IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Case No: S/4102275/2017 Heard at Edinburgh, before a Full Tribunal, on 9th, 10th, 11th, 12th, 13th, 16th, 17th and 19th with Deliberation on 20th April 2018

Employment Judge: J G d'Inverno, QVRM, TD, VR, WS
Members: Ms L Crooks
Mr S Currie

Mrs K Lucas	Claimant In Person
Lloyds Banking Group Plc	1st Respondent Represented by:- Mr T Cloke, Solicitor
Scottish Widows Services Limited	2nd Respondent Represented by:- Mr T Cloke, Solicitor
Ian McGowan	3rd Respondent Represented by:- Mr T Cloke, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is:-

(First) For the purposes of her complaints under both the Equality Act 2010 and the Employment Rights Act 1996 the claimant's employer was, at the material

times and continues to be, the second named respondent Scottish Widows Services Limited.

(Second) The claimant's complaints of discrimination because of the protected characteristics of sex and of race are dismissed.

(Third) The claimant's complaints of having suffered detriment for reason of having made a protected disclosure are dismissed.

_____
Employment Judge

_____
Date of Judgment

Entered in Register and Copied to Parties _____

REASONS

1. This case called for Final Hearing before a Full Tribunal at Edinburgh on 9th, 10th, 11th, 12th, 13th, 16th, 17th and 19th April 2018. The claimant, Mrs Lucas, appeared on her own behalf; the 1st, 2nd and 3rd respondents were represented by Mr Cloke, Solicitor.

Oral Evidence

2. The claimant gave evidence on her own behalf. In addition, the Tribunal heard evidence for the claimant from:-

- Mr Paul Christer; and,
- from Mr Harry Lukas, a colleague and fellow team member of the claimant.

3. For the 1st, 2nd and 3rd respondents the Tribunal heard evidence from:-

- Andy MacRae, the claimant's former Line Manager
- Ian McGowan, the claimant's 2nd Line Manager and the 3rd respondent
- Mr Krispal Bhachoo, the claimant's current Line Manager, who as of April 2017 reports to the Head of Fund Governance to whom the Fund Governance functions for which the third respondent was previously responsible were transferred
- Mr Brian McReady, a member of the Asset Allocation Team
- Richard Conway, the claimant's current second Line Manager
- Alison Morris, the Internal Investigating Officer in the claimant's complaint of harassment
- Steve Byron, the Appeal Manager who heard the claimant's internal appeal against the outcome of her internal harassment complaint

Documentary Evidence

4. Parties lodged a Joint Bundle of Documents numbers 1 to 42 and extending, initially to some 573 pages. In the course of the Hearing each party tendered certain additional documents which in the absence of objection were received and incorporated within the Bundle. On the penultimate day of Hearing the claimant tendered a 97 page document produced from the Lloyds Banking Group of Companies Intranet, two pages of which she contended were relevant to the determination of the issue of the identity of her employer. The respondents' representative maintained objection to the admission of the tendered documents both on the grounds of the lateness of their production, that is to say after all but one of the witnesses in the case had given evidence and had been discharged with the consent of both parties and secondly, on the grounds that upon an initial perusal of the two pages referred to they did not relevantly inform the issue of the identity of the claimant's employer. Having heard both parties, the Tribunal allowed the documents to be received and form part of the Bundle. There was also available to the Tribunal the claimant's Bundle of Documents relied upon by her at Open Preliminary Hearing.

The Issues

5. In the course of Case Management Discussion conducted at the outset of the Hearing parties confirmed that the issues remained those recorded at Annex A to the Note attached to the written copy of the Tribunal's Orders issued following the Closed Preliminary Hearing of 10th November 2017, the same being replicated at pages 100 and 100A of the Joint Bundle and replicated below. In addition, there remained live for determination the Preliminary Issue of the identity of the

claimant's employer and which had been carried forward for determination at the Final Hearing in terms of the Tribunal's Judgment issued following Closed Preliminary Hearing on 15th January 2018.

6. Following the hearing of evidence and in the course of submission, the claimant further confirmed that the following were the Issues which she continued to stand upon and in respect of which she sought determination.

Identity of the Claimant's Employer

(First) Was the first named respondent, Lloyds Banking Group Plc, The Mound, Edinburgh, EH1 1YZ, which failing both the first and the second named respondents jointly, the claimant's employer/employers at the material times, and for the purposes of her complaints of:-

(a) of direct discrimination in terms of section 13 of the Equality Act 2010;

(b) of victimisation in terms of section 27 of the Equality Act 2010; and,

(c) of having suffered detriment because of having made a qualifying and protected disclosure in terms of section 43B(b) and section 44 of the Employment Rights Act 1996

Protected Disclosure and Consequential Detriment

(Second) Did the claimant make a qualifying and protected disclosure in terms of section 43A, 43B(1)(b) and 43C of the Employment Rights Act 1996.

(Third) What is/are the protected disclosure/disclosures made by the claimant and founded upon by her.

(Fourth) Let it be assumed that the claimant did make a protected disclosure/disclosures, did the claimant suffer a detriment in consequence thereof having made the disclosure/s.

(Fifth) If so, what was the detriment suffered and founded upon by the claimant.

(Sixth) Let it be assumed the claimant made a protected disclosure and further let it be assumed that the claimant suffered a detriment, was the detriment suffered by her as a result of her making any such protected disclosure.

(Seventh) Which respondent subjected the claimant to the detriment.

(Eighth) If the claimant suffered a detriment as a result of making a protected disclosure/disclosures what compensation should be awarded to her in consequence of her so suffering a detriment.

Direct Discrimination because of the Protected Characteristic of Sex and or of Race (section 13 of the Equality Act 2010)

(Ninth) Was the claimant treated less favourably by the first, second and or third respondent than the first, second or third respondent treated or would treat a hypothetical comparator whose circumstances were substantially the same as those of the claimant but who did not share the claimant's protected characteristic/characteristics.

(Tenth) What was the less favourable treatment suffered by the claimant at the hands of the first, and or second and or third respondent.

(Eleventh) Was the claimant treated less favourably than the first, second and/or third respondent would treat others because of the claimant's protected characteristics of sex and or of nationality (race), and thus did the first, second and or third respondent directly discriminate against the claimant in terms of section 13 of the Equality Act 2010.

(Twelfth) Who is the comparator and or the comparators in comparison with whom the claimant asserts she was treated less favourably as a result of her sex or nationality.

Victimisation Section 27(2) of the Equality Act 2010

(Thirteenth) In submitting a complaint under the first and or second respondent's harassment policy against her second Line Manager Mr Ian McGowan, on 14th March 2017, did the claimant carry out a protected act in terms of section 27(2)(c) of the Equality Act 2010.

(Fourteenth) What detriment did the claimant suffer at the hands of the first, second and or third respondent and which she also stands upon for the purposes of her section 27 EqA 2010.

(Fifteenth) Did the first, second and or third respondent subject the claimant to any such detriment because the claimant had carried out the protected act.

(Sixteenth) If the first, second and or third respondent has discriminated against the claimant in terms of section 13 or has victimised the claimant in terms of section 27 of the Equality Act 2010, to what remedy, by way of damages and or declaration, is she entitled in consequence.

7. Although the List of Issues produced at pages 100 and 100A of the Bundle included a potential issue in terms of section 26(1) of the Equality Act 2010, the claimant confirmed, in the course of her submission, in light of the evidence heard and, at the request of the Tribunal she having first taken the short adjournment to reflect upon the matter, that she no longer offered to prove any freestanding complaint of harassment in terms of section 26(1), the same, therefor, no longer being an issue before the Tribunal for determination. Rather, prayed in aid such instances of conduct which occurred after the lodging of her internal harassment complaint on 14th March 2017, as evidence of detriment suffered because of her having made a protected disclosure.

