# EMPLOYMENT TRIBUNALS

**Claimant:** Samantha Walker

**Respondents:** 1. Co-operative Group Limited
2. Richard Pennycook

**HELD AT:** Manchester **ON:** 13-17 August 2018
20-24 August 2018
28-31 August 2018
(in Chambers)
8 and 9 October 2018
(in Chambers)
26 October 2018
(in Chambers)

**BEFORE:** Employment Judge Sherratt
Ms L Atkinson
Mr W Haydock

**REPRESENTATION:**

**Claimant:** Mr Simon Devonshire, one of Her Majesty's Counsel
**Respondents:** Mr Andrew Burns, one of Her Majesty's Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the first respondent.

2. The claimant's work was, from a date to be determined, equal to that of her named comparators having been rated as equivalent in a job evaluation study. The defence of material factor fails.

3. The respondents directly discriminated against the claimant on the ground of sex in relation to the decision to grade the claimant's performance as only "partially achieved" for 2015 without an adequate year end appraisal.

4. All other claims are dismissed against both respondents.

# REASONS

## Introduction

1. The claimant was employed by the first respondent from 25 March 2013 until her period of notice expired on 4 April 2017. She brings claims under the Employment Rights Act 1996 and the Equality Act 2010.

2. The claimant is associated with a person acknowledged by the respondent to be a person with a disability for the purposes of section 6 of the Equality Act 2010. This person will be referred to as "the associated disabled person" and not by name.

3. The agreed List of Issues for determination by the Tribunal is as follows:

**List of Issues**

**1.** Ordinary Unfair Dismissal/Automatic Unfair Dismissal (whistle-blowing)

a) What was the reason for the dismissal?

i) the Claimant asserts whistle-blowing (see (3) below)

ii) the Respondents assert performance and/or SOSR (see below)

Automatic Unfair Dismissal (whistle-blowing) contrary to s103A ERA 1996

b) In relation to the Claimant's whistle-blowing complaint:

i) Did the Claimant make any disclosure(s) which amounted to a protected disclosure (as defined by s43A ERA) during her employment as alleged?
The Claimant alleges she made protected disclosures about gender based inequalities in pay to the Second Respondent (i) in or about mid-November 2015 (Amended ET1 para 9), (ii) on or about 17 December 2015 (Amended ET1 para 9B), and (iii) on or about 12 January 2016 (Amended ET1 para 10).

ii) If the Tribunal finds that the Claimant did make any such disclosure(s), was the reason or principal reason for the Claimant's dismissal that she made a protected disclosure?

Ordinary unfair dismissal contrary to s98 ERA 1996

c) If the reason was performance and/or SOSR:

i) Was the reason a potentially fair one within the meaning of s98 ERA?

ii) Did the First Respondent act reasonably in treating that reason as a sufficient reason to dismiss the Claimant?

iii) Was the dismissal of the Claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses?

Compensation*

d) If the Tribunal finds that the Claimant was unfairly dismissed, is it just and equitable to award any compensation in the circumstances and, if so, in what amount?

e) It is accepted that the First Respondent failed to comply with the ACAS Code in respect of the Claimant's dismissal. Should the Claimant's compensation be enhanced on that ground (and if so by what amount)?

f) Should any compensation awarded be reduced on the following grounds and, if so, by what percentage:

i) Did the Claimant's conduct contribute to or cause her dismissal?

ii) Can the Respondents show that following a fair procedure would have made no difference to the decision to dismiss the Claimant?

iii) To what extent has the Claimant mitigated her losses?

**2.** Equal Pay

Rated as Equivalent

a) Has the First Respondent carried out a job evaluation study in relation to the Claimant's and her comparators roles within the meaning of s65(4) and s80(5) Equality Act 2010? Specifically, was the review carried out by Hay Group in 2014 a valid job evaluation study of those roles for those purposes?

b) If so, the job evaluation study gave the Claimant's job an equivalent rating to that of her comparators who were paid more. The Claimant relies on Nick Folland and/or Alistair Asher as her comparators.

Work of equal value**

c) If there was no job evaluation study applying to the Claimant and/or her comparators for the whole or part of the period covered by the claim, did the Claimant's role involve work of equal value to that of her comparators?

Genuine Material Factor Defence

d) If so, in either case, is any difference in pay due to a genuine material factor which is not directly or indirectly discriminatory?

e) If relevant (i.e. if the Claimant alleges and proves any genuine material

factor has a disparate adverse impact on women), is the difference in treatment objectively justified?

Remedy*

f) If not, is the Claimant entitled to:

i) a declaration she is entitled to equal pay and benefits?

ii) arrears of pay (including bonus) and, if so, in respect of what period and in what amount?

iii) an award of damages?

**3.** Whistle-blowing detriments contrary to s47B ERA 1996

a) If the Tribunal finds that the Claimant made any protected disclosures, does the Tribunal have jurisdiction to hear all parts of this complaint? The Respondents submit not: some parts out of time. The Claimant submits yes: continuing act/alternatively Tribunal should extend time (if necessary).

b) To the extent the Tribunal has jurisdiction, did the Claimant suffer any detriment(s) on the grounds she made a protected disclosure? The Claimant alleges the following detriments which the Respondents deny:

i) The Second Respondent's failure to engage with the equal pay issues the claimant raised and the suggestion instead she move jobs;

ii) The Second Respondent's attempts to reduce and/or marginalise the Claimant's role and/or remove the Claimant from the Executive;

iii) The Second Respondent's decision to grade the Claimant's performance as only 'partially achieved' for 2015 resulting in a reduced bonus without an adequate year end appraisal;

iv) The refusal of the Claimant's part-time working request;

v) The decision to give the Claimant notice on 1 April 2016;

vi) The immediate announcement of the Claimant's exit and its mischaracterisation;

vii) The Second Respondent's discussions about these matters behind the Claimant's back and/or with the other (male) members of the Executive.

c) Is the Claimant entitled to compensation for: *

i) Injury to feelings?

ii) Personal injury?

iii) Financial loss? Has the Claimant mitigated any losses?

**4.** Victimisation contrary to s27 Equality Act 2010

a) If the Tribunal finds the Claimant did a protected act (the Claimant relies on the same facts cited for protected disclosures), does the Tribunal have jurisdiction to hear all parts of this complaint? The Respondents submit not: some parts lodged out of time. The Claimant says yes: continuing act/just and equitable to extend time (if necessary).

b) To the extent the Tribunal has jurisdiction, was the Claimant victimised because she did a protected act? The Claimant relies on the same detriments alleged as whistle-blowing detriments above.

c) If so, is it just and equitable to award the Claimant compensation and, if so, in what amount? (see paragraph 3(c)) *

**5.** Direct sex discrimination contrary to s.13 EqA

a) Does the Tribunal have jurisdiction to hear all parts of this complaint? The Respondents submit not: some parts lodged out of time. The Claimant says yes: continuing act/just and equitable to extend time (if necessary).

b) To the extent the Tribunal has jurisdiction, was the Claimant treated less favourably than a man? The Claimant relies on:

i) the same treatment she alleges constitutes whistleblowing detriments above;

ii) the decision to give the Claimant notice of termination of and the termination of her employment.

c) If so, was the reason for that unfavourable treatment because of the Claimant's sex?

d) For the purpose of these claims, the Claimant relies on:-

i) A hypothetical comparator, in respect of detriments 3(b) (i), (ii) and (vi) above;

ii) A hypothetical comparator and/or Messrs Folland, Asher, Bulmer and Murrells (male colleagues on the EC) in respect of the detriments set out in paragraphs 3(b) (iii) & (v) and 4(b)(ii) above;

iii) A hypothetical comparator and/or Mr Roberts (identified in ET1 para 22.3), in respect of the refusal to review the Claimant’s rating;

iv) A hypothetical comparator in respect of the refusal of the Claimant’s part-time working request (para 3(b)(iv) above), although the Claimant will draw evidential comparison with the positions of the Second Respondent and Mr Bracken (as set out in ET1 para 22.2);

v) A hypothetical comparator in respect of the detriments set out in paras 3(b)(vi) and (vii) above, although the Claimant will draw evidential comparison with the position of Mr Folland.

e) If the claim is well founded, is it just and equitable to award the Claimant compensation and, if so, in what amount (see paragraph 3(c))? *

~~**6.** Indirect sex discrimination contrary to s19 Equality Act 2010~~

a) ~~Does the Tribunal have jurisdiction to hear this complaint? The Respondents submit not: lodged out of time. The Claimant says yes: continuing act/just and equitable to extend time (if necessary).~~

b) ~~If so, did the Respondents apply a PCP? If so, what was that PCP?~~

~~The Claimant asserts it was that the role of CHRO can only be undertaken on a full-time basis with normal holidays.~~

c) ~~Did that PCP put women at a particular disadvantage compared to men?~~

d) ~~Did that PCP put the Claimant at that particular disadvantage?~~

e) ~~If so, can the Respondents justify the PCP by showing it to be a proportionate means of achieving a legitimate aim?~~

f) ~~If not, is it just and equitable to award the Claimant compensation and, if so, in what amount? (see paragraph 3(c)) *~~

~~**7.** Associative indirect disability discrimination contrary to s19 Equality Act 2010~~

a) ~~Does the Tribunal have jurisdiction to hear this complaint? The Respondents submit not on the basis that:~~

i) ~~it was lodged out of time; and/or~~

ii) ~~a claim for associative discrimination cannot be brought under s19 Equality Act 2010.~~

~~NB: The Respondents do not dispute that the Claimant's daughter has a disability within the meaning of the Equality Act 2010. So far as necessary on the time point, the Claimant will say on continuing act/just and equitable to extend time (if necessary).~~

b) ~~If so, did the Respondents apply a PCP? If so, what was that PCP?~~

~~The Claimant asserts it was that the role of CHRO can only be undertaken on a full-time basis with normal holidays.~~

c) ~~Did that PCP put those with primary care responsibilities for disabled children at a particular disadvantage compared to those without disabled children?~~

d) ~~Did that PCP put the Claimant to that particular disadvantage?~~

e) ~~If so, can the Respondents justify the PCP by showing it to be a proportionate means of achieving a legitimate aim?~~

f) ~~If not, is it just and equitable to award the Claimant compensation and, if so, in what amount? (see paragraph 3(c)) *~~

**8.** Associative discrimination arising from disability contrary to s15 Equality Act 2010

a) Does the Tribunal have jurisdiction to hear this complaint? The Respondents submit not on the basis that:

i) it was lodged out of time; and/or

ii) a claim for associative discrimination cannot be brought under s15 Equality Act 2010.

So far as necessary on the time point, the Claimant will say yes; on basis of continuing act/just and equitable to extend time (if necessary);

b) If so, was the Claimant treated unfavourably <u>when she was given notice of termination of her employment</u>. because of something arising in consequence of the Claimant's disability?

c) If so, was that treatment a proportionate means of achieving a legitimate aim?

d) If not, is it just and equitable to award the Claimant compensation and, if so, in what amount? (see paragraph 3(c)). *

* To be determined at a separate remedy hearing if required

**Only to be considered at a separate hearing if rated as equivalent claim fails and/or in respect of the period prior to the equivalency rating (unless otherwise conceded)

(The list was not amended following the first respondent conceding “ordinary” unfair dismissal. The items ~~struck through~~ were withdrawn or <u>clarified</u> by the claimant's counsel at the end of the evidence.)

**The Evidence**

4. The claimant gave evidence on her own behalf and called Julia Davenport. The respondent accepted the evidence of the claimant’s second witness, Karen Speakman, who was not called before the Tribunal for cross examination.

5. Evidence for the respondent was given by Richard Pennycook, Gary Dewin, Rod Bulmer, Helen Webb, Ursula Lidbetter, Pippa Wicks and Stevie Spring.

6. The Tribunal was presented with ten lever arch files containing in the region of 3.500 pages the majority of which were not referred to.

**Findings of Fact**

7. The Tribunal has received evidence on many issues but for the purposes of finding facts relating to the claims of unfair dismissal, detriment and discrimination we shall only make findings in relation to the matters which we consider to be relevant. There will be some duplication under different headings. Some of the other

matters referred to may become relevant depending upon the conclusions reached at the liability stage.

The Equal Pay Claim

8. The claimant was appointed Director – Group HR Strategic Projects by the first respondent on 25 March 2013 at a salary of £190,000 and a guaranteed bonus of £50,000.

9. At the end of 2013 the claimant was given a performance rating of "outstanding".

10. Following the unexpected departure of Rebecca Skitt in February 2014 Euan Sutherland, the then Group Chief Executive, invited the claimant to step up to the role of Group Chief HR Officer at a base salary of £500,000.

11. The Group Remuneration and Appointments Committee ("Remco") met on 26 February 2014 at which the Group Chief Executive explained the background to his proposed changes to his executive team. The committee, in accordance with the rules, were invited to confirm the proposed appointments prior to any announcements being made.

12. There was a paper setting out detailed proposals in relation to remuneration for the new executive team. The Group Executive Remuneration Report was not considered at that meeting but at a subsequent meeting held on Tuesday 4 March 2014.

13. In the paper concerning Executive Structure and Remuneration prepared by Euan Sutherland in February 2014 he set out the background involving recent changes to the Executive where a number of people had stepped down, and the new Executive structure going forward was set out.

14. Chief Operating Officer was to be Richard Pennycook. CEO Retail was to be Steve Murrells. CEO Consumer Services was to be Rod Bulmer. Group General Counsel was to be Alistair Asher. Chief External Affairs Officer was to be Nick Folland. Chief Strategy Planning Officer was to be Paula Kerrigan. Chief HR Officer was to be Sam(antha) Walker.

15. The executive remuneration proposal was stated to be based upon the need of the Co-operative Group for an executive team with the potential to deliver the critical transformation. The proposed remuneration structures underpinned the changes to the executive team by creating "one team" and addressing inconsistencies. The executive agenda was said to be possibly the most complex one facing a large business in the country at that time involving fixing a business on the verge of financial collapse, turning around the food business after years of neglect, re-forming a membership system that was faltering from a fundamental disconnect, effecting a major governance change, rediscovering the purpose of the mutual sector's largest contributor, redefining the social goals agenda to create a forceful campaigning organisation, balancing the highly sensitive political agenda across all of Westminster, removing the taint of scandal and refreshing an iconic national brand. The objectives of the remuneration proposals were:

- Retention of continuing executives through the transformation period (the next 3-4 years);
- Reflection of increased roles and responsibilities in the remuneration packages where appropriate;
- Standardisation of the packages and terms for new executives;
- Bringing consistency to executive packages and contractual terms.

16. There was a reference to members of the executive being in tiers from 1-4. In particular there was a reference to "pay at or above upper quartile base salary to bring total remuneration in line with market, due to the low variable pay. Within tiers 3 and 4, the base salaries for Steven Murrells, Nick Folland and Alistair Asher are already above upper quartile, therefore the committee is asked to consider treating the new entrants to tiers 3 and 4 in the same manner and approve base salaries of at or above upper quartile. In order to align total remuneration for the executives within tiers 3 and 4 with market, the committee could approve a fixed 'allowance' which increases that individual's package to compensate for the low variable pay opportunities".

17. As to those tiers, tier 1 was for the Chief Executive Officer, tier 2 for the Chief Operating Officer, tier 3 for the Divisional Chief Executives and tier 4 for the other executives who were Nick Folland, Alistair Asher, Sam Walker and Paula Kerrigan.

18. It was proposed that base salary ranges apply to the tiers to ensure consistency and for the purposes of this judgment the only relevant base salary range is that of tier 4, which was suggested to be from £500,000 to £650,000.

19. The paper went on to give details of current packages and how it compared to market rates.

20. The paper set out the salaries paid and the proposed salaries under the new scheme. We are aware that as well as base salaries the individuals were entitled to annual bonus and long-term incentive plans, and for the purposes of this judgment we shall look only at the base salaries on which the other payments are calculated.

21. According to the report Nick Folland had a current base salary of £425,000 and the proposed base was £550,000.

22. Alistair Asher had a current base of £475,000 and the proposed base was £550,000.

23. Paula Kerrigan and Sam Walker each had a base salary of £215,000 and the proposed base for them was £500,000.

24. The Group Remuneration and Appointments Committee considered this report on 14 March 2014 when Mr Pennycook, who had by this time taken over as Chief Executive Officer from Mr Sutherland, said he wished to adopt the same structure as had been previously proposed by Mr Sutherland. His priority was to stabilise the executive team. He reported that Mr Sutherland had spoken to each of

the people concerned to inform them of his recommended pay increases which had given rise to expectations. Mr Pennycook was concerned that any changes to the figures communicated would further unsettle the team. He accepted that standardisation could lead to some individuals being levelled up, but in the current circumstances he considered that getting things right for the whole team was more important than getting things right for individuals.

25. The committee took immediate advice from Mr Jeremy Orbell of New Bridge Street, Remuneration Consultants, and he advised that standardisation of executive salaries based on tiered bands was not typical. The usual approach was to look at market data for individual roles.

26. From the minute, "the committee noted Richard Pennycook's views but expressed concerns about two individuals who were newly promoted into their roles for whom the proposal seemed high. After a lengthy discussion, it was agreed that in respect of the two individuals who were not yet proven at that level, the proposed band should be scaled back. To assist in determining the correct level, New Bridge Street would provide market data for the roles in question".

27. The meeting went on to consider the preferred approach of the executive to standardisation which was consistent with the one team approach. The committee requested changes to the tier 4 salary range to more appropriately reflect the experience of certain individuals. It was agreed that the tier 4 band would be revised to £350,000 - £550,000. After a lengthy discussion it was agreed that the salary for the HR Director and Strategy Director should be adjusted to £400,000 (compared with the proposed £500,000) to reflect the fact that they were both new to roles at that level.

28. After the meeting Mr Pennycook undertook discussions with the claimant and Ms Kerrigan. Ms Kerrigan was fine with a salary of £400,000 rather than the £500,000 proposed, but the claimant "pushed back a little". Thereafter the base salary level for the claimant was fixed at £425,000.

29. In the document presented to the remuneration committee there was further background information concerning the executives and it was said of Sam Walker that she "has a proven track record within the HR discipline with exceptional experience in the areas of HR strategy, culture development, organisational design and capability across both the public and private sectors including media, pharmaceuticals, utilities and FMCG".

30. As to Nick Folland he "has deep experience that will ensure that we develop and sustain the external and internal relationships that are vital to our future success and will continue to work on the reform of our membership system".

31. Alistair Asher "has more than 30 years' experience in the legal industry. He was formerly a senior partner with one of the top five legal firms and played a significant role in the design of the business model that ultimately saved the bank from resolution".

32. Paula Kerrigan was said to be "a commercially orientated strategy and finance senior executive; achieving particular success in establishing start-up operations,

integrating acquisitions, implementing control and monitoring processes and developing businesses into mature structured organisations".

33. Nick Folland joined the first respondent in March 2013 as Group Director of External Affairs. His offer letter referred to a basic salary of £350,000 per annum and the role offered to him was Group Director – Government Relations.

34. At the Group Remuneration and Appointments Committee meeting on 18 July 2013 the committee noted that Nick Folland had been appointed in May 2013 as Group Director of External Affairs at a salary of £350,000. It was now planned to expand this role to include being the Executive Director of the Group Chief Executive's Office. Furthermore, the role would be responsible for social goals which until recently had been part of the former Corporate Relations function. Accordingly, it was proposed to increase Nick Folland's base salary to £425,000 to recognise the increased size of role and additional responsibilities.

35. Reference has been made above to the remuneration paper prepared in February 2014 in which Nick Folland was to become Chief External Affairs Officer with responsibility for external affairs, public relations, external and internal communications, membership, social purpose and goals. His salary was proposed and agreed at £550,000.

36. Alistair Asher was recruited to join the first respondent in July 2013 as General Counsel at the height of the crisis in the bank. A paper was prepared outlining his proposed appointment. There was the need to strengthen the leadership of the legal function and a need for Group General Counsel with obvious credentials and immediate credibility. Alistair Asher was said to have over 30 years of experience of a wide range of commercial and corporate finance transactions including public takeovers, private acquisitions and disposals, joint ventures, equity issues, refinancing and restructurings. He had a large number of regular blue chip clients. He was said to be a solicitor and a plateau partner in a "magic circle" law firm with a total compensation rate of £1.5million. The salary to be offered to him was £475,000 but with guaranteed bonuses and eligibility to participate in the long-term incentive plan it was thought that he would almost reach his previous remuneration figure.

37. The Group Remuneration and Appointments Committee agreed his appointment in June 2013.

38. The proposal to increase his base salary to £550,000 in the February 2014 report was approved by the Remuneration Committee.

39. The Tribunal heard the evidence of Ursula Lidbetter who was a member of the Group Remuneration and Appointments Committee at the relevant time. She explained that the decision to adjust the salaries of the claimant and Paula Kerrigan down from £500,000 was because:

> "There were varying levels of skill and experience within the executive team. Both Sam and Paula were newly promoted to the executive and unproven at that level, unlike everyone else on the team at that time. The proposed increase from £215,000 to £500,000 seemed excessive for individuals who

had no experience at executive level. We did not feel there was any justification for more than doubling their salaries in those circumstances. In relation to Sam, she had been appointed to the role without any normal recruitment process and no real assessment of her suitability. I was also conscious that the proposed increase in base salary was overlaid with the more generous executive terms on bonus and LTIP which, in effect, meant that Sam's total remuneration package would be increasing from approximately £450,000 to £1.5million (i.e. a base salary of £500,000, guaranteed bonus of 1 x salary and LTIP participation equal to 1 x salary). Although all of the proposed remuneration packages were high, we had experience of other members of the executive team and knew what they were capable of. My early observations of Sam were that she was not operating at the same level as others on the team. Given their inexperience at executive level, the proposals for Sam and Paula stood out as being excessive. We had already faced the Bank crisis and were in the midst of a governance crisis. Euan's resignation was another crisis point. It was a very difficult situation. We had some excellent executives who were bewildered by what was going on. We were facing a whole host of issues. It was so important at that moment that we gained some stability. Any more change at that stage was not what was required. Regardless of whether in calmer times you might have said 'this is not ideal', we absolutely had to maintain stability and the top team of people and support our interim CEO. At that time, it wasn't overtly talked about but Co-op's reputation was so poor that it was likely to be extremely difficult to recruit high quality external candidates. We needed continuity and we had to retain the team we had. The priority was stability, putting forward a positive front and delivering the message that everything was under control. Alistair and Nick, the other two individuals in tier 4, were still vital to the Co-op's survival as they were not just doing their day jobs. At this point, Alistair was leading the Bank separation and sitting on the Bank's Board. He was heavily involved in the secondary capitalisation of the Bank and the governance reforms. Nick had taken on responsibility for membership and was at the heart of the highly controversial and fiercely opposed governance reforms which were causing massive upheaval in the boardroom. There was a significant difference between the additional roles that Alistair and Nick were doing and what Sam and Paula were doing. Sam and Paula were not playing that crucial role in the rescue phase. I was and still am satisfied that it was entirely appropriate for Alistair and Nick to be paid that much more than Sam and Paula relatively speaking, given the additional critical roles they were performing at the time and the experience they brought with them. I did not and still do not see any justification for paying Sam at the same level as Alistair or Nick at that time, particularly given her inexperience at executive level."

