Case Number: 2206398/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Posavec	**v**	**Emirates NBD PJSC**

Heard at: London Central
On: 5 – 19 June 2017

Before: Employment Judge Hodgson
Ms C Ihnatowicz
Mr D Pugh

Representation
For the Claimant: in person
For the Respondents: Mr S Brittenden, counsel

JUDGMENT

The unanimous judgment of the tribunal is -

1. **The claim of unlawful direct discrimination fails and is dismissed.**
2. **The claim of discrimination arising from disability fails and is dismissed.**
3. **The claim of failure to make reasonable adjustments fails and is dismissed.**
4. **The claim of unfair dismissal contrary to section 103A Employment Rights Act 1996 fails and is dismissed.**
5. **The claim of detrimental treatment contrary to section 47B Employment Rights Act 1996 fails and is dismissed.**
6. **The claim of unlawful deduction from pay wages fails and is dismissed.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 12 July 2016 the claimant brought claims of direct discrimination, failure to make reasonable adjustments, discrimination arising from disability, dismissal and detriment for making protected disclosures, and failure to pay wages.

The Issues

2.1 At the commencement of the hearing the issues to be considered were identified. There were a number of documents that purported to set out issues.

2.2 The tribunal produced a list of issues and handed it to the parties on day 2. The parties were informed that no issues or allegation would be decided if it were not in the list. The parties were informed that they should bring any inaccuracies to the tribunal's attention and should inform the tribunal if any detriments were missing. The parties were told that the addition of detriments may require an application to amend.

2.3 Neither party alleged that the tribunal's issues were deficient. They are produced below with some minor amendments and with a number of refinements agreed in the hearing.

2.4 We note that on a number of occasions during the hearing, we reiterated that no detriments would be considered that were not in the issues. There was no application to add any more detriments.

2.5 The issues to be determined are set out below.

Disability

2.5 Did the claimant have a disability in that the claimant had a physical or mental impairment which has a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities?

2.6 The claimant relies on two impairments. The first impairment is fibromyalgia. The second impairment is depression.

2.7 It is alleged the first impairment could produce physical pain and affect the claimant's ability to write. Its effect on her ability to deliver professionally was that her writing and typing would be affected such that she may miss words, misspell words, or miss letters.

2.8 Both impairments were said to affect the claimant's ability to concentrate. She described herself as having a mental fog on occasions.

2.9 The claimant alleged the fibromyalgia was a pre-existing condition and was already long term.

2.10 The claimant alleged she had no previous episode of depression. The depression started around late March 2016. She alleged it became long-term when a psychiatrist diagnosed in September 2016 that the depression would continue for at least a year.

Direct discrimination - section 13 Equality Act 2010

2.11 Did the respondent treat the claimant less favourably than it treats or would treat others?

2.12 If so, was such treatment because of the protected characteristic of disability?

2.13 The allegation of detriment relied on is by dismissing the claimant.

Discrimination arising from disability – section 15 Equality Act 2010

2.14 Did the respondent treat the claimant unfavourably?

2.15 If, so was it because of something arising in consequence of the claimant's disability? It is the claimant's case that the matter arising in consequence of disability was the disability-related sickness absence.

2.16 This allegation was allowed by way of amendment on 21 December 2016. No treatment was identified. It was agreed at the full merits hearing that the claimant could rely on dismissal as the relevant treatment, but any other treatment alleged would require a specific application for amendment.

2.17 Has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

2.18 The respondent's aim related to the need to provide an effective and efficient compliance team to perform relevant compliance duties.

Duty to make adjustments – section 20 Equality Act 2010

2.19 Was a duty to make adjustments engaged by the respondent applying a provision criterion or practice to the claimant which placed the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

2.20 If so, did the respondent comply with any duty by taking such steps as in all the circumstances of the case as it was reasonable for the respondent

to have to take in order to comply with its requirement under section 20(3) Equality Act 2010?

2.21 The specific provision criterion or practice relied on by the claimant was not identified on day one, it was not contained in an application to amend; and it was not set out in the amendment allowed by Employment Judge Wade. The substantial disadvantage alleged, similarly, was not identified. [During the course of the hearing, the claimant clarified the provision criterion or practice was the the retaliation for the protected disclosures and the substantial disadvantage was that the retaliation caused a worsening of her mental health.]

2.22 The claimant identified a specific adjustment that she says should have been provided. It is her case that she should have been moved away from Mr Alonzo and Mr Tamotheran. It being her case that she could continue with her same job as a compliance manager; however, she would continue not in the compliance department, but in the operations risk department.

Wages

2.23 The claimant alleges that there was an unlawful deduction of wages as the respondent failed to pay a discretionary bonus in respect of the year ending 30 June 2016.

Detriment done on the ground of a protected disclosure

2.24 Has the claimant made a disclosure? The claimant alleges there were two disclosures of information: first, by email of 22 February 2016; and second, an email of 4 April 2016. The specific information disclosed was unclear.

2.25 The respondent accepts that there was disclosure of information by email of 22 February 2016. The detail of that concession is set out in the respondent's concession filed on 6 June 2017. There are two areas of information identified.

2.26 The first disclosure of information on 22 February 2016 concerned a CASS report (the FCA's client asset rules). The information was that at the end of 2015 client money had been received, but had not been transferred into a specific client account within 10 working days.

2.27 The second disclosure of information on 22 February 2016 concerned the allegation that a member of staff had taken pictures on a mobile phone of FATCA forms and then emailed them. This was alleged to be a breach of the Data Protection Act 1998 (DPA).

2.28 No other specific area of information was relied on by the claimant.

2.29 The alleged disclosure of 4 April 2016 referred to an email of that date. The main information concerned an AML SYSC report. The claimant's particulars of claim record the disclosure as follows:

The head of compliance/MLRO and AML manager were involved in releasing and receiving payments on daily basis from the payment system without performing the checks for money-laundering and fraudulent transactions and therefore placing R in breach of AML regulations and the money-laundering implications. The AML compliance manager and head of compliance/MLRO as a second lines of defence ignored banks own processes designed to safeguard against the risk of financial crime and failed to monitor sufficiently on an ongoing basis the financial crime risks associated with the business relationship and also, catch and investigate transitions that could potentially lead to money laundering.

2.30 The Respondent accepts that in the email of 22 February 2016, the claimant raised allegations that senior management 'may' be acting in breach of FCA Rules and the DPA.

2.31 The respondent does not admit that there was disclosure of information on 4 April 2016. It does not accept that any information disclosed constituted a protected act.

2.32 The claim form refers to providing further particulars, but no applications been made to incorporate further particulars.

2.33 Was any information disclosed a protected disclosure in that:

2.33.1 it was a qualifying disclosure made in accordance with section 43C – 43H Employment Rights Act 1996;

2.33.2 the claimant had the necessary reasonable belief at the time of the disclosure that it tended to show one of the matters in section 43B (a) – (e); and

2.33.3 the disclosure in the reasonable belief of the employee was made in the public interest.

2.34 The claimant relies on section 43B (1) (a), and, or (b): that a criminal offence has been committed, is being committed or is likely to be committed; or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The relevant legal obligations identified are "financial services regulations/rules."

2.35 Has the claimant suffered detriments as a result of the protected disclosure – s47B Employment Rights Act 1996?

2.36 The claimant alleges the following detriments:

2.36.1 allegation 1: the decision not to award C bonus in respect of the year ending 30 June 2016 [ET1, paras 19, 30(i); ET3, paras 4-5, 8-9];

2.36.2 allegation 2: the decision to give C a "U" performance rating (the lowest) of which she was informed on 4 March 2016;

2.36.3 allegation 3: the decision to reject C's appeal against her bonus and rating on 11 March 2016;

2.36.4 allegation 4: Ms Persand attempting to start a performance management process for C on 18 May 2016;

2.36.5 allegation 5: the refusal by Ms Persand and Mr Steele Bodger on or about 19 May 2016 to engage with C's unresolved dispute of her rating/bonus;

2.36.6 allegation 6: the rejection of C's grievance by Mr Steele-Bodger against David Alonzo and Aran Thamotheran on 16 May 2016; and

2.36.7 allegation 7: the decision to invite C to attend a disciplinary hearing (confirmed by letter dated 23 May 2016) [ET1, paras 28, 30(ii), ET3, para 24].