8. Although covered in evidence and therefor the subject of Findings, in submission the claimant did not stand upon her complaint of harassment or seek to rely upon

the instances of alleged discriminatory treatment in that regard which the respondents maintained were time barred and which were respectively:-

(a) an alleged failure by the third respondent to properly welcome her and introduce himself to her on her first day of employment 3rd November 2014,

(b) alleged failure of the third respondent to introduce her to the CEO of the second respondent during a brief visit by that individual to the department on 12th March 2015 and the third respondent's failure to explicitly thank her for her production of a Board paper at the end of February 2016 or his failure to offer her personal condolences following the death of her husband.

Findings in Fact and in Law

9. The oral evidence led before the Tribunal was wide-ranging.

10. On the oral and documentary evidence presented, the Tribunal unanimously made the following essential Findings in Fact in relation to the Issues before it and which, in the submission of parties, required determination.

11. The first respondent is an international bank with offices in Edinburgh. The second respondent is a subsidiary of the first respondent. The first respondent is the Holding Company for the second respondent and a number of other "Lloyds Banking Group" Group Member Companies. The structure and membership of the

Lloyds Banking Group ("the Group") results in part from various amalgamations and takeovers which have occurred within the banking sector. At the material times the third respondent was employed by the second respondent as Head of Fund Propositions. The third respondent is a Senior Manager within the second respondent's Investment Department. At no point during the claimant's employment was the third respondent the claimant's Line Manager.

Identity of the Claimant's Employer

12. The first respondent is designed Lloyds Banking Group Plc with registered office The Mound, Edinburgh, EH1 1YZ.

13. The second named respondent is designed Scottish Widows Services Limited with registered office 69 Morrison Street, Edinburgh, EH3 8YF.

14. In the claimant's written conditional contract of employment (at pages 193-201 of the Bundle), subsequently confirmed and hereafter referred to as "the claimant's written contract" "the Group" is defined as meaning "*Lloyds Banking Group Plc*, *any subsidiary or Holding Company (as such terms are identified in the Companies Act 2006 of Lloyds Banking Group Plc and any subsidiary undertaking of any Holding Company of Lloyds Banking Group Plc)*, in each case from time to time, and a '**Group Company**' shall mean any such Company".

15. In the claimant's written contract of employment the claimant's employer is specified and defined as Scottish Widows Services Limited (the 'Company') which

is further described as a Company being in the "Group", that term being as defined earlier in the contract.

16. The claimant's written contract sets out in detail a number of express terms and further, at clause 17, bears to incorporate by reference certain of the Company's policies as amended from time to time and certain "Group Policies" and records the claimant's agreement to and with the terms of any "Company or Lloyds Banking Group policies which may vary from time to time".

The Group brands

17. The Group logo comprises the words "Lloyds Banking Group" surmounting a black horse rampant, regardant, sinister.

18. The Group logo appears upon:

(a) the internet page upon which the vacancy, within the second respondents in respect of which the claimant responded, was advertised (page 1 of the claimant's Bundle relied upon by her at the Open Preliminary Hearing);

(b) the Manager, fund reporting and analysis vacancy job details page which was accessed through the internet page (page 5 of the claimant's Bundle relied upon at the Open Preliminary Hearing);

(c) the offer of employment, dated 13th October 2014, with the second respondent which emanated from "Jane Cunningham, Head of

Recruitment Operations, HR Chief Operating Office, Lloyds Banking Group Recruitment Services, Mail Services Drop Zone 11, Keans House, Andover, SP10 2NQ" and at the foot of the pages on which there also appears the words *"Lloyds Banking Group Plc is registered in Scotland number 95000, registered office: The Mound, Edinburgh, EH1 1YZ*" (pages 182-183 of the Joint Bundle);

(d) the claimant's P60 End of Year Certificate dated 5th April 2017 on which same document her employer's name and address is set out as Scottish Widows Services Limited, 8th Floor, G Mills, Deanclough Mills, Halifax, HX3 5AX (page 31 of the claimant's Bundle relied upon at the Open Preliminary Hearing);

(e) the Internal Group Internet HR Advice and Guidance page (page 33of the claimant's Bundle relied upon at Open Preliminary Hearing);

(f) the claimant's written conditional contract of employment with the second named respondents (page 11 of the claimant's Bundle relied upon at Open Preliminary Hearing);

(g) the claimant's pay slip dated 20th September 2017 (at various pages of the Group HR website) (pages 43, 45, 47 and 49 of the claimant's Bundle relied upon at Open Preliminary Hearing); and,

(h) correspondence emanating from the Human Resources Personnel who responded to the claimant's letters of complaint.

19. The Human Resources advisory function is largely centralised within the Group and offers advice to all Group Member Companies. In some Member Companies and Divisions within the Group that centralised function is supplemented by "HR Business Partners" who may from time to time be located within particular Divisions or Group Member Companies.

20. At the time of her taking up appointment with the second named respondents, in terms of her written contract, the claimant's first and second Line Managers were both employees, in terms of their own written contracts of employment, of the second named respondent.

21. As at the date of the Open Preliminary Hearing, in January 2018 and as at the date of the Final Hearing, the claimant's first Line Manager, Krispal Bhachoo is an individual who, in terms of his written contract of employment (pages 162-169 of the Joint Bundle) is an employee of another Group Member Company, HBOS Plc.

22. In the course of her employment the claimant performs duties in relation to funds held not only by the second named respondents but by a number, although not by all of, other Group Member Companies.

23. The claimant's terms of employment are substantially determined not by her but by the second respondent.

24. The first named respondent is the Group Holding Company, holding the majority of shares in each of the Group Member Companies. The first named respondent employs few, if any, employees directly.

Finds in Fact and in Law

25. That the claimant was from the commencement of her employment and continues to be, employed by the second named respondent Scottish Widows Services Limited.

Findings in Fact continued

26. The claimant, who defines herself as a female of Asian nationality, commenced employment with the second respondent on 3rd November 2014 in the capacity of a Fund Governance, Analysis and Performance Manager. The claimant has remained in continuous employment with the second respondent in that capacity since 3rd November 2014. The claimant's employer, from the commencement of her employment was and continues to be the second named respondent.

27. The claimant's duties and responsibilities include the production of analysis of and the reporting on funds offered to customers. The claimant was line managed by Mr Andy MacRae until 24th January 2017. Mr MacRae in turn reported to the third respondent who, until on or about the 4th of April 2017 was the claimant's second Line Manager.

28. From 18th January 2017 the claimant has been line managed, on an interim basis, by Mr Krispal Bhachoo. Mr Bhachoo was appointed by the third respondent to act up as Team Leader and Line Manager of the team of which the claimant is a member, in circumstances in which Andy MacRae had commenced a period of indeterminate sick leave.

29. From on or about 4th of April 2017, the responsibility for the work of the team of which the claimant is a member was transferred to the new Head of Funds Governance's management chain. As at that date the third respondent ceased to be the claimant's second Line Manager.

30. Upon commencement of employment, employees of the second respondents are typically introduced to the business including, when available to various Managers. The responsibility of making and managing such introductions is that of the first Line Manager. On the first day of the claimant's employment the third respondent who was the claimant's second Line Manager did not introduce himself to the claimant. Neither was the claimant introduced to the third respondent on the day of her employment notwithstanding an attempt by another member of the team to achieve that. In the circumstances neither the acts nor the omissions of the second and or third respondent in that regard constituted discrimination in terms of section 13 of the Equality Act 2010. The claimant made no mention of concern arising from or connected with her first day of employment until 4th of April 2017 in the course of meeting with Alison Morris the Officer investigating her internal complaint and which took place on 4th April 2017 some 2 years and 4 months later.

