time limit is adjusted to take account of pre-claim conciliation.
165. Conduct continuing over a period is treated as done at the end of period. When there are a number of incidents occurring over a period of time they may in appropriate circumstances be considered as being part of a continuing act in the sense of a continuing state of affairs pursuant to which discriminatory acts occurred from time to time; **Hendricks v Commissioner of Police of the Metropolis** [2003] ICR 530.
166. A distinction is to drawn between conduct extending over a period and a one off act that has continuing consequences: **Barclays Bank v Kapur** [1991] 2 A355, [1989] ICR 753; **Owusu v London Fire and Civil Defence Authority** [1995] ICR 574 c.f. **Sougrin v Haringey Health Authority** [1992] 650.
167. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. Extension of time should be the exception, although the Tribunal has a broad discretion to extend time when there is a good reason for so doing: **Robertson v Bexley Community Centre (t/a Leisure Link)** [2003] IRLR 434. The fact that an employee is pursuing an internal grievance or other procedures is a factor that may be taken into account in determining whether time should be extended: **Apelogun-Gabriels v Lambeth London BC** [2002] ICR 713.

Analysis

168. The list of issues in this matter is extremely detailed and, in many places, repetitive. At times the allegations are salami sliced into a series of nearly identical complaints under numerous heads of complaint. In reality there are a number of key complaints. These relate to the appointment of Mr Whittern as point person/acting Deputy Head of Markets Compliance, the appointment process for the new Head of Markets Compliance, the treatment of the Claimant during her maternity leave, the Claimant's job role on her return from maternity leave, the recruitment process for the Eastern and Western Europe Compliance role and the manner in which the Claimant's grievances were dealt with. We have focused on these key issues in reaching our determination.
169. The determination of discrimination claims rests primarily on the drawing of appropriate inferences. In certain cases that can be done by using section 136 EqA as a tool. However, section 136 EqA can be difficult to apply in practice. It can be conceptually difficult to separate treatment from which an inference might be drawn from the explanation for that treatment. A holistic approach to drawing inferences is sometimes more effective, considering the totality of the evidence to decide the reason for treatment.
170. The Respondent accepts that, as in much of the banking sector, there is a significant underrepresentation of women in more senior roles. At the Respondent there is a significant underrepresentation of women at level L3, the level of the Head of Markets Compliance and above. In the London office there has been no promotion of a woman to a L3 level in compliance since 2012.
171. Dr James told us that she has given some thought to why there is such an underrepresentation of women at the higher levels of her industry. She told us that she had pondered whether it may be that there are many steps of promotion to climb. If women are only disadvantaged by a small percentage at each step, as they climb there is a compounded disadvantage, with the percentage of women eligible for progression dropping at each step, which results in few women being at the higher levels.
172. A relatively small hand up to an employee may have substantial and long lasting effects. Being allowed to act in a role may provide the experience that enables a person subsequently to be promoted to a substantive role at that level. Where such advantages and promotions occur in an opaque environment there is much more risk of discrimination occurring. If such assistance is disproportionately given to men that will have a substantial effect over time.
173. It is notable that there are no written records of the decision to make Mr Whittern the point person/acting Head of Department and there are no records of the interviews of the internal candidates who applied to be Head of Markets Compliance. This is just the type of opacity that can allow discrimination.
174. Discrimination may result from stereotypical assumptions that disadvantage women. Traits that are considered as positives in men may be seen as negative when they are exhibited by women. Men are often praised for their

hard work and determination, whereas in this case it is notable that Mr Niermann referred to the Claimant's "unhealthy obsession with work".