2.37 Was the dismissal automatically unfair contrary to section 103A Employment Rights Act 1996.

Evidence

3.1 For the claimant we heard from: the claimant, C1. She also relied on an impact statement, C1b.

3.2 For the respondent we heard from: Mr David Alonzo, R6; Ms Alicia Persand, R7; Mr Raashed Amin, R8; Mr John Hiatsi, R9 ; Ms Christalla Yiangou, R10; Mr Duncan Steele-Bodger, R11; and Mr Aravinthan Thamotheran, R12.

3.3 From the respondent we received a bundle, R1; a chronology, R2; a proposed timetable, R3; a cast list, R4; and a concession, R5.

3.4 On day two the claimant produced a list of issues, C2; an addendum list of issues, C3; and a list of incidents, C4.

3.5 On day three the claimant filed a proposed timetable, C5

3.6 Both parties gave written submissions.

Concessions/Applications

4.1 On day one of the hearing, we considered the issues in the case. We noted that the respondent conceded there were protected disclosures made on 22 February 2016. We ordered the respondent to set out, by day two, a full list of the information accepted as raised and the reason why it was protected.

4.2 We spent some time identifying the specific documents which now formed the pleadings in the case. We identified the original claim form. There

had been two amendments, albeit the claim form itself had not been specifically amended. The first amendment was allowed by Employment Judge Baty at a case management discussion on 5 September 2016. He had allowed, by way of amendment, matters 3(v) – (vii) of the list of issues filed on that day to be incorporated as specific allegations. We have incorporated those matters in the issues as given to the parties. The second amendment was allowed by Employment Judge Wade on 21 December 2016. Again, the particulars themselves were not amended. The full extent of the amendment allowed is set out in the narrative to her decision at paragraph 2.1 - 2.5.

4.3 The first amendment permitted three additional detriments pursuant to section 47B Employment Rights Act 1996.

4.4 The second amendment from 21 December 2016 occurred following the claimant's dismissal. Claims of disability discrimination were allowed pursuant to section 13, section 15, and sections 20/21 Equality Act 2010. The amendment permitting a section 15 claim failed to identify the specific treatment relied on. We considered the original application and confirmed that the only possible treatment identified in the application was the dismissal. We specifically ruled that the only treatment that could be pursued as a section 15 claim was the dismissal.

4.5 We discussed the timetable on day one. We noted the parties proposed the respondent give evidence first; we indicated that was a reversal of the normal order. We postponed any decision until the following day. The timetable was, eventually, agreed.

4.6 On day two, the respondent filed a concession confirming it accepted the disclosure of 22 February 2016 was protected.

4.7 On day two of the hearing, we gave the parties our list of issues. This superseded the documents filed by the claimant, including a set of issues, that morning.

The Facts

Background

5.1 The respondent is a private bank in the UK. It has approximately seventy employees. It has a UK compliance team responsible for all regulatory and financial crime compliance within the UK. That team is headed by Mr David Alonzo.

5.2 On 29 June 2015, the claimant joined the bank as a compliance manager within the compliance team. She was one of five individuals within the team. The claimant had previously worked in compliance as a contractor at a number of banks and had been employed at one.

5.3 The claimant's duties included the following: to provide day to day support to the London branch's business on all regulatory matters; to assist Mr Alonzo in ensuring that the regulatory risk of the branch remained low by continuously adapting to new regulatory policies; to assist in training the employees within the London branch on regulatory changes; to provide cover for the financial crime, compliance manager, Aran Thamotheran and/or Mr Alonzo in our absence; to execute the risk based compliance monitoring programme providing regular reporting to Mr Alonzo; to keep up to date with regulatory developments and assess their impact of on the London branch; and to execute regulatory reporting as and when required.

Mr Alonzo's initial concerns

5.4 Mr Alonzo became concerned about the claimant's performance soon after she joined the bank.

5.5 It is the respondent's case that there were a number of meetings with the claimant when matters pertaining to her performance were discussed. The claimant has denied that many of these meetings took place. It is therefore necessary for us to consider whether certain meetings occurred. We have preferred the respondent's evidence. We find that there is evidence, on the balance of probability, that the meetings said to have taken place by the respondent, did take place.

5.6 In late August 2015, Mr Alonzo met with the claimant. In his workbook, he made a brief note of the matters discussed (R1/385). His concerns included the following: the claimant needed to communicate more clearly with the compliance team and more widely within the bank; her advice had been too general in nature and needed to be tailored to the requirements of the bank; that once an approach to an issue was agreed, it should be completed; and she needed clear agendas when attending scheduled meetings and clear objectives.

5.7 Mr Alonzo continued to have concerns.

5.8 In August 2015, the claimant drafted a reply to be forward to the ombudsman. The reply was unsatisfactory. Mr Duncan Steele-Bodger, the respondent's UK country head, rejected the claimant's draft by email of 5 August 2015 stating "a bit of work needed I think." This was a sarcastic comment indicating the work was seriously unsatisfactory. The letter was entirely redrafted by Mr Pardeep Singh, UK legal counsel.

5.9 Part of the compliance team's role is to review and release payments from the bank's "safe watch" queue. Essentially, this is approving transactions on a day-to-day basis. There is a two-stage process. One individual acts as an analyst, who makes the payment. A second person acts as a checker. We reject the claimant's suggestion that she could not be required to act as a checker, or that she did not understand that was her role on 27 August 2015 when she failed to undertake her duties as a checker and release funds. This led to what is known as a loss event whereby the bank was potentially exposed to a complaint from a client. This was a material failure on the claimant's part.

5.10 Prior to the claimant arriving, CASS (the FCA's client asset rules) had been identified as a area that needed review. A key objective for the claimant was to work on a CASS compliance monitoring report. This was a significant and complicated piece of work. The claimant need to liaise with individuals, including Mr Richard Jablonowski, UK chief investment officer.

5.11 Mr Jablonowski had concerns about the claimant and he raised them with Mr Alonzo (R1/478 and 480). His concerns were significant. His email of 28 September 2015 stated that the claimant's "attachment indicates the level of confusion that frankly, should not be there. This is taking time to sort out and it should be relatively simple." Mr Alonzo reviewed the draft CASS compliance monitoring report and formed the view the claimant was confused on the mechanics of custodian arrangements in the context of acknowledgement letters. We do not need to consider the detail of this. The general position is that he was concerned about the claimant's level of understanding in a number of respects.

5.12 The claimant circulated a "completed" CASS review on 15 October 2015. Mr Alonzo was surprised as she had not cleared it with him.

5.13 The claimant also worked on a compliance trade monitoring report. She circulated the report on 10 November 2015, without first showing it to Mr Alonzo. Both the circulation of, and the content, of the report caused Mr Alonzo concern. We accept by this time he had asked the claimant to show him reports before circulating them. On 11 November, Mr Alonzo returned the report to the claimant, with marked up comments (R1/584). He specifically asked the claimant to let him see all reports before circulating them outside the team. He did this because he was concerned about the quality of her draft.

5.14 At paragraph 33 of his statement he records his concerns as follows:

> **33. In terms of the issues in the report:**
>
> **(a) at page 11 of the report she quoted COBS 7.12 which no longer exists and Sup 17 was quoted as a reference relating to Customer Order and Execution records when this chapter is about Transaction Reporting. (see page 594 of the bundle);**
>
> **(b) at page 22 of the report she used an example to set out why we needed to implement procedures to detect market abuse (see page 605 of the bundle). However, her example related to a product that we do not trade and a trading pattern involving thousands of orders being placed and cancelled in one day's trading. The Bank's own transaction volumes would average out at less than 100 per month (for example, the total trades in 2016 to the end of November 2016 amounted to 702 trades of which 550 where for our discretionary portfolios and therefore not client initiated); and**
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> **(c) the grammar in the report was poor and there was a lot of irrelevant wording in certain sections.**

5.15 Following further amendments, the report was ready to issue on 3 December 2015.

5.16 Around the same time, Mr Alonzo also asked the claimant to review the bank's European real estate fund (EREF). Mr Alonzo records his concerns at paragraphs 35 and 36 of his statement.