31. On or about the 12th of March 2015 the Chief Executive of the second respondent, Mr Toby Strauss, visited the teams for which the third respondent was responsible. The meeting was scheduled to last 15 minutes. In the event Mr Strauss was running late and spent only some 5 minutes in the department. As was common practice, in advance of the visit the third respondent had identified individuals, in this case 2/3, to hold themselves ready to be introduced to the Chief Executive

should time permit. Each of the individuals was selected because in the case of one he already knew the Chief Executive having worked with him in a previous role and in the case of the others had prepared work which was submitted to the Chief Executive. The claimant was not one of the individuals selected. The claimant was not introduced to the Chief Executive by the third respondent during his brief visit. The alleged acts or omissions of the second and or third respondents in this regard did not constitute discrimination in terms of section 13 of the Equality Act 2010. The claimant did not mention that incident as giving rise to any concern on her part at the time and first mentioned it at her meeting with Alison Morris on 4th April 2017, some two years later.

32. At or about the end of February 2016 the claimant prepared a Board paper at the request of the third respondent in the normal course of her duties. The period during which the claimant worked upon and produced the paper coincided with the period during which her husband was suffering from cancer from which, shortly after the claimant's production of the paper, he subsequently died. Although the claimant had the option, at that time, of indicating that she was not available to work which indication would have been respected by her Line Manager and by both the second and third respondent, she chose to make herself available for work and agreed to undertake the task when asked to. She nevertheless felt particularly vulnerable at that time. The third respondent, while generally aware that the claimant's husband was suffering from cancer and that his health was deteriorating, was not privy to the precise state of his health at the time at which he requested that the claimant undertake the task of preparing the paper, or at the time at which the paper was delivered. The second and or third respondent's acts

or omissions in that regard did not, in the circumstances, constitute discrimination in terms of section 13 of the Equality Act 2010.

33. The third respondent did not expressly thank the claimant for her efforts in producing the paper at that time.

34. Following the subsequent death of the claimant's husband the department's staff, including the third respondent, sent flowers to the claimant expressing regret. The third respondent did not express personal condolences to the claimant on the occasion of her husband's death. The third respondent failed to do so through oversight on his part which he subsequently regretted.

35. The claimant was subsequently asked by her then Line Manager Mr MacRae to review the basis upon which the second respondent adjusts the allocation to different asset classes within its funds. She was asked to author an optimisation review paper identifying any issues which potentially required action together with potential adjustments to the process, the same to be submitted to the Unit Linked Investment Management Committee ("ULIM") for consideration. The Committee was the control body by which any changes to the then currently authorised optimisation process required to be approved, prior to their implementation.

36. The third respondent, as Head of the Department and a ULIM Committee member acted as the "sponsor" of the paper. As sponsor, the third respondent was responsible for ensuring that the paper was drafted in a manner comprehensible to the members of the ULIM Committee which included ensuring that the paper would be understood by those members of the Committee who came from a less

technical background in its subject matter than the author; and further, that the paper was drafted to take account of or reflect also the views of relevant stakeholders on whose functions any ultimately approved and authorised changes to the optimisation process would impact.

37. The claimant was first tasked by Mr McReady to prepare the review paper in early September 2016 as part of the process of optimising funds including the review of their risk rating which was work which the respondents routinely carried out. Mr MacRae's aspiration, all other things being equal, was to see the paper which the claimant was tasked with preparing, submitted to ULIM for initial consideration at its October scheduled meeting and, if changes to the process were approved and authorised by the Committee to see the process of their implementation begin in November. Those were the aspirational timelines given to the claimant at the point at which Mr MacRae tasked her with carrying out the review. Although at the time of receiving the task the claimant did not consider that the timelines set were likely to be problematic, as she began to carry out the task she came to consider that the timelines were unrealistic. She did not revert to either Mr MacRae, her first Line Manager or to the third respondent, the paper's sponsor, at any point to advise them of that view or to ask for adjustment of the timelines. Had she done so the third respondent would have agreed to the timelines being adjusted. In the event, the draft of the claimant's paper which was produced in October was not one ready for submission to ULIM and it was not submitted to the Committee's October meeting.

38. In August of 2016 the claimant had been separately tasked by Mr MacRae to carry out a review of the optimisation of a specific fund (SWODP) as part of the routine work taken forward by the second respondents. As part of this review the claimant contacted Mr Andy MacRae, her Line Manager and Mr Brian McReady, Senior Assistant Allocation Manager, to discuss the fund and it was left with Mr MacRae and Mr McReady to discuss further and take any action considered appropriate. Following the tasking of the claimant in early September with the "optimisation review" the review of the SWODP Fund was put on hold pending, what at that time was hoped to be the submission of a paper to ULIM in October and the emergence from ULIM of any authorised changes to the optimisation process, which could then be given effect to in the routine review of the SWODP Fund.

The Optimisation Review

39. As the third respondent was the sponsor of the optimisation review in relation to which the claimant was charged with preparation of a paper, the claimant sent her first draft to the third respondent for review. After reviewing the draft the third respondent considered, standing that the ultimate audience of the paper would be a panel of individuals who were not close to the subject matter or used to considering funds from such a technical perspective, that the claimant's first draft report was overly complex and would need to be amended to make it readily comprehensible to the members of the ULIM Committee. The third respondent suggested to the claimant that the draft be revised to achieve that effect. The third respondent did not ask or direct the claimant to change the overall content or recommendations of the report.

40. A number of further drafts of the claimant's paper were provided by the claimant to the third respondent for review. On each occasion, the third respondent made comments mainly in relation to style and to the comprehensibility of the subject matter to the prospective audience of the ULIM Committee members.

41. The claimant further amended her report and in November 2016 the respondent asked the claimant to send the draft report to Mr McReady, who as control function (cf30) was a regulated individual involved in the signing off of the outcomes of the optimisation process, for his review and comment. Mr McReady was also a managerial member of the Asset Allocation Team which was one of the identified stakeholders, in relation to the report, and whose views the ULIM Committee would require to take account of in considering and approving any recommendations contained in the report and whose views, therefore, should appropriately be included and reflected in any such report going to the ULIM Committee.

42. After reviewing the draft report, Mr McReady sent the claimant some comments about it while also confirming that he disagreed with some of the content. In her response, the claimant did not engage with the views expressed by Mr McReady but appeared to be dismissive of them. Mr McReady considered that response and the respondent's attitude, which he perceived the response to be reflecting, to the input which he had offered, to be unprofessional. He did not wish to become involved in a face to face argument with the claimant. By email of 22nd November 2016 he advised the third respondent that he felt that the claimant had been unprofessional in her email communication with him in respect of the report and his input but, as he did not wish to become involved in a direct argument with the

claimant he would leave the matter of input to the paper to the third respondent to resolve. The claimant's Line Manager Mr MacRae, for his part, and the third respondent, for his part, also considered that the nature and manner of the claimant's response to Mr McReady's email was inappropriate and unhelpful in the circumstances.

43. As the ULIM Committee member responsible for sponsoring the optimisation review paper the third respondent understood that it was both appropriate and likely to be a prerequisite of obtaining ULIM Committee approval that the claimant engage with Mr MacRae, who was also a member of the Committee. The same in his capacity as an approver of the process and a managerial member of one of the stakeholders and that the paper ultimately submitted should in some way take account of or otherwise reflect the input offered by him. He explained to the claimant in an email that if the Asset Allocation Team (of which Mr McReady was a member), as approver of the process, was unable to support the report as ultimately drafted, there was available to the claimant, against the above background, the options of either:-

(i) considering Mr McReady's input points of view and redrafting elements of the paper to reflect these while also developing some of the arguments which the claimant had raised in her email to Mr McReady, in order that the paper reflected balanced views of both the claimant and Mr McReady on the particular issues which would then inform the Committee's consideration of those issues, or, alternatively

(ii) to arrange a discussion with the Asset Allocation Team with a view to reaching a common view on the issues and then by reflecting the outcome of that discussion in a further draft of the paper.

44. Up until November 2016 the parties to the email correspondence at various stages were respectively the claimant, the third respondent, Mr McReady and Mr MacRae, the claimant's Line Manager who had tasked the claimant with the preparation of the paper. It was managerially appropriate for all of those individuals to be party to the email exchange.