175. Men are often praised for ambition and wishing to progress whereas Mr Niermann stated when trying to explain what he meant by the word "divisive", when applied to the Claimant and Ms von Pickartz, said that when they discovered that Mr Jooma was leaving they came to his office and tried to put their positions forward which he considered was "intrusive". He criticised them for trying to "further their own interests". When put to him that an alternative word that that might better describe what he was referring to was "forceful" he accepted that that might well be the case. Men are often lauded for being forceful personalities whereas Mr Niermann saw it as a negative when demonstrated by these two women. We appreciate that English is not Mr Niermann's first language so were careful to ensure he had adequate time to seek to explain precisely what he meant.
176. Men are often praised for their commitment to work whereas it is notable that a number of the Respondent's witnesses have spoken of the Claimant in a pejorative manner for returning to work after her waters broke and she had attended hospital. It was clear that her baby was likely to come earlier than expected and she attempted to finish off some work before she left. While it is understandable and reasonable for her colleagues to be concerned for the health of a pregnant woman and her baby, the Respondent has not explained why they spoke of the Claimant in such pejorative terms saying she "had to be forced out of the office". Mr Dyos referred to this being an example of the Claimant being "controlling". Some of the Respondent's witnesses spoke of their experience as fathers as if it would allow them to judge the situation better than the Claimant could herself.
177. There can also be a tendency, particularly where advantages are awarded without transparency, for people who select to prefer those who look like themselves. It is telling that Mr Diaz suggested that the explanation why Mr Whittern was recorded in 2015 as the person closest to promotion was because of his "personality", that he was "easy to get along with" and "a good communicator". There was nothing to suggest that the Claimant and Ms von Pickartz were poor communicators and to the extent that there was tension in the office that resulted from Mr Whittern having been made point person/acting head without transparency, and the continued pretence that this was of no real significance.
178. Another aspect of a tendency to prefer those who are like oneself can be to prefer their explanation for problems.
179. There can also be a stereotype that women are too emotionally involved in office relations or politics. This stereotype was demonstrated by Mr Niermann describing the Claimant and Ms von Picard as "divisive". He seemed almost unable to explain why he used the term. The only thing he could come up with was that they wished to put themselves forward as possible replacements for Mr Jooma. The word divisive was repeatedly used in this case, but only about women. Mr Walsh was unable to give a rational explanation why he referred to Ms von Pickartz as divisive, suggesting unconvincingly that she divided

opinion. There was an assumption that the “toxic” relations in the office must be the fault of the “divisive” women.

180. There were long-standing problems within the Markets Compliance Team. We are mindful of the fact that Mr Jooma has not given evidence and so has not been able to give his version of events. The evidence we have heard suggests that the problems in the department mainly resulted from his management style. That was the evidence of the Claimant and Ms von Pickartz. That was what Mr Whittern had been told prior to joining the Respondent. Mr Whittern queried the possibility that he might be micromanaged by Mr Jooma. The potential problems with Mr Jooma’s management style had been highlighted by the recruitment agent, who could only realistically have received that information from the Respondent. Mr Whittern spoke with the Claimant and Mr Clinch about Mr Jooma and understood that they both were unhappy about Mr Jooma’s management.
181. Despite that evidence it is clear Mr Niermann quickly formed a negative view of the Claimant and Ms von Pickartz. At paragraph 17a Mr Niermann complains that they made “tendentious” complaints that they had been micromanaged by Mr Jooma. It is hard to understand why he formed the view that they were being tendentious and why was he so quick to support Mr Jooma. He rejected what two women had told him about Mr Jooma and preferred to side with another man. Indeed, Mr Niermann went further and concluded that both women were self-serving in making the complaints. He concluded that the poor relations in the department must be the fault of the two “divisive” women.
182. Mr Niermann decided at an early stage that it was unlikely that any of the VP's would be appropriate for the Head of Markets Compliance because of toxic atmosphere. He did not consider that Mr Jooma might have been responsible for created the divisions within the team.
183. We find that Mr Whittern was treated as the senior member of the team by Mr Niermann. We considered that Mr Niermann was disingenuous when he suggested that the point person/acting head of Department role was of no great significance. We consider that from the start Mr Niermann wanted to make Mr Whittern effectively the acting head of Department. It was a significant advantage. We accept that Mr Niermann did treat and regard Mr Whittern as the senior member of the team. He did so, to a significant extent, because he made stereotypical assumptions about the Claimant and Miss Von Pickartz being “divisive” that were gender related. Gender was a significant and material factor in the decision taken by Mr Niermann to favour Mr Whittern over the Claimant. We consider that Mr Niermann treating Mr Whittern as senior person constituted direct sex discrimination. We also consider that his appointment as point person/acting head was an act of direct sex discrimination. We accept that at the time this decision was taken Mr Niermann did not appreciate that the Claimant was deputy, so we do not find there was a separate act of discrimination in her being side-lined as deputy.
184. We hold that there were repeated denials that Mr Whittern had been elevated. We consider this had the effect of violating the Claimant's dignity and was related to her gender, in that Mr Niermann did not tell the truth about the situation to the Claimant and Miss Von Pickartz because he considered them