> **35. Around this time, I also asked Sonya verbally to review the Bank's European Real Estate Fund (EREF), which had resulted in some complaints from clients. I asked her to review whether she felt the fund would have been suitable to sell today under the suitability rules in place now.**
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> **36. Sonya sent me her review by email on 17 November 2015 (see page 637 of the bundle). I again had to make a significant number of amendments to her review and sent this back to her by email later that day (see page 642 of the bundle). My main concern was that the review simply wasn't accurate. For example, she had stated that the FCA had highlighted to all firms the importance of making a suitability assessment in treating customers fairly in 2005 (see page 644 of the bundle). However, in fact, a statement to this effect was made by the FCA in 2001 and they had also emphasised that treating customers fairly was not just an issue of suitability, it was also about client's best interests – it was therefore much wider than Sonya had implied. In addition, she had left out the key issue to be taken into account for assessing suitability, namely attitude and capacity for risk. The FCA had written a whole paper on this issue and I was surprised that Sonya had not referred to this. Furthermore, the whole purpose of the review which I had asked her to undertake was a review of the fund as against the current suitability rules and yet Sonya had not focussed on this question.**

5.17 Mr Alonzo had further concerns about the claimant's work on the AML/KYC compliance review. He deals with this at paragraphs 38 and 39 of his statement.

> **38. Sonya had also been working on an AML/KYC Compliance Review to analyse and review the Bank's AML/KYC processes and procedures. The review, once finalised, would then be sent to John Hiatsi, the Bank's Operational Risk Officer, Group Compliance and Duncan Steele-Bodger.**
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> **39. On 9 December 2015, I received an email from Sonya attaching the Investment Management report and the AML/KYC Review and confirming that she had included them in the Branch Risk Committee Report (BRC Report) (see page 730 of the bundle). The BRC is the Branch Risk committee which meets monthly to identify and discuss the key risks to the UK business. I was frustrated that Sonya had included both of these reports in the BRC Report as I had previously specifically asked Sonya not to circulate reports before I had reviewed them. In addition, reports should not be included in the BRC Report without the business within the Bank having first had the opportunity to challenge the contents of the reports, after which the reports could then be finalised. I went back to Sonya to this effect the same day (see page 730 of the bundle) and also, around the same time, told her that Aran would also need to input into the AML/KYC review, given his involvement in AML/KYC from a Financial Crime perspective.**

5.18 The claimant circulated the report to group compliance on 17 December 2015, contrary to Mr Alonzo's instructions. She also implied it was finalised, when it was not.

5.19 In October 2015, Mr Alonzo asked the claimant to review the Skillserve system. This is the e-learning module system provider for the bank, and it

deals with matters such as compliance training and know how. The claimant was to liaise with Ms Alicia Persand, the bank's HR business Partner, and was to consult employees outside of compliance.

5.20 Ms Persand raised concerns about the claimant's attitude by her email of 18 December 2015 (R1/870). Mr Alonzo deals with this in his statement at paragraph 44.

> **44. I then received a further update from Alicia by email on 18 December 2015, following a discussion we had had the previous day (see pages 870-871 of the bundle). Alicia set out in more detail concerns she had in relation to the way in which Sonya had sought to carry out the Skillserve task. For example, Alicia had received feedback from Skillserve that Sonya had been rude to them and implied their modules were 'boring'. In addition, Alicia informed me that Sonya had put forward Thomson Reuters as an alternative, without conducting a proper price comparison or a detailed analysis of suitable modules offered. Alicia stated in her email that she felt Sonya had 'completely undermined everything' she had asked Sonya to do. I was really concerned by this - the task was not one which I had expected to require this level of supervision, let alone for concerns to have been raised by Skillserve with Alicia. I spoke to Sonya about the issues going through each point and explaining that her performance on this project was just not acceptable at her appraisal meeting on 15 January 2016 (there was a delay as Sonya was away on leave on 18 December and did not return until 28 December 2015, by which time I was then away on leave and did not return to work until 4 January 2016).**

5.21 During her evidence, the claimant denied that she had been asked to liaise with Ms Persand or that she had received any instructions from Ms Persand. We have not found the claimant's evidence on this point to be credible. It is clear that Ms Persand gave direct instruction to the claimant, we have seen, for example, her email at R1/672. The claimant's suggestion that she was not taking instructions from Ms Persand is without foundation.

5.22 Mr Alonzo summarises further concerns at paragraphs 45 to 48 of his statement:

> **45. A number of other concerns also arose after our August 2015 catch up meeting, in addition to those referred to above.**
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> **46. On 2 November 2015, I was, for example, copied into an email from Richard to Sonya in relation to London equity positions disclosure (see page 550 of the bundle). Sonya had flagged a regulatory requirement to Richard, stating that it was a front office task and not something which Compliance should or had to take ownership of. I had concerns about the abruptness of her email and the way in which she had interacted with other senior members of staff outside of the Compliance team. I would have expected a member of my team to explain to Richard what the impact of the new requirement was, and what he needed to do moving forward, given the knowledge which sits in the Compliance team. As referred to above, I had also previously made it clear to Sonya that my team should be advising the business and not just quoting rules at them. We needed to interpret these rules and deliver clear concise reports detailing exactly what the business needed to do to comply.**

> **47. A further and related concern I had related to the generic nature of Sonya's advice. For example, she would often email me regulatory updates without focussing on the impact the update would have on the Bank and tailoring her advice accordingly. By way of example, Sonya emailed me on 30 November 2015 regarding the Mortgage Credit Directive (see pages 681-683 of the bundle). In her email to me she cut and pasted parts of the briefing produced by the FCA on this topic, but failed to provide me with any tailored advice on next steps which the Bank should be taking. Accordingly I went back to her, asking her to clarify what her recommendations were for the Bank. This was not something which I would expect to have to do for someone at Sonya's level.**
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> **48. A further example of the above related to advice provided by Sonya to me in relation the Approved Persons Regime. As I explained in my email to Sonya on 8 January 2016 (see page 932 of the bundle) in response to her email on 11 December 2015 (see pages 932-934 of the bundle), the advice which she provided me was not appropriate to the Bank, given its size and given our then governance structure seemed to be acceptable to the regulator.**

5.23 We have set out Mr Alonzo's concerns at some length. It is the claimant's case that Mr Alonzo raised no concerns with her about her performance. The claimant's suggestion is that Mr Alonzo has, in some manner, sought to invent concerns. We do not accept the claimant's evidence. We are satisfied that Mr Alonzo did have significant concerns, and that these matters were raised with and discussed with the claimant at the material times.

5.24 The respondent operates an appraisal system. It normally consists of a midyear and end of year review against written objectives. As she did not start until partway through the year, the claimant did not have a formal midyear review; however, Mr Alonzo met with the claimant on 8 September 2015 to finalise her objectives and to talk about his concerns (R1/470A). Those objectives do not identify day-to-day tasks. However, day-to-day tasks are relevant to the appraisal.

5.25 The final rating given on appraisal is determined by a number of factors, Mr Alonzo describes it as follows:

> **50. The Bank's annual end of year appraisal process then commences in December, with initial meetings taking place then and a follow up meeting being held in January. The Bank's appraisal grades are based on a grid formation made up of a combination of 'objectives ratings' and 'behaviours ratings'. The objectives ratings are as follows: 5 – Stretch Performance, 4 – Superior; 3 – On Target; 2 – Threshold; and 1 – Below Threshold. The behaviours ratings are then as follows: A for Role Model; B as Acceptance; and C – Unacceptable. A combination of the objectives and behaviours ratings then gives the employee an overall grade, the available grades being: 'O' for Outstanding (5A); 'E' for Excellent (5A, 4A, 4B); 'V' for Valuable (3A, 3B); 'B' for Basic (5C, 4C, 3C, 2A, 2B); and 'U' for Unacceptable (2C, 1A, 1B and 1C). Where an employee is awarded a 'U' grade, this automatically results in a performance development plan being initiated and in the employee being deemed ineligible for any bonus award for the relevant performance year.**

5.26 The respondent's performance policy makes it clear that a U grade will make an individual ineligible for any discretionary bonus for the relevant year.