45. On 24th January 2017, shortly before commencing a period of sick leave, Mr MacRae, the claimant's then Line Manager had agreed in discussion with the third respondent, and with a view to advancing the issue of the optimisation review that he would ask Mr Ken Robertson, a contractor then available within the department, to take over the further drafting of the optimisation review paper for submission to the ULIM Committee based upon the drafts produced by the claimant to date and with her input. That decision was one taken with a view to supporting the claimant who had come to regard the optimisation review task as onerous and with a view to advancing the refinement of the various drafts already produced into a format capable of being submitted to the ULIM Committee with some prospect of its being understood and its recommendations potentially approved.

46. Mr MacRae and the third respondent had agreed that he, Mr MacRae, would advise the claimant of that decision in advance of its implementation. Due to his

deteriorating state of health Mr MacRae did not so advise the claimant prior to commencing his sick leave. The third respondent was unaware that Mr MacRae had not done so and, when meeting with the claimant later in January of 2017 on an entirely different matter had no reason to mention the decision to the claimant.

47. When the claimant became aware of Mr Robertson's involvement she raised no concerns in that regard with her then substitute acting Line Manager Mr Bhachoo or with Mr MacRae following his return to work later in 2017.

48. Ultimately, a position paper was presented to the ULIM Committee in March of 2017 which was followed by further papers from Mr MacRae in May and June 2017 following Mr MacRae's return to work to duties other than team managerial duties. Concerns identified by the claimant regarding the optimisation process were included as part of that series of papers.

49. As of 4th April 2017 the third respondent no longer has structural managerial responsibility for the claimant or for the team within which she works. With effect from that date the responsibility for the Fund Governance functions carried out by it were incorporated within the responsibilities of the separate Fund Governance department.

50. At the time of first tasking the claimant with the optimisation review the claimant's Line Manager Mr MacRae considered that the Optimisation Review task was work which should take priority over the Pensions Investment PIA Review and ADC Reporting tasks which the claimant had at that time been carrying out. He considered that to leave the claimant with both tasks would be to overburden her, particularly in the circumstances of her husband's relatively recent untimely death

and doing? which he wished to avoid. He accordingly advised the claimant that she should concentrate on the optimisation review and that he would take up with his Line Manager the reallocation of the PIA Review work that the claimant was carrying out to other members of the team who were able to cover it. In doing so Mr MacRae was motivated by a combination of:-

(a) his managerial assessment of the requirement to prioritise that work,

(b) the fact that the claimant's technical skills best suited her, she also being the person who had first identified potential issues in the optimisation review, to carry out the optimisation review work,

(c) a desire to try to avoid overburdening the claimant by leaving both tasks with her; and

(d) the fact that the next major task to be carried out in the PIA Review work which the claimant had previously been tasked with would involve a major data lift which another team member had substantial experience of and would be well placed to carry out.

51. In so deciding Mr MacRae was in no way whatsoever motivated by the fact that the claimant had identified issues with and/or expressed any concerns in relation to, the then existing optimisation process or the optimisation of any particular fund.

52. At the end of October 2016, no paper recommending changes to the optimisation process having yet gone to the ULIM Committee the third respondent advised the claimant that while supportive of the general direction of travel identified in her first

draft paper and since it would clearly be some time before any change of basis could be approved, he considered that the routine review of specific funds, which had been temporarily suspended pending what was initially hoped would be the emergence of approved changes to the process some time in November, could not be left in limbo indefinitely and that he had accordingly asked the claimant's Line Manager to consider with the claimant how to take forward, in parallel, the optimisation process on the one hand and the review of funds under the then current approved basis.

53. The claimant did not wish to be involved in further review of funds under the existing approved methodology because she wished to avoid any potential for there arising at some time in the future some question of whether in doing so in the context of a review of the process being underway she might be regarded as having acted unprofessionally. She wished to protect herself from any such potential and declined to take forward the review of funds under existing methodology. She was not required by the respondents to carry out those reviews.

54. The claimant was not and has not been excluded by the respondents from working on corporate pension funds review. She was asked to give priority to the optimisation review in terms of a managerial decision of her Line Manager in consultation with his Manager which decision also saw the tasking of a colleague of the claimant's, Mr Harry Lukas, who was particularly experienced in heavy data lifting with the next major task in the PIA Review work.

55. In the past the PIA Review work had been carried out by external contractors who reported to the respondents. The respondents had decided to take that task in

house by purchasing from the contractors and in due course themselves operating a relevant software package. At the time of asking the claimant to give priority to the optimisation review, the next major task required to set up the in house model for PIA Review was a heavy data lift. The claimant is not precluded from carrying out such PIA Review work in the future. Should the opportunity to carry out such work arise and should the claimant wish to she is at liberty to volunteer to do so. In the respondent's assessment there is nothing, all other things being equal, which would preclude the claimant from carrying out such work in the future.

56. In or about 8th March 2017 the claimant overheard the third respondent speaking with the contractor Ken Robertson. From the parts of the conversation which she overheard the claimant believed that the third respondent was asking Mr Robertson to "review the risk rating process". The claimant considered that to be an act which was humiliating to her as she had been conducting risk rating reviews since 2014. The third named respondent did not ask and was not asking Mr Robertson to review the risk rating process on that occasion but rather, was advising him to take into account risk rating while undertaking an entirely separate piece of work.

Bonus

57. In January of 2017, prior to his commencing sick leave Mr MacRae met with other senior managers to discuss performance ratings of various members of his team. That meeting, known as a calibration meeting, was a routine meeting carried out by managers collectively in advance of the annual performance bonus round.

58. Mr MacRae, notwithstanding the fact that he had become aware that the claimant's communication with, amongst others, stakeholders in respect of the optimisation review report had been attendant with some criticism, considered that it was appropriate to award the claimant a "good" performance rating. That took into account the claimant's overall annual performance and also took into account her own personal circumstances including the untimely death of her husband which Mr MacRae recognised had, of necessity been difficult for her. Mr MacRae along with other managers and by way of input to the calibration meeting, provided bullet points in relation to his various team members designed to contribute to the determination of individual bonuses.

59. The communication of bonus awards is the responsibility of first Line Managers and in normal circumstances the claimant, together with the other members of her team would have been advised of her annual bonus by Mr MacRae.

60. Due to Mr MacRae's absence on sick leave, that task required to be delegated upwards to the third respondent who was the second Line Manager of the claimant and her fellow team members. There is annually fixed by the company a range within which bonus awards can be and are made. The fixing of a bonus within that range is ultimately a matter at the discretion of the respondent's managers. In fixing the levels of bonus awards within that range for amongst others the members of the claimant's team, including the claimant. The third respondent took account of the points previously input by Mr MacRae to the calibration meeting. Due to his absence on sick leave Mr MacRae had reduced that input to a series of bullet points in respect of each of his team members and had made these available

to the third respondent for use at the individual bonus communication meetings which he required to conduct in Mr MacRae's absence.

61. The third respondent met separately with each individual on his own and Mr Bhachoo's teams including the claimant. With the exception of his own direct reports in respect of whom he superimposed communication of their bonus awards upon other meetings, the third respondent met with each of the individuals, including the claimant, to whom he communicated their bonus awards individually and successively in the same meeting room. The meeting room was the one most proximate to and available for use by the teams of which the third respondent was second Line Manager. It was the normal practice for the team's members to have amongst others their bonus meetings in that room. The use of any other room would have involved the pre booking of such a room in another part of the building and the movement of the manager and the individual to and from that other room. Such a use, had it been opted for in relation to the claimant's bonus meeting, would have identified that meeting as one which was in some way different from the others, that is to say non-standard.

62. Within the range of bonus awards an average award emerges in any particular year and all bonuses awarded are awarded either at, above or below that average level of award. The award communicated to the claimant in March 2017 in respect of her previous year's performance was an award which was below that year's average. It was not the lowest award communicated by the third respondent. In the same series of meetings the third respondent communicated other performance bonus awards which were below the 2017 average.