to be divisive. This involved gender stereotyping them as explained above. It is reasonable for the Claimant to consider the treatment to have the effect of violating her dignity and we find that the treatment constituted harassment.

185. We consider that the Claimant was not fairly considered for the Head of Market Compliance role. From an early stage Mr Niermann had decided that he was not at all likely to award the position to an internal candidate. We do not consider this initially excluded Mr Whittern. It did exclude the Claimant and Miss Von Pickartz. From the outset there was no realistic prospect of them being appointed. Again this is because of the stereotypical characterisation of them by Mr Niermann as being “divisive” women and because Mr Niermann resented them seeking to put themselves forward which he saw as a negative for these two women, whereas we do not consider he would have criticised a man in similar circumstances. We find that this was direct sex discrimination. These stereotypical assumptions would not have been made against the Claimant if she was a man.
186. We do not consider that there is a basis on which the Claimant should have been appointed automatically to the post of Head of Markets Compliance. We consider that open and fair recruitment should have been applied.
187. As the Claimant was not in the running for the position we do not get to the stage at which there was a selection between her and Mr Dyos. What would have happened if the Claimant had been fairly considered will be a matter to determine as a remedy issue.
188. We do not consider that there is separate discrimination in Mr Niermann failing to provide feedback. We consider he did provide feedback of the limited nature that he stated that he wanted candidate that could hit the ground running. We do not consider that this referred to someone who would not be absent on maternity leave which is the basis upon which it was argued by the Claimant to be discriminatory. It really was a way of trying to explain that he wished someone to take over management of the Department and deal with what was in his perception a toxic environment; i.e. an explanation of the conduct we have found discriminatory, rather than a further free standing act of discrimination. We do not consider it had the purpose or effect of creating a hostile environment etc and do not consider it was an act of harassment.
189. We consider that the most likely explanation for the Claimant’s IT equipment being disabled for a period of two weeks is that HR when dealing with her maternity leave provided for the first two weeks to be MTA. We do not see that this can be seen as a detriment as the period fell within the compulsory maternity leave period, during which it would be a criminal offence for the Respondent to allow the Claimant to undertake any work. We do not consider it had the purpose or effect of creating a hostile environment etc and do not consider it was an act of harassment.
190. We consider that the Claimant was discouraged from attending the quarterly Review Meeting because of assumptions made about what a woman should do while on maternity leave. This was outside of the compulsory maternity leave period. There was no reason why the Claimant should not attend and we

consider that she was dissuaded because she was undertaking maternity leave. We find that this was an act of maternity discrimination.