5.27 Mr Alonzo met with the claimant on 16 December 2015. He had provided the claimant with the end of year appraisal form for her comment, on 15 December 2015. The claimant's comments on the appraisal form were discussed on 16 December. Mr Alonzo identified continuing performance issues, including the quality of her report writing, the claimant ignoring his request to see reports before distribution, and her performance on the Skillserve project.

5.28 On 14 January 2016, Mr Alonzo submitted to HR his proposed appraisal grade for the claimant to HR. The overall grade was 2C (2 represented threshold performance and C represented unacceptable for behaviours). This would lead to an overall U rating.

5.29 Before the grades were finalised, it was necessary to go through a process known within the bank as calibration. Essentially, a number of managers meet, as the calibration team, to review proposed grades.

5.30 The overall grade includes a number of measures of performance and behaviours. Mr Alonzo found the claimant showed unacceptable behaviour in six of nine standards. Her performance was satisfactory in some areas but not in others.

5.31 Mr Alonzo met with the claimant on 15 January 2016 to discuss his proposed grading of her(R1/959). Mr Alonzo had sought advice from Ms Persand on how the performance development plan operated.

5.32 The calibration meeting took place on 26 and 27 January. There were ten members of the calibration committee. The grades for a number of individuals were challenged, but not the claimant's.

5.33 On 25 February 2016, Ms Persand emailed Mr Alonzo and confirmed the appraisal grades for all of his direct reports, including the claimant (R1/1073).

5.34 On 3 March 2016, Mr Alonzo met with the claimant to discuss the final grade. This was the first time he specifically confirmed the final grade of 2C. The claimant stated she did not agree with the rating and refused to sign the appraisal form. She later signed the form, when it was explained that she could appeal. The claimant's appeal was dealt with by Mr Steele-Bodger.

5.35 Mr Alonzo continued to have concerns about the claimant's performance. There was a further loss event on 21 January 2016 when the claimant failed to release funds as the checker. There were ongoing problems of the AML/KYC compliance review report. This led to a number of meetings. It has been the claimant's case that the meetings on 12 and 15 February did not take place. We do not accept the claimant's evidence.

These meetings are referred to in a number of emails, and it is clear they did take place.

5.36 It is the claimant's case that there was a meeting on 24 February 2016 which involved her, Mr Alonzo and Mr Thamotheran. The respondent says the meeting never occurred.

5.37 It is the claimant's case that the meeting happened in the morning of 24 February 2016 and lasted up to an hour. Thereafter she returned to her desk and undertook work before going to lunch. It is the claimant's case that she took extensive handwritten notes of that meeting and thereafter produced a typed version of the minutes.

5.38 We have seen clear evidence that Mr Alonzo and Mr Thamotheran were initially engaged in a meeting from 09:00 to 10:00 which concerned a matter being investigated by the police. Thereafter, Mr Alonzo was in a BRC (branch risk committee) meeting, which lasted approximately two hours.

5.39 There are significant difficulties with the claimant's account. There is no contemporaneous email showing that the meeting was called. Mr Alonzo was not available when the claimant says the meeting took place. There is no contemporaneous documentation demonstrating the meeting occurred. There are significant problems with the claimant's alleged minutes. The Word document was not initially disclosed. It is the claimant's case it was lost by her solicitor in September 2016, and not retrieved until early January 2017. The claimant was asked by the respondent to produce an electronic version of the word document. It is her case to us that she does not have the word document. She says it was typed at the respondent's premises, but she cannot confirm whether it was saved as a Word document. It is her case that she does not have an electronic version, yet she failed to state that simply to the respondent's solicitors when asked for the document. Moreover, she was asked to forward the document so its properties could be checked. It is her case to us that she did not understand that the properties would demonstrate when the document was created and modified. We do not credit that evidence. We have decided on the balance of probability that the alleged meeting of 24 February 2016 did not occur.

5.40 It is clear that there were continuing problems with the AML/KYC report. Mr Thamotheran, in particular, sought to finalise the report during several meetings. This did not prove possible. The claimant on 30 March 2016 alleged the report had, in fact, been finalised in December 2015 and submitted to BRC (R1/1165). It was untrue to say the report had been finalised.

5.41 We find that there were serious concerns about the claimant's conduct and competence.

5.42 The respondent has accepted on 22 February 2016 the claimant made a disclosure of information that was protected. The concession made to the tribunal was in the following terms:

> **Respondent's concession: disclosure 22 February 2016 [4.1049-53]**
>
> **1. The Respondent (R) accepts that in the email of 22 February 2016, C raised allegations that senior management 'may' be acting in breach of FCA Rules and the Data Protection Act 1998.**
> **1.1 In respect of the disclosure concerning 'Client Money' paragraphs 1-5 appear to contain background information. However, it is accepted that the matters set out in paras 6 – 23 amount to a disclosure of information that tended to show that R had (allegedly) acted in breach of various obligations specified by C in this document.**
> **1.2 In respect of the disclosure about 'client data protection' arising out of an incident where client data was photographed on a private mobile phone and emailed to a compliance analyst on 19 February 2016 [4.1052], it is accepted that the factual information at paras 1-7 and the identifying rule breaches at paras 8-11 are disclosures of information.**
> **2. R accepts that in respect of 1.1 and 1.2 above:**
> **2.1 C reported information that alleged that R was acting in breach of one or more legal obligations (specified by C in the disclosure itself) pursuant to s. 43B(1)(b) ERA 1996.**
> **2.2 Whilst R does not accept the veracity of the allegations, R does not take any point as to whether C had reasonable belief in the same, or whether such disclosures were made in the public interest.**

5.43 It is not necessary for us to decide whether the claimant or the respondent was right about the disclosure. The respondent accepts that there may be a range of opinion and accepts that the claimant made the disclosure in the public interest and genuinely believed there was potential breach of the regulations and also the Data Protection Act.

5.44 The claimant made a further alleged disclosure on 4 April 2017. It is not admitted that this was a disclosure of information made in the public interest. The nature of the disclosure is extremely difficult to understand. We have set out, in the issues above, the claimant's description from his own claim form.

Investigation of protected disclosures

5.45 Mr Steele-Bodger was, at the material time, country head in the UK for the respondent. Mr Alonzo reported to Mr Steele-Bodger. He dealt with three matters concerning the claimant. The first, was her appeal against her appraisal rating, the second, was investigation of her alleged protected disclosures, and the third, concerned a specific grievance raised by her. We will consider each separately.

5.46 Mr Steele-Bodger considered the claimant's disclosure of 22 February 2016. He took the view it is contained two disclosures which he described as follows in his statement (para 27):

> **…she raised concerns in relation to the transfer of client monies to the London office and potential resulting breaches of the FCA's Client Asset**

> **("CASS") rules and (ii) a separate potential data protection breach in relation to client data she said had been sent by a relationship manager to a member of the compliance team via a private mobile telephone (see pages 1049 to 1053 of the bundle).**

5.47 Mr Alonzo, as head of compliance, would normally have overseen the investigation. However, as the disclosure concerned Mr Alonzo, Mr Steele-Bodger investigated it.