40. In cross examination Ms Lidbetter confirmed that the remuneration committee had not taken any advice on discrimination issues and/or equal pay.

41. In July 2014 the Co-op Group invited proposals to support the development of group wide grading structure. The Hay Group was appointed to carry out the work. Jamie Davidson, who managed the grading review carried out by Hay together with a colleague, gave evidence and confirmed that the purpose of the project was to

develop a group wide grading structure to introduce consistent grades across all of the different businesses which made up the Co-op Group and which, until that point, had their own grade structures. The Co-op, he said, was anxious to implement a new structure suitable for the organisation going forward i.e. a single grading structure and reward arrangements which were suitable for all of its businesses (food, insurance, legal services and funeral care).

42. He told us that the Hay method is based on an analysis of the following three main factors:

(a) Know-how (the level of knowledge, skills and experience required for fully acceptable job performance);

(b) Problem solving (the span, complexity and level of analytical, evaluative and innovative thought required in the job); and

(c) Accountability (the discretion given to the jobholder, either to direct resources of all kinds or to influence or determine the course of events, and his/her answerability for the consequences of his/her decisions and actions).

43. The three factors outlined above are used to facilitate comparison between jobs. The factors can be broken down into eight dimensions each of which attract a score. The tool of comparison is the “step difference” principle. For example, if the difference between an element in two jobs is immediately evident and requires no consideration at all then there is probably a three-step difference or more. By contrast if, after some consideration and scrutiny, a difference can just be discerned then the difference is a one step. Each of the evaluation factors is set out on a grid with defined levels within the factors and point scores indicating job size along them.

44. One of the first activities in the project was to evaluate the most senior roles to set the ceiling for the rest of the roles in the organisation. In order to evaluate the executive team roles it was important that they accurately understood them, the accountabilities of each and the context within which they operated. They interviewed each member of the executive. This included a meeting with Richard Pennycook where they discussed the overall organisational strategy, the business context at the time and they sought his views on the relative complexities of the roles in his team.

45. Once the interviews had been undertaken they evaluated the roles using the Hay method which involved using the scales for each of the dimensions but also weighing up the roles relative to one another and referring to the evaluation scores for senior roles in organisations of a similar size and complexity.

46. The role of the Chief Executive Officer generated a score of 6512. The Chief Financial Officer was 3536. The Chief Executive Officer for Retail was 3720 and for Consumer Services was 3232. The score for the Chief HR Officer (the claimant) was 2228. The score for the General Counsel, Alistair Asher, was 1936 and for the Chief External Affairs Officer, Nick Folland, it was 1868. Paula Kerrigan was by this time no longer employed.

47. On the basis of the evidence of Mr Davidson we accept that the differences between the scores for the claimant and her comparators, the General Counsel and the Chief External Affairs Officer each had one step between them, thus the claimant's role was marked one step above that of the General Counsel and two steps above that of the Chief External Affairs Officer.

48. Following the production of these scores they were fed back to the claimant and to Mr Pennycook as part of the quality assurance process. According to Mr Davidson the claimant provided a number of comments during the meeting, including that she felt her own role may have been evaluated too highly, but they spoke to Richard Pennycook who was clear that he believed the role was at the right level relative to the others therefore the evaluation score for the claimant's role remained unchanged during the quality assurance process.

49. In respect of the work done by Hay, Mr Pennycook referred to the meeting following the conclusion of the exercise and he was encouraged to see that their evaluation of the executive confirmed they were all indeed clearly operating at an executive level:

> "Whilst their work did not reflect the totality of the roles and responsibilities some of the executive had been doing at the height of the rescue when their pay had been set and notably excluded membership from the assessment of Nick's role due to anticipated changes, this seemed irrelevant to the exercise given that they were all clearly grade A and the output would not be used for any other purpose for the executive as the Remuneration Committee had its own separate advisers on executive remuneration issues and the output from Hay was not brought to Remco's attention. I was, therefore, more interested to understand how Sam and the HR team would go about the process of dividing the remaining SMG members between grades B and C. Clearly anyone graded "C" would be sensitive to whether this would have a bearing on their overall status or reward. By way of example, grade B managers would receive higher incentive opportunities than grade C. The process of working through this, individual by individual for the B and C grades, was undertaken in the first half of 2015".

50. At the start of Mr Davidson's evidence he was asked a number of supplementary question by Mr Burns on behalf of the first respondent. With regard to the £80million change project referred to in the claimant's notes and how the exclusion of it would affect the evaluation of the claimant's role, he said his memory of the role was not such that he could say if it would make a difference but it was important enough to say that it was a factor considered in the rationale. The £80million budget was not as important as whether or not the person was leading the change programme.

<u>The first alleged protected disclosure</u>

51. According to the further particulars appended to the amended claim form, the claimant alleges that in or about mid November 2015 the claimant handed Mr Pennycook an article entitled "The rise of the Chief People Officer" and advised him that:

(1) This was the job that she felt she was doing;

(2) She would like to discuss this further as part of her year end review in December 2015;

(3) She wanted her role recognised as having at least equal value with the rest of the EC – a statement which carried the clear implication and both parties recognised as an expression of concern that Mrs Walker was the victim of unequal pay.

52. From the claimant's statement she tells us that in or around mid-November 2015 she handed Richard Pennycook an article entitled "The rise of the Chief People Officer". While she cannot remember the precise terms of their conversation she was clear as to its gist and as to the main points that she raised:

> "I explained to Richard that I was already doing the Chief People Officer role described in the article, this was something that I would like to discuss at my year end review in December, and that I wanted my role recognised as to having at least equal value with my peers on the executive. I was (of course) the only woman employed on the EC at this time. In this context, I have no doubt that Richard clearly recognised that I was asking for parity of pay with the males on the executive and was raising concern that I was the victim of unequal pay. That he had this understanding is confirmed by our discussions on 16 December 2015 which I describe below."

53. In cross examination the claimant stated that she had given Mr Pennycook the article when they were together on the ninth floor at Angel Square, Manchester. She confirmed what she had said in her statement, that she wanted the role recognised as equal to her peers. She wanted Mr Pennycook to recognise her role as having equal value. According to her he knew that what she was talking about was pay. She said she wanted to be valued. She did not use the word "victim" but she was clear that it was about pay. In doing her job she wanted to be valued and she saw it as a job of the same value as the jobs done by the guys.

54. Mr Pennycook accepts that she had shared the Chief People Officer article with him around November 2015 which made him think that she would welcome changes to her role to give her greater flexibility, which in turn would enable him to make other arrangements for the Co-op's executive HR leadership. It was an interesting article, he said, reflecting changes taking place in some other organisations where traditional HR roles were elevated to include ownership of the purpose and culture of the organisation. He pointed out the difference between traditional organisations and the Co-op, which was owned and in some respects governed by millions of members, which was not the case in normal corporate entities. He said it was clear to him that the claimant would not be suited to such an expanded role. He mentioned casually to the claimant a couple of days later they should take time to discuss her longer term career aspirations and would she be interested in an operational role? According to him she said that while an operational role could offer higher remuneration her priority was to create more flexibility in her work life balance. She explained plans to marry her partner and therefore that she would be taking on a new family. Her ideal would be to have a role where she could take all school holidays off to be with her family.

55. Mr Pennycook stated that the claimant's allegations as to discussions about the article in the context of equal pay were not an accurate reflection of the discussions. According to him the claimant did not mention anything to do with equal pay or sex discrimination when she raised the article with him, and the article did not talk about it either. She did not, according to him, complain or suggest that the Co-op was doing anything wrong or unlawful. As far as he was concerned the article was being drawn to his attention to show the claimant's future career aspirations for her HR role within the Co-op rather than raising an issue about her current role or equal pay concerns. She did not at any time suggest she was already doing a Chief People Officer role and did not ask to discuss it in her review, and did not say she wanted to be recognised or valued on the same basis as her male executive colleagues.

56. In cross examination he accepted that the claimant had shared the Chief People Officer article with him in November 2015. He did not believe she said it was what she was doing. The article makes clear that it is not the role she was doing. He read the article and thought it interesting. It was a very big role encompassing membership and the HR function. She did not say she wanted to discuss it at her year end review. She did not say she wanted her role to be valued equally with that of the other executives. No such conversation took place. When the article was handed over it was approximately four feet from his PA, and had such issues been raised he would have felt it inappropriate to talk in that forum. He would have taken the claimant to a private room. It never happened. He acknowledged that the (female) Company Secretary was paid less than the claimant but she was only part of the Executive Committee because of the rules of the organisation. Pippa Wicks was at that time a consultant rather than an employee, although fully on the Executive. Apart from those two the other executives were male. He did not recall whether or not he gave a copy of the article to Pippa Wicks but he shared it with her because he thought it was an interesting article. His discussion with the claimant about an operational role was after the article was given, but he disagreed that he raised this with her because she said she was underpaid in relation to her colleagues. The discussion of an operational role related to a discussion at the Remco meeting in October.

57. At the October Remco meeting there had been discussion about the operational roles becoming larger and the functional roles becoming smaller and he was interested to know in which way the claimant would like to proceed. He said he was hypothesising as to whether or not the claimant had the ambition for an operational role but she said "no", and that she would value more flexibility in her life.

58. Had the claimant raised the question of pay he would not have been at all concerned. He was actively encouraging the search for things that were wrong and needed to be fixed. He would not have been defensive about it but would have dealt with it appropriately by taking advice just as they did with many issues.

59. On 15 December 2015 the Guardian published an online article "Gender pay gap doubles for women over 40 in management says study", which according to the claimant drew attention to a 35% pay gap between men and women in managerial roles in the age range 46-60 with women over 40 being in the "worst affected group"

for gender based pay disparities at management levels. The claimant's partner emailed a link to the article to her on the day of publication.

60. In the respondent's further amended grounds of resistance it is denied that the claimant has made any protected disclosures or done any protected acts, or that the respondent has subjected her to any detriments on the ground of the matters alleged by the claimant to be protected disclosures and/or protected acts at paragraphs 9-11 of her claim form. Although it is accepted that the claimant had discussions with Mr Pennycook in November 2015, it is not accepted that those discussions were as described by the claimant at paragraphs 9-11 of her claim form. It is therefore not admitted that anything said by the claimant to Mr Pennycook on those occasions (or, for the avoidance of doubt, on any other occasion) amounted to a protected disclosure or protected act. It is denied that the Chief People Officer role referred to by the claimant was the same as or equivalent to her existing role of Chief Human Resources Officer. It is denied that the conversation described in paragraph 10 of the claimant's claim form took place as characterised, and that the claimant has stated to Mr Pennycook, the executive or the Remco, that the Co-op has an equal pay problem.

61. The amended response goes on to deal with all the alleged disclosures averring that:

> "In mid-November 2015 the claimant passed the Chief People Officer article to Mr Pennycook and suggested that she would like to do a new combined CHRO and Membership Director role. Mr Pennycook reflected on this suggestion overnight and thought that such a role would not work as it would be too large for the claimant and not suited to her capabilities. The next day Mr Pennycook had another conversation with the claimant and suggested that if she wanted to increase the size of her role and therefore her earnings she should consider moving to an operational role. However, the claimant said that flexibility was more important to her than money and that before long she wanted to move to a role where she could spend the totality of the school holidays with her new family. The conversation on or around 17 December while Mr Pennycook was on holiday was related to the claimant's poor performance.
>
> The claimant did not at any time suggest that she was already doing a Chief People Officer role, did not ask to discuss this new role in her review and did not mention equal value or equal pay. She did not say that she wanted to be recognised or valued on the same basis as the rest of the executive. Ms Wicks did ask the claimant for a copy of the Chief People Officer article but does not believe that the claimant gave or sent a copy of the article to Ms Wicks. The claimant did not make the first or second disclosures as alleged.
>
> Mr Dewin was not aware of the data relating to the gender split of B and C grades in the Hay grading analysis and so did not and could not have reached any conclusion about it or made the alleged comment that it was 'not looking good for the women'. He was concerned at about that time with differences of opinion over the dividing line between B and C grades but that was nothing to do with gender.

The claimant did not give Mr Pennycook any Guardian article, whether in November 2015 or on 12 January 2016 and whether entitled 'In the Boardroom' or 'Gender pay gap doubles'. His conversations with the claimant in mid-January after the claimant returned from a short absence principally concerned a race complaint made by a more junior employee about her and the high profile Tribunal claim of Ms Harmeston in which both were witnesses. The claimant did not say anything about any pay gap or mention equal pay, whether in the context of the Hay gradings or at all. She did not say that the Co-op had an equal pay problem generally or in respect of her. The claimant did not make the third disclosure as alleged."

The second alleged protected disclosure

62. It is alleged that:

"On or about 17 December 2015, Mr Pennycook called Mrs Walker from his vacation in Austria. On that occasion (as more particularly set out in paragraphs 13 and 14 below):

(i) Mr Pennycook told Mrs Walker that he did not think that Remco would authorise any more pay for her and suggested that she consider other roles such as the MD of Funeral Care or 'something' with the Legal Services business;

(ii) Mrs Walker told Mr Pennycook that she wished to be recognised and valued on the same basis as her male peers (which both parties knew and understood to be an expression of concern that she was not being paid equally to her male colleagues); and

(iii) Mrs Walker suggested that parity could be achieved in other ways than increasing her remuneration if they were resistant to this (and made the reduced hours proposal referred to below)."

63. Paragraphs 13 and 14 of the amended claim form allege that:

"13. Following the discussions referred to in paragraph 9 above Mr Pennycook telephoned Mrs Walker on or about 17 December 2015 (from his vacation in Austria) and told her that he did not think that Remco would authorise any more pay for her, and suggested that she consider other roles such as the MD of Funeral Care or 'something' with the Legal Services business. This failed to engage with the implications of the equal pay issue Mrs Walker had raised by the first disclosure seemingly because of Mr Pennycook's concern at the actual or likely attitude of Remco and/or stereotypical assumptions on his (and/or their) part about the 'value' of the HR role, traditionally seen as a role in which women predominate. 14. Mrs Walker had no wish to leave her HR role. Equally however she had no wish to become embroiled in an antagonistic dispute. She told Mr Pennycook that she wished to be recognised and valued on the same basis as her male peers and this could be achieved in other ways than increasing her remuneration if they were resistant to this. One suggestion she made was that now that Sue Tunmore had been recruited the business could recognise Mrs Walker's worth

> and value by pegging her salary but increasing her holiday entitlements (to 15 weeks in 2017, the equivalent of term time working) to accommodate her responsibilities (1) as primary carer for [the associated disabled person], and (2) as a working mother to three step-children."

64. According to the claimant's witness statement, the night before she left for the Christmas break Richard Pennycook called her from his personal mobile. The call took place on 16 December 2015 and lasted for almost 27 minutes. The call was not prearranged or diarised. She dived into a meeting room to take the call:

> "Sure enough Richard wished me Merry Christmas and said he wanted to catch me before I left for the holidays as he was cognisant of the fact that he hadn't got back to me about my concerns in respect of my pay. He said that unfortunately he didn't think Remco would approve a salary increase for the role I was doing. It was not clear whether he just thought this or that he had approached them and this is what they actually thought. He then said he assumed I wanted a longer term career in the Co-op and asked me to confirm this. I said I did. He then went on to discuss other operational roles and mentioned Funeral Care and Legal Services. I knew what he was getting at as we had discussed Legal Services and Funeral Care being merged in the future…I told Richard that while I was flattered and had that Funeral Care offer come a couple of years previously before I was CHRO I might have jumped at it, however given the journey I had been on with my team and how much we had achieved my heart was firmly in HR.

According to the claimant:

> "This seemed to stump Richard for a moment and he said he wasn't sure what else he could do. Thinking out loud I said that what if I was to go part-time like other Executive members but with no change in pay, he encouraged me to keep talking. I said that this wasn't just about me wanting a pay rise per se, it was about me wanting to be recognised and valued alongside my male peers. Richard clearly understood that I was referring to the differences in our pay. While this conversation stemmed from Richard coming back to me about the CPO article, by this time I was also aware of the Guardian article. I do not recall making specific reference to the Guardian article during this call but I may have quoted some of the contents when discussing equality of treatment with my male colleagues. I told Richard I didn't think the job could be done in part-time weeks as anything could happen with people on any day, but it could perhaps work with more holidays. I said I was going to ask for more holidays in 2016 because of my forthcoming marriage and honeymoon and had carried over one week already. Perhaps I could have another two weeks without loss of pay, making it a total of ten weeks, and ramp this up in 2017 perhaps to term time working during the last year of the rebuild strategy. This way my pro-rated pay could be equivalent to the men on the Executive Committee. I also pointed out to Richard that Sue Tunmore, who had now joined, was more than capable of covering those weeks as I had in fact reported to her whilst we were at Britvic, so I believed this to be a low risk approach. I reminded him that I had covered both Sue's HRD Service Delivery role and mine for almost two years and I was exhausted. Richard seemed

> quite excited by this and said it was a good idea. He said he would give it more thought and we would pick up again in the New Year. We both wished each other a Merry Christmas again and the call ended."

65. The claimant emailed Richard Pennycook at 15:37 and he replied from Austria (with a time difference of plus one hour) at 15:22, incorporating in his email his responses to her questions. The subject heading of the email exchange was "Did you want another catch up this side of Xmas?" with the claimant saying that she was happy either way, and she set out various matters as a list after stating, "(other than me, which I'm happy to wait for now you know it's not £ I'm seeking) are".

66. The items on the claimant's list are not relevant to the matters before the Tribunal but in Richard Pennycook's emailed response he wrote:

> "Re you, I know you spoke to Pippa. It all sounds good to me. I'll have something drafted for when you get back. We need to talk some more on the flexible time thing, so give it further thought in terms of what might work for you."

67. In her witness statement the claimant suggests a belief that this corroborates her case on the discussions she had with Richard (and Pippa Wicks) in November and December raising the equal pay issue. Again according to the claimant, the comments of Richard Pennycook betray no suggestion there were any concerns about her performance or any hint he believed she was failing in her role. As an aside, the claimant notes that this particular email exchange was not disclosed until 18 July 2018 with no explanation why it was not disclosed earlier.

68. In cross examination the claimant said Mr Pennycook wanted to come back to her on their previous discussion when she had talked about the Chief People Officer role. He did not want her to think he had forgotten it. He said he did not believe Remco would agree a pay rise for the role that she did. He said if he was to get more money for her it would have to be in an operational role. "Would I consider an operational role?". He talked about Funeral Care and Legal Services. "He was talking about other roles if I wanted more money. Remco would not approve more money for the HR role. We did not talk about my performance. We were talking money and roles. I was flattered he thought I'd do Managing Director of Funeral Care but I was not interested. My heart and soul was into HR and I wanted to stay in HR". She put to him what about if she worked less without any pay reduction?

69. The claimant could not remember if she mentioned the Guardian gender pay gap article. She might have quoted parts of it.

70. Mr Pennycook's version of events from his witness statement is that:

> "I was due to be on holiday after the following week, but I did not want to let time pass without starting to address the fact that Sam had lost the confidence of important members of the Board and Executive. I hope it is clear from documents in the bundle that I was keen to support Sam and if possible recover the situation. I therefore called Sam on 16 December 2015 when I was on holiday in Austria. It was a shame I had to do that by phone and I apologised to Sam for that but it was important Sam was aware of the

> urgency and significance of the situation. I also wanted to give her time to think about things over the Christmas period. There are no notes of our conversation as it was not a formal meeting. However, I was very precise on the call – I explained that a number of important initiatives under Sam's leadership had gone poorly, that as a result relationships with her close colleagues were under strain and that we would need to make adjustments to her role in order to recover the situation. I said, 'if you carry on acting as you are, you are getting to fail, and I do not want that to happen'. I encouraged Sam to think hard over the Christmas period about options for reshaping her role. I said that when we were both back we needed a full conversation face to face. I did not discuss Sam's pay with her as alleged in her claim, and she certainly said nothing about wishing to be recognised and valued on the same basis as her male peers as she now alleges. That is simply fabrication. She said nothing at all about equal pay or parity of pay during this call. My call to her was purely to ensure that the performance concerns were addressed urgently. Sam emailed me a couple of days afterwards asking whether I wanted another catch up before Christmas but explaining that she was happy to wait for now and reflecting that for further discussions what was important to her was flexibility and time with her family as we had discussed previously. I indicated I understood this and that we would pick up again on these discussions after Christmas but asked her in the meantime to give further thought in terms of what might work for her. From that point on discussions with Sam about her performance were interwoven with discussions about a reshaped role."

71. In cross examination Mr Pennycook confirmed he rang the claimant and set out the initiatives that had gone poorly. The projects had gone badly because relations with close colleagues were under strain.

> "The telephone call was far from ideal. We hadn't had a face to face meeting. I didn't want to get to the end of the year without telling her that there were serious issues on which she would fail. We didn't go through every project although naming some of them."

72. Mr Pennycook talked about the agreement they had that the claimant did not want to represent the executive on Remco as an example of how they might make adjustments. According to him he made very precise criticisms. There was absolutely no reference to Remco and no salary increase. There was no reference to money. This was entirely illogical. He could not have said this to the claimant without talking to Remco. If the claimant had raised it he would have had to commission Remco.

> "We'd moved well beyond the operational role. She had indicated she would like flexible engagement, school holidays off, working term times. It was absolutely not about a pay rise or working fewer hours for the same salary."

73. Mr Pennycook disagreed that he canvassed not working in the holidays. The Chief People Officer article was discussed when she gave it to him.