63. In the course of the meeting, the third respondent explained to the claimant the rationale underlying the determination of her particular award. In doing so he made reference to the bullet points provided to him by Mr MacRae for his use in Mr MacRae's absence. He did not provide the claimant with a spreadsheet showing the outcome of the calibration meeting in relation to all employees within the department. Such a spreadsheet is never provided to individuals when communicating to them their bonus award. The claimant was dissatisfied with being awarded bonus at a level below the year's average. She subsequently asked the third respondent how she could challenge the award. The third respondent advised her that he was not aware of there being any specific procedure or right to appeal against the award of a bonus and that she should therefore make contact with and take advice in relation to that matter from the Human Resources Department.

64. On 14th March 2017 the claimant submitted a formal complaint of harassment against the third respondent. The claimant indicated in the complaint that she felt she had been treated differently by the third respondent because she was a "mature Asian female returner".

65. The respondents fixed the level of bonus communicated to the claimant in March 2017 in relation to and in consequence of her performance in that year and their assessment of it while also taking into account the mitigating factors associated with her husband's illness and untimely death. The respondents did not fix the claimant's performance bonus at the level communicated because she had carried out the protected act of lodging a grievance complaint against the third respondent.

Grievance

66. The second respondent acknowledged the receipt of the claimant's complaint on the date it was lodged, 14th March 2017, and furnished her with a copy of the second respondent's harassment policy.

67. The second respondent appointed Alison Morris, Head of Capital and Risk Oversight, to investigate the claimant's complaint.

68. As part of the investigation Ms Morris met with the claimant, the third respondent, Mr MacRae and Mr Bhachoo. Ms Morris also reviewed all of the documentation that had been provided by the claimant and the other employees who had been spoken to as part of the investigation. During the investigation Ms Morris was concerned that the claimant might be being required to work with the 3rd respondent. It was confirmed, that from 10th April 2017, the claimant's management line would, for other reasons and in any event, in the Funds Government department change to Richard Conway. In addition, Ms Morris sent an email to the claimant on 10th April to confirm that once Mr Conway was in place and notified of the situation, the claimant and Mr Conway could discuss and consider together the putting in place of arrangements which may assist the claimant, for example, a facility by which the claimant might work from home from time to time should she prefer to do so. Since April 2017 the claimant's direct Line Manager, on an interim basis, has been Mr Bhachoo while Mr Conway is the new "Head of Department" that the claimant and Mr Bhachoo ultimately report to.

69. The claimant submitted her formal internal complaint of harassment directed against the third respondent, to the second respondent on 14th March 2017. The second respondent's determination of the claimant's complaint at first instance was communicated to the claimant on 26th May 2017. The claimant exercised her right to appeal against the grievance outcome and determination of complaint on 2nd June 2017. Following the appeal process the respondent communicated appeal outcome and determination to the claimant on 17th July 2017.

70. The Lloyds Banking Group Internal Harassment Policy, to which the second respondent subscribe, identifies at paragraph 7 (page 117 of the Joint Bundle) that the respondents will aim normally to have the investigation at first instance complete and the issue determined and an outcome letter issued within 8 weeks, or in more complex cases up to 12 weeks. The policy further provides at paragraph 8 changes 117 and 118 of the Joint Bundle that their right of appeal having been exercised, the appealing party will be given not less than 7 calendar days advance notice of an appeal meeting unless otherwise agreed and further that the appeal meeting will normally be held within 21 calendar days of the notification of exercise of the right of appeal and that the Appeal Manager's decision, which is final, will normally be communicated to the Appellant in writing within 14 calendar days of the appeal meeting.

71. The claimant's complaint and appeal were respectively investigated, determined and processed within the indicative timescales set out in the Policy.

72. During the period of the investigation and initial determination of the claimant's complaint the respondents did not require either the claimant, the party making the

complaint or the third respondent, the party against whom the complaint was directed, to absent themselves from their respective workplaces. The Lloyds Banking Group Harassment Policy does not require that the respondents so require either or both of the parties to remove themselves from the workplace. The claimant did not request that the second respondent remove the third respondent from the workplace during the investigation and determination of her complaint at first instance.

73. The Lloyds Banking Group Harassment Policy provides at paragraph 6 page 116 of the Joint Bundle that there may be particular circumstances in the particular case that might result in the respondents requiring the person complained about or, in some cases, the person making the complaint to remain at home while the investigation is ongoing. Although the claimant did not ask, prior to the determination of her grievance at first instance that the third respondent be excluded from the workplace, she did make such a request on 3rd July 2017 during the appeal process. The second respondents gave consideration to that request under the Policy. They determined that as, with effect from 4th April 2017 the third respondent was no longer in the claimant's management chain, there was no requirement for day to day contact between the claimant and the third respondent and that it would be possible for both the claimant and the third respondent to remain at work during the appeal process.

74. On 26th May 2017 Ms Morris, the Investigating Officer, wrote to the claimant confirming her decision not to uphold the claimant's complaint. Ms Morrison indicated in her outcome letter that although she felt that some of the treatment

which the claimant had experienced had fallen below the standards expected of the second respondent she could find no evidence of harassment.

75. Following the internal appeal process, on 17th of July 2017 Mr Byron, the Appeal Officer wrote to the claimant confirming his decision not to uphold the claimant's appeal. Mr Byron concluded that he could find no evidence to support a finding that the third respondent had undermined or harassed the claimant during her employment.

Acting Up

76. In or about January of 2017 when the claimant's then Line Manager commenced a period of sick leave, he was unclear in his discussions with his own Line Manager the third respondent, as to when he might expect to be fit enough to return to work. In the circumstances of what was an indeterminate period of absence the third respondent considered that it was both necessary and appropriate to appoint a temporary Interim Manager to act up and deputise for Mr MacRae in his absence. The making of such a temporary managerial appointment and the identification of an individual to fill it, is a matter which, in terms of the second respondent's procedures, lies within the discretion of the individual senior manager. The third respondent identified and asked one of the claimant's fellow team members Mr Chris Bhachoo to deputise temporarily as the Interim Manager. Mr Bhachoo agreed to do so and was so appointed. The third respondent identified and selected Mr Bhachoo as a person to whom he would offer the appointment because of the available team members, including the claimant, Mr Bhachoo was

recorded as having identified in his annual review process a desire to take on the responsibility of a promoted post and had separately been assessed as having the potential to do so.

77. The third named respondent did not choose and appoint Mr Bhachoo (and in consequence exclude from consideration and not appoint amongst others the claimant) because of the claimant's protected characteristic of race and or sex nor because the claimant had made any of the disclosures upon which she founds.

78. The appointment of Mr Bhachoo occurred before the claimant carried out her protected act of lodging her grievance. The team members from amongst whom Mr Bhachoo was selected for the appointment included several women of whom two, including the claimant were of Asian extraction/nationality. As at the date of Hearing, Mr Bhachoo continues to act up as Team Leader on an interim basis. In the interim period Mr MacRae has returned to work but, at his request not to the managerial duties of Team Leader. As at the date of Hearing the position of Team Leader, held by Mr Bhachoo on an interim basis had still to be filled on a permanent basis. The filling of the position on a permanent basis is regulated by the second respondent's internal procedures which will require that the post be advertised first internally and ultimately, if necessary, externally. Application will be open to all with relevant experience, qualification and skills. The claimant falls into that category. If and when the appointment of Team Leader is advertised the claimant will be eligible and entitled to make application and to be considered for appointment to the post. The claimant is also at liberty to apply for other Team Leader managerial posts which are advertised by the second respondents and for

which she considers she has the relevant experience, qualifications and skill sets. The claimant has not been denied promotion.