5.48 Mr Steele-Bodger met with the claimant on 23 February 2016 to discuss the disclosure. Mr Steele-Bodger asked Mr Singh, as legal counsel, to investigate. Mr Alonzo was asked to respond to the disclosures and he did so on 10 March 2016. The claimant was updated on the action taken on 15 March 2016. Mr Singh provided his report in early May 2016 (R1/1363). His report reached the following conclusions, as set out at paragraph 32 of Mr Steele-Bodger's statement:

> **(i) CASS 7.13.36 R clearly indicated that it was permissible to accept mixed remittances and that it was not necessary to ascertain prior to receipt whether any of the monies were client monies. Importantly, the mixed remittance in question had been paid into the Bank's Nominee Company Account, which is a designated client account, ensuring that it was adequately protected;**
>
> **(ii) the same rule is clear that the client monies should be allocated to a client within 10 working days of the money being identified as client money. Here, whilst they were some delays in the monies being identified as client monies as they were received just before the Christmas break, the client monies were allocated immediately on being so identified;**
>
> **(iii) the Advisory Retrocessions did include client details, including names, accounts and amounts. However, the amounts stated by each client did not distinguish between what was client money and what was money the Bank was entitled to. In fact, of the $12,000 or so received, only $190 ended up being client money and therefore subject to the relevant CASS rule;**
>
> **(iv) the monies had rightly not been included in the CMAR report.**

5.49 In relation to the data protection issue, he concluded that the photographs could not be read and therefore there was no breach. He also accepted the claimant could not have known they were illegible without seeing the files, which she had not. Therefore, it was concluded, by luck, that there had been no data protection breach.

5.50 Mr Steele-Bodger did not deal with the alleged disclosure of 4 April. Mr John Watson Gibson was asked to investigate.

Appraisal

5.51 Mr Steele-Bodger confirmed on 4 March 2016 that as a result of the U rating the claimant was ineligible for a bonus. Shortly thereafter, Ms Persand informed him that the claimant wished to appeal her appraisal rating. Mr Steele-Bodger and Ms Persand met with the claimant on 7 March 2016. They reviewed the objectives set on her appraisal form and

sought clarification for why she considered Mr Alonzo's conclusions to be inappropriate. The meeting was then adjourned and feedback was obtained from others.

5.52 Mr Steele Bodger had direct personal knowledge of the problem with the ombudsman letter and the Skillserve issue. He was also aware that it had taken a long time to finalise the compliance monitoring report. He spoke with Mr Jablonowski, Mr Singh, Ms Persand, and Mr Marlon Rashon. He sent a summary of his findings by email 14 March 2016. He summarises the feedback in his statement as follows:

> **(i) Richard said that her approaches to his team were untargeted and confusing and that she had presented the Investment Management Report to the Branch's Risk Committee without him first having had sight of it;**
>
> **(ii) Raashed fed back that she seemed to have been surprised that he needed to be approved as part of the new Senior Managers' regime, which seemed to either indicate she didn't know he was the Head of Private Banking or else that she did not think the Head of Private Banking would need to be approved;**
>
> **(iii) Pardeep said that her work on the response to the Ombudsman had been very poor and that she had been defensive and insecure in her interactions with him;**
>
> **(iv) Alicia said she had refused to follow the agreed path in relation to Skillserve; and**
>
> **(v) Marlon said that her approach was unstructured and she tended to ask lots of seemingly random questions.**

5.53 Mr Steele-Bodger met with the claimant again on 11 March 2016. He indicated that the feedback he had received demonstrated that the claimant did not adequately understand the business and that there was a lack of structure in the way she carried out her work. She had been provided with relevant feedback. She needed to accept the constructive criticism and participate in the performance development plan.

5.54 Mr Steele-Bodger decided that the appraisal rating was justified. His role was to review whether it was an appropriate rating. He declined to interfere with it.

5.55 Directly as a result of the claimant's failings, Mr Steele-Bodger also took the view that Mr Alonzo, who had overall responsibility, had materially failed in respect of the claimant's work and he also received a poor rating for this objective.

<u>The grievance</u>

5.56 On 29 March 2016, the claimant raised a formal grievance (R1/1157). Mr Steele-Bodger identified her grievance as follows:

> **(i) John Hiatsi had told her he had been invited for lunch by David and Aran Thamotheran on 18 February 2016 and that, during lunch, they had**

> **sought to persuade him to join a plan to blame her for failing to clear payments on 21 January 2016;**
>
> **(ii) David had become annoyed by Sonya wheezing in the office as a result of her asthma.**

5.57 A further grievance was sent on 1 April 2016. Mr Steele-Bodger understood her complaint was that Mr Alonzo had called a meeting involving all of the members of the compliance team, except her. She said that during the meeting he had again tried to persuade the team to side against her and confirm his lies (R1/1184).

5.58 During the course of her evidence, the claimant identified there was another letter of 1 April 2016 which she says contained a grievance. It was not headed grievance and it is clear that Mr Steele-Bodger overlooked it. The claimant did not pursue it at the material time.

5.59 Mr Steele-Bodger acknowledged the claimant's grievance when he returned to work following holiday, on 21 April 2016. He met with Mr John Hiatsi, Mr Alonzo and Mr Thamotheran prior to meeting with the claimant. He therefore collected relevant evidence. Thereafter he spoke with further witnesses in the team. He ascertained that no one was aware the claimant had asthma. He deals with the conclusions he reached at paragraph 43 of his evidence.

> **Following the meeting on 5 May 2016, I considered again the representations Sonya had made and wrote to her on 16 May 2016 setting out my decision (see pages 1400 to 1402 of the bundle). In my decision letter, I confirmed that John had denied that David had tried to blame her for the loss on 21 January 2016 and confirmed that the operational risk report had reported the loss as a team failure. I also confirmed that there was also no corroborating evidence in support of her allegation surrounding the alleged 1 April meeting and that I was somewhat concerned that she was quite so insistent as to what must have been said at the meeting even though she wasn't there. Finally, in relation to the allegations regarding her asthma, I confirmed that none of the team had corroborated her claims, with David, John, Sonia and Seja all saying they did not even know Sonya suffered from asthma. I therefore rejected all parts to Sonya's grievance and, at the end of my letter, confirmed that she could appeal my decision by writing to Alicia, setting out the grounds of her appeal, by no later than 24 May 2016.**

5.60 The claimant did not appeal this grievance decision.

Matters leading to proposed disciplinary

5.61 The claimant commenced sickness absence of 4 April 2016. She was suffering from stress. It is common ground that she became depressed.

5.62 The claimant subsequently returned to work on 17 May 2016. On her return to work, Mr Alonzo, Ms Persand, and Mr Singh agreed to hold a return to work meeting. Ms Persand and Mr Alonzo wanted to discuss what support could be put in place to assist the claimant.

5.63 The meeting went badly. The claimant wished to revisit her appraisal grade and her grievance.

5.64 There was a further meeting on 18 May 2016 between the claimant, Mr Alonzo and Mr Thamotheran to finalise the AML compliance review report. There were further difficulties at that meeting.

5.65 There were further concerns about the claimant's behaviour and aggressive comments in emails.

5.66 It was decided that it would be necessary to instigate disciplinary proceedings.

5.67 By letter of 23 May 2016, Ms Alicia Persand wrote to the claimant and invited her to a disciplinary meeting. The specific allegations relied on were as follows:

> **(i) It is alleged that, at a meeting on 19 May, you acted in a rude and aggressive manner towards David Alonzo, in front of Aran Thamotheran, a member of his team, and also spoke down to him on a number of occasions. I have attached a copy of the notes on the meeting and an email from Christalla Yiangou HR coordinator, with her views on the meeting;**
>
> **(ii) It is alleged that you were unreasonably rude and aggressive in an email to David Alonzo dated 20 May 2016 (sent at 3.09pm). A copy of David's email and your response is enclosed; and**
>
> **(iii) Whilst we acknowledge your right to disagree with your performance rating, it is alleged that you are reluctant to even cooperate with the performance development plan to be initiated following on from your rating (despite having already exhausted your right to appeal against the rating). As has been explained to you, a performance development plan is initiated automatically when an employee receives an "unacceptable performance" rating. A copy of the draft framework issue to you and a note of your discussion with me in relation to it on 20 May is again enclosed.**

5.68 The letter of 20 May 2016, referred to above, included the following comment, "…You both ganged up on me and spoke to me in condescending and patronising way. It was just awful…"

5.69 On 25 May 2016, the claimant commenced sickness absence and never returned to work. The disciplinary process was never concluded. The meeting scheduled for 1 June 2016 was postponed. By letter of 27 June 2016, Ms Persand confirmed that the matter would be kept under review.