74. As to the claimant's follow up email about it "not being £ I'm seeking", he said it was not right that they referred to money in the discussion. "It reflected back to

Sam not wanting an operational role and wanted to talk about term time working". He thought it was in the context of the conversation further back from that.

75. Mr Pennycook agreed there was no hint of consideration of her performance in the subsequent emails. According to him the call was amicable despite the content being difficult. The tone was constructive.

76. According to Mr Pennycook he wanted the claimant to continue to work for the Co-op in a role that she could do. He was not about to fire her, it was that he wanted to find something she could do. According to him, the claimant knew she was struggling and looking for help. She was very professional, however, continuing as normal on the day-to-day stuff.

77. Mr Pennycook was taken to the claimant's subsequent written grievance where it was stated that:

> "Later than month you called me from your holiday in Austria and said that Remco would not authorise any more pay for me. I was disappointed but told you that it was not just about me wanting a pay rise. I explained that I wanted to be properly valued alongside my male peers. You asked me whether I would be prepared to consider MD of Funeral Care or a similar as a potential future solution and I said there was an alternative possible solution. I suggested that we could deal with the problem by adjusting my working hours and that I would be interested in having more non-working days using a pattern which was convenient for the company. This would enable me to spend more time with my family, particularly [the associated disabled person] whose condition had recently worsened. You agreed to discuss this further in January 2016."

78. In response to this being pointed out Mr Pennycook said that when he received the letter he knew that what she said had been discussed on the phone on 16 December.

79. Mr Pennycook was taken to the notes of an interview with Lord Adebowale who was investigating the claimant's grievance, when he summarised the purpose of the call from Austria which was that he was concerned that if she carried on as she was she was going to fail. What he saw was causing him real concern as they were close colleagues. He sensed that from then on the claimant did not want to engage in conversation. However, Lord Adebowale put to him that it was a serious phone call and asked if he had followed it up in writing. Mr Pennycook said "no, the call was saying 'have a think, we need to engage on this when you're back'."

80. In cross examination Mr Pennycook said it was an extremely important call. He expected it to be followed up after Christmas. The email exchange was nothing significant. Very little in it related to what was discussed. He did not want to follow it up in writing until the claimant had had time to think. He was not aware why the email exchange was not disclosed until 18 July 2018.

81. As to the pleaded defence, he told his lawyers his version of the call from Austria. He had not approved the response/defence. Whilst he understood the

claimant to be saying it was related to pay, they were talking about adjustments to her role to help her to succeed.

82. Mr Pennycook was taken again to the interview with Lord Adebowale when he said that the claimant had more than an inkling about his concerns. "Her response to most points was that it was the fault of others". In the interview he said that he and the claimant never talked about equal pay.

83. His understanding was that in 2017 the claimant would have a new family, teenage kids, and would like a role which would allow her to take school holidays off. This was never mentioned in the context of pay. It was not mentioned in the context of the claimant comparing herself with other executives. She was motivated by money. The Chief People Officer article related to a bigger role so pay could be increased. Conversations about flexible working had nothing to do with a pay rise. According to him, in his interview with Lord Adebowale he was positive about her flexible working proposal. He explored with her what a reshaped role would look like. There was a meeting of minds on it, "capable of supporting learning and development, supporting exec with off-sites and team dynamics. My strong feeling was: couldn't run operational HR if take a third of the year off".

The third alleged protected disclosure

84. In her amended pleading the claimant states that in ~~late November 2015~~ or around 12 January 2016 (on the ninth floor of the Co-op's main offices), Mrs Walker had another conversation with Mr Pennycook during which she made "the third disclosure", in terms as follows:

> "10.1 She drew his attention to ~~another~~ the Guardian article, ~~entitled 'In the Boardroom'~~, referencing the widespread gender based pay inequality ~~in the City~~ at management level;
>
> 10.2 She explained that the average pay gap quoted in the article was 35% and suggested that the gap between her pay and that of her colleagues was more than that, ~~at 41%~~;
>
> 10.3 She advised him that we (i.e. HR) had seen the first cut of the Hay gradings for the B grades and that they did not look good from an equal pay perspective;
>
> 10.4 ~~T~~ She said that the Co-op had an equal pay problem that not only exposed them to statutory claims, but which was inconsistent with the Co-op's declared values and was a possible source of negative publicity, particularly having regard to the imminent gender pay gap reporting obligations being introduced by the Government;
>
> 10.5 ~~A~~ She said that as the only woman on the EC, addressing her position would be an important step for both the Group and the CEO towards *"being Co-op".*

85. According to the claimant's witness statement on or about 5 January 2016 she had a one-to-one with one of her direct reports, Gary Dewin, Director of Pensions

and Reward. During the meeting she asked him about the rollout of the B and C grading as he was leading this. "I was worried it would show gender based pay disparity. His response to me was that it was 'not looking good' for the women".

86. The claimant goes on to say that she and Mr Pennycook had barely spoken since the New Year and he had not come back to her on her proposal to solve the equal pay issue, so she decided to give him a prompt on or around 12 January 2016. She says that:

> "I approached Richard whilst he was working in our open plan on the ninth floor of the Co-op's executive floor. Initially, I discussed a few queries with him relating to Debbie's exit. At the end of this conversation I mentioned the Guardian article to Richard and said that it talked about a report by Deloitte which put a ten year timeframe on equal pay being reached in the UK. I quoted some percentages – from recollection I said that the pay gap quoted in the article was 35% and that the gap between my pay and that of my male colleagues was 41%. (On reflection I realise that I may have got this percentage wrong but it was in the right ballpark). I also referenced that the pay gap doubled for senior women over the age of 40."

87. She continued:

> "I also told Richard that HR now had the first cut of the Hay grading outcomes for grade C as well as B and they were not looking good from an equal pay perspective. I told him that I thought the Co-op had an equal pay problem which not only exposed the business to legal claims but was inconsistent with the Co-op's declared values. I warned Richard that this could be a possible source of negative publicity, particularly with the Co-op being seen as a 'national institution' and a members owned organisation with the values of equality and equity. I advised him that gender pay inequality was a hot topic in the media and that the issue would increasingly be in the spotlight with the reporting obligations being introduced by the Government. I reminded Richard that I wanted to discuss my situation first. I explained that as the only woman employed on the Executive Committee I felt addressing my position was an important step for both the Co-op and him towards *'being Co-op'.* He said he had been doing some thinking and would come back to me after the [Harmeston] Tribunal."

88. In cross examination she said that on 12 January she spoke to Mr Pennycook in the office before he left to attend the Harmeston Tribunal. The time before the hearing was kept free for Tribunal updates. "This was the only time Pippa Wicks, Richard and I could catch up. Pippa was not in the office". She never gave Richard Pennycook the Guardian article. The discussion would have been sometime between 7.30am and 10.00am. The article had been emailed to her in mid-December. She remembered the article and decided to tell Richard Pennycook about it. She originally went to him to talk about Debbie's exit at the end of her contract. According to the claimant she sat down by Richard's desk and having talked about Debbie and her exit package decided she would mention herself. She was just discussing money and a colleague and it prompted her so that they were going to talk about her. The claimant quoted from the Guardian to deal with women

over 40 and the gap being bigger for them. She was over 40. She agreed that the gender pay gap was completely different from equal pay. She had met Gary Dewin at the end of the previous week who said it was "not looking good for the Bs and Cs". She alerted Richard Pennycook to what Gary Dewin had said and that "we would be facing an issue". The equal pay discussion was about her. Women over 40 was her. Her conversation with Gary Dewin had been about the gender pay gap. In her conversation with Gary Dewin she asked what men v women looked like at A and B grades and at C and D grades and Gary Dewin said it was not looking good for the women. With Gary Dewin she was just talking in general terms. She thought they were going to have an issue so she was raising it with Richard Pennycook.

89. She accepted that Mr Dewin had made a pre- meeting list of what he wanted to raise but the claimant would have asked him for an update. According to her Mr Dewin did say it was not looking good for women. The claimant accepted she did not raise the article with Remco and did not raise male/female salaries at any subsequent Remco. She told Richard Pennycook she thought they had a problem based on what Gary Dewin had said.

90. It was put to the claimant that "yesterday she had said she would be involved in fixing the problem" and she said that she would be going forward.

91. She was asked: if there was unlawfulness she would have done a paper for the Remco/Pennycook creating a strategy to resolve it? Her answer was "absolutely, when the grading was sorted out". There was already a project underway about pay at the lower end in the supermarket. We thought we were going to have a similar issue as Asda. By 12 January we still hadn't had the Cs confirmed". She was highlighting that as this goes on she thought they were going to be facing a problem. As CHRO she would have had to do a paper but she would have had to have had statistics to validate the information for Remco. This was way too early on. It was early enough to raise with Richard Pennycook. In her supposition if there was a problem with Bs and Cs it was probably going to be a problem further down as well. She had said it to him about herself and she said it looked like they were heading into a problem.

92. It was put to her that if she thought there was already a problem at the executive level in the way Remco set pay that she would have brought it to the attention of Remco and written a paper to deal with it. The claimant said she had a good relationship with Richard Pennycook. He had agreed to consider her flexible working and she was gently keeping pressure on in January. He had not come back to her on this. She gave him a chance to do something about it along the lines discussed. Had he come back to her later on and not had the discussion they were having she might well have written a paper but it did not work out that way. By the time of the 12 March Remco in 2016 she and Richard Pennycook were still in conversation.

93. From the witness statement of Mr Pennycook it was on 12 January 2016 that the claimant was informed that a grievance had been raised against her by an employee of the Co-op who was also a council member. January was the time of the three week Employment Tribunal from 5 to 22 January 2016. As they were both

witnesses they were advised not to engage closely during this period, and as a result he saw little of Sam at this time.

94. Mr Pennycook is aware that the claimant alleges that she shared with him a Guardian article dated 15 December 2016 entitled, "Gender pay gap doubles for women over 40 in management, says study":

> "During the course of the grievance process and these proceedings the date Sam alleges she shared the article with me has changed several times. I understand she now states that she did this in or around January 2016. Sam never shared that article with me or had any discussion with me about it. The new date she alleges, 12 January 2016, does not ring true. As explained, Sam had just returned to work after a fraught Christmas period during which [the associated disabled person] had been taken seriously ill and they were immersed in preparation for a Tribunal hearing as well as discussing the complaint against her by the Co-op member. It is not plausible that we would have been discussing an article like that with everything else going on at that time."

95. Mr Pennycook categorically confirms that the claimant never raised any concerns about a gender pay gap or equal pay at executive/management level or specifically in relation to her with him at any time. She never raised any equal pay concerns arising from the Hay grading review with him nor did she with Remco, which would have been the appropriate forum for her to raise such concerns in her capacity as CHRO and there is no evidence of this in the Remco minutes.

96. According to Mr Pennycook, none of his actions were a response to any complaint or whistle-blowing as he had no knowledge that she had raised any such matter. His actions were simply to ensure that the Co-op had an able and effective CHRO during its important rebuild phase.

97. At the start of his evidence Mr Pennycook was asked a supplementary question by his counsel concerning 12 January, and he denied the conversation with the claimant in its entirety. On 12 January, he had been driven from his home in Yorkshire to the Tribunal. He had a Board call on his way in and went straight to the Tribunal.

98. The claimant referred to her discussion with Gary Dewin who reported to the claimant in relation to pensions, rewards and benefits. According to Mr Dewin's witness statement, he was aware the claimant made a specific allegation that during a one-to-one in or around 5 January 2016 she asked him about the Hay job evaluation for the B and C grades as between men and women, and in response he said that it was "not looking good" for the women. In the course of preparing his statement he checked his diary and could see he was working from home on 5 January although he did have a scheduled one-to-one meeting with the claimant on 8 January 2016. Ahead of the meeting he sent to himself a list of items for discussion with the claimant which did not include any reference to the Hay job evaluations, and although he could not recall the conversation in detail he had no recollection of discussing the Hay job evaluations during the meeting. He had no recollection of discussing the gender split in the B and C grades or of making the comment alleged by the claimant. Indeed he did not recall ever having any conversations with her or

anyone else regarding the gender split in the B and C grades, and did not recall seeing any data relating to the gender split in the B and C grades in the Hay grading analysis, although the data was not anonymised so it would have been possible to work out how many males and females were in each grade by looking at the list of names. There was lots of debate about where to draw the grade boundaries between grades B and C but this had nothing to do with gender.

99. At the start of giving his evidence Mr Dewin was asked supplementary questions about this matter. To him it made no sense for there to have been a conversation about grades in January 2016. The grades were mapped in the summer of 2015 with the project finalising in January 2016. The Bs and Cs and some of the Ds were done by the summer of 2015.

100. In cross examination he stated that the Cs would have been validated between April and July 2015. He did not remember any conversation in January 2016 with the claimant about things "not looking good for the women". He disagreed that the claimant asked him this question.

101. In his closing submissions Mr Burns refers to his cross examination of the claimant on the public interest disclosure allegations:

> Q: First protect disclosure, you said you wanted role to be properly "valued"?
>
> A: Could have said "valued and recognised".
>
> Q: At the time you wrote grievance letter, didn't have in mind that you said "male peers"?
>
> A: Really don't know, can't remember – just been dismissed in that letter, was all over the place.
>
> Q: In grievance letter you said you cancelled meeting on 7 December but now 4th or 11th?
>
> A: This is a mixture of two conversations going on here. Mixture of Chief People Officer and Guardian article.
>
> Q: After reading third paragraph in grievance letter, "in December 2015 you made it clear that the Co-op had an equal pay problem?".
>
> A: That is all conversation in January before the Employment Tribunal on 12 January…got muddled up…that was January conversation.
>
> Q: Can't be because you say before December call. So in April 2016 you though the conversation was in December?
>
> A: I wrote December but this reflects the January conversation.
>
> Q: You are telling us today that in the account you wrote in April in response to the termination letter you have mixed up the three

protected disclosures and run them together. You hadn't got straight when – because your mind was jumbled?

A: Yes, it happened just not in that order.

360 Feedback Report

102. The claimant was the subject of a 360 Feedback report which was published in November 2015. The topics involved "Leading for the Future", "Managing Performance" and "Commercial Acumen". Feedback was given by ten people who reported to her, four of her colleagues and her manager, Richard Pennycook.

103. From 22 questions Mr Pennycook scored the claimant at 100% on nine of them, and on 11 of them Mr Pennycook rated the claimant higher than she had rated herself.

104. In cross examination Mr Pennycook told us that the 360 feedback evaluated behaviours rather than competencies. His scoring was done in August when he had no concerns whatsoever about the claimant's behaviour. He did not know when the claimant would have got it. He accepted he was her manager and he scored her higher than others had. He would however expect all the executives would score 100% in many of the matters and 75% in some of the others. It was a low bar and undemanding. The scores related to the first half of 2015. There was no real reason to think he had a downer on her behaviours and he wanted her to stay with the Co-op. In the first half of 2015 he saw her at her best.

105. As to whether the 360 related to behaviours rather than competencies, some of the questions were as follows:

"2.1 Set clear direction so that others understand what, why and where we are going – creating clarity from ambiguity.

4.2 Run effective team meetings/huddles.

4.3 Agree clear and measurable objectives that are reviewed regularly (for self and others).

4.4 Coach others to improve their performance/build their capability to meet future needs.

4.5 Demonstrate a clear understanding of competitor or industry leading strategies."

106. The introduction to the document says that:

"The results from your 360 report will contribute towards your overall performance rating. It will specifically provide evidence about how you have undertaken your role and the extent to which you have role modelled the Co-op leadership standards in addition to a number of other inputs, including performance in your day job, achievement of your objectives as well as financial and engagement measures."

Claimant's 2015 Performance Review and Grading

107. Each member of the executive is appraised annually by the Chief Executive. The Chief Executive agrees his assessment with the Chairman of the company and the Chairman of Remco. This assessment was used in connection with the calculation of the annual bonus from 2015 onwards.

108. According to the claimant, she was due to have her end of year review towards the middle of December 2015, but the night before this was due to take place she received some unfortunate news about the death of a good friend, and although the claimant went into work the following day she was not in a fit state to have such a discussion with Richard Pennycook and so she went home. They were unable to rearrange an annual review before Richard Pennycook went on holiday to Austria, and at that stage it does not appear that any further formal appointment was fixed to discuss matters in 2016.

109. As part of the appraisal process the employee submits paperwork containing their self-appraisal. According to the claimant, she first submitted her version in January 2016.

110. In cross examination the claimant confirmed that the document was created in January 2016. She wrote it on the train. There needed to be a discussion and an agreement with Mr Pennycook about the contents of the document. She was cutting and pasting what she was working on at that time to discuss matters with Mr Pennycook. She put in the matters she thought he would want to talk about. The claimant was questioned at length about the contents of the document, and then there were more general questions concerning it. The claimant said that the matters she had put in were not caveats but were conversation points. She set out how various objectives were achieved.

111. The claimant's document was attached to an email sent to Richard Pennycook by the claimant's PA on 4 February 2016 at 17:22 under the heading "Paperwork for tomorrow's review meeting". Mr Pennycook's PA was copied in with the request that she should print a set of the papers for him and give them to him. Looking at the format of the document, the claimant's objectives are set out in the first column, behaviours/skills demonstrated in the second column, performance measures in the third column, development in the fourth and delivery outcome in the fifth and final column.

112. The claimant's first objective related to "one team – fair reward", which related to the development and agreeing of a future pay strategy and fixing some of the basic matters. The claimant dealt with the closure of a defined benefit pension scheme and the launch of an enhanced defined contribution scheme with no industrial action and a saving of £30million. She said of this as to the delivery outcome, "Delivered, although comms. and grade B decision making should have occurred sooner".

113. The second item under objective one related to governance around grade B implementation, "now needs establishing and link to TOM principles". This involved introducing a new grading model for Co-op wide and job families. As to the outcome, this was "delivered, although ongoing systems implementation issues causing delay

to system integration (IT issue)". There was then a third outcome of benefit portal of current benefits launched and accessible from any device.

114. The second objective was "One team – high performing organisation", which involved establishing a TOM with the Group Executive with agreed design principles. This involved re-setting the team and governance. The second objective involved saving £57.4million in FTE with the claimant noting the delivery outcome as "FTE delivered. Lack of governance re implementation of principles. No idea if cost brought back via BU's or consultancy. (Not in scope of programme)".

115. Also in objective two were "redesigning fit for future processes, building leadership capability for the future, acquiring some key skill gaps required to meet strategic intent and growing performance management capability". The claimant's assessment of her performance here was positive.

116. The third objective related to "fixing the basics – One HR". Having described the objectives and what was done, in the final column the claimant noted:

> "Business plan had to be revisited due to misalignment of Group IT and retail IT. Poor stakeholder management. Deloittes overcharged and underdelivered – now rectified. Had to dismiss Programme Lead and Project Lead. Business Plan re-cut and now on track but continuing IT issues. Continuing issue of lack of relationship with Oracle at right level in organisation. Appointed ST and NS."

117. For objective four, "Fix the basics leading the HR function", again the claimant set out what was to be done and what had been achieved, and her self-assessment was positive.

118. For objective five, "One Team RtEC". Again having set out what was to be done and what had been done the claimant in herself assessment noted:

> "Plan not delivered by end of 2015. Weak project team. No ownership from business units (until January 2016). Scope kept changing. Lack of coordination between RtEC, meaningful membership and Brand."

119. We have not been provided with a copy of this document with the manager's comments or the year end performance rating, suggesting that this document was never completed by Mr Pennycook.

120. Taken from the claimant's witness statement, on or around 5 February 2016 Richard Pennycook asked to speak to her about the claimant's new role, and she does not refer to any performance appraisal. She emailed Richard Pennycook after that meeting at 18:49 on 5 February with no mention of any performance review related issues.

121. It does not appear to have been put to the claimant in cross examination that there was in fact a review of her performance at her meeting with Mr Pennycook on 5 February 2016.

122. Mr Pennycook stated that the process for each member of the Executive including the claimant would involve a first meeting when each of the objective outcomes would be discussed but he would not give any indication as to what the overall performance rating would be because he needed to reflect on what had been said then consult with the Chairman and the Remuneration Committee Chair before confirming ratings. Once that had been resolved he would organise a second meeting with the executive member to confirm the rating. According to his witness statement, the meeting with the claimant on 5 February constituted the first meeting in the process, and then due to her frequent absences later on they were never able to conclude the formal performance review process for 2015.

123. According to Mr Pennycook, he believed that her own self-evaluation was a fair reflection of her performance, and discussions about her performance and the possible reshaping of her role became completely intertwined. He referred to the self-appraisal document referred to above, holding the belief that the claimant's comments in the right-hand column were a fair reflection of a very difficult year, stating that many phrases used by the claimant simply would not appear in an appraisal that reflected solid achievement. Her comments were consistent with the issue that he and others had observed and he thought it was a fair reflection of her performance, and in the light of the significant issues she had acknowledged he considered a "partially achieved" rating to be appropriate.

124. In his evidence Mr Pennycook does not state that the claimant's performance was discussed with her. He agreed with her self-assessment.

125. Mr Pennycook explains his views of the claimant's performance in 2015 in his witness statement from paragraphs 27-32 inclusive, and these matters are set out over five pages. He refers to her five objectives. Objective 1 was "One Team – Fair Reward". Objective 2 was "One Team – High Performing Organisation". Objective 3 was "Fixing the Basics – One HR". Objective 4 was "Fix the Basics – Leading the HR Function". Objective 4 was "One Team – Refreshing the Emotional Connection (RtEC).

126. Objective 1 involved closing the defined benefit pension scheme and moving to defined contributions. Gary Dewin was in charge of the project and handled it well but he needed the support of the claimant in the sensitive handling of the impact on senior colleagues from grade C and upwards and on producing effective Group wide communications. In October and November 2015 Mr Pennycook was increasingly concerned that the claimant was not handling these aspects effectively. Steve Murrells and Rod Bulmer became increasingly frustrated with her management of the process and voiced their concerns to Mr Pennycook, who took the view that they had been given no clear plan or guidance for how to implement the changes with their senior teams. According to him, it was clear that the claimant had not thought through how the proposals impacted on these higher graded people and had not devised an appropriate communications plan.

127. Objective 2 involved the design of a new target operating model. The design of it did not go well as the claimant acknowledged in her self-evaluation, but many other aspects of this objective were in fact delivered and it was the strongest area of the claimant's performance in 2015.