Finds in Fact and in Law

79. That the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider, both in terms of section 123 of the Equality Act 2010, her complaints of having suffered detriment by reason of making a protected disclosure and of discrimination, insofar as founded upon the averments of alleged conduct on the part of the third respondent given notice of at paragraphs 3, 4 and 5 of the paper apart to her initiating Application ET1 first presented to the Employment Tribunal on 1st August 2017 and being allegations:-

(a) that the third respondent was quick to introduce himself to a younger white male fellow starting employee, on 3rd November 2014, but did not proactively introduce himself to the claimant;

(b) that on 12th March 2015 the third respondent introduced the second respondent's CEO to three younger white male team mates but did not introduce the claimant to the CEO during his brief visit to the department and,

(c) that the third respondent asked the claimant to prepare a Board paper at the end of February 2016 at a time when her husband was suffering from cancer and was terminally ill; and

(d) further, that she having delivered the paper 24 hours prior to her husband's death shortly thereafter the third respondent, who was her second Line Manager, had not expressly thanked her for preparing the paper and had not offered to her his personal condolences on her bereavement, as opposed to the collective condolences offered by the department.

80. The allegations relate to discreet standalone acts which are not interconnected. None of the allegations are connected to later allegations such as taken together form series of allegedly unlawful acts. The allegations are presented outwith the four month period occurring immediately prior to the date upon which the claimant first presented her initiating Application ET1 which, taking into account the extension of the normal statutory time limit arising from the application of ACAS Early Conciliation in terms of section 207B of the RA 1996, is the time limit during which, at first instance, the Tribunal would have jurisdiction to hear the complaints in terms of section 123(1)(a).

81. On the evidence presented the complaints, respectively submitted in excess of three years, two years and one year after the expiry of that time limit, are not complaints submitted within such other period as the Employment Tribunal thinks just and equitable.

Summary of Submissions

82. In the course of her submissions the claimant, Mrs Lucas, made reference to a decision of the Employment Tribunal at first instance in Case Number 1800507/2014 the case of **Miss L Southern v Britannia Hotels Limited**. The case was one which was concerned with a complaint of indirect sex discrimination which was dismissed, and with a complaint of harassment in terms of section 26 of the Equality Act 2010 which was upheld, the Tribunal making an award of compensation for injury to feelings in the sum of £19,500. In fixing that sum, the Tribunal took account of the vulnerable state in which they considered the claimant, in that case, to be.

83. The claimant also relied upon **Western Union Payment Services Limited v Anastasiou UKEAT/0135/13LA** in relation to the distinction to be made between a "qualifying disclosure of information" and "the mere providing of an opinion".

84. Dealing firstly with protected interest disclosure, the claimant identified three events/communications each of which she submitted constituted a qualifying and protected disclosure in terms of sections 43A, 43B(1)(b) (that is a disclosure that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject); and in terms of section 43C of the Employment Rights Act 1996:-

The First Disclosure

85. The first disclosure she submitted was made by her in a conversation with Andy MacRae, her Line Manager, on 12th September 2016 in which, she asserted in

evidence that, she told him that she "*did not wish to carry out the optimisation of funds on the current basis because she felt it would be in breach of FCA Rules*" (a statement which Andy MacRae stated in evidence he had no recollection of her making to him).

Alleged Resultant Detriment

86. In the claimant's submission she was subjected to two detriments in consequence of having made the first disclosure:-

The First Detriments

(a) that in terms of email dated 13th September 2016, pages 231 and 232 of the Joint Bundle, her then Line Manager Andy MacRae asked her to draft a paper, intended for submission to the ULIM Committee for approval in October 2016, setting out a proposed revised approach to optimisation together with the rationale for this and, thereafter, assuming a basis of proceeding was agreed with ULIM, to complete the required modelling for two identified funds "managed growth" and "mass advice" by the end of November 2016. In the claimant's submission the detriment was constituted not by her being asked to undertake the work but rather by the timescales within which she was asked to undertake it namely to have a paper ready for presentation to the ULIM Committee meeting of October of that year and thereafter to take forward the required remodelling for the two specifically named

funds by end November of that year. In the claimant's submission although, not apparent to her at the time, those timescales were subsequently identified by her as she progressed the work, as being unrealistic.

The Second Detriment

(b) In Mrs Lucas's submission the second detriment was constituted by Andy MacRae's decision, communicated in the last paragraph of the email of 13th September 16 that he regarded the work which he had asked the claimant to undertake in the email as work taking priority over the PIA Review and ACD reporting being other tasks with which she was previously engaged which in his view, he could have covered by other people.

The Second Disclosure

87. Mrs Lucas submitted that the second disclosure was constituted by the statement contained in the first draft of the paper prepared by her and sent to Andy MacRae on or about 14th October, and in particular the statements contained in the first sentence of the second paragraph thereof, viz:- "*this table however highlights the current conflict between our SAA and MTAA time horizons";* And in the last sentence of numbered paragraph 4.2 at the same page (240 of the Joint Bundle):-

"*This drift was not addressed in the recent optimisation of L-day and Solution funds as the funds continue to be optimised with reference to their historical peg.*"

Alleged Resultant Detriment

In the claimant's submission she was subjected to three detriments in consequence of having made the second disclosure:-

First Alleged Detriment

(a) That her year end bonus was one of those fixed by the third respondent at a level less than the Company average of 15%.

Second Alleged Detriment

(b) That the third respondent had copied to Brian McReady in the Asset Allocation Team and to Andy MacRae, the claimant's then Line Manager, an email dated 22nd November 2016 (pages 257 and 258 of the Bundle) and addressed to the claimant in which, having summarised the then present position in relation to the paper which had been drafted by the claimant, namely:-

(i) that it was not supported by asset allocation and "at present it will not be" and thus,

(ii) in those circumstances, would not be approved by ULIM i.e. without the support of the Chair of the ULIM Committee the paper could not successfully be submitted to and approved by ULIM.

(iii) In the same e-mail he had gone on to identify two options for the claimant to consider each representing potential ways forward which might lead to circumstances in which the paper could be submitted and ULIM's approval obtained.

(iv) In the claimant's submission and as she did not wish to take forward either of the options suggested, identifying them to her as courses of action for consideration constituted a detriment.

Third Alleged Detriment

(c) That in terms of an email of 23rd December 2016 addressed to the claimant Brian McReady of Asset Allocation and to Andy MacRae regarding the optimisation process review, the third respondent shared with all three addressees including the claimant, his analysis, as sponsor of the paper, of the position as it then stood; setting out his understanding of what the "problem statement" could usefully include

and sought views on that potential approach from all three addressees, including the claimant and, subject to their supporting it, asked that the claimant take matters forward on that basis.

Third Disclosure

88. In the claimant's submission the third disclosure upon which she founds is contained within her email dated 30th January 2017 addressed to Kevin Stewart, Ian McGowan (her third Line Manager), Harry Lukas and Brian McReady (pages 308 and 309 of the Joint Bundle) and in the question posed by her in that e-mail which is in the following terms:-

> "***Subject: RE: PIA Optimisation Update***
>
> *Harry's work so far relates to the pre-retirement, stay invested path only. Before proceeding further, do we need to extend the analysis to at retirement and the other cash flow profiles in order to ascertain their full impact and ensure compliance with FCA COBS?*
>
> *Kind regards*
>
> *Kit*"

Alleged Consequential Detriment

(a) In the claimant's submission she was thereafter subjected to the detriment of being excluded from further involvement in the PIA Review.

Victimisation

89. In Mrs Lucas's submission, and a matter not in contention between the parties, the lodging by her on 14th March 2017 of a complaint, under the Lloyds Banking Group Internal Group Harassment Policy, against the third respondent (who at that time was her second Line Manager), amounted to her doing a protected act in terms of section 27(2)(d) of the Equality Act 2010 – that is, making an allegation (whether or not expressed) that the third named respondent had contravened the Equality Act 2010.