<u>Matters leading to the claimant's dismissal</u>

5.70 On 30 June 2016, the claimant stated in an email that she had previously asked to move away from Mr Alonzo. Ms Persand disputes this. We note it is clear that she made reference to it in one of her emails of 4 April 2016. We do not need to resolve exactly when the claimant first indicated that she had a problem working with Mr Alonzo. It is clear that her relationship with Mr Alonzo, and her wish not to work with him had a significant influence on the way matters then developed.

5.71 On 28 April 2016 the claimant's solicitors requested the claimant be moved to a different department. They also, in an open letter, alleged the claimant had suffered bullying and harassment after making "a protected disclosure pursuant to section 27 of the Equality Act 2010" they requested a payment of £75,000 for injury to feelings.

5.72 As the claimant's grievance had been rejected, Ms Persand did not consider it appropriate to move the claimant out of the compliance team.

5.73 On 4 August 2016, Ms Persand referred the claimant to occupational health. In his report of 18 August 2016, Dr Macfarlane advised that the claimant believed that her work situation was materially affecting her health and was not keen to return unless there were changes made.

5.74 By letter of 24 August 2016 (R1/1590T), Ms Persand confirmed it would not be possible to minimise the claimant's contact with Mr Alonzo. She asked whether the claimant was willing to return in her role as compliance manager reporting to Mr Alonzo, and if so when she would return.

5.75 In the same letter, Ms Persand referred to the possibility of mediation between the claimant and Mr Alonzo. She also sent the claimant information about vacant roles, albeit she considered none of them suitable. The claimant did not respond.

5.76 On 7 September 2016, Ms Persand gave further instructions to Dr Macfarlane to consider whether the claimant may be fit to return to work in the current team, and to report on the claimant's attitude to mediation.

5.77 On 15 September 2016, Ms Persand informed the claimant that her entitlement to enhanced sick pay would expire on 11 October 2016 (R1/1614). The claimant responded saying that she would wish to use her outstanding holiday. We need not consider the detail of this.

5.78 On 5 October 2016, Dr McFarlane reported that the claimant did not feel able to return to work or participate in mediation. He stated he would refer her to a specialist psychiatrist. He reported the claimant remained angry about the work situation. He remained hopeful that the claimant would, following the psychiatric appointment, be able to participate in mediation.

5.79 Ms Persand wrote to the claimant on 11 October 2016 (R1/1637) and noted the claimant felt unable to return to work. She confirmed that support would be provided by way of a phased return, but it would not be possible to minimise contact with Mr Alonzo. Mediation was again referred to. The claimant was asked whether she would participate. Ms Persand also stated that if no solution, via mediation or alternative employment was forthcoming, given the claimant's relatively short service, the bank may consider terminating her employment.

5.80 On 13 October 2016, the claimant replied stating she had been signed off until 24 November 2016. She had met with the psychiatrist on 12 October 2016, and would meet again on 15 October 2016. She did not address the questions concerning mediation.

5.81 By letter of 19 October 2016, Ms Persand confirmed that the matter would be considered again after the expiry of the current sickness certificate. She reiterated the need to consider return on a phased basis and to commit to mediation if termination was to be avoided.

5.82 On 25 October 2016, Ms Persand started the process of obtaining cover for the claimant's position. This led to the appointment of Mr Ian Tostevin as a contractor; he started on 14 November 2016, as temporary cover, with a notice period of one week. He was subsequently appointed as a permanent employee, during the process of dismissing the claimant.

5.83 On 23 November 2016, Ms Persand received Dr McFarlane's latest report (R1/1660). He indicated that she was improving gradually and may be fit to return in January 2017. He confirmed the claimant was not currently fit to participate in mediation, but may do so in the future.

5.84 The claimant was then signed off until 24 January 2017.

5.85 Ms Persand then discussed the matter with Mr Raashad Amin, who by that time had become the new CEO of the London branch, (replacing Mr Steele-Bodger, the previous head of private banking).

5.86 Mr Amin had considered, and approved, Ms Persand's correspondence with the claimant, from at least 19 October 2016. He considered all the relevant occupational health reports reviewed all correspondence. He directed and agreed the course of action with Ms Persand.

5.87 Mr Amin took the decision to dismiss the claimant and wrote to her on 29 November 2016, indicating he believed that dismissal would be appropriate. He sets out his reasons at paragraph 21 of his statement as follows:

> **…(a) by the end of January 2017, she would have been employed by the Bank for 19 months and yet been off work sick for 10 of those 19 months;**
>
> **(b) the compliance team needed additional support and we needed to have a permanent employee in situ in the compliance manager role. Whilst we had engaged a temporary contractor, there tends to be a greater risk that contractors will leave for some other assignment. We therefore wanted to have a permanent employee in the role, given they would hopefully be focussed on staying longer term (and indeed would, for example, also be on a longer notice period);**
>
> **(c) given there were also significant performance issues in relation to her work and disciplinary proceedings were still open, the Bank did not feel it would be reasonable to wait any longer for her return to work (or to keep her in employment solely so she could, for example, receive group income protection).**

5.88 He confirmed that whilst he believed termination would be necessary, he wanted to give the claimant an opportunity to submit any written representations she wanted him to consider before he reached a final decision. He requested a reply by 6 December 2016. He asked the claimant to confirm what her position was with regard to Mr Alonzo

5.89 The claimant replied on 2 December 2016 (R1/1666). She stated her anticipated date of return was 24 January 2017. She asserted there was no reason why a temporary replacement could not cover her absence. She denied any evidence of any significant performance issues. She alleged Mr Alonzo had a personal vendetta against and that her illness had resulted from his retaliation. She alleged Mr Alonzo wished to have dismissed. She stated she was "aghast" at being asked to confirm her position on working in Mr Alonzo's team, and that it was a reasonable adjustment to move into the risk Department.

5.90 Mr Amin then took the decision to terminate the claimant's employment. He wrote to the claimant on 7 December 2016. He confirmed that even if she were to return to work, and there was still some doubt about that, the proposed mediation process would further delay matters. He confirmed that having regard to the bank's need for a permanent person in her role, and the fact she had been absent for 8 of 17 months service, the bank could no longer wait for her return. He gave the claimant three months' notice, terminating on 7 March 2017.

5.91 The claimant was signed off sick for a further period after 24 January 2017, despite the claimant initially stating she would return on 24 January 2017.

5.92 Mr Amin reconsidered matters, but decided that the claimant had not confirmed that she would report to Mr Alonzo or enter into mediation. He considered the tone of her correspondence with Mr Alonzo and decided there was no real prospect of her accepting direction from Mr Alonzo in the future. Further, there were continuing concerns about her performance. He was concerned about the claimant's failure to cooperate with the performance development plan. He found her attendance to be exceptionally poor. He did not believe there was any real prospect of the mediation being successful. On 19 January 2017, Ms Persand wrote to the claimant setting out the bank's position as communicated by Mr Amin. The claimant did not respond.

Disability

5.93 We accept there is evidence that the claimant has fibromyalgia and since around March 2016, has had depression.

5.94 The claimant alleges that the depression became long-term in September 2016 when it was confirmed by a psychiatrist. The respondent concedes that the depression became long-term when the claimant started her sickness absence from depression in or around 25 April 2016. As the

respondent's concession is significantly more favourable than claimant's original position, we accept that the depression was a disability as from no later than 25 April 2016.

5.95 We have considered whether the fibromyalgia could also be a disability. We have limited evidence on this point. We have limited evidence as to the specific effect on day-to-day activity. We do not have sufficient evidence to demonstrate that it caused any difficulty with concentration.

The law

6.1 Direct discrimination is defined by section 13 Equality Act 2010.

> **Section 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. …**
>
> **(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B. …**

6.2 The burden of proof is found at section 136 Equality Act 2010 .

> **Section 136 Equality Act 2010 - 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.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.3 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura**

International plc [2007] IRLR 246. The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Annex

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.4 Section 15 Equality Act 2010 deals with discrimination arising from disability.