128. Objective 3 was to design and implement new systems to manage personnel and payroll processing. The claimant was the executive sponsor. There was a routine meeting of the IT Executive Committee in October 2015. The claimant did not attend despite having been invited, and it was apparent that the project was not in good shape. According to Mr Pennycook, this showed extremely poor judgment by the claimant as the sponsor not to attend such an important meeting. He was concerned that her lack of experience in overseeing such large programmes was leading to a lack of robust governance. He sets out his criticisms of the claimant in this regard and then states that ultimately, through support and intervention from him and Pippa Wicks, the project was brought under control but delivered late and significantly over budget. In his view the claimant as sponsor was accountable for that.

129. Regarding objective 4, the feedback from the Board and the Executive was that the strategy she had set out was over ambitious. This was in accordance with Ruth Spellman's view expressed to Sam before the Board meeting. In his view messages along these lines did not appear to be getting through to the claimant. The document continued to reflect over optimism and a lack of clear prioritisation. The year ended without an agreed HR strategy.

130. Objective 5 was the claimant's single biggest objective of 2015. This was to develop a comprehensive implementable plan to re-induct all 65,000 colleagues in the purpose and values of the Co-op. There needed to be Board sign-off for plans before the end of 2015. The Enterprise Leadership Group were to be briefed on 3 and 4 November 2015. At the 16 October Board meeting the Board approved a programme but shortly after it became clear that the claimant could not deliver the RtEC programme in the way proposed. She could not achieve the dates or the costs laid out. There was a need rapidly to re-plan a programme that had just been signed off by the Board, causing credibility issues with the Board. Mr Pennycook removed the claimant from the project and put Pippa Wicks in charge. In his judgment this was particularly damaging to the claimant's relationship with the rest of the Executive Team who felt badly let down.

131. This programme involved the four options. The claimant was there when they were discussed and if she thought any of them would not work she should have said so but did not. She did not take full ownership and responsibility for her projects and sought to blame others.

132. He was aware the claimant alleges most of the vital five projects went through various stages of being the red and behind schedule, and whilst agreeing that they were this, he says, is the nature of complex projects. The claimant, however, did not step in when needed to get things back on track. He did not need to step in on any other project. Only the claimant's. To summarise, of her five objectives for 2015 objective 2 had been carried out satisfactorily, objectives 1 and 3 had incurred significant issues, objective 4 simply was not achieved and objective 5 was the sort of situation from which it is very difficult to recover.

133. In cross examination it was put to Mr Pennycook that on 5 February they discussed flexible working not the appraisal. He said this was not correct. He was taken to an email sent by him to the claimant on 11 March 2016 at 18:20 including

the words "we should do the performance review that had to be cancelled so that we have this conversation properly and in the round, considering all aspects of last year", and he said that every one-to-one, every engagement on executive matters, relates to performance management. In 2015/16 he had more conversations with the claimant than with any other executive. They had been discussing it for many weeks. Stage one was to ensure the form she had submitted was correct. The first stage can be brief or long. On 5 February it was not a long conversation. He agreed with the comments she had made and the objectives were discussed at great length over weeks and months. "Through discussion we knew very well how she had performed". The closing process involving a longer meeting never took place.

134. On 11 February Mr Pennycook sent an email to the Group Chairman, Allan Leighton, attaching a summary of the executive reviews for 2015, stating that he had "undertaken reviews with each of the team in detail".

135. The available gradings were "unacceptable", "partially achieving", "achieving", "exceeding" and "outstanding". Two people had been graded as "exceeding", the claimant and two others (males) as "partially achieving" with the rest of the team "achieving".

136. In justifying to the Group Chairman the "partially achieving" rating for the claimant he stated in writing that:

> "Sam entered 2015 with a highly ambitious agenda and with gaps in her team. As an exec we consciously determined to make 'big changes fast' in the HRD landscape, in order to get tough actions out of the way in the early stages of Rebuild – in particular pensions changes and colleague re-grading. In the early part of 2015, recognising the challenge ahead, I pressed Sam hard to bring in support for her agenda. She insisted that she had it covered.
>
> Sam brings a passion for the Co-op to her role, and a determination to deliver. However, she struggles to operate at the highest level and in Q2 we saw the impact of this and the lack of back-up in her team. The grading and pensions changes were made but caused more noise and re-work than necessary. Areas of the Rebuild project sponsored by Sam (TOM project, re-induction project and the HR systems project) all missed key milestones and deliverables. Sam's strengths are badly needed in the Co-op. She has driven the leadership development agenda, building a competency in this area that was completely absent. Her insights into top team dynamics are good, and she frequently spots issues with senior colleagues before their line managers have noticed. Sam was the catalyst for the upskilling of the food executive. Overall a disappointing year for Sam, reflected in the grading."

137. We have referred to Mr Pennycook's email attaching a summary of the executive reviews for 2015, and other matters within it are relevant to the claimant's allegations of direct sex discrimination in connection with the way in which other executive colleagues were assessed and reviewed for 2015. After the introduction Mr Pennycook states that:

> "There is one more nuance that I will discuss with Stevie. You will recall that we took the Exec pension contributions as a percentage of salary down by 6%

> at the end of last year (effectively a 6% reduction in base pay) without compensation. I committed to the team that we would be erring on the side of generosity in bonus/LTIP out-turns to help offset this change. Steve M was particularly emotional about it. In the proposals here, I have not consciously made any adjustment for Alistair, Sam or Ian Ellis – in the case of Alistair and Sam I will point to the LTIP out-turn at 90% as being gracious, and in the case of Ian Ellis he is very mature about this and content with the decision. I have added 10% to the bonus out-turns for Steve and Rod as a one-off compensation for the pensions change. As the leaders running our P and Ls, I think this is an important statement of support for them, but wanted to highlight to you that it is a discretionary element in the bonus proposal. Once I have your view I will also discuss it with Stevie."

138. The claimant refers to Mr Folland as a comparator in respect of 2015 but he does not figure in the documentation produced by Mr Pennycook as he had already left the business.

139. Mr Asher was rated as "achieving" with the rationale being that:

> "Alistair delivered strongly in 2015. As we establish new ways of working with regulators, fellow societies and members, Alistair is a vital overseer of this complex landscape. His interventions have frequently saved us from inadvertently creating problems for ourselves. In particular, Alistair has been instrumental in setting up the FRTS structure in a way which provides rigour to our interactions with independent societies. Alistair has been an enthusiastic member of the NOMA Board, encouraging ambition for this project and ensuring that the Co-op is at the heart of the development of Northern Manchester."

140. Looking to Mr Bulmer, his rating is "achieving+" with the rationale being:

> "A year of really solid achievement for Rod, and tough due to being stretched across his leadership team for most of the year following the retirement of the Funeral Care MD. Rod is a very effective Co-op leader – he builds teams, creates clear objectives, and supports his team to deliver. Major progress was made in the year in the execution of the GI strategy (which itself is a tough challenge), particularly in building an effective team in that business for the first time in many years. Likewise in pursuing the Bank separation agenda where Rod cleverly ensured that we are in the driving seat and have limited exposure to Bank delays and overruns. In organising succession for the Funeral Care MD Rod was perhaps overambitious in taking on the role himself for much of the year, but nonetheless delivered a strong performance. His final solution for the succession, making two key hires, was innovative and has given the Group a step forward in succession cover elsewhere and in the senior leader population. The position of CLS is challenged, and Rod has been decisive in moving that business towards a more focussed but sustainable future. At Group level Rod is an important contributor to team cohesion. His longer tenure in the Co-op gives him authority in talking about our need for sensitivity to active members, whilst his interventions on the need

for rigorous process are always welcome. Rod is a stalwart member of the Exec team."

141. Mr Murrells is rated as "exceeding+" with the rationale being that:

"This was a very strong year for Steve where he and his team really hit their stride. Good work from the previous year started to pay dividends with the product range dramatically improved and management capability across the store was increasing. The produce move was bold (and worked), the store refurb programme delivered and the new store pipeline was strong. Steve's team is as strong as any in the industry, albeit at the second attempt with some key roles. Steve himself is a charismatic and visible leader. Prompted by the Group, Steve did good work with OC & C to make granular sense of our store estate and the missions being served and to understand clearly our options around non core operations. Health and safety and mediation work rose up the food agenda during the year, perhaps a little late in the turnaround but good to see that it is an absolute priority. As always, much more to do and we did not quite get where we wanted to in 2015 on background price or reducing promo participation. I am confident this will be tackled in 2016."

142. In her witness statement the claimant says of Rod Bulmer that he had a difficult year. He was responsible for two of the Winning Ten projects:

(i) The Funeral Care business which did not hit budget in 2015; and

(ii) The General Insurance business, which made heavy losses in 2015 and had failed to re-platform and implement the IT required for it to complete in the marketplace, and is still to do so.

143. The claimant in her witness statement says that Steve Murrells did not perform strongly in that:

(1) He refused to implement the Target Operating Model ("TOM"), changes for the food business that had been approved by the Executive as a whole – e.g. resisting the move to centralise part of Marketing and insisting that the food business retained its own complete marketing function, thus causing duplication and additional cost.

(2) He insisted that the Co-op compensate the grade B members of his senior team for losses consequent on the move from a defined benefit to defined contribution scheme following a serious disagreement with Rod Bulmer cutting across the One Co-op ethos of ensuring that all staff were treated the same, with the consequence that all 60 grade B members across the Co-op (predominantly male) received such compensation;

(3) His food business was very resistant to and slow to implement the grading review, and in particular to reduce the disproportionate number of its employees at grade B;

(4) The food business failed to hit its budget for 2015 (a target of the True North II, one of the vital five projects in the rebuild strategy for which he was responsible); and

(5) The food business was the subject of substantial fines following two highly publicised health and safety prosecutions for causing the death of two members of the public (an elderly man in Truro and a cyclist in London).

144. Based on these matters the claimant does not believe that applying any fair objective standard her performance during 2015 could properly be described as worse (or more worthy of criticism) than the performance of Rod, Steve or Alistair. Looking at the paperwork for Steve's appraisal she could not see how it would justify an "outstanding" rating for 2015 and she relies upon this apparent disparity of treatment in support of her discrimination claims.

145. In his witness statement Mr Pennycook states that at no time was the claimant the only woman on the Executive. At the start of his tenure there were four men and four women on the Executive, and thereafter never fewer than three women. The claimant was not the only member of the Executive he rated as "partially achieving". He gave two male members of the Executive team the same "partially achieving" rating. He did not rate the claimant as partially achieving because of her sex or because of alleged protected disclosures. He did not agree with her assessment of the performance of the other male Executive members. His proposals in relation to the performance ratings and the reasons for them were set out in his memorandum to Remco.

146. Mr Pennycook continues, noting that although other rebuild projects were in the red at times the Executive sponsors on them stepped in to deal with the problems in the way needed. The claimant was not close enough to the detail. She did not take ownership of the issues with her projects. The claimant compared her treatment with Alistair Asher, in particular alleging that he was accountable for legal services which suffered a loss in 2015 but that no action was taken against him for underperformance. In his view this demonstrates a fundamental misunderstanding of Alistair's role and responsibilities. He was not accountable for legal services. He was responsible for the governance of it, which he did well. It was the Managing Director who was responsible for profitability.

147. Mr Pennycook was cross examined on these matters. He confirmed that Mr Folland had left in January 2015. He was not failing but the company could not find a role big enough for his skills at the end of the rescue phase. Mr Folland was redundant. Mr Pennycook agreed to him going in January. He had no reservations about his quality.

148. Looking at Mr Bulmer and Mr Murrells, it was the view of Mr Pennycook that the Executive Sponsor of a project carries the can and cannot blame others. As to Mr Murrells, who was judged to be "exceeding+", it was noted that Food had missed budget but it had achieved a threshold budget profit which triggered bonuses. It was related to performance for the Group as a whole.

149. In an email from Stevie Smith it was apparent that Food had used up a £25million contingency and a near £7million underinvestment in V5/W10. Stevie Smith noted that General Insurance ended the year at more than treble the predicted loss.

150. Looking at Mr Bulmer who was rated as "achieving+", the fact that there was three times the predicted loss in general insurance was not relevant to bonus: profit and loss is not a good measure of performance (in general insurance).

151. Mr Pennycook did not consider it unreasonable for Mr Murrells to have a different point of view on pensions.

152. Mr Asher was out of the country for some time in 2015 having taken a vacation to take part in a triathlon.

153. As to the claimant, in early 2014 Mr Pennycook thought she lacked emotional intelligence to act at the executive level, but by August 2015 he had no reservations about her. There were some significant bumps in 2014 but did not see any in 2015.

154. Mr Pennycook was cross examined about the various projects the claimant had responsibility for. Starting with the grading project, he was aware of bumps with it. They were not to his mind as significant as some others, but this was a component in his decision making. The grading project created more noise in some of the businesses than it should have done in terms of communications and preparedness. Communication materials were delivered late into the briefing process.

155. On pensions, this was a big project with the outcome achieved without industrial action. Mr Bulmer and Mr Murrells had different points of view from the claimant, and indeed different views between themselves. The claimant as the executive responsible for the project should have had the right conversation with them to stop the "headbutting". In the view of Mr Pennycook, the job of a Senior Executive Sponsor is to reconcile the positions and to deliver agreed solutions that people feel good about. In the end he had had enough and had to tell them to "suck it up".

156. In October 2015 in relation to the 1HR project the claimant was invited to a meeting two days before it was due to take place. The meeting was with Oracle because the Co-op was not in control of the project. The project was in a poor shape and in Mr Pennycook's view the sponsor should have either attended the meeting or changed its time to allow her to attend. He accepted that the claimant was not solely responsible for problems and delays of the 1HR project. According to Mr Pennycook, sometimes Executive Sponsors get unlucky but their job as sponsor is to flex and compensate. Executives are paid to deliver.

157. On the project concerning renewing the emotional connection, it became problematic in the fourth quarter of 2015. At a meeting in October 2015 (in respect of which no paperwork has been provided) there were four possible ways of delivering the project to the staff members. They ranged from "Vanilla" to "Razzamatazz", with the second and third projects somewhere between. Mr Murrells and other members of the Executive voted for the "Razzamatazz" project but at the time the details had not been worked through and it was not possible to guarantee

deliverability of the options. In the view of Mr Pennycook it is entirely appropriate that the sponsor is aware of what is deliverable. Mr Murrells did not know that they had not done the detailed preparation to show it was deliverable. Costings had not been done. It should not in his view have been presented as an option. At executive level the sponsor has ownership and should deliver, and "if you don't deliver there are questions on how you are evaluated". The issue is how the bump is responded to. When the bump is so big that you have to go back to the Board it is very damaging for the reputation of the individual. In order to fix this bump he had to deploy Pippa Wicks because he had lost confidence in the claimant to do it.

Review of 2015 gradings and assessments in 2016

158. In the List of Issues there is reference to "a hypothetical comparator and/or Mr Roberts in respect of the refusal to review the claimant's rating". The List of Issues refers to paragraph 22.3 of the claimant's claim, which alleges that Mr Pennycook facilitated the upgrading of Mr Roberts' "achieved" rating just days before he advised Mrs Walker that it was too late to review her "partially achieved" rating.

159. On 15 March 2016 the claimant sent an email to Richard Pennycook under the hearing "My Performance Review 2015" saying that she had reflected on their discussion on 14 March and thought he was absolutely right that she had not reflected her objectives in the paperwork in the right way. She had written the document in the spirit of discussion as opposed to a demonstration of delivery and she appreciated this would have made it difficult for him to go back to the Chairman of the company and the Remuneration Committee with any sort of reflection post formal review type of conversation. She went on to make various points about what had gone on in 2015 whilst not intending the email to be defensive. Towards the end of the third page she hoped the email helped him "reflect further on her 2015 performance as requested yesterday". She had to accept that she could not be graded as "exceeds" but she did not believe that given what they had delivered and the platform that had been created for the rest of the rebuild that 2015 was not an "achieved" year for HR or for her.

160. On 17 March Mr Pennycook emailed Allan Leighton and Stevie Spring (Remco chair), and about the claimant he said:

> "Conversations with Sam have been difficult and emotional. Not surprising given that I am effectively downsizing her role, and also given the very stressful situation she faces at home. I am nearly there with a structure that keeps her in the business rather than her becoming an early exit, which I would prefer to avoid. She will serve 12 months' notice but move immediately into a role which is not on the exec…Fair to say that Sam is feeling pretty beaten up by this but I do think she can pull through it. In order to bring her back up motivationally I would like to upgrade her year end rating from "partially achieved" to "nearly achieved". She is very clear that in a steady state I would have graded her "partial"; however to give her the best chance of making a success of the new role I think we should uprate her in order to boost her self-esteem. I am clear that her performance was not at "achieve" level but I can also look you in the eye and say that we should cut some slack for a colleague whose [associated disabled person] was in a coma for many

> months last year. The effect of this would be to move her AIP from 20% of salary to 40% (full "achieved" would be 60%)."

161. The response of Stevie Spring was that she was usually sympathetic but she understood the claimant was intending to exit the business and develop a flexible portfolio. Had the plan changed? Mr Pennycook told her that the plan for the claimant had not changed fundamentally but they would honour her contract for 12 months. Beyond that period she may step out of the organisation or work for it in a more flexible way, but if she continued she would be on a revised contract on normal market rates for senior HR not an executive role.

162. Stevie Spring felt conflicted on giving the claimant the additional bonus suggested. Whilst wanting to support his decision as Chief Executive and to continue to cut her the slack she needed she could not help think Sam would still be banded as partially achieving so she did not see how it would make a tangible difference other than financially. If he insisted it was necessary to do it and the Chairman agreed she would support his view and recommend it to the Remuneration Committee. By 19 March Stevie Spring suggested it was too late to re-rate the level and expect it to have any difference at all on the claimant's work motivation. Against her £1million gross the additional £85K seemed rather inconsequential. She suggested the alternative was leaving bonuses where they were, giving the claimant time off in lieu instead.

163. The claimant's assessment did not change.

164. The claimant seeks to contrast this with the position of Stuart Roberts, who reported to Rod Bulmer. According to Mr Pennycook, Mr Bulmer felt a change to the rating of Mr Roberts was appropriate for the reasons he explains in his witness statement. According to him this was ultimately a decision for Rob Bulmer and it was left to his judgment.

165. He referred us to a chain of emails on this subject which started from Rod Bulmer on 19 March 2016 concerning his discussions with Stuart Roberts on his 2015 rating. Having set out his rationale he said he was raising the position with Mr Pennycook as he felt a little uncomfortable that the process had left Stuart Roberts in a position that did not feel quite right. Mr Pennycook said that he would leave the matter to the judgment of Mr Bulmer, but he copied this to the claimant who stated on 20 March to Rob Bulmer that:

> "This is the process in action and you have my full support. If, on balance, having heard Stuart's representations, you want to change the rating to 'exceeds', you are free to use your judgment to do so."

166. By 31 March Rob Bulmer reported that he wished to amend the rating of Mr Roberts to "exceed" and this was done.

<u>Other relevant background matters</u>

167. On 14 May 2014 an email was sent by Jennifer Barnes to various members of the then Board stating:

> "During a conversation with Sam, our new Head of HR, she told me that Euan resigned to force the governance review to move faster and the intention of some of the executive was that he would return to his role of CEO after delivering this and had support for forcing the Board to this. As we have been told that the Group's position was compromised by his resignation and IF this was brinkmanship this means that the future of the Group was put at risk for a power game."

168. Paul Myners, then Senior Independent Director, responded to the effect that he did not believe the brinkmanship point. If true it had been well concealed from him.

169. Paul Myners sent this email exchange to Richard Pennycook who responded with:

> "So this intervention from Sam is a disaster – I will probably have to fire her. Trust will have gone sharply backwards, for no gain. Another day at the Co-op…"

170. In his witness statement Mr Pennycook said that the claimant made some unhelpful and inaccurate comments to the Board speculating about the exit of Euan Sutherland and that he was very frustrated by her conduct. The Executive's relationship with the Board had been fragile at that time due to recent events and her intervention which had no basis in fact had been disastrous. It seriously undermined the Board's trust in the Executive just as they were starting to improve the relationship. His email indicated he thought he would have to fire her such was her incompetence, however the claimant apologised for this and he gave her the benefit of the doubt and so they moved on.

171. The evidence of the claimant was that she had not said what she was accused of having said and that she had a witness to this effect.

172. The statement to the effect that she apologised and he gave her the benefit of the doubt appears to be inconsistent with the evidence that the claimant did not use these words in the first place.

173. Mr Pennycook at this time held the view that as someone newly promoted to the Executive the claimant's inexperience showed from time to time, occasionally reflecting poor judgment or an overly emotional response. He thought the claimant lacked the emotional intelligence to operate at executive level because she did not try to control her emotional reaction to things in the way required at the top level.

174. 2015 was the first year of the Co-op's rebuild programme which was focussed on laying the ground for large scale implementation activity in 2016/2017. This involved what were known as the "Vital Five" and "Winning Ten" programmes, the aim of which was to transform the operation of the whole of the Co-op to include not only the businesses and the employees but a new membership scheme.

175. In October 2015 Richard Pennycook wrote a strictly confidential note to the non-executive directors on the subject of Executive team development and succession management. It was designed to summarise the rationale for the current

executive structure, the intended direction through the rebuild phase and succession considerations. By way of executive summary, the Group Executive Team was almost complete. Good succession plans were in place for both emergency succession and longer term development into role. As rebuild completes a smooth transition to a leaner executive team can be achieved with base cost for the team at approximately half the then current levels.

176. As to the claimant, he proposed "making an immediate change to have Sam Walker report into the COO. This will allow Sam to continue to pursue the operational HR agenda whilst Pippa Wicks will pick up the exec level HR and the interactions with the Remco". Mr Pennycook was looking for support from the non-executive directors for the immediate steps he proposed to take with regard to the claimant and another matter that is not relevant to us.

177. From the witness statement of Mr Pennycook around that time various people were raising what he referred to as "significant performance concerns" with him about the claimant in his weekly calls and one-to-one meetings. Helen Webb, HR Director in Food, was said to be struggling with the claimant who was her line manager and there was a poor relationship. It was clear to him from feedback sessions at the end of Board meetings that the claimant had a credibility issue with the Board, and various Board members were being negative about her ability. As a result, he had started to talk to the claimant about moving responsibility for the Remuneration Committee to Pippa Wicks during the autumn of 2015. According to him there was a lot going on at the time and he wanted to test the water gently with the claimant about this to explore if she was receptive to agreeing changes to her role, so he started by talking to her about changing how they dealt with the Remco and the possibility of Pippa Wicks taking that over. According to him he was working up to the discussions about the other changes gently and initially got Pippa involved as additional support to the claimant on her some of her projects.