191. We do not find that there were any other separate acts of discouraging the Claimant from participating in work, or excluding her from work, during the maternity leave period.
192. On return from the maternity leave the Claimant found that substantial elements of her job had been transferred to Ms Burch. When the Claimant left for maternity leave Ms Burch took over nearly the entirety of her role. When Ms Bailey joined rather than providing maternity cover by doing the Claimant's job she provided support, advice and supervision to Ms Burch who continued to essentially undertake the Claimant's job. That is why no handover on the Claimant's return. There was no real intention of Ms Burch handing back the work to the Claimant. Since the Claimant's return she and Ms Burch have, despite the protestations to the contrary, been essentially at the same level. The Claimant has not been permitted to conduct the managerial aspect of her role. We consider that was done because the Claimant was on maternity leave. We consider that it represents maternity discrimination. The maternity leave was not just a circumstances in which the d Ms Burch' role naturally developed but advantage was taken of the Claimants absence on maternity leave to pass significant elements of her role to Ms. Thereafter we find that the Claimant was side-lined as Ms Burch line manager on her return from maternity leave and her role was diminished. That is continuing and we consider it is ongoing maternity discrimination.
193. Mr Niermann and Mr Dyos did not fully address the Claimants concern about Ms Burch reporting to her. However, we do not consider that that was a separate act that was related to the Claimant's gender.
194. We consider that the real detrimental treatment that the Claimant suffered was the passing of a substantial element of her work to Ms Burch. We consider that the treatment is ongoing and forms part of a continuing act with the appointment of Mr Whittern as point person/acting head, the failure to properly consider the Claimant for the Head of Markets Compliance role, and that therefore the claims were submitted within time.
195. We do not consider that the Claimant was subject to discrimination in respect of the head of Eastern and Western Europe Compliance role. We consider that this was not direct sex discrimination or maternity discrimination harassment or victimisation. Claimant was not considered for the role because she did not apply. We do not consider that the failure to inform the Claimant of the opening of the post or that it had become available on the computer system was done in any sense because of her pregnancy, maternity or gender or, in respect of informing her about the role becoming available, because of her having done a protected act. The Claimant alleges that there was a failure to give her advance notice of the post becoming available. Again this had nothing to do with her gender or maternity. The reason the Claimant was not appointed was because she did not apply. Her circumstances were materially different to Mr Rogalla.

196. To the extent it could be said that any provision criterion or practice was applied by discretion in respect of promotions being granted to managers we consider that this is an example of the type of case that Lady Hale referred to in **Esopp**. It is necessary for a Claimant to establish that she has suffered a disadvantage as a result of the PCP being applied to her. Just as in the example given by Lady Hale an employer could defend claim of indirect discrimination in respect of a written test by showing that candidate did not complete the test, in the case of a job application any PCP in relation to selection cannot be the cause of the disadvantage if the woman did not apply.
197. We do not consider that there is any proper basis on which the Claimant should be transferred into the role as a means of resolving her grievance. That would have been contrary to proper recruitment practices.
198. We consider that the second grievance was determined within a reasonable period of time. We do not accept that the Claimant was subject to a detriment in this regard.
199. We consider that the grievances were dealt with genuinely. Although we have reached a different conclusion about discrimination we accept that Dr James was seeking genuinely to reach proper conclusion on the grievance. She is not an equalities law specialist and was undertaking her first grievance. While she may have not tested some of the evidence more robustly we do not consider this was because of the allegations of sex discrimination. We consider that she formed a genuine opinion to the best of her abilities and do not consider that a victimisation complaint is made out in respect of the grievance decision.
200. If we had not held that there is a continuing act we would have extended time in respect of the allegations we find proven. The Claimant stated repeatedly in her evidence that she was repeatedly told that she was overreacting. She was keen not to do so and to seek to resolve matters at work. The Claimant was repeatedly told by Mr Niermann and Mr Dyos that she was overreacting to Mr Whitton's role as point person that it was of nothing of real significance. It took her a considerable time to appreciate the role really was as significant as she thought. Mr Dyos repeatedly suggested that the Claimant role had not changed on her return from maternity leave, whereas in reality she had lost nearly all of the management element of her role and much of her work had been passed to Ms Burch. Again, it took time for her to appreciate that was the case. The Claimant sought to resolve matters internally and thought that the Head of Eastern and Western Europe Compliance role might be an opportunity for resolution, but unfortunately did not see the advertisement.

201. The Respondent had been able to robustly defend the claim they have not been disadvantaged by any delay in putting forward their case as cogently as they could. We would have considered it just and equitable to extend time

Employment Judge Tayler
22 March 2018