> **(1) A person (A) discriminates against a disabled person (B) if-**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

6.5 Section 20 Equality Act 2010 deals with the duty to make adjustments

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's 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.**
> **…**

6.6 Section 21 Equality Act 2010 deals with the failure to comply with the duty.

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
> **…**

6.7 Disability is defined as a physical or mental impairment which has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activity (see section 6 Equality Act 2010).

6.8 The definition of long-term is contained in schedule one, section 6 Equality Act 2010.

> **LONG-TERM EFFECTS**
>
> **2(1) The effect of an impairment is long-term if-**
>
> > **(a) it has lasted for at least 12 months,**
> > **(b) it is likely to last for at least 12 months, or**
> > **(c) it is likely to last for the rest of the life of the person affected.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.**
>
> **(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.**

> **(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.**

6.9 Section 47B Employment Rights Act 1996 provides that a worker has a right not be subject to a detriment on the ground that the worker made a protected disclosure.

> **(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**
> …

6.10 Section 103A Employment Rights Act 1996 provides that an employee who is dismissed for making a protected disclosure will be regarded as unfairly dismissed.

> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

6.11 Section 13 Employment Rights Act 1996 prohibits unauthorised deductions from wages.

> **Section 13 - Right not to suffer unauthorised deductions**
>
> **(1) An employer shall not make a deduction from wages of a worker employed by him unless--**
>
> > **(*a*) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
> > **(*b*) the worker has previously signified in writing his agreement or consent to the making of the deduction.**
>
> **(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised--**
>
> > **(*a*) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
> > **(*b*) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.**
>
> **(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion…**

Conclusions

Detriment on grounds of a protected disclosure

7.1 We first consider whether the claimant has been subject to a detriment done on the ground that the claimant made a protected disclosure.

7.2 The first thing to consider is whether there was a protected disclosure. The respondent concedes that the disclosure of 22 February 2016 was protected. No admissions are made as to whether the claimant's alleged disclosure of 4 April 2016 was also protected. However, we do not need to decide whether the disclosure of 4 April 2016 was a protected act, as there is no attempt by the claimant to differentiate between the effect of the disclosures of 22 February and 4 April. It is not the claimant's case that any detriment was on solely ground of the 4 April disclosure or that any detriment was done on the ground of the cumulative effect.

7.3 The most favourable position for the claimant is to assume that an alleged disclosure did contain information that was protected as it concerned potential breach of regulations. For the purpose of this analysis, therefore, we will assume that there were protected disclosures of information on 4 April 2016.

7.4 We must now consider the detriments. We must first consider whether the alleged acts actually occurred. If they did occur, it is necessary to consider whether the acts were detrimental. If they were detrimental, we need to consider whether the causational link is made out: was the alleged detrimental treatment on the ground of a protected act. We will consider each detriment in turn.

Allegation 1: the decision not to award C bonus in respect of the year ending 30 June 2016 [ET1, paras 19, 30(i); ET3, paras 4-5, 8-9].

7.5 This concerns the bonus for the year ending December 2015, which would have become payable on 30 June 2016. The respondent had a pre-existing policy which was set out clearly in its documentation. It is not necessary for us to determine whether this was also part of the claimant's contract. The policy made it clear that when an individual receives an overall grade U following an appraisal that individual would not qualify for any bonus.

7.6 The claimant received a U rating for the appropriate period. That grade was decided, and given, before the claimant made any protected disclosure. It was that grade which disqualified the claimant from receiving the bonus.

7.7 It may be possible to argue that the grade was given on grounds of the disclosure. However, the decision concerning the claimant's grade occurred significantly prior to the disclosure. There has been some suggestion from the claimant that this was some sort of pre-emptive retaliation. That argument is founded on an assertion that there was no problem with the claimant's general performance and attitude. That argument is unsustainable. Mr Alonzo has given clear and cogent evidence demonstrating the fact that he had significant concerns about the claimant's performance, from at least August 2015. We reject the

claimant's evidence that Mr Alonzo did not discuss his concerns with her. It is clear that he did. It is clear that it was his general concern about her poor performance which led to the U grade.

7.8 The refusal to award the claimant bonus had nothing to do with any protected disclosure.

Allegation 2: the decision to give C a "U" performance rating (the lowest) of which she was informed on 4 March 2016.

7.9 We accept the claimant was informed of the decision to give her a grade U on 4 March 2016. However, this was the outcome of a long process. The process involved setting objectives, and thereafter a number of meetings. Provisional grades were given by Mr Alonzo and were reviewed by the calibration team, all prior to the first disclosure.

7.10 As noted above, Mr Alonzo based his view on the available evidence. It is clear that he had significant concerns about the claimant's ability and her behaviour. He had proper grounds for the scores given. The reason the claimant received a grade U is because that properly reflected her performance. It was not on ground of any disclosure.

Allegation 3: the decision to reject C's appeal against her bonus and rating on 11 March 2016.

7.11 The appeal against the bonus was rejected by Mr Steele-Bodger. Mr Steele-Bodger understood that it was the bank's policy that when an individual received a U grade during the appraisal, no bonus would be payable. He considered in detail the basis for giving the U grade, and he reviewed the available evidence. He undertook specific enquiries. He had legitimate and appropriate grounds for accepting that the appraisal grade was appropriate. He refused to interfere with the grade, because there was clear evidence that it was appropriate. The inevitable result was that she would not receive a bonus. His decision was not on the ground of a protected disclosure.

Allegation 4: Ms Persand attempting to start a performance management process for C on 18 May 2016.

7.12 The respondent has a clear policy that the giving of a U grade will lead to a performance management process. There is no specific basis for suspending that process during any appeal. In any event, the claimant did appeal the grade. Mr Steele-Bodger upheld the original grade. The policy then dictated that performance management should result.

7.13 The claimant did not want to participate, as she did not accept that the grade was appropriate. Ms Persand needed to move matters forward. The reason for proceeding with performance management was because it was a necessary part of the policy and was clearly warranted. She waited till after the appeal finding. It had nothing to do with the protected disclosure.

Allegation 5: the refusal by Ms Persand and Mr Steele Bodger on or about 19 May 2016 to engage with C's unresolved dispute of her rating/bonus.

7.14 It is clear that when the claimant returned to work, she wished to continue the debate about her performance rating and the bonus. In an email on 19 May 2016, Ms Persand made it clear that the process had finished. The grade had been decided, and it had been reviewed by the calibration team. The claimant appealed. The appeal was unsuccessful. Ms Persand was entitled to take the view that the matter was at an end and engage no further. There was no reason for Mr Steele-Bodger to act further. His role in this process was completed. This was not a detriment on ground of a protected disclosure.

Allegation 6: the rejection of C's grievance by Mr Steele-Bodger against David Alonzo and Aran Thamotheran on 16 May 2016.

7.15 Mr Steele-Bodger considered the grievance. He sought evidence from the claimant and other relevant individuals. He considered whether the factual circumstances alleged were made out. He was entitled to conclude that the claimant had not established the factual basis of her grievance. He was entitled to conclude that the claimant's grievance was not substantiated. He rejected the claimant's grievance because he had investigated it adequately, considered the relevant evidence, and found no evidence in support. He did not reject kit on the ground of the protected disclosure. The protected disclosure played no part in his decision.

Allegation 7: the decision to invite C to attend a disciplinary hearing (confirmed by letter dated 23 May 2016) [ET1, paras 28, 30(ii), ET3, para 24].

7.16 The claimant was invited to attend a disciplinary hearing by letter of 23 May 2016. The specific allegations relied on were set out in that letter. We have considered them in our finding of fact. At the time the claimant was requested to attend the disciplinary meeting, there was clear, ample, prima facie evidence that her behaviour was inappropriate. There was clear evidence that she had been rude in emails. There was clear evidence she been rude in person. There was clear evidence that she did not want to engage with Mr Alonzo and hence accept legitimate management instructions. Disciplinary proceedings were instigated because there was clear evidence that the claimant was behaving inappropriately.