Claimant's possible future role

178. We shall consider this matter from October 2015 onwards, which is when Mr Pennycook prepared his paper including the proposal to make an immediate change to have Sam Walker report to the COO to allow her to continue to pursue the operational HR agenda whilst Pippa Wicks would pick up exec level HR and the interactions with the Remuneration Committee.

179. Ms Spring confirmed to us that she and Mr Pennycook discussed this paper and she agreed to the proposal concerning the claimant.

180. We have set out above details of the claimant passing to Mr Pennycook the article concerning "The rise of the Chief People Officer".

181. In November 2015 Richard Pennycook prepared a note to the Remuneration Committee regarding Group executive pay rebalancing. The only reference to the claimant is that, "arrangements for Alistair Asher and Sam Walker will flex to reflect our previous discussions on their future roles". This note was not circulated to the claimant.

182. On 24 November 2015 Helen Webb, Director of HR, Food Retail, sent an email to Steve Murrells ahead of his meeting with Allan Leighton, capturing what she thought were the issues of leadership for the HR function, and she set out five of them, concluding that the HR Executive felt compromised by the claimant's lack of competence having never worked at the senior level in any business. She realised that. "this note is potentially dynamite and probably enough to get me the sack so please treat with care…".

183. When the performance appraisal meeting due to take place in December between the claimant and Richard Pennycook was cancelled owing to the death of the claimant's friend, the meeting was not rearranged because Mr Pennycook was due to be on holiday after the following week. This led to the telephone call on 16 December from his holiday. The conversation was without notes but according to Mr Pennycook he explained that a number of important initiatives under her leadership had gone poorly, that as a result relationships with her close colleagues were under strain and that they would need to make adjustments to her role in order to recover the situation, "if you carry on acting as you are, you are going to fail and I do not want that to happen". According to him he encouraged the claimant to think hard over the Christmas period about options for reshaping her role, and when they were both back they needed to have a discussion.

184. The claimant followed this up with an email, referred to at paragraph 65 above including her comment that she was "happy to wait for now you know it's not £ I'm seeking".

185. Mr Pennycook recollects in the conversation asking the claimant whether she would be interested in an operational role at some point, and she said that while an operational role could offer high remuneration her priority over the coming couple of years was to create more flexibility in her work/life balance. She explained plans to marry her partner and therefore she would be taking on a new family. Her ideal would be to have a role where she could take all school holidays off to be with her family.

186. He thought that she would welcome changes to her role which would remove her responsibility for managing the relationship with the Remuneration Committee following what he thought was a breakdown of trust between her and Stevie Spring.

187. Mr Pennycook later found the claimant open to Pippa Wicks leading for the executive at the Remuneration Committee, and this was implemented in March 2016.

188. From the claimant's perspective the call from Austria was not prearranged. She went to a meeting room to take it. Richard Pennycook wished her a Merry Christmas and said he wanted to catch her before she left for the holidays as he was aware that he had not got back to her about her concerns in respect of pay. He said unfortunately he did not think the Remuneration Committee would approve a salary increase for the role she was taking. It was not clear to her whether he just thought this or whether it was what had actually been said to him. He then said he assumed she wanted a longer term career in the Co-op and asked her to confirm it, which she did. He then went on to discuss other operational roles and mentioned Funeral Care and Legal Services. She knew what he was getting at in connection with rebalancing

executive salaries from high base with lower variable pay to the other way round. Whilst she was flattered she told Richard Pennycook that had the offer come up a couple of years previously before she was Chief Human Resources Officer she might have jumped at it, but given the journey she had been on with her team and how much they had achieved her heart was firmly in HR. According to the claimant Mr Pennycook was not sure what else he could do, but then thinking out loud she said what if she was to go part-time like other executive members but without any change in pay. He encouraged her to keep talking and she said it was not just about her wanting a pay rise it was about her wanting to be recognised and valued alongside her male peers which, according to her, "Richard clearly understood that I was referring to the differences in our pay". In this regard she told Richard Pennycook she did not think the job could be done in part-time weeks as anything could happen with people on any day, but it could perhaps work with more holidays. She said she was going to ask for more holiday in 2016 because of her forthcoming marriage and honeymoon and had carried one week over already. Perhaps another two weeks without loss of pay, making a total of ten weeks' holiday, and then increase up in 2017 perhaps to term time working during the last year of the Rebuild strategy; this way her pro-rated salary could be equivalent to the men on the Executive Committee. She pointed out that Sue Tunmore had joined the company and was more than capable of covering the weeks when she was away as the claimant used to report to her in a previous employment. According to her, Mr Pennycook seemed quite excited by this and said it was a good idea that he would give more thought to and they would talk again after Christmas.

189. We have referred above to the claimant's email where she was not seeking £.

190. Mr Pennycook's response to this was that he would have something drafted for her when she got back. They needed to talk some more on the flexible time thing so she should give it further thought in terms of what might work for her.

191. At the beginning of January 2016, the disabled person associated with the claimant was taken very ill and hospitalised so the claimant's time was, unsurprisingly, taken up with this.

192. Also around this time the first respondent was the respondent in another Employment Tribunal in Manchester involving a senior employee, and various members of the Executive were involved in the Tribunal process.

193. The third alleged protected disclosure took place on or about 12 January 2016 according to the claimant.

194. The claimant and Mr Pennycook continued their discussions on 5 February, and we have set out above matters in relation to the first part of the appraisal discussion. According to the claimant, Richard Pennycook asked to speak to her. He said he had thought about her suggestions, the reduced hours proposal, but had decided her role could not be carried out part-time even with Sue Tunmore in the team. She was taken aback and very disappointed and did not believe he had given any serious consideration to her suggestion (particularly in the context of her personal circumstances as carer for the associated disabled person and a mother of five children. According to her, he was very blunt and categorical and giving her the clear impression there was no room for discussion. This surprised the claimant

particularly when Mr Pennycook himself worked flexibly to carry out an additional role as the Chairman of another company and as a non-executive director in two more.

195. The claimant accepts that Richard Pennycook then proposed splitting her role in two with her being responsible for strategy and Sue (her deputy) responsible for operations, with both of them reporting to Pippa Wicks once she became Chief Operating Officer. This came as a complete shock to the claimant and she rejected the proposal immediately on the basis that it was completely impractical to split HR strategy and operations and it would be a significant demotion for her. She said Richard Pennycook would be mad to move HR from the executive when the Co-op employed more than 70,000 people and the external market would think he had lost the plot. Also she said it would not be appropriate for her to report to Pippa Wicks given that Pippa had almost no HR experience. She made reference to her relationship with Pippa Wicks and whilst she got on well with her as a peer she did not think she could possibly coach her as her subordinate. If she accepted the proposal she would have lost line management responsibility for a large part of her function. There was no suggestion she was doing her job poorly or she was out of her depth, still less any opportunity to comment on any concerns he might have.

196. According to Mr Pennycook in this conversation the claimant acknowledged things had not gone well for her in 2015 consistent with what she had written in her performance evaluation. They began to explore ways to craft a new role for her that would be within her capabilities. After an exchange of emails they agreed to meet again on Sunday 7 February. The claimant's email and the options outlined did not really reflect what they had discussed though. Most notably he said it was what was really driving the need for change which were concerns about her performance. He asked her to bear in mind the context, namely they were trying to structure a role which had her “in flow” everyday rather than constantly stressed and creating the flexibility she would value around her work/life balance. He was keen to balance her desire for more flexibility – working in term-time only – with the role better suited to her capabilities, and in all of the conversations he said there was never any suggestion she would forego her contractual rights. Rather at the end of her notice period she would transition to a new contract drawn up to reflect the new agreed role.

197. The claimant said she would try and put something in writing to discuss on Sunday if possible. The exchange of emails started with the claimant on Friday 5 February 2016 at 18:49 in an email headed “Options for HR”. Option 1 had HR not on the executive, reporting instead through the Business Units and Support Centre. Sue Tunmore would report to Pippa Wicks with certain responsibilities. The other HR Directors would have hard line reporting to their respective Business Units. If this decision had already been made and the Board was aware then the claimant said she was redundant with immediate effect or as soon as the decision was implemented.

198. Option 2 would have HR still on the executive with all shared services remaining in the Support Centre but optimised under the Chief Operating Officer. Certain people would report to her. Sue Tunmore would only be focussed on certain parts of the business in relation to HR, and the claimant would remain on the exec

reporting to Mr Pennycook and overseeing the HR Rebuild strategy and the centres of expertise areas referred to.

199. Option 3 would involve Helen Webb leaving the Co-op between September 2016 and June 2017 at which point Sue Tunmore would go into her role for a year. Whilst she was seconded for a year someone else would cover that role and on return from secondment Sue Tunmore could report to the COO. By this time the claimant will have helped create an executive team and delivered the HR Rebuild strategy. At this point HR might no longer sit on the executive and she would either be redundant or they would explore further opportunities.

200. The claimant went on to talk about the Rebuild of the business and how various roles would change, and in conclusion she hoped, "this gives some other options than the one we discussed today, which in my view, would render me redundant. I do not feel I can play a coaching role to other exec members if I am reporting through one and, as I also said, I love working as a peer with Pippa. This dynamic would (and has) change instantly if I were to report through her".

201. Having received this Mr Pennycook asked how they would structure a role in which she was "in flow" every day, and how did they create the flexibility that she would value around work/life balance?

202. They met again on 7 or 8 February and, according to the claimant, Mr Pennycook said he had heard her concerns so she could continue reporting to him but he wanted Sue Tunmore to report to Pippa Wicks. The claimant would remain on the Executive Committee.

203. According to Mr Pennycook the email sent by the claimant on 5 February did not really reflect what they had discussed.

204. According to Mr Pennycook the parties continued their discussions over the coming days and he took the view that the claimant was in denial about the performance issues that had led him to the discussions and was therefore highly resistant to change.

205. The claimant recalls a meeting on 22 February with Mr Pennycook saying that he had been reflecting and was sticking to his original decision. This was that the claimant could report to him but he wanted Sue Tunmore to report to Pippa Wicks. The claimant said, "that sounded like a take it or leave it" and he said it was. According to the claimant she asked if "leave it" meant redundancy and he said that he really did not want that to be the case. She was to think about it overnight and get back to him.

206. According to Mr Pennycook they met in London on 23 February. They would discuss things and he would think they were making progress but when the claimant thought about it and came back it was with something very similar to her current role or that which had been discussed and he had said would not work.

207. According to the claimant on 23 February she read to Richard Pennycook a proposal that she had handwritten which had her role as CHRO on the Executive reporting to Richard Pennycook. She would be Coach and Business Partner to the

executive and the grade B and C employees. She would have a number of people reporting to her and a dotted reporting line from the HR Directors in the various businesses. She set out the various tasks that she would be responsible for and then went on to give "my proposal" as follows:

> "I support you and Pippa to make this international model work in a domestic market.
>
> I am assuming she is all operations so not just IT and HR but Finance and Call Centre strategy too. Otherwise how does this get communicated with my reputation intact?
>
> I get recognition for performance and delivery to date, acknowledging I've done two jobs for two years and I'm paid substantially less than my peers.
>
> What this looks like for me is equivalent to 'outstanding' rating payments for AIP and LTIP for 2015.
>
> We agree a settlement agreement now for end 2016 (redundancy and 12 months' notice plus agreed 'exceed' rating in line with NF and CD who were not performing).
>
> In return I make this model work and retain best talent to do so (happy to explain headlines now).
>
> Also happy to help find my successor and/or continue as consultant in 2017."

208. Mr Pennycook was provided with a copy of this document by the claimant. He was cross examined about it. With reference to the claimant saying she was paid substantially less than her peers he said he knew she was motivated by money.

209. It was put to him that his evidence was wrong. The claimant was raising it in clear form. It was a concern that she needed to be acknowledged that she was paid less than her peers. Mr Pennycook said at that time they were entering a discussion about her future role. She did not refer to her male peers. He regarded Pippa Wicks as a fully-fledged member of the Executive from 2014 onwards (even though her services were supplied through a third party consultancy). He accepted that he had taken a copy of the claimant's note.

210. He accepted that shortly thereafter the claimant had sent him a text which made reference to the need to look at her from an equal pay perspective, and she also referred to working equivalent to three days a week and accepting a redundancy payment from her current role and so she would be rebalancing six months earlier than other people. Mr Pennycook accepted having received the text but stated that it was confused. The reference to "equal pay" he thought reflected the fact that the conversation was changing. He was not prepared to talk terms for the new role until they knew what it was. It remained his case that the claimant had not raised equal pay. It was nothing to do with the flexible working discussions. No-one told him that the claimant had raised equal pay with them.

211. Mr Pennycook's text message response was to the effect that whilst he was sympathetic to what she wanted to achieve he thought they were in danger of pushing the boundaries too much and damaging their credibility:

> "The June date and the consulting rate are both a bit convoluted. Would it be easier just to work 12 months' notice then move to a rebalanced contract which keeps you in the new role? Package will be attractive and if earnings are important that keeps you on payroll with all benefits etc. Have a think. I'll come and find you in a Board break."

212. On 26 February 2016 Richard Pennycook sent an email to Sam Walker and Pippa Wicks saying that:

> "The three of us represent the knowledge circle so far as the proposed reshaping of HR. Please could you review together the 2016 work programme with a view to…Once you are ready we should meet to review and agree it, ahead of sharing it with anyone else, along with the fundamental principles that Sam has drafted."

213. The claimant responded saying she would discuss matters with Pippa Wicks and come back to him.

214. On 4 March 2016 the claimant was signed off sick for a month.

215. Notwithstanding this the claimant and Mr Pennycook were still in discussion, such that on 8 March the claimant sent an email to him setting out her thinking, with details of reporting changes, her role focus and her remuneration, and asking for consideration for the fact that she had been doing effectively two jobs for the last two years prior to the arrival of Sue Tunmore. The 2015 long-term incentive programme bonus will be based on her old role salary of £215,000 unlike the rest of the executive team who had already been appointed, so she would see a very small bonus compared to the rest of the team. She asked for some consideration to be given to this.

216. The response of Mr Pennycook was that:

> "Thinking back to our first conversation I asked you to report in to Pippa. I said you would have my and her full support for the reshape role which would still involve attendance at the exec. You were very resistant and I understand that. Unfortunately I am not getting support for keeping your reshaped role as an Exec position. I don't have a sign off for what we talked about the other day. I have indicated the effect of this below. Please reflect overnight and we'll talk tomorrow."

217. The claimant responded to ask if she could clarify a few points and Mr Pennycook did. He confirmed it was his decision that she would not have an executive level role. That was his decision based on lots of conversations. They could discuss her 2015 rating the following day. The role offered was reporting to Pippa and not on the Executive. She would be on new terms and conditions at the end of 12 months and it was the first respondent's intention to issue her with notice of change of terms.

218. The claimant and Mr Pennycook met on 10 March 2016 and Mr Pennycook sent an email to her on 11 March at 10:42 setting out proposals with the motivation behind this said to be very much to make her job more doable and to give her the flexibility she needed in her personal life too. As to reporting the claimant would move from the Group Executive to the Office of the Executive. Reference was made to how other members of the HR team would be involved. The claimant's role focus was set out. The claimant would not sit on Remco. As to remuneration, there would be two extra weeks of holiday in 2016 on the same remuneration then from March 2017 rebalanced in line with the sizing of the job role and notice period to change from 12 to 6 months in January. The salary would be pro-rated based on nine weeks' extra leave equivalent to term-time working, with the long-term incentive programme awards continuing in respect of 2017, 2018 and 2019 and time apportioned from 2020.

219. The claimant responded saying she would have a look at it over the weekend and then went on to raise the question of her 2015 rating. For them to move forward she needed to feel all of her hard work, long hours and big achievements had been recognised and could he re-read the paperwork she submitted. She was immensely proud of her function and did not feel she could stay emotionally connected with the Co-op if she felt unfairly treated so could he please re-look at it.

220. It was this that prompted the email from Richard Pennycook about doing the performance review that had to be cancelled so they had the conversation properly and in the round, considering all aspects of last year.

221. On 13 March the claimant emailed Richard Pennycook saying she had had a good hard think over the weekend and she could see he was trying to get a win/win for both of them. She was grateful for the changes agreed but they still needed to change things in a few areas. She referred to the 2015 performance rating. She would be happy to accept "achieved". The aim of securing an "exceeding" rating for 2016 was too risky for her. She had no confidence a fair decision would be made and she would need a guaranteed "exceed" rating. Whilst appreciating this placed the burden of risk on him she hoped he would understand her work ethic and she would not let him down. It was really important her role was seen as an executive level role. She was well-known in the HR community and anything else would be seen as a demotion and have a very detrimental effect on her reputation. The proposed role would not come out as A grade but he had the ability to make it such. The final request was in respect of a personal matter.

222. On 23 March 2016 the claimant emailed Richard Pennycook to say she would consider what they had discussed over the Easter break and she wanted confirmation that she had correctly captured what was discussed. The claimant set out matters in an email and Mr Pennycook's emailed responses are shown below *in italics*:

- "You have offered an additional two weeks paid annual leave this year in addition to the extra two already agreed due to my family circumstances and I can choose how I use this to support [associated disabled person's] rehab. *Agreed.*

- You have offered the support of a professional coach (EL) – I would also like to consider others of my own choosing if this is possible. *We should establish whether the chemistry with E works and if not we can think again.*

- Any LTIPS already awarded (including this year's) are protected from future performance ratings even if Remco now change the rules (I would want this covered in any agreement Mark writes up). *This will be what it will be – i.e. same as for anyone else. I will be arguing that there is no backdating of the personal performance condition for in flight LTIPS.*

- LTIPS maturing in 2017, 2018 and 2019 are all based on my current salary, no pro-rating for new role of flexi working. *Agreed.*

- Objectives for this year will be set in the context of my personal circumstances with the aim of achieving an 'exceeding' rating by year end. *Agreed.*

- My work pattern from next year will be equivalent, but not necessarily exactly, to term-time working i.e. 15 weeks' annual leave a year. *Agreed, with package pro rata.*

- My base salary will be rebalanced 12 months from the start of this agreement in line with the market and eligible for exec terms in terms of LTIP and AIP as it will remain an executive position. *Whole package will be established based on job sizing done by Hay. (BTW, I expect the exec terms to disappear as colleagues get rebalanced. Stevie is strong on this point).*

- Role focus to include direct through the office of the exec (although this might change depending on how this Co-op and member relations director role pans out. *Agreed.*

- Role focus to include exec member on Academy's Trust Board. *Agreed.*

- Have I missed anything? *As above, we should get the Hay work done promptly."*

223. A later short exchange suggested that the matters would take effect once officially documented.

224. The claimant went on sick leave on 23 March 2016.

225. In the absence of anything further from the claimant the letter of notice was sent.

226. Mr Pennycook accepted that he had discussed matters concerning the claimant with Board members as their approval was needed for his proposed changes. From the Executive he had discussed matters with Pippa Wicks, the other

female member of the Executive because she would be taking on some HR responsibilities from the claimant; with Mr Asher from a legal perspective and with Mr Murrells as the claimant would need his support in a new role.

Notice of Termination

227. According to Mr Pennycook, in his witness statement, the claimant commenced a period of sick leave from 25 March 2016. Although he tried to contact her she did not respond. At this time no agreement had been reached as to her future role, and he realised that he was not going to get any agreement from the claimant unless he put some time limit on things:

> "Plainly it is not appropriate for an executive to be put through a performance improvement plan or similar. At the top of any organisation it is always very brutal – if you are not performing you are normally out immediately in order to avoid serious damage to the business. However, I did not want to lose Sam. I wanted to try to keep her in a role that she could manage to be fair to her. It was not her fault that she had been promoted in an emergency into a role to which she was not suited. But I felt we had got to the point where I needed to write to her formally about this. Our discussions about a way forward had not worked. The business needed an effective CHRO who could drive the people agenda forward. Sam, unlike other members of the Executive, still had a 12 month notice period, and so I decided to start the notice clock running on ending her employment in her current role. My intention was to continue our discussions with a view to agreeing a new role during the notice period. I thought Sam would stay with the business and that was what I wanted – Sam working in a role she could manage, not one where she was out of her depth. None of the actions I took were anything to do with her sex, her supposed complaints or [anything to do with the associated disabled person] as she alleges in her claim."

228. On 1 April 2016 Mr Pennycook sent the following letter to the claimant:

> "We have spoken over the last three months about the changes that we want to make to the HR function. As indicated to you and for the reasons that I explained, we are now at the point where those changes have to be implemented and so I am writing, formally, to give you 12 months' notice to terminate your employment with the Group, as required under your service agreement with the Group. Unless you accept a new role with the Group, your employment will terminate on 2 April 2017 when your notice expires.
>
> I would also suggest that you take leave of absence for the next three months, to 30 June 2016. This would in essence be compassionate leave, recognising the difficult family circumstances that you face and reflecting our desire to give you time and space to make the necessary adjustments and to think through whether you wish to take up our offer of an alternative job role with us.
>
> Clearly it is not possible, or fair, to say nothing to colleagues about your absence from work. We intend to announce on 7 April that you are on compassionate leave, with the following brief statement made to Enterprise Leaders and the HR community:

*[Some of you will know that [the associated disabled person] has special needs which are particularly acute at the moment.] Sam will be taking extended family leave through until 1 July 2016 and in the meantime the following arrangements will apply:*

- *ST, GD, AS, JS and MP will report to PW who will chair the HR Executive.*
- *The Business Unit HRDs will report directly to their Managing Directors."*

229. The letter to the claimant went on to say:

"Please let me know ahead of close of business on 6 April if you wish to make any amendments to this statement and whether you are happy for us to include the section in square brackets. Whilst you are on leave, we will be asking you to have career counselling and development conversations with experts who, whilst independent, will be able to advise you on your continuing career options with the Co-op or on alternatives beyond the Co-op if you choose to leave us. We will be in touch shortly to set out those sessions."

230. The claimant replied in writing on 6 April in a letter covering some eight sides of A4 paper. By way of introduction she confirmed that she was currently signed off work for 12 weeks with stress and felt very unwell so the situation was even more difficult and deeply upsetting than it would have been had she been in good health, but given the time limit imposed she would try and respond, with her responses potentially being less comprehensive and less well reasoned than would usually be the case.