90. The claimant submitted that because she had carried out that protected act on 14th March 2017, she had been subjected to detriment at the hands of the first and or second named respondents as follows:-

First Detriment

(a) In the claimant's submission the first consequential detriment was constituted by an alleged failure on the part of the first and or second named respondents to follow the Group Harassment Policy, in the particular of not requiring the third respondent to stay at home at the point at which she made the complaint and pending its investigation outcome and internal appeal.

Second Alleged Detriment

(b) Being the first respondent taking a total period of eleven weeks that is from 14th March to the 26th of May to investigate and dispose of her internal complaint at first instance complaint (and appeal in the time frames set at pages 380-382 of Joint Bundle) and page 116 of the Joint Bundle.

Third Alleged Detriment

(c) The copying by the third named respondent in the period 31st October 2016 to 18th November 2016 to some or all of Brian McReady, Krispal Bhachoo and Ken Robertson (the last, a contractor to whom work on the optimisation process was allocated) of email communications with and from the claimant and in response to the claimant's e-mails and relating to the optimisation process review (see pages 237-252 of the Joint Bundle).

Fourth Alleged Detriment

(d) The third respondent Andy MacRae reassigning the optimisation review to Ken Robertson on or about 20th January, without first telling the claimant.

Fifth Alleged Detriment

(e) Conducting the claimant's bonus meeting in the meeting room which was located in the area of her team in circumstances when it was known that her bonus was to be less than the 15% average.

Sixth Alleged Detriment

(f) The third respondent coming over to the claimant's bank of desks on 12th September 2017 and sitting in Harry Lukas's then vacant seat in order to speak to a contractor who was also at the desk in the adjacent seat.

Seventh Alleged Detriment

(g) The third respondent behaving in a manner in the work place which showed no sign of his being concerned about the fact that the claimant had complained about him.

Eighth Alleged Detriment

(h) The claimant's perception and or belief that the third respondent must have discussed the detail of her complaints with other employees.

Direct Discrimination

91. Mrs Lucas submitted that the Tribunal should find that the respondents had treated her less favourably because of her protected characteristics of sex and or race (Asian nationality) than they would have treated a hypothetical comparator whose circumstances, in all regards other than the possession of the protected characteristics, were substantially the same as those of the claimant.

Instances of Less Favourable Treatment founded upon

92. Mrs Lucas identified and relied upon three instances of alleged less favourable treatment:-

(a) **(First instance)** The third respondent's failure to consider and select her, as opposed to her fellow team member Krispal Bhachoo, as the individual to deputise, on a temporary basis, for Team Line Manager, Andy MacRae during his absence on sick leave. And in particular:-

(i) Failure to actively consider the claimant at the time as an alternative candidate

(b) **(Second instance)** the fixing of her bonus at the year end at a level below the 15% Group average including in particular:-

i. The third respondents giving consideration in reaching his view to the bullet points (copied at page 303 of the Joint Bundle) prepared by Andy MacRae her Line Manager in the reporting year for use by the third respondent in his absence on sick leave for all of his direct reports, including the claimant; and, of his failure to demonstrate his calculation by providing the claimant at her bonus meeting with a copy of the departmental spreadsheet showing the bonuses of all department members.

(c) **(Third instance)** The third respondent, and or Andy MacRae for whose actings the second respondent is vicariously liable, choosing Harry Lukas to take over the PIA Review work from the claimant so that the claimant might give priority to the optimisation process paper with which she had been tasked. In this regard the claimant invited the Tribunal to reject, as incredible, the evidence of Mr MacRae which was to the effect that leaving both tasks with the claimant would have resulted in her being overburdened, something which he was continuously at pains to avoid since the death of her husband, further that he considered Harry Lukas's skillset to be well suited to the substantial task of data lifting which required to be next undertaken as part of the PIA process and, that the claimant's personal skills well

suited her to the preparation of the Optimisation Process Review Paper including, not least, the fact that the issues which it was intended the paper would address were issues first focused and well understood by the claimant.

93. In summary, Mrs Lucas invited the Tribunal to find her complaints; of having suffered detriment by reason of making a protected disclosure in terms of section 43B of the Employment Rights Act 1996, of victimisation in terms of section 27; and of direct discrimination in terms of section 13 (both of the Equality Act 2010) as established.

94. By way of remedy and in addition to the Remedy of damages, the claimant sought the declarations set out at paragraph 3 of the paper apart to initiating Application ET1 viz:-

"**Remedy**

i. that the third respondent be forbidden from harassing or bullying other employees of the first respondent and related companies; and

ii. that the first respondent's bonus system be made transparent and open to challenge to prevent it being used to discriminate and persecute its employees".

95. In respect of damages, Mrs Lucas made reference to and relied upon the Schedule of Loss produced at page 573 of the Joint Bundle and sought damages under the following headings or heads:-

i. damages for personal injury to feeling
ii. damages for personal injury
iii. damages for damage to reputation
iv. damages for financial loss including reduction in bonus
v. damages for loss of promotion

96. The claimant further submitted that in assessing damages the Tribunal should take account of the "aggravating factors" listed by her at pages 22 and 23 of the Joint Bundle (paragraph 40 of the paper apart to the initiating Application ET1). In all the circumstances the claimant submitted that the Tribunal should regard appropriate compensation as falling within the revised top *Vento* band.

97. The claimant made no submissions in respect of the criticisms of Time Bar advanced by the respondent. As noted in paragraph 8 of this Note of Reasons, however, in submission she did not stand upon the incidents of 3rd November 2014 and 12th March 2015.

Summary of Submissions for the Respondents

98. Mr Cloke, for the respondents indicated that in the interest of completeness his submissions would cover all matters referred to in evidence including those not

expressly founded upon or referred to by the claimant in her submission. In the course of his submissions he referred the Tribunal to the following authorities from the larger bundle which he had lodged and provided to the claimant:-

2. **Cavendish Munro Professional Risk Management Limited v Geduld [2010] IRLR 38**

3. **Kilraine v London Borough of Wandsworth [2016] IRLR 422**

4. **Black Bay Ventures Limited (trading as Chemistree) (Appellant) v Gahir (Respondent) [2014] IRLR 416**?

6. **Aspinall v MSI Mech Forge Limited UKEAT/891/01**

8. **Fecitt and others (Respondents) v NHS Manchester [2012] IRLR 64**

10. **Bolton School v Evans [2017] IRLR 140**

11. **Madarassy (Appellant) v Nomura International Plc (Respondents)**

12. **Igen Limited v Wong [2005] IRLR 258**

15. **Shamoon (Appellant) v Chief Constable of the Royal Ulster Constabulary (Respondent) [2003] IRLR 285**

99. In relation to detriment, both in respect of the complaint of having suffered the same in consequence of making a protected disclosure and for the purposes of the section 27 EqA 2010 (Victimisation) complaint, Mr Cloke referred the Tribunal to and relied upon the definition set out by the House of Lords in **Shamoon (Appellant) v Chief Constable of the Royal Ulster Constabulary (Respondent) [2003] UK HL11**, per Lord Scott concurring at paragraph 637:-

> "*The test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment, is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a justified and reasonable sense of grievance about the decision may well do so.*"

100. For the first, second and third respondents and against that background their representative Mr Cloke made the following submissions:-

Identity of the Claimant's Employer

101. That the claimant's written contract of employment unequivocally identified the second respondent Scottish Widows Services Limited of 69 Morrison Street, Edinburgh, EH3 8YF as the claimant's employer and that that position was confirmed by the practical reality as disclosed in the evidence.

102. That while Lloyds Banking Group of Companies shared a number of Group policies which had application throughout the Group Companies, the first named respondent Lloyds Banking Group Plc was the Holding Company of the Group and had very few, if any direct, employees.

103. That the claimant's terms and conditions of employment were substantially determined by the second named respondents who were identified as her employer.

104. That the claimant enjoyed the full ambit of employee rights as against the second respondent.

105. There was no need to imply into the claimant's employer employee relationship with the second named respondent, a joint employer employee relationship with the first named respondent.