7.17 The claimant believes her behaviour was appropriate largely because she takes the view that she was being treated badly in relation to the grade she received and the refusal to pay her bonus. However, her dissatisfaction with the way she had been treated tells us nothing about the respondent's reason for starting the disciplinary process. We find that the disciplinary process was not on the ground of any protected disclosure. It had nothing to do with any protected disclosure.

<u>Dismissal section 103A Employment Rights Act 1996</u>

7.18 We next consider the 103A claim. It is clear the claimant was dismissed. The claimant has established the fact of dismissal and the fact of protected disclosure. The claimant was not employed long enough to bring a claim of ordinary unfair dismissal. Therefore, she has more than an evidential burden. It is arguable that the bare facts of dismissal and disclosure are not enough to establish any prima facie case. However, this is a case where the respondent has run a positive case based on its reason to dismiss. For the reasons we will come to we have found that the respondent has shown its reason and so we do not need to wrestle further with the burden of proof.

7.19 We must decide the reason for the dismissal.

7.20 We find that the primary reason for the claimant's dismissal was her sickness absence. When deciding to dismiss, Mr Amin took into account the relevant surrounding circumstances. He decided that the respondent needed to cover her role and that it was unsatisfactory to continue the temporary contract indefinitely. He was aware that the claimant was not engaging with the process of mediation. He believed there was no reasonable prospect of the claimant returning to work within a reasonable period. He envisaged difficulties if she did return, as she was not engaging with the process of mediation and was refusing to work with Mr Alonzo. He was concerned there would be further delays during the disciplinary process. He believed there was no prospect of her returning to work with Mr Alonzo. There were no other jobs identified that she could do.

7.21 It follows there were key elements in his thought process: her continued long term absence; there was no firm date for her return; the absence could continue indefinitely; there was no reasonable prospect of her returning to work within the department under the supervision of Mr Alonzo; and there was no reasonable prospect of working in any other position. He therefore dismissed.

7.22 The claimant did, during her notice indicate she may return. He reviewed the position, but it did not materially alter the circumstances as he understood them. It did not alter his reason for dismissal.

7.23 It follows we cannot say that the sole or principal reason for dismissal was any protected disclosure. The respondent's reason for dismissal had nothing to do with protected disclosures. The 103A claim fails.

<u>Disability</u>

7.24 We accept that the claimant was disabled by reason of her depression. That much has been conceded. For the purpose of analysing the discrimination claims, we assume that the fibromyalgia had the physical effects as described by the claimant. We do not need to do resolve, finally, whether it was a disability. Having regard to the analysis below, nothing turns on it.

Reasonable adjustments

7.25 The claimant alleges the provision criterion or practice was the retaliation for the protected disclosures. We have considered each of the allegations said to amount to retaliation and we have found that none was retaliation for a protected disclosure.

7.26 It is the claimant's case that it was the process of retaliation which caused her substantial disadvantage, namely a worsening of her mental health. As there was no retaliation, any worsening of her mental health did not arise from the alleged provision criterion or practice.

7.27 We have considered whether the provision criterion or practice can survive, absent a reference to retaliation. It may be possible to argue that the failure to give a bonus is a provision criterion or practice. However, once the reference to retaliation is removed from the provision criterion or practice, this creates a fundamental difficulty. A non-disabled person who performed as poorly as the claimant would also have received a grade U, and would have had the disadvantage of not receiving a bonus. That said, the disadvantage alleged by the claimant is not the receipt of the U grade, or the failure to receive the bonus (both of which lie at the heart of each of the alleged detriments), the disadvantage is alleged to be the way the retaliation worsened her mental condition. The disadvantage as alleged is contingent on a finding of retaliation. Any provision criterion or practice based on the allegations, without reference to the element of retaliation, does not produce the disadvantage alleged.

7.28 The adjustment envisaged by the claimant is removing her from the team so that she was no longer under the supervision of Mr Alonzo. We have found that any duty to make reasonable adjustments cannot engage in the way envisaged by the claimant. The provision criterion or practice is not made out. The substantial disadvantage is not made out.

7.29 It follows that the adjustment, namely removing her from the line management of Mr Alonzo, could not reduce a substantial disadvantage caused by a provision criterion or practice. It follows that it is not an action that it was reasonable for them to have to take.

7.30 The claimant is a disabled person. She did not want to be managed by Mr Alonzo. That does not give her an automatic right to any adjustment. The adjustment must be one which reduces a true disadvantage caused by a provision criterion or practice. Here the provision criterion or practice envisaged by the claimant is not made out.

7.31 It is clear that the respondent did recognise the claimant was disabled and did seek to make adjustments to enable her to return to work. She was offered a phased return to work. She was offered mediation. These were designed, first, to bring her back into the working environment and second, to deal with her concerns about Mr Alonzo. The claimant failed to agree to

those adjustments; she appeared unable to recognise that the respondent was seeking a solution.

Direct discrimination

7.32 In order to succeed on direct discrimination, there must be facts from which we could conclude that the reason for dismissal was because of the claimant's disability. We do not need to consider in detail the reverse burden of proof. The respondent has advanced an explanation which we have accepted. The reason for dismissal was as set out above. It was the claimant's sickness absence which led directly to the dismissal coupled with the fact that there was no reasonable prospect of her returning to undertake her current role. This was not in any sense at all because of the disability.

Discrimination arising from disability

7.33 There can be no doubt that the dismissal is unfavourable treatment. We have already considered the reason for dismissal. A substantial part of the reason for dismissal was the disability-related absence. It follows that discrimination arising from disability is made out, subject to the justification defence. We must consider whether the dismissal was a proportionate means of achieving a legitimate end.

7.34 The aim is clear. The aim was to provide an effective, efficient compliance team to perform relevant compliance duties. There is no doubt that is a legitimate aim.

7.35 The means adopted was the appointment of a full-time permanent member of staff to undertake the compliance role, which involved dismissing the claimant. This means, the appointment a new person, achieved the aim.

7.36 Was it proportionate? The discriminatory effect is significant. The effect is the claimant loses her job directly as a result of her sickness related absence. It is that discrimination we must balance against what we determine are the reasonable needs of the employer.

7.37 We have considered the needs of the employer. There was a clear need to have an individual working within the compliance team as compliance manager. There was a need for consistency and this involved, as far as practicable, employing someone who would stay long-term and be committed to the role. The role would be best performed by someone who could build up relevant expertise and knowledge of the business. That person should be able to liaise with the team and accept management from Mr Alonzo. Having a permanent employee would decrease the risk of an individual leaving suddenly. It is clear that there are good reasons for employing a permanent employee capable of working in the team.

7.38 The claimant was absent. It was possible that she would not return at all. Whilst there was a possibility that she may return in January 2017, it was also possible that she would not return. The claimant had failed to confirm

she would enter into mediation. She had made it clear she no longer wished to work with Mr Alonzo. There was clear evidence that there was little or no prospect of any mediation which would lead to the claimant accepting line management from Mr Alonzo again.

7.39 It is clear that the relationship of mutual trust and confidence had broken down. The respondent did all that was reasonable to salvage the situation. The respondent's reasonable attempts failed because the claimant would not engage. In the circumstances, it was proportionate to employ the means of dismissal and the appointment of a replacement. The claim of discrimination arising from disability fails.

Wages

7.40 The claim for unlawful deduction from wages fails because the discretionary bonus was never payable. We have already considered this. The fact the claimant received a grade U in her appraisal disqualified her from receiving a bonus. As no bonus was due, there can be no unlawful deduction from wages.

Other points

7.41 For the reasons we have given, we do not need to decide, finally, whether fibromyalgia was a disability. Nothing turns on it.

7.42 Further, we do not have to decide whether the 4 April 2016 email was a disclosure which was protected. It is clear that no detriment was on the ground of that alleged disclosure or as a result of it being one of a number of disclosures.

7.43 For the reasons we have given all claims fail.

Employment Judge Hodgson
21 July 2017