231. They had been speaking about changes to the HR function for three months, with Mr Pennycook having made his views clear from the outset that he no longer wished her carry out her current role and this had not changed. She was aware of his intention that she surrender at least half her current role to Pippa Wicks who would have management responsibility for key members of her team. The main discussion had been in relation to a possible new role for her with that possible role having changed, evolved and changed again. It was on the Thursday before Easter that he confirmed that the role he was proposing was not at executive level, representing a further significant and humiliating diminution in her status, seniority and responsibilities. She made it clear to Mr Pennycook that if it was to be a workable option, as a minimum, any alternative role would have to at Executive level.

232. She did not regard their conversations as formal consultation, nor until very recently had he suggested he was intending to give her notice of termination of employment if they could not agree on the constantly changing proposals. She was not given any right to be accompanied.

233. According to the claimant, the process followed had been unfair, unreasonable and disregarded her contractual entitlements and things had been taken out of sequence. According to the claimant, the process should have required proper, detailed consultation in good faith with a view to reaching agreement, and only if it was not possible to reach agreement would the company be in a position to

give notice of termination, and only after that notice had expired would they be able to take away her work and responsibilities.

234. She referred to the proposed announcement and although it was suggested the proposed announcement would present the changes as a temporary solution in fact he intended the changes to be permanent and employees receiving the announcement would realise that. The claimant set out her belief that the Executive Team were all aware he was having supposedly confidential conversations with her, and had either confirmed this with her or could not look her in the eye. She had felt isolated and ostracised. She made reference to an unresolved grievance raised by a member of the respondent's council.

235. As to the future, she could not accept the role outlined as, apart from anything else, to do so would cause significant damage to her professional reputation. It was clearly a demotion as it was not on the Executive Team. Secondly, she would be seen to be condoning the idea of HR not having a seat at the executive which, in an organisation employing more than 70,000 people and claiming to put its people first, was an untenable situation:

> "The words and actions just do not match and it would not be possible for me to carry out the role in the way you propose with any degree of integrity."

236. She could not agree to the proposed announcement. It was not correct. She was off work because she was very ill, with the illness being caused by a number of factors but in the main by the Co-op failing in its duties towards her. She was very disappointed this point had been reached, having worked together with Mr Pennycook for a long time and thinking that they understood, trusted and had confidence in each other. Since receiving the letter she had reflected on what had happened over the last six months and had tried to work out why things had changed so dramatically.

237. The claimant noted that in October 2015 she was commended for the Board presentation, one of her team was described as "outstanding" by the Chairman, and the Enterprise Leaders Event in November led by her team was widely acclaimed. She referred to November 2015 when she handed to Mr Pennycook a copy of an article about the rise of the Chief People Officer, stating she wanted to discuss her role going forward as she believed she was already doing most of what was described. She thought her role should be properly recognised.

238. In December 2015 when she had not had her end of year review she reminded him she was the only woman on the executive with five men and pointed out she was earning 41% less than the nearest man (although this should have been 34% but it is still a significant number), particularly as her role had been "evaluated" at a higher level that the General Counsel role – also on the executive and held by a man. She made it clear that the company had an equal pay problem and this meant not only statutory exposure but was also inconsistent with the company's vaunted values and the possible source of very negative publicity, not least because of the imminent gender pay gap reporting obligations. According to the claimant:

> "You seemed taken aback by the concerns I had raised but did not come up with any immediate constructive proposals."

239. She referred to the call later in December saying that the Remuneration Committee would not authorise any more pay for her when the claimant said she was disappointed, but that it was not just about her wanting a pay rise, it was about wanting to be properly valued alongside her male peers. In the conversation she had been asked whether she would be prepared to consider MD of Funeral Care or similar but she said there was an alternative possible solution involving adjusting her working hours and she would be interested in having more non-working days using a pattern convenient to the company. This would enable her to spend more time with her family, particularly the associated disabled person whose condition had recently worsened.

240. According to the claimant, Mr Pennycook had agreed to discuss this further in January 2016 but in that month two dates for her year end review were cancelled with no explanation. By early February 2016 the atmosphere had changed and there was a suggestion of splitting her role with her and Sue Tunmore reporting to Pippa Wicks. This was a clear demotion and she had serious concerns about Pippa's management style.

241. Thereafter their conversations were essentially about possible other roles rather than dealing with concerns over her existing role, but:

> "Despite a number of different suggestions all of which involved my demotion and the diminution of my responsibilities and status we failed to reach agreement. You refused to move from your initial proposal and made it clear that it was a case of 'take it or leave it'."

242. The claimant went on to note that despite the fact that there had been no formal meeting or discussion Mr Pennycook informed her that he had decided to rate her performance as "partially achieved" and apart from the effect that this erroneous rating had on her confidence and general sense of wellbeing, it made a significant difference to her potential bonus. If, as she believed should have been the case, she had been rated as "exceeded" she would likely have received a bonus of 60%-75% of salary whereas "partially achieved" would only bring a percentage bonus of 20%. Even "achieved" would have led to a 50% bonus. All her direct reports had attained "achieved" or "exceeded" and this was peer reviewed, so how could she only be rated as "partially achieved"? She stated that they agreed in a ten minute discussion in March that the paperwork the claimant submitted did not reflect the year accurately. The claimant subsequently resubmitted paperwork but there had been no proper performance discussion about the 2015 year end review and her rating of "partially achieved" remained and the corresponding bonus payment has been recorded in the annual report.

243. The claimant went on to state that:

> "Having reflected, it is obvious to me that the turning point occurred when I raised the equal pay issue. As part of my proposal to address this inequality, I suggested part-time working, especially for reasons related to [the associated disabled person's] disability. From then onwards the company's treatment of me has deteriorated markedly. I have been subjected to a constant stream of undermining conversations and unhelpful, demeaning proposals culminating

> in your letter of 1 April 2016 to the extent that I have now been signed off work sick with stress for 12 weeks.
>
> As a result of the company's treatment of me, I believe that I have a valid equal pay claim because of the differential between me and the male members of the Exec. I have already mentioned the Hay evaluation. I believe that my treatment would also constitute sex discrimination. In raising my equal pay claim I made a protected disclosure as a result of which I have been punished and subjected to detriment. You have now confirmed that in due course I will be dismissed. This would be an automatically unfair dismissal. I have also been subjected to less favourable treatment as a result of requesting part-time working and disability discrimination on the basis of [the associated disabled person's] disability. As a result of your failure to follow a proper process, I also have a claim of unfair dismissal.
>
> In view of the unacceptable nature of the alternative role which you have proposed, it appears that I will not be employed beyond the end of my notice period. With the stigma of my demotion and poor treatment my prospects of securing a reasonable suitable alternative role are very poor."

244. Having set out what she would like to recover should her claims succeed, the claimant did not "wish to take proceedings against you or the company unless I really have to do so. I urge you to reconsider your position. If you are unwilling to do so, I will pursue a grievance and, if the outcome is unsatisfactory, you will leave me with no realistic alternative but to take proceedings".

245. On 18 April Richard Pennycook responded in writing to the claimant stating he was saddened to receive the letter, and noting the statement that the claimant was not willing to accept the offer of an alternative role at the expiry of the notice period. She had raised a number of serious allegations. He disagreed with her account of recent events and did not accept the allegations. The allegations would be investigated under the grievance procedure. He did not consider that laying out a detailed rebuttal of her accusations would be helpful to her state of mind, and whilst she was away from work there was no urgency to do so.

The Grievance

246. On 1 June 2016 the claimant confirmed that she did want to have the grievance investigated. The claimant did not want to have it investigated by Sir Christopher Kelly, one of the independent directors. This resulted in Lord Victor Adebowale being appointed to hear the grievance on 15 July 2016.

247. The claimant provided a further statement of her grievance on 3 August 2016 after which Lord Adebowale investigated the grievance. This involved meeting the claimant on 7 October 2016 and then various other people.

248. The grievance decision was announced on 12 April 2017. The claimant appealed against it on 24 April 2017 and Hazel Blears was appointed to hear the grievance appeal. She did this and reported on 21 July 2017 rejecting the claimant's appeal.

## Discussion and Conclusions

249. The first section of the List of Issues covers ordinary unfair dismissal/automatic unfair dismissal (whistle-blowing) and compensation. Before we can start to reach any conclusions on the question of dismissal we must address the question of the protected disclosures and protected acts.

Did the claimant make one or more protected disclosures?

250. The law related to protected disclosures is to be found in the Employment Rights Act 1996 as follows:

> "**43A Meaning of "protected disclosure"**
>
> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
>
> **43B Disclosures qualifying for protection**
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
>
> (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
>
> (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

**43C Disclosure to employer or other responsible person**

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

251. In his submissions on behalf of the claimant Mr Devonshire referred to there being what he called the key "jury" questions to be determined by the Tribunal. The first is whether she made any of her three alleged disclosures to Mr Pennycook, and the second is whether Mrs Walker had anything in the nature of a proper performance appraisal discussion in respect of 2015 before she was dismissed. We shall return to this question later, concentrating for now on the questions as to the alleged protected disclosures. Taken from his submissions –

> "Mrs Walker says that she raised concerns with Mr Pennycook about the apparent pay inequalities between her and her colleagues on three occasions: mid November 2015; 16 December 2015 and 12 January 2016…Mrs Walker says that on the second of those occasions Mr Pennycook told her that Remco would not approve a salary increase for the role she was doing and that if she wanted more money she might consider an operational role. Mrs Walker replied that it was not about money but being valued equally with her peers and one way of accommodating this was allowing her to work reduced (more family friendly) hours on the same pay.

Mr Pennycook contends that:

(1) This description of their discussions was/is "simply fabrication";

(2) He used the 16 December 2015 discussion to deliver a very blunt message to Mrs Walker that she was underperforming, itemising the important initiative under her control that had gone badly;

(3) They never talked about equal pay; and

(4) The request for flexible working was never mentioned in the context of pay…

If Mrs Walker's evidence is accepted it is clear that she blew the whistle about gender based inequalities in what she reasonably believed to be the public interest. In any event, even if the issues she raised focussed solely on her own position (and included no public interest element), they would qualify as protected acts for the purposes of section 27 of the Equality Act 2010. On any fair interpretation she was making claims of gender based unequal pay. As the Court of Appeal has recently made clear in **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, the meaning of a statement is not just a matter of the words used, but falls to be decided by reference to the context in which it is made. This observation was made in the context of whistle-blowing legislation, but it applies equally to the identification of protected acts for Equality Act purposes… It is obvious what Mrs Walker was saying – she believed that she was being disadvantaged in the matter of her pay because of her gender and didn't feel she was being treated as well as her male peers on the Exec."

252. In his submissions on behalf of the respondents Mr Burns argues that:

"The claimant's case on whistle-blowing makes little sense. She was responsible for pay and equality. She had known the precise pay differences between herself and her comparators after March 2014. She was the person to whom any whistle needed to be blown on this. Had there been an equal pay issue – it would not have been any problem or work for Richard Pennycook – as he commented in cross examination: 'Many things were broken in the Co-op and we were actively searching for things that needed to be fixed'. If she had equal pay concerns RP would have simply asked her to report to Remco with a solution to remove any potential legal risk. Indeed had she genuinely had any concerns about unlawful inequality she would just have done her job and raised it directly with Remco and particularly with Stevie Spring who is a vocal proponent for women's equal pay issues. There is no email, note or report because she had no equal pay concerns. She only raised it explicitly in her 6 April letter post termination and used comparison with her peers in seeking a pay off if she accepted a reduced role."

253. In his submission the claimant did not make protected disclosures or do protected acts as she did not communicate information to Richard Pennycook that tended to show (in her reasonable belief) that the first respondent was breaching its legal obligations to pay employees equal pay for equal work.

254. He referred to section 43B(1) of the Employment Rights Act 2010 and section 27 of the Equality Act, and then referred to the recent review of protected disclosures by the Court of Appeal in **Chestertons v Nurmohamed [2018] ICR 731**:

> "(a) The definition has both a subjective and an objective element…the subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in subsection (1). The objective element is that that belief must be reasonable.
>
> (b) A belief may be reasonable even if it is wrong. That is well illustrated by the facts of Babula's case where an employee disclosed information about what he believed to be an act of criminal incitement to religious hatred, which would fall within head (a) of section 43B(1). There was in fact at the time no such offence, but it was held that the disclosure nonetheless qualified because it was reasonable for the employee to believe that there was."

255. In the submission of Mr Burns it is not sufficient simply to make unspecified and generalised allegations about wrongdoing as the ordinary meaning of giving information is conveying facts that tended to show a breach of a legal obligation. He too referred to the case of **Kilraine**:

> "Whether the words used amount to a disclosure of information will depend on the context and the circumstances in which they are used and ultimately the decision is one of fact for the Tribunal which hears the case. The context here is that she was one of the most senior HR professionals in the UK and should have conveyed precise information to RP and Remco had she a genuine concern. In this case 'information' would be giving facts to RP which showed that the claimant was doing work rated as equal to AA and NF (her comparators) and that their pay difference was due to her sex. Even on the claimant's own account she did not do that."

256. Mr Burns then went on to deal with the facts as he saw them in respect of each of the protected disclosures.

257. Mr Justice Langstaff in **Kilraine** says that "I turn now to the cases in respect of the third and fourth disclosures. These were rejected. So far as the third is concerned, this was upon the basis that it was an allegation and not a matter of information. I would caution some care in the application of the principle arising out of *Cavendish Munro*…The dichotomy between 'information' and 'allegation' is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point."

258. The Tribunal will proceed to make factual findings in relation to each of the three disclosures and then, based upon the facts found, consider whether or not the claimant made qualifying protected disclosures.

259. In respect of the first alleged disclosure which relates to mid November 2015, we have no doubt in concluding that in or about the middle of November 2015 the claimant handed Mr Pennycook a copy of an article entitled “The Rise of the Chief People Officer” and that they discussed it. There is no doubt from the claimant's evidence that she could not remember the terms of their conversation in any detail, and of course it was not reduced to writing on either side.

260. Based on the claimant's own evidence we cannot be satisfied as to what she said to Mr Pennycook, but if we look at it not just being a matter of the words used but something falling to be decided by reference to the context in which the alleged disclosure was made, we were invited to read the article as part of our pre-reading, and we did so. The article relates to a description of a new role which develops the role of the Chief Human Resources Officer by adding things to it, but the article itself nowhere refers to how, if at all, it relates to the remuneration of the Chief People Officer and/or how that might relate to the pay of other “Chief Officer” roles within any organisation.

261. Reviewing all the evidence and taking it in context, we are unable to find that when providing the Chief People Officer article to Mr Pennycook the claimant disclosed any information to him to the effect that the respondent had failed to comply with its legal obligation in respect of equal pay.

262. The second alleged protected disclosure relates to the telephone conversation between the claimant and Richard Pennycook on 16 December 2015. Again, neither party made a note of the conversation, but the claimant did send to Mr Pennycook the email referred to at paragraph 65, which for the Tribunal confirms that the question of money was to some extent discussed. We also note the response from Richard Pennycook in which he does not say that this was not discussed, he stated it all sounded good to him and that he would have something drafted for the claimant when she got back, and the need to “talk some more on the flexible time thing”.

263. This email exchange was disclosed much later than the majority of the other documents.

264. In the light of the contemporary email exchange corroborating the claimant’s evidence that there was a reference to money in the conversation, we have no difficulty in finding that the question of pay and how the claimant’s future with the Co-op might develop were discussed, which would include the claimant carrying out her then existing role on a part-time basis.

265. The parties seem to agree that the question of an operational role was put by Mr Pennycook to the claimant but she said that this was not of interest to her.

266. In the absence of anything else by way of corroboration, the Tribunal prefers the claimant's recollection of this conversation, which includes her reference to wanting to be recognised and valued on the same basis as her male peers. We also find that the claimant made reference to continuing to carry out the same role on the same salary but working fewer hours and/or weeks which could have brought parity between the claimant and her male comparators on a pro rata basis.

*267.* Looking at the words used and their context, we are not satisfied that the claimant has disclosed information which tends to show that the employer is failing to comply with a legal obligation in connection with equal pay for men and women. No legal obligation is referred to. The claimant is the only person referred to. There is no mention of the rest of the Co-Op's female employees. The claimant's pleaded case at 62 (ii) above refers to what "both parties knew and understood" from what she claims she said. In our judgment a protected disclosure must contain information. It is not something that can be based upon an implication.

268. The third alleged protected disclosure relates to an alleged discussion in the Manchester office on 12 January 2016 which occurred early in the morning before the start of the Harmeston Employment Tribunal which the Co-op was then defending.

269. We have set out the pleaded allegation at paragraph 84 above, and the claimant's evidence in support of it immediately thereafter.

270. We have also set out at 99 and 100 the evidence of Gary Dewin to the effect that the question of the outcome for B grades was not discussed by him with the claimant on or about 5 January, and in any event that outcome had arrived in the middle of 2015. Also, he did not remember making any reference to things not looking good for the female members of management.

271. We note that Mr Pennycook claims that the conversation could not have taken place as alleged because he was driven directly to the Employment Tribunal and did not attend the Manchester office that morning.

272. The Tribunal is faced with the conflicting evidence of the claimant and Mr Pennycook in respect of a conversation for which neither party has produced any directly corroborative evidence. The only other relevant evidence comes from Mr Dewin who denies that the claimant asked him about the B grades in January 2016 and states that the Hay work on the B grades had been finished in the summer of 2015.

273. It is for the claimant to show that there was a disclosure of information to the respondent. In respect of the third alleged disclosure, considering the evidence of Mr Dewin to the effect that he did not provide the claimant with the information that she allegedly conveyed to Mr Pennycook and the evidence of Mr Pennycook that he was not present we cannot be satisfied that the claimant made the third alleged disclosure.

274. We shall move on to consider the question of whether or not the claimant did one or more protected acts at this point.

<u>Did the claimant do one or more protected acts?</u>

275. The claimant alleges that she was victimised contrary to section 27 of the Equality Act 2010, and as to protected acts she relies on the same facts cited for the alleged protected disclosures.

276. Section 27 of the Equality Act 2010 defines victimisation and provides that:

> **"27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act -
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

277. The allegation here is that the claimant (B) was "making an allegation (whether or not express) that A or another person has contravened this Act".

278. In respect of the first alleged protected act we did not find that the claimant had engaged on the question of equal pay with Mr Pennycook, and therefore we do not find that she did a protected act by making an allegation that there had been a contravention of the Equality Act 2010 in relation to equal pay.

279. With regard to the second alleged protected act we did not find that the claimant had made the second protected disclosure and we do not find that the claimant did a protected act by making an allegation that the respondent had contravened the equal pay provisions of the Equality Act 2010.

280. Having found that the third alleged protected disclosure was not made, we are for this reason unable to find that the claimant did a protected act.

<u>What was the reason, or principal reason, for the dismissal?</u>

281. In respect of the dismissal of the claimant, Mr Devonshire starts his submissions with the factual background where at the start of 2016 the disabled person associated with the claimant was taken very ill. There followed discussions of the possibility of a more flexible working arrangement for the claimant, with the claimant contending that it had never been suggested to her that she was underperforming until March 2016 when she was given her 2015 "partially achieved" rating in her performance appraisal. Thereafter on 1 April she was given 12 months' written notice of termination.

282. In his submission the Co-op's case is that by the end of 2015 Mr Pennycook had growing concerns about the claimant's ability to fulfil the role of Chief Human Resources Officer with alleged significant failings in various aspects of this work. The Co-op contends the claimant was dismissed for capability/some other substantial reason, with the projects for which she was Executive sponsor encountering significant difficulties with missed key milestones and deliverables, although this is not the reason given in the dismissal letter. As none of this was put to the claimant at the time and because the projects themselves are only referred to in the amended ET3, the precise boundaries of the respondent's case are unclear, which he says has left Mrs Walker having to seek to prove a negative.

283. Mr Devonshire goes on to say that it is almost axiomatic (at least on the present facts) that if the dismissal was tainted with discrimination or victimisation it was unfair. Equally if the reason or principal reason was her whistle-blowing disclosures it would be automatically unfair under section 103A of the Employment Rights Act 1996. The submissions which he goes on to make address the contention that the dismissal was substantively fair on the hypothesis that Mrs Walker's 'proscribed motivation' case is not made good.

284. He points out that the first respondent conceded the unfairness of the dismissal by means of an amendment to its response made in March 2018, "without any or any sufficient procedure because her position was so senior that it would have been inappropriate to follow a formal incapability or performance improvement process. Although this would have made no difference to the eventual outcome, it is conceded that the…dismissal was procedurally unfair on this basis". Before deciding whether some form of performance improvement programme was required or appropriate, the Co-op had first to decide whether she had failed in the respects [supposedly] alleged. On any view this required articulating the [supposed] criticisms of her performance and giving her an opportunity to comment on them to determine whether blame for any failures fairly identified could properly be laid at her door…The lack of process that attended the dismissal has wider potential significance. Where an employee raises a prima facie case that she has been unfavourably treated on a proscribed ground (whether sex, associative disability or the making of protected statements), the Tribunal will look to the employer for an innocent or non discriminatory explanation and, if such an explanation is not forthcoming, must draw an inference of discrimination (in the context of an Equality Act claim) and may do so (on a claim of detriment or automatically unfair whistle-blowing dismissal contrary to section 103A ERA). In this context, the Tribunal must ask why an organisation like the Co-op (which espouses values of equality and fairness) dispensed with the most basic pre-requisite of fairness – a right to be heard before the imposition of a sanction.

285. For the respondent Mr Burns submitted that it is for the Tribunal to determine whether Richard Pennycook, when deciding to give the claimant notice, was motivated by the fact that she was whistle-blowing or doing a protected act. He denied this in cross examination.

286. In the submission of Mr Burns, the claimant's case on whistle-blowing makes little sense. She was responsible for pay and equality. She had known the precise pay differences between herself and her comparators after March 2014. She was the person to whom any whistle needed to be blown on this. Had there been an equal pay issue it would not have been any problem or work to RP. As he commented in cross examination:

> "Many things were broken in the Co-op and we were actively searching for things that needed to be fixed."

287. If she had equal pay concerns, Richard Pennycook would have simply asked her to report to Remco with a solution to remove any potential legal risk. Indeed had she genuinely had any concerns about unlawful inequality she would just have done her job and raised it directly with Remco and particularly with Stevie Spring who is a vocal proponent for women's equal pay issues. There is no email, note or report because she had no equal pay concerns. She only raised it explicitly on 6 April (in her response to the termination letter) and used comparison with her peers in seeking a pay off if she accepted a reduced role. Further, if whistle-blowing was really the motivation then Richard Pennycook would have wanted to get rid of the claimant as was put to him and ensure that she was out. But as the claimant accepted, that was not his aim. He was always trying to keep her in an HR role in the Co-op.

288. Mr Burns put in an extract from cross examination of the claimant where he asked:

> "But you accept he wasn't trying to get rid of you, wanted to give you 12 months' notice and you to be grade B. Genuinely what he wanted?"

289. In response to this the claimant said, "I think that's what he wanted, yes".

290. On the basis of this, the idea that the claimant was dismissed because of whistle-blowing and/or victimisation does not, in the submission of Mr Burns, add up.

291. Also in his submission Mr Burns noted that "ordinary" unfair dismissal was conceded, and so section 98 of the Employment Rights Act 1996 need not be addressed, except to say that the Co-op contends that the reason for the dismissal was related to capability or SOSR but it is admitted that it was not reasonable to dismiss without any process. He then went on to submit that there needs to be a subjective enquiry into the mental processes of the person who took the decision to dismiss. What motivated Richard Pennycook to demote the claimant from the Executive, to move her to a reshaped HR role reporting to Pippa Wicks and then to issue her with 12 months' notice when she failed to agree to the proposal? Was it the numerous reports and concerns he was getting from various levels of colleague that she was not able to manager the CHRO role or was it because she complained to

him about equal pay, allegedly on three occasions from November 2015 to January 2016?

292. Section 103A of the Employment Rights Act 1996 provides that:

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

293. As we have found that the claimant did not make any protected disclosures the claimant's claim under section 103A cannot be well-founded.

294. What was the reason (or, if more than one, the principal reason) for the dismissal for the purposes of section 98 of the Employment Rights Act 1996? It is for the employer to show what it was. Was it a reason relating to the capability of the claimant, or was it some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held, commonly shortened to SOSR?

295. Mr Burns for the respondent submits that the reason for dismissal was related to capability or SOSR, and he goes on to refer to matters related to her capability and how various of the projects that she was the Executive Sponsor of had not worked as well as they should have done.

296. In our judgment the reason for the dismissal was that set out in Mr Pennycook's 1 April 2016 letter, to the effect that the first respondent needed to make changes to the HR function and they were now at the point where the changes had to be implemented and so she was formally given 12 months' notice to terminate employment as required under the service agreement, but with the opportunity for the employment to continue after the end of the period of notice should the claimant accept a new role on different terms within the Group.

297. This is consistent with the view expressed by Mr Pennycook as long ago as October 2015 when he proposed to the Remuneration Committee making an immediate change to have the claimant report in to the COO to allow her to continue to pursue the operational HR agenda whilst Pippa Wicks will pick up Exec level HR and the interactions with the Remuneration Committee. The changes to the HR function following the giving of notice to the claimant were consistent with the stated intention.

298. We find that the reasons set out in writing by the respondent when giving notice to the claimant under her service agreement, which were the only reasons for dismissal given to the claimant in the absence of any formal process, were the reasons for the dismissal and that they amounted to substantial reasons justifying the termination of the employment of the claimant holding the CHRO position that she held.

299. The List of Issues provides that the question of compensation for unfair dismissal is to be determined at a separate remedy hearing if required.

Equal Pay

300. Has the first respondent carried out a job evaluation study in relation to the claimant's and her comparators' roles within the meaning of section 65(4) and section 80(5) of the Equality Act 2010? Specifically, was the review carried out by the Hay Group in 2014 a valid job evaluation study of those roles for those purposes?

301. Section 65 of the Equality Act 2010 comes within Chapter 3, Equality of Terms, and provides that:

> "(4) A's work is rated as equivalent to B's work if a job evaluation study –
>
> (a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or
>
> (b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system."

302. Section 80 deals with interpretation and subsection (5) provides that:

> "A job evaluation study is a study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skill and decision-making, the jobs to be done –
>
> (a) by some or all of the workers in an undertaking or group of undertakings…"

303. In his submissions on behalf of the first respondent Mr Burns states that:

> "It is accepted that the Hay Group grading project was a Job Evaluation Scheme so the only issues are: was it accepted by Co-op as a 'valid study' and did it contain fundamental errors?"

304. Again, according to Mr Burns it is accepted that:

(a) It was a valid study for setting the ceiling and context for the grading project – not for setting executive pay. There was no requirement to grade the executives relative to each other as they were all to be grade A. It was not commissioned and was not accepted by anyone – including the claimant – as a valid study for the purposes of setting executive pay or grading executives relative to one another. The precise scores for the executive roles were irrelevant, except as comparisons with grade Bs.

(b) If a valid study for setting executive pay it contained fundamental errors:

(ii) C's role was rated as if she had accountability for an £80million change project. She accepted she did not. Her Vital Five contribution was already evaluated – it was not the business as usual CHRO role.

(iii) NF's role was rated without his responsibility for membership only membership governance which Julia Davenport said was different.

(iv) It rated the roles as they were in late 2014/early 2015 (when NF's role was almost redundant and AA had completed recapitalisation of the Bank) not the very full, actual job they had been doing in early 2014 when pay was set.

305. Mr Burns quotes from Harvey paragraph Q (1507):

> "The Job Evaluation Scheme must be non-discriminatory and generally must be objective and capable of being applied impartially…If these criteria are met a Tribunal will loath to interfere with the study, unless it is shown to have been based on a fundamental error; even if this is so, the Tribunal may not proceed to its own evaluation exercise…Where a Job Evaluation Scheme has been carried out an employee may rely on it even though it has not actually been implemented by the employer…However that may not be so if the employer, having commissioned it, does not accept it as a valid study: **Arnold v Beecham Group Limited 1982 IRLR 307, EAT**."

306. The bundle of authorities provided by Mr Burns does not include the case of **Arnold**. As we understand it in that case the Employment Appeal Tribunal held that:

> "The acceptance of the results of a job evaluation study by both the employer and the employee representatives was a precondition of it being regarded as valid and complete."

307. In **Arnold** neither side accepted the job evaluation study, and Mr Arnold, who had been placed into a higher grade by the JES, brought a claim to the Employment Tribunal when he did not get the pay he thought he should have got based upon the study. In that case the Employment Appeal Tribunal held that the union and employer had in fact accepted the validity of the study because they had agreed grade boundaries and notified employees of them.

308. In this case, the Hay evaluation was carried out and the results were provided only to Mr Pennycook and to the claimant in the first instance. The claimant questioned the level of her score but Mr Pennycook was content with the outcome of the scoring in which the claimant's role had been scored slightly higher than those of her two subsequently identified comparators, although of course at that stage the question of equal pay had not been raised by the claimant.

309. In our judgment Mr Pennycook, having met with Mr Davidson to look at the outcome, accepted the results of the job evaluation study, in which the roles of the executives were all independently assessed on the same basis by the same assessors for setting the ceiling and context for the grading project, on behalf of the first respondent. The claimant, having initially questioned the outcome for her role, also accepted it. In our judgment these acceptances made the Hay job evaluation study a valid and complete study for the purposes of section 65 of the Equality Act 2010.

310. In respect of the submission of Mr Burns that the claimant's role was rated as if she had accountability for an £80million change project Mr Davidson, who was responsible for the study together with his colleague, suggested it was not the £80million that was important but whether or not the claimant was responsible for leading the change programme. He was not able to say that it would make a difference to the outcome of the study and it is not for us to undertake our own exercise on this question. With regard to the role of NF being rated "without responsibility for membership" we were taken to the Hay Group rationales and the role of the Chief External Affairs Officer is said to be "sized without membership". Mr Davidson did not state how the evaluation of the role would have differed had membership been included in it and again it is not for us to undertake our own exercise on this question.

311. As to the third matter raised by Mr Burns that the roles were rated as they were in late 2014/early 2015, in our judgment there has to be a time when the roles are rated and the Hay system seems to involve the roles being rated as a snapshot of what they involve at the time the study is undertaken rather than looking back to what they might have involved when remuneration levels were set or when jobs might have been different.

312. Having considered the submissions of Mr Burns we have rejected them for the reasons given and we find that as a result of the job evaluation study the claimant was doing work rated as equivalent to that of her comparators from no later than 12 February 2015 when Mr Pennycook accepted the Hay evaluations of the roles including those of the claimant and her two comparators in the full knowledge of the claimant's score relative to the scores of all of the other executive roles.

313. Section 69 of the Equality Act 2010 deals with "defence of material factor" and provides that:

> "(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –
>
> (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
>
> (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
>
> (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.
>
> (3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) 'Relevant matter' has the meaning given in section 67.

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's."

314. For the respondent Mr Burns put forward the following material factors:

(a) Vital roles – the Co-op saw AA and NF as vital to the immediate survival of the Co-op. They were part of the core team who with RP refinanced the Bank and reformed governance so that Co-op was not regarded as ungovernable and bound to fail. C and a strong HR function was important but not regarded as vital, as was AA and NF's core work.

(b) Executive experience – the Remuneration Committee considered that both the claimant and Paula Kerrigan were newly promoted to the Executive and unproven at that level unlike everyone else on the team at that time. The proposed increase from £215,000 to £500,000 seemed excessive for individuals who had no experience at executive level. The Remco did not feel there was any justification for more than doubling their salaries in those circumstances.

(c) Flight risk – it was crucial in the eye of the storm to maintain stability and the top team of people and support the interim CEO. Euan Sutherland had recruited NF as his Chief of Staff and AA as his Corporate Lawyer but ES left abruptly. There was an understandable concern that they might consider following him out. Had either of them followed him then that could have brought down the Co-op.

(d) Market forces – AA was on a higher pay package as he was a top Corporate Lawyer with particular expertise in the Co-op Bank separation and was paid at the high market rate for top general counsel. This exceeds the market rate for CHROs. The claimant tried and failed to introduce anecdotal evidence that there is some sex based disparate impact in the market rates for Corporate Lawyers and CHROs. It would of course need to be proved by statistical evidence about the gender split among CHROs and general counsel and there is none.

315. The Tribunal is prepared to accept that when the Remuneration Committee fixed the salaries of the claimant and her comparators in February and March 2014 the four material factors referred to above applied to the claimant and to her comparators. Those factors do not seem to the Tribunal to be in any way related to sex. There is no reason why the roles fulfilled by any of the relevant people could not have been fulfilled by people of the other gender.

316. Having accepted that there were material factors justifying the pay differentials between the claimant and her comparators at the time of their salary increases in February and March 2014, we have also found that by February 2015 their work had been rated by a job evaluation study with the role performed by the claimant scoring higher than the roles of her comparators.

317. We are aware that the important roles carried out by the claimant's comparators in connection with the saving of the Co-op were reducing in importance up to the time of the salaries being fixed and thereafter. We are aware that what was referred to as the rescue phase finished at the end of the third quarter of 2014 and that the recovery phase started from October 2014. At some stage between February 2014 and February 2015 in our judgment the importance to the respondent of the roles carried out by the claimant's comparators declined relative to the importance to the respondent of the work being done by the claimant, particularly in respect of the recovery phase. In our judgment the value of the claimant's job had on the basis of the job evaluation study, albeit by slim margins, overtaken those of her comparators by the time of the study.

318. In these circumstances we find that the historical explanations for the pay differential given at the time the pay was set were no longer material at the time of the Hay job evaluation study and that value of the claimant's work was equal to that of her comparators.

319. The point at which the claimant gained the right to equal pay with her comparators is a matter that falls to be determined as part of a remedy hearing as set out in the List of Issues.

Whistle-blowing Detriments

320. We have found that the claimant did not make any protected disclosures and so the claims in respect of whistle blowing detriments under section 47B of the Employment Rights Act 1996 cannot be pursued.

Victimisation

321. We have found that the claimant did not do any protected acts and so the claims in respect of victimisation under Section 27 of the Equality Act 2010 cannot be pursued.

Direct Sex Discrimination

322. We shall return to questions of jurisdiction when we have considered the allegations of direct sex discrimination.

323. Section 13 of the Equality Act 2010 provides that:

> "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."

324. Section 23 deals with the comparison by reference to circumstances and provides that:

> "On a comparison or cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case."

325. For the claimant Mr Devonshire submits that, "it is notorious that proving discrimination claims raises particular difficulties for claimants because discriminators seldom acknowledge that they are discriminating and sometimes do not even admit it to themselves". Accordingly, in dealing with the discrimination and victimisation claims under the Equality Act the Tribunal will need to have regard to section 136 (reversal of the burden of proof) and the well-known guidance in **Igen v Wong [2005] ICR 931**. In essence:

(1) It is for Mrs Walker to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed unlawful discrimination/victimisation; and

(2) It is for the Co-op to prove that the treatment was in no sense whatsoever on the proscribed ground. If the Co-op fails to discharge that burden, the Tribunal must draw inference of direct discrimination.

326. Mr Devonshire accepts that at stage one:

(i) Generally speaking it is not enough (for the burden to shift) for the claimant to point to a difference of treatment and a difference of proscribed characteristic;

(ii) "Something more" is required that could potentially support the inference of discrimination; and

(iii) The mere fact that the employer has behaved unreasonably (without more) cannot be equated with discrimination.

(iv) Lies or dishonest explanations are clearly capable of constituting the "something more" at least where they are linked to the matters of which [discriminatory] complaint is made. Thus rejection of an explanation for allegedly unreasonable conduct towards a claimant entitles a Tribunal to infer that there was a different explanation than the once advanced by him, and that the true explanation was a discriminatory one (i.e. can provide the "something more", where there is a difference in treatment and a difference of proscribed characteristic).

327. In deciding whether there is enough to shift the burden of proof it will be necessary to have regard to the choice of comparator and to ask whether their circumstances were the same (or at least not materially different) and to recognise that "in constructing the hypothetical comparator, it remains open to the Tribunal to have regard to the cases of others, even if only as 'evidential' rather than 'statutory' comparators" – **CP Regents Park Two Limited v Ilyas UKEAT/0366/14**.

328. In short:

> "Inadequate explanations, lies, unexplained unreasonableness, the betrayal of stereotypical attitudes in remarks about or in the course of dealings with the

claimant, particular context and circumstances, a lack of relevant records (where records would be expected), an unexplained failure to give timeous disclosure of relevant documents, and statistical anomaly are all capable of constituting 'something more' (when coupled with a difference of treatment and a difference of proscribed characteristic) and shifting the burden of proof."

329. Finally, it is important to remember that all the claimant has to show is facts from which the Tribunal could (not must) draw the inference absent an innocent explanation.

330. Mr Devonshire goes on to look at stage two. In his submission if the burden shifts it is for the respondent to prove that the treatment was "in no sense whatsoever" on the proscribed ground. It is accepted that the respondent does not have to prove that it took the action complained of for a good or objectively justified reason, merely that it was taken for a reason in no sense whatsoever on the proscribed ground. However:-

(1) This requires the Tribunal to assess not merely whether the employer 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 the proscribed ground was not a ground for the treatment in question.

(2) 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.

(3) It is trite that discrimination does not have to be conscious and the discriminator may not recognise or admit (even to himself) that he has a proscribed motivation.

(4) The Tribunal has to go beyond asking whether the respondent had a genuine or honest belief for the explanation put forward to test whether it has a basis in fact, and only if it does so can it go on to conclude that the explanation is genuine and credible.

(5) Whilst the test is not to ask what a reasonable employer would have done, action which is wholly unreasonable may assist in drawing inferences that the employer's purported explanation is not the true explanation and that he was covering a discriminatory intent.

(6) A good indicator of the nature of the burden on the employer is provided by **EB v BA [2006] IRLR 471** where the claimant (who had undergone gender reassignment) contended that she had been discriminated against because she had not been put forward for numerous project opportunities unlike her comparators. The employer contended that it "could discharge the burden of proof on it by either general evidence of her relative lack of competence and suitability combined with market deterioration or by a detailed analysis of the projects and proposals to which she was not staffed". The Court of Appeal disagreed, "…only a detailed analysis could…discharge the

burden. Without such an analysis it is very difficult to see how the respondent could justify the fact that the appellant was only allocated to some three projects over such a long period". The case also indicates that it will not be open to the respondent to hide behind its own failure or omission to produce documents to assert that the claimant has not shifted the burden and/or if it wishes to discharge the burden placed upon it.

(7) Given that the burden is on the respondent at stage two it plainly falls to be tested by the explanation that the respondent in fact puts forward, not explanations he could have (but did not choose) to advance.

331. In the submission of Mr Burns for the respondents the test for direct sex discrimination is well-known. In **Nagarajan v London Regional Transport [2000] 1 AC 501**, this explains how the Tribunal should examine the mental processes (whether conscious or unconscious) which led the putative discriminator to do the act to see if there is evidence of a discriminatory motivation. What needs to be identified is the effective cause of the acts complained of. However, it is discrimination if sex is an effective cause, it need not be the only or main cause. The key question for the Tribunal is under section 23 –

> "On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case."

332. In relation to each of her actual comparators there are clear material differences and the same differences would also apply to hypothetical comparators.

333. **Shamoon** gives guidance on the use of actual and hypothetical comparators, and in the submission of Mr Burns based on **Shamoon**:

(1) The test for discrimination involves a comparison between the treatment of the claimant and another person, actual or hypothetical, who is not of the same sex or racial group as the case may be.

(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the claimant…

(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a Tribunal may infer how a hypothetical statutory comparator would have been treated. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question to those of the claimant and all the other evidence in the case.

(4) The question of whether the differences between the circumstances of the claimant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the Tribunal to resolve this dispute

> because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator.

334. It will be seen from the List of Issues that in respect of direct sex discrimination the claimant relies on the same treatment she alleges constitutes whistle-blowing detriments and in addition the decision to give her notice of termination and the actual termination of her employment.

335. The first alleged detriment for the Tribunal's consideration is in respect of the second respondent's failure to engage with the equal pay issues the claimant raised and the suggestion instead that she move jobs, in respect of which the claimant relies on a hypothetical comparator.

336. In his submissions for the claimant Mr Devonshire does not put forward the characteristics of a hypothetical comparator for the purposes of this claim. Mr Burns submits that:

> "The comparator in the same material circumstances would have the same concerns and complaints over his ability to cope with the role of CHRO. The complaints raised with RP and the concerns expressed by the Co-op's witnesses have not been challenged as genuine. Where there were genuine concerns over a CHRO's ability to cope, the Co-op would regardless of sex seek to remove that person from the Executive, remove him from the CHRO responsibilities and seek to redeploy him in a more suitable junior role. The same announcement would have been made to a comparator with difficult family circumstances in order to prevent colleagues from inferring that the CHRO was being removed before the new role had been agreed and the transition properly communicated. The comparator would be treated in the same way. Gender is irrelevant to the treatment."

337. In our judgment for these purposes the hypothetical comparator is a man holding the position of CHRO on the respondent's Executive who had had the same discussions with Mr Pennycook as the claimant and where the Chief Executive Officer had the same concerns over his performance that Mr Pennycook had over the claimant's performance in the role.

338. We have referred above to the fact that Mr Pennycook was engaging with the claimant in relation to creating a new role with commensurate pay and/or more time away from work in keeping with the sentiments he had expressed in his October 2015 note, and in keeping with the claimant's expressed wish to work for fewer weeks each year.

339. Looking at the reason why the second respondent acted as he did in relation to the equal pay issue and the suggestion that the claimant move jobs, we conclude that the actions of Mr Pennycook were not because of the protected characteristic of sex but for the reasons we have already found. Mr Pennycook was following his October 2015 agenda.

340. The second alleged act of direct discrimination relates to the second respondent's attempts to reduce and/or marginalise the claimant's role and/or remove her from the Executive, and again the claimant relies upon a hypothetical comparator.

341. There can be no doubt that it was the intention of Mr Pennycook to attempt to reduce and/or marginalise the claimant's role and/or to remove her from the Executive. This amounted to the claimant being treated less favourably, but would her hypothetical comparator have been treated any differently? Was the treatment because of her sex?

342. On the basis of the evidence before us we are satisfied that it was Mr Pennycook's previously stated intentions with regard to changing the claimant's role that was the reason for her treatment and that the hypothetical comparator would have been treated in the same way.

343. The third matter relates to the second respondent's decision to grade the claimant's performance as only partially achieved for 2015 resulting in a reduced bonus without an adequate year end appraisal. In respect of this matter the claimant relies on a hypothetical comparator and/or Messrs Folland, Asher, Bulmer and Murrells (male colleagues on the EC) in respect of detriments 3(b)(iii) and (v) and 4(b)(ii) above.

344. In relation to this allegation, there is no doubt that the grading of the claimant for 2015 was "partially achieved" which resulted in a reduced bonus. Had the claimant been rated as "achieved" or higher then the bonus would have been greater. We have found that the claimant's year end appraisal process was not adequate in that Mr Pennycook did not go through the whole of the process that he described in writing to Mr Leighton with the claimant whereas he appears to have done so with the other members of the Executive who were on the same bonus scheme.

345. The claimant compares herself with Messrs Folland, Asher, Bulmer and Murrells together with a hypothetical comparator. We disregard Mr Folland because he was not the subject of a grading in 2015. Mr Asher's position was different from the claimant in that it was anticipated that he would be leaving during the year to come, and so we do not regard him as properly comparable with the claimant.

346. Mr Bulmer and Mr Murrells were expected to be ongoing employees.

347. Mr Burns submits that the claimant was not in the same material circumstances as them because they had different jobs, different projects, different teams, different responsibilities, different performance objectives and different performance outcomes. The only similarity is that they were all Executive members. In any event Mr Bulmer and Mr Murrells both had successful periods in their respective divisions. Given that their circumstances were not comparable there can, in the submission of Mr Burns, be no direct discrimination.

348. For the claimant Mr Devonshire submits that it is no answer to this claim to say that the treatment afforded to the comparators is irrelevant because their roles

and responsibilities are not exactly comparable. Quoting from **Balamoody v United Kingdom Central Council for Nursing & Midwifery [2002] ICR 646**:

> "Where there is no evidence as to the treatment of an actual male comparator whose position is wholly akin to the applicant's, a Tribunal has to construct a picture of how a hypothetical male comparator would have been treated in comparable surrounding circumstances. Inferences will frequently need to be drawn. One permissible way of judging a question such as that is to see how unidentical but not wholly dissimilar cases were treated in relation to other individual cases. It is not required that a minutely exact actual comparator has to be found. If that were the case then isolated cases of discrimination would almost invariably go uncompensated."

349. Looking at the competing arguments in our judgment the circumstances of Messrs Bulmer and Murrells were not materially different from those of the claimant and so they are proper comparators. They were all members of the same Executive team. They were each assessed by Mr Pennycook under the same bonus scheme against their own objectives.

350. Where they seem to have had performance issues the comparators were arguably not treated as harshly in their assessments as was the claimant. In this regard we note the use of the contingency in the Food budget, the general insurance losses and the health and safety issues.

351. In our judgment these are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondents contravened section 13 and directly discriminated against the claimant.

352. Has the respondent, therefore, shown that it did not contravene section 13 of the Equality Act 2010?

353. Mr Burns submits that the fact the fact that one colleague has a negative view of another is not (of itself) evidence of poor performance. It is for the line manager to make a judgment based on objective data. In a discrimination/victimisation case the Tribunal must test the reasonableness of the line manager's conclusion in deciding whether the proffered (innocent) explanations can or should be accepted at face value. This requires stepping into the mind of a putative discriminator because it is only by reference to the materials available to him and to his thought process in the light of those materials that the question of whether he had a proscribed motivation (whether conscious or subconscious) can be assessed. The process is complicated in the present case because the respondents' (alleged) poor performance case has never been formulated – not even in the amended ET3. The first time it was set out was in Mr Pennycook's statement (as a rationalisation after the event). This has left Mrs Walker having to shoot at an ill-defined and moving target.

354. According to Mr Pennycook, he had "no concerns whatsoever" about the claimant's performance as at August 2015 when he completed her 360˚ appraisal which was very substantially positive, particularly from Mr Pennycook's perspective. So whatever difficulties there may have been in the political turmoil that followed her appointment in the first half of 2014, things were progressing well by late summer 2015. What is more, her presentation to the Board on 26 October 2015 had gone

well and she was identified as part of the "fabulous team" in Mr Pennycook's effusive email dated 27 October 2015. The Enterprise Leaders event on 3 and 4 November 2015 had been "fabulous" and (even if Mr Bulmer had some reservations about it) they were not shared by Mr Pennycook as was apparent from his cross examination: "A lot of positive feedback. Good event. EL (population of about 80 people) got a lot out of it". He was also very complimentary about the claimant's performance at the Members Council meetings on 4 and 5 December 2015.

355. In the submission of Mr Devonshire this is the context in which Mr Pennycook's criticisms of Mrs Walker in his witness statement fall to be addressed. The relevant question is a comparative one and applying an objective standard Mrs Walker's performance does not justify the criticism.

356. In relation to fixing the basics, in his witness statement Mr Pennycook supports the allegation by criticising:

(1) The pre-read document Mrs Walker prepared for the Board dinner; and

(2) The ongoing discussions Mrs Walker had with the Executive about HR strategy, thereafter claiming it was over ambitious and ignored feedback she received from her executive colleagues and from Ruth Spellman on the Board, but in his submission neither of these criticisms has objective substance:-

(a) Dealing first with the Board presentation Mr Pennycook had described the document "shaping up very well" and telling "a good story" before Mrs Walker even took it Ms Spellman encouraging her to emphasise "the level of change underway". Mr Pennycook seemed to share Mrs Walker's concern that Ms Spellman's comments did not acknowledge the level of change underway. Messrs Nugent, Murrells and Ellis were all complimentary about the document before it was presented. The presentation was well received. Mr Pennycook sought to retreat from the criticisms of the pre-read document, in his cross examination suggesting that there were two documents – the pre-read (which was good) and a later strategy (which was poor). This is not what his statement says and the second document was not identified in re-examination and remains unidentified.

(b) As to HR strategy going forward, Mrs Walker accepted that there was too much on the HR agenda for 2016 but as she advised Mr Pennycook and Ms Wicks on 26 February 2016, "Most of the plan this year is business unit driven as you will have noticed from the documents I have given you both (unlike last year with pensions, grading and Support Centre cost saving)…I have therefore asked the three key HR Directors…to review their business people plans and make either a case for a deferral…or to build a business case for more HR support". The direction of travel after the completion of the centralised projects was Business Unit driven – this did not change when Ms Wicks

took over. Mr Devonshire submits that there is no objective basis for any of these criticisms and it is not accepted that Mr Pennycook had them in mind when dismissing. They are an attempted rationalisation after the event. In the submission of Mr Devonshire the paper trail in respect of refreshing the emotional connection is substantially incomplete. Central to the criticisms of Mrs Walker is that she/her RtEC team promoted four options in circumstances where she should have known that one of them (the high profile option 4) was unachievable. Mrs Walker makes the point that the RtEC team included the HRD and one business person from each of the Business Units (including food) and that they did not suggest that option 4 was unachievable. Quite apart from that Mr Murrells voted for it. Mrs Walker has long pressed for the production of the four options proposal and the minutes of that key discussion. The relevant of the minutes was acknowledged by the Co-op in February. The Tribunal recorded the Co-op's agreement to give disclosure of the document in its Order dated 20 February 2018. No suggestion was made at that stage that the document did not exist or could not be found. It is obvious that such a critical meeting would have been documented and Ms Wicks confirmed this in her cross examination. Given that this is such a significant feature of the Co-op's case this is highly unsatisfactory.

(c) The comments in relation to **EB v BA**, the case that indicates it will not be open to the respondent to hide behind its own failure or omission to produce documents to assert that, the claimant has not shifted the burden and/or if it wishes to discharge the burden placed upon it.

357. In his submission whilst it is clear that RtEC hit a bump in the road in November 2015:

(1) On the claimant's case, having voted for option 4 Food changed its mind because it could not afford to or was not prepared to release its staff in the numbers required by the proposal.

(2) This was the key problem, but as Ms Wicks acknowledged the problem was that Food (not the EtEC team) had failed to put together a backfill budget to meet option 4.

(3) Mrs Walker has never contended that she was or is immune from any criticism in this regard. She put it to Mr Pennycook there was fault on both sides. Poor execution by central teams did not help, but when the culture was one of almost automatic opposition from both camps, how did they break the cycle? On any view in his submission the culpability was shared.

(4) In any event it is in the nature of transformational projects that they will hit difficulties from time to time, and the skill of the sponsor is to provide leadership when issues emerge.

(5) A workaround was in place by 1 December 2015.

(6) Mrs Walker's proposal that RtEC, revitalising our brand and meaningful membership, be brought under one Project Manager on 5 February 2016 was acted on.

(7) As Mrs Walker observed to Mr Pennycook in March 2016 – "the final work solution is a much better one than the big event Greg sold the Exec and all those on the steering committee responsible for the scheduling phase have walked away with exceeding ratings for 2015". As she said, the project delivered on time and won a national engagement award.

358. Mr Devonshire moves on to Mr Pennycook's October 2015 document and his discussion with Stevie Spring as to the possibility of dismissing Mr Asher by the end of 2016 and demoting Mrs Walker to pursue an operational agenda with pretty much immediate effect. However:

(1) Nothing was set in stone at this stage and neither proposal was acted upon at the time.

(2) It seems likely that the proposals were tabled to appease Ms Spring rather than from any perception on Mr Pennycook's part that he needed to change the claimant's role.

(3) It is noteworthy that Mr Pennycook did not act on these proposals at the time. Indeed, when he did start discussing alternatives with Mrs Walker (February 29016) his suggestion was in fact that she focus on strategic HR and Mr Asher did not in fact leave at the end of 2016.

(4) The fact that such a proposal was considered is not evidence that Mrs Walker was an underperformer. Indeed, the fact that it was not acted upon reflects her positive performance and suggests that Mr Pennycook did not share Ms Spring's negative views of the claimant.

359. Mr Burns for the respondents submits that in respect of Mr Pennycook's decision to grade the claimant's performance as "partially achieving" for 2015 resulting in a reduced bonus without an adequate year end appraisal, there was an adequate year end appraisal. Although the initial stage one meeting was cancelled in December for good personal reasons it was rescheduled for 6 February 2016 and the claimant prepared her self-evaluation papers and sent them to Richard Pennycook. He felt that her self-evaluation was a fair reflection of the difficult year that she had had. At the stage one meeting on 6 February there was no disagreement on her performance against her objectives – Richard Pennycook agreed with her that she had not met them in full. The suggestion to Richard Pennycook in cross examination that he was giving dishonest evidence in saying that there was any sort of stage one appraisal meeting is simply contradicted by the documents. The claimant's apparent position that her appraisal documents were not used in the 6 February 2016 review meeting or were simply ignored is entirely unlikely.

360. In any event, submits Mr Burns, “partially achieving” was the claimant's own assessment on any sensible reading of her appraisal form. Mr Pennycook composed his comments and sent them in draft for approval in the usual way by way of stage two. He did the same with his comments on the other executives who had stage one meetings of similar length to the claimant. The report back meeting (stage three) at which Mr Pennycook discussed the proposed grading was delayed by the negotiations between them over a new role. He told her the rating on 10 March following her request to know her bonus. In his submission the claimant around that time was pushing for a “high exceeding” grading, not because it reflected her genuine self-assessment but because by 13 March 2016 the claimant was trying to secure the best available deal for a new told or an exit.

361. After submitting that the claimant could not properly compare herself with her named comparators, Mr Burns noted that the claimant accepted that the appraisals carried out Mr Pennycook contained his genuine views about her performance and that of her comparators, but she challenged whether those views were reasonable. In his submission none of them was in the same circumstances as the claimant with her team, her colleagues, Board members and the Chief Executive Officer regarding her as out of her depth and struggling with an executive role. In his submission a hypothetical executive in such circumstances would have been treated in the same way. In his submission it is trite law that whether the claimant (or even the Employment Tribunal) regards the appraisal or the process as “reasonable” is irrelevant to discrimination. Their circumstances were not comparable and so there can be no direct discrimination. It is unrealistic to suggest that the lack of procedure indicates discrimination.

362. In considering whether the respondents have shown that the claimant's treatment in respect of the third allegation was “in no sense whatsoever” on the proscribed ground we have considered the following matters:

(1) A review meeting for the claimant was scheduled to take place on 5 February 2016. At the first meeting with each member of the Executive each of the individual’s objective outcomes were supposed to be discussed by Mr Pennycook with each member of the Executive, including the claimant.

(2) In his witness statement Mr Pennycook did not state that the claimant’s performance was discussed with her on 5 February.

(3) When Mr Pennycook’s email to the claimant on 11 March stating that they should do the performance review that had to be cancelled so they could have a discussion properly and in the round considering all aspects of the previous year was put to him in cross examination he said that he had discussed the appraisal with the claimant on 5 February. It had not been a long conversation.

(4) In his email to Mr Leighton justifying his assessments of the executives Mr Pennycook wrote that he had undertaken reviews with each member of the team “in detail”.

(5) There was no stage two meeting with the claimant whereas the other members of the Executive had second meetings.

(6) Mr Murrells and Mr Bulmer were favoured with extra bonuses in lieu of pension contribution as part of the appraisal/reward process, notwithstanding Stevie Spring raising questions as to their performance in 2015.The claimant was not so favoured.

(7) In respect of her 360 Feedback report published in November 2015 we have noted above at 106 that "the results…will contribute to the overall performance rating" and at 103 that for 9 out of 22 questions Mr Pennycook had rated the claimant at 100% and on 11 out of the 22 he had rated her more highly than she had rated herself. We found that there were competencies as well as behaviours to be assessed in the 22 questions.

(8) Mr Pennycook's stated reasons for scoring the claimant as he did and the reasons why he scored the comparators as he did notwithstanding the matters raised by the claimant, and also those matters noted by Stevie Spring, relating to matters under their control.

363. Mr Pennycook held detailed reviews or discussions with all the other members of the Executive Team, including the comparators, in which they had the opportunity to explain their self-assessments to him and to give any necessary explanations of what they had written. We find that he also had second meetings with them.

364. In contrast to this the only 2015 review discussion that Mr Pennycook had with the claimant was short. The meeting went on to discuss other things than the performance review. The claimant was unable to discuss matters in the round as Mr Pennycook appeared to have reached a conclusion from her written document without discussing it with her or affording her the opportunity to explain the rationale behind her self-assessments. The claimant was in our judgment treated less favourably than Mr Murrells and Mr Bulmer in relation to the assessment process and she did not have an adequate year end appraisal.

365. We find that Mr Pennycook's evidence in respect of his performance review meeting with the claimant was unsatisfactory. It was not mentioned in his witness statement. He had sent an email to the claimant about doing the performance review that had to be cancelled suggesting that to his mind, when he sent the email, the meeting had not taken place. He had told Mr Leighton that he had discussed matters related to the reviews in detail with each member of the team when he clearly had not had such a discussion with the claimant.

366. Taking all of these matters into account we cannot be satisfied on the balance of probabilities that Mr Pennycook's failure to give the claimant an adequate year end appraisal and his decision to grade the claimant's performance as only 'partially achieved' for 2015 was in no way whatsoever on the proscribed ground.

367. The fourth allegation relates to the refusal of the claimant's part-time working request. We have previously found that there was an ongoing and unfinished

discussion as to the claimant's future work for the first respondent. We do not find that there was a refusal of the request. There was a failure to agree. We do not find that this was an act of discrimination on the grounds of sex. The hypothetical comparator would still have had to reach an agreement on an overall basis with regard to a change in the pattern of working.

368. The fifth matter is the decision to give the claimant notice on 1 April 2016. In this regard the claimant compares herself with a hypothetical and/or Messrs Folland, Asher, Bulmer and Murrells. We know that Messrs Folland and Asher were given notice where Messrs Bulmer and Murrells were not. The circumstances in which Messrs Folland and Asher left were different from the claimant because when they were given notice it was with a view to them leaving, whereas with respect to the claimant contractual notice was given with the possibility of her, during the notice period, agreeing a new role to take effect at the end of the period of notice. As things transpired there was no such agreement.

369. We remind ourselves of the letter of notice referred to above at paragraph 228 to the effect that the company wanted to make changes to the HR function and they needed to be implemented. On this basis we are satisfied that the claimant and/or the hypothetical comparator holding the CHRO position would both have been given contractual notice to terminate their roles together with an invitation to find a new role during the notice period failing which they would leave at the end of it. We do not therefore conclude that the giving of notice was an act of direct discrimination against the claimant because of her sex.

370. The sixth allegation relates to the immediate announcement of the claimant's exit and its mischaracterisation.

371. The proposed announcement, which as Mr Burns points out does not relate to the claimant’s exit from the business, was put to the claimant and she was invited to make amendments to it. We have found that the claimant could not agree to the proposed announcement. It was not correct. She was off work because she was very ill, with the illness being caused by a number of factors but in the main by the Co-op.

372. The proposed announcement seems to us to move the HR team forward in a manner consistent with Mr Pennycook’s expressed desire to restructure the HR team.

373. The actual announcement appears to have been made on 7 April 2016 as part of a press release in relation to the annual results for 2015, saying that:

> “…Pippa will take executive responsibility for the One HR and Being Co-op programmes as they move into delivery. Pippa will also cover the central HR functions while Sam Walker takes a period of family leave until the end of June. Sam’s business unit direct reports will report to their respective CEOs or MDs for this period.”

374. The claimant wrote in to object to that announcement being made and she was clearly hurt and upset by it.

375. Whilst the claimant believes that this was detrimental action against her because of the protected characteristic of sex, we do not agree with this view. In our judgment the claimant's hypothetical comparator would have been treated in the same way. If an Executive Director of a large organisation is to be away from the business for an extended period then it is usual for something to be announced and we do not find that the making of, or anything in, this announcement amounts to less favourable treatment of the claimant because of the protected characteristic of sex.

376. The seventh allegation relates to the second respondent's discussions about these matters behind the claimant's back and/or with the other (male) members of the Executive.

377. Mr Pennycook had discussed matters with Alistair Asher, the General Counsel, with Pippa Wicks, the female member of the Executive who would be potentially taking on some more work and Mr Murrells whose support was needed. The members of the Remco or the Board who may have been involved were not members of the Executive.

378. In our judgment it would not be unreasonable for a Chief Executive Officer in such circumstances to hold discussions with the company's legal counsel, and with the executives who would be most affected by the proposed changes before reaching any conclusion on whether or not to make them. We take the view that had the hypothetical male comparator been the person concerned then such discussions would still have taken place. We do not find that this amounts to less favourable treatment on the grounds of the claimant's sex.

379. At 5(b)(ii) in the List of Issues the claimant relies on the decision to give her notice of termination and of the termination of her employment.

380. We have dealt above at (v) with the decision to give the claimant notice. As to the termination of her employment, that was the legal consequence of the notice having been given and in the intervening period there being no agreement reached between the parties as to a future role for the claimant within the first respondent organisation. Were the hypothetical comparator to be in the same circumstances then we consider that the outcome would have been the same in the absence of any agreement to the contrary. We do not find that this amounts to any direct discrimination on the grounds of the claimant's sex.

381. In the list of issues at 5 d) iii) there is reference to paragraph 22.3 of the claim form in respect of the refusal to review the claimant's rating where Mr Pennycook facilitated the upgrading of Mr Roberts's 'achieved' rating just days before he advised Mrs Walker that it was too late to review her 'partially achieved' rating.

382. We find that Mr Pennycook did seek approval for the raising of the claimant's rating but was turned down by Stevie Spring the Remco Chair. In respect of Mr Roberts, the decision was to be taken by Rob Bulmer who did change the rating with the claimant's full support. In our judgment Mr Pennycook did not make the decision not to increase the claimant's rating and did not make the decision to increase Mr Roberts's rating. We do not find that the claimant has shifted the burden against either respondent.

383. Having found that the respondents did discriminate against the claimant when deciding to grade her as only "partially achieved" for 2015, we must now come back to consider whether we have jurisdiction to hear this part of the complaint on the basis of it being out of time. The claimant says that we do have jurisdiction because it relates to a continuing act and/or it is just and equitable to extend time if necessary.

384. Time limits are dealt with in section 123 of the Equality Act 2010 which provides as follows:

(v) [Subject to section 140A] Proceedings on a complaint within section 120 may not be brought after the end of –

(1) the period of 3 months starting with the date of the act to which the complaint relates, or

(2) such other period as the employment tribunal thinks just and equitable.

(vi) Proceedings may not be brought in reliance on section 121(1) after the end of –

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(vii) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(viii) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

385. The decision to grade the claimant was in our judgment a one-off act and not conduct extending over a period.

386. The decision to grade the claimant was made at the latest by 11 February 2016 as evidenced by Richard Pennycook sending the email to Allan Leighton with his Exec reviews for 2015.

387. The claimant was not made aware of her 2015 rating until on or about 10 March 2016.

388. The claim form was received on 8 September 2016, so allowing a month or so for early conciliation the claim in this regard was approximately two months out of time.

389. The claimant in her letter of 6 April 2016, in response to the letter of notice, raised the question of her performance rating for 2015, and this matter formed part of her grievance in respect of which she was not interviewed until early October 2016 which resulted in the grievance outcome dated 12 April 2017.

390. Mr Devonshire submits that it is plainly just and equitable to extend time in circumstances where the parties were following an internal grievance process and there is no prejudice to the respondents by the supposed delay.

391. We agree with Mr Devonshire that in the circumstances of this case, particularly involving substantial delay on the part of the respondent in dealing with a grievance raised by the claimant on 6 April 2016, and no evidence of prejudice or hardship to the respondents, that it is just and equitable to extend the time limit set out in section 123 to allow this aspect of the claimant's claim to proceed.

392. It has been agreed that questions of remedy will be dealt with at a separate remedy hearing.

393. The only remaining matter relates to associative discrimination arising from disability contrary to section 15 of the Equality Act 2010. From the claimant's closing argument, we note from Mr Devonshire that the associative disability arising discrimination claim is only made in relation to the issuing of the notice of dismissal (and the consequential dismissal). Continuing with Mr Devonshire's submission:

> "On the question of associative disability discrimination, Mrs Walker does not suggest that anyone at the Co-op sought deliberately or consciously to disadvantage her because she has [an associated disabled person] or needed accommodations to address the occasional consequences of the [associated disabled person's] disability. But she does not have to make good her claim. The case she makes is akin to that made by the claimant in **Coleman v Attridge Law** [2008] ICR 1128 that she suffered disability discrimination on the ground of her [association with the associated disabled person]. Put simply, Mrs Walker was understandably distracted in the first three months of 2016 arising from the associated disabled person's disability. Mr Pennycook got fed up of this – characterising her as '*going through some sort of meltdown*' and telling the Chair of Remco that he had to cope with '*hours of tear laden conversations*' (which was simply untrue). That is enough; the question is one of cause not notice; Pnaiser. Dismissing (on notice) for poor performance without engaging in any process to determine whether that

was a justifiable outcome was (quite clearly) not a proportionate means of achieving a legitimate aim.

The Co-op suggests that the claim for associative discriminative cannot be accommodated within the language of section 15 (seemingly because they refer to the unfavourable treatment arising in consequence of the *claimant's* disability, not that of someone for whom the claimant is responsible). A similar argument dealing with the direct disability discrimination and harassment provisions under the old DDA was rejected by Underhill P (applying a purposive construction) in **EBR Attridge Law v Coleman [2010] IRLR 10**. The same reasoning applies here."

394. For the respondent Mr Burns submits that:

"[Whilst the claimant is associated with a disabled person] the claimant is not a disabled person and has no claim under section 15 of the Equality Act. The suggestion that the associated disabled person's disability was any part of the decision to remove her from the Executive, reshape her role and then give her 12 months' notice is unsupported by any evidence and not put as such to Richard Pennycook to comment upon. Nothing unfavourable arose in consequence of the associated disabled person's disability."

395. In our judgment The Equality Act 2010 specifically does not provide for associative discrimination claims under section 15. The Act was made by Parliament after the **Attridge** decision was known and therefore it must have been considered when passing it. This Tribunal concludes that it does not have any jurisdiction to consider a complaint of associative discrimination in circumstances where the disabled person for the purposes of section 15 is an associated disabled person and not the claimant. The claimant's claim under section 15 therefore must fail.

**Remedy**

396. The parties are invited to seek to resolve the question of remedy between themselves.

397. If this cannot be done then the claimant shall apply for a remedy hearing with a schedule of claim and a time estimate for the remedy hearing.

Employment Judge Sherratt

12 November 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

13 November 2018

FOR THE TRIBUNAL OFFICE