106. That no evidence had been placed before the Tribunal that went to establish such a joint employer employee relationship, far less an exclusive employer employee relationship, with the first named respondent.

107. That it was the second respondents and not the first respondents who were fixed with vicarious liability for any alleged wrongdoing on the part of their employees and or agents and that all of the alleged wrongdoers in the case were either employees or agents of the second named respondents.

108. That no inference as to joint employer employee relationship arose from the mere sharing and use, within the Group of Companies, of a common logo or by incorporation by reference into the claimant's contract of employment of certain policies which had application also to other Group Member Companies.

109. That pages 12 and 13 of the document lodged by the claimant on the last day of Hearing "Lloyds Banking Group Corporate Governance Framework and Legal Entity Management Standards" contained nothing which went to establish such a joint employer employee relationship with the first named respondent. The particular pages appeared to deal with the upward reporting or escalation of entity issues, by the Group Member Companies within their business areas to the relevant Boards as appropriate; and in ensuring that relevant Board requirements are effectively communicated to the business areas and their entities via the relevant Executive Committee or direct to the relevant entity Board.

110. That Lloyds Banking Group Plc as ultimate shareholder was ultimately able to exercise direction over the operation of subsidiaries but that that was direction which arose out of the majority shareholding which the first respondents had and not out of, and nor was it dependent upon, the existence of any joint employer employee relationship with employees of individual Group Member Companies.

111. The respondents' representative invited the Tribunal to hold on the evidence presented that the claimant's employer, for the purposes of her claims, was at the material times and continued to be, the second named respondent.

Protected Disclosures

112. The respondents' representative's primary submission was that none of the alleged disclosures first, second or third, relied upon by the claimant constituted disclosures of information and as such were not qualifying disclosures in terms of section 43B(b) of the Employment Rights Act 1996. On that primary basis he submitted that all of the complaints of having suffered detriment in consequence of protected disclosure fell to be dismissed.

113. In the alternative and let it be assumed that the Tribunal considered that one or more of the communications relied upon did constitute "disclosure of information", in Mr Cloke's secondary submission all three failed to satisfy some or all of the other requirements of section 43B such that they failed to amount to disclosures qualifying for protection.

114. Before turning to consider each disclosure Mr Cloke set out what he submitted to be the appropriate tests to be applied namely,:-

(a) In relation to the nature of the communication, that to qualify for protection what is said or done must be more than a communication or statement of position, more than the expression of an unsubstantiated position.

(b) Further, that the information disclosed must be information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show, in the case given notice of by the

claimant, 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 the claimant must show that she had been subjected to any established detriment relied upon, because she carried out a particular established protected act.

115. Turning to each of the three alleged disclosures founded upon by the claimant:

(a) (a conversation of 12th September with her Line Manager Andy MacRae in which the claimant asserted she stated that she could not carry out the optimisation of funds on the current basis because "it would be in breach of FSA Rules". Mr Cloke submitted;

i. That such a statement, let it be assumed that the Tribunal was satisfied that it had been made, amounted to a mere expression of opinion on the claimant's part, an opinion which it was clear from other communications passing to the claimant was not shared by either Mr MacRae, her first Line Manager or by the third respondent, her second Line Manager.

ii. Separately, and in any event, that what was only a general reference to breach of FSA Rules was too vague to satisfy the requirements of section 43B. Except in the most obvious

of cases (and in Mr Cloke's submission that this case was not obvious was supported by the fact that Mr MacRae did not share the claimant's opinion), if a breach of legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to a statute or regulation.

- That assessment was one which fell to be made as at the time the assertion relied upon was made and not in the light of evidence given subsequently as to what was being meant.

- In her evidence before the Tribunal the claimant had retrospectively identified some of the FSA principles as being what she actually had in mind at the time of making that statement to Mr MacRae.

- On the evidence before it however in Mr Cloke's submission the Tribunal could not reasonably find in fact that very general non-specific reference to "breach of FSA Rules" was sufficient, as at the time it was communicated, to identify an obligation by reference to statute or regulation, which the claimant had stated would be broken.

iii. Mr Cloke further submitted that the claimant had confirmed in evidence that her expressed reluctance to proceed with the optimisation of funds on the then current basis was driven by a desire to protect herself from any future suggestion that she might be seen to have acted in a way that might attract professional criticism. While accepting that the making of a disclosure for such personal interests was not incompatible, *per se*, with also holding a reasonable belief that it is made in the public interest, he invited the Tribunal on the basis of the claimant's own evidence, to find in fact that the disclosure was made in the claimant's personal interest rather than the public interest.

Causal Connection

116. The respondent's representative reminded the Tribunal in relation to the section 43B claims, let it be assumed that all other requirements of section 43B were satisfied and as appropriate the requirements of section 43C such as to constitute one or all of the three communications relied upon by the claimant a protected disclosure and let it be further assumed that each of the alleged detriments relied upon by the claimant properly fell within the definition of detriment, all of which was denied, that in each case, for the complaint to succeed, the Tribunal must be satisfied on the evidence that the act or omission said to constitute the detriment to which the claimant was subjected occurred or was otherwise done by the respondent or persons for whom the respondents were liable **because** the

claimant had made the disclosure. In Mr Cloke's submission in relation to each of the three disclosures relied upon and all of the detriments there was no factual basis before the Tribunal upon which it could be so satisfied.

117. The claimant had put no evidence before the Tribunal which went expressly to establish a causal connection between the two. Separately, and on the other hand, the respondents had provided reasonable and credible explanations for the occurrence of each of the alleged detriments identified being explanations which, objectively considered, discharged the burden of proof of causation by showing that the making of the alleged protected disclosures had played no part whatsoever in the alleged acts or omissions of the second and or third respondent relied upon by the claimant as detriments.

118. On that basis alone (absence of proof of causal connection) Mr Cloke submitted that all of the complaints of having suffered detriment by reason of protected disclosure fell to be dismissed.

119. In relation to the second disclosure, that the two sentences founded upon by the claimant in the first draft of her paper respectively at paragraphs 4.1 and 4.2 (copied at page 240 of the Bundle and respectively being:-

> "*This table, however, highlights the current conflict between our SSA and MTAA time horizons*" and, at 4.2 under the heading Risk Bench Marking – "*This drift was not addressed in the recent optimisation of L-day and solution funds as the funds continue to be optimised with reference to their historical peg.*"

Mr Cloke submitted that the words did not, in their terms, amount to a qualifying disclosure in terms of section 43B(b) ERA 96, in that neither statement tended to show that a person had failed, is failing or was likely to fail to comply with any legal obligation to which he is subject. The statements were preliminary observations in a draft paper designed to review the current optimisation process and to recommend improvements. The statements do not identify, by reference to regulation, or statute or even in general, the terms of or any legal obligation in respect of which there is said to be non compliance.

120. Of the two detriments which the claimant asserts she suffered in consequence of the second alleged disclosure, the first of these namely that the third respondent at paragraph 5 of his email of 31st October 2016 (copied at page 237 of the Joint Bundle) while supporting the direction of travel identified by the claimant in her paper had also expressed the view that the ongoing and outstanding review of funds (which had been temporarily suspended pending the production of the claimant's first draft, should in his view be taken forward under the current methodology pending the emergence of any new methodology approved by ULIM, and that he had asked the claimant's Line Manager to consider how to run these pieces of work in parallel, did not, in Mr Cloke's submission, amount to a detriment.

121. Although the claimant in her evidence before the Tribunal stated that she perceived that statement as one designed to put her under pressure to carry out some of the then pressing work under the then existing approved methodology, as a matter of fact the claimant was not required to take forward concurrently the

routine review of funds on the then existing and approved methodology and as a matter of fact she did not do so.

122. Separately and finally in Mr Cloke's submission, on the evidence of the respondent's witnesses, any such concurrently resumption of the continuous process of routine review of funds under the then existing approved methodology, would have resulted because of the need to carry out that work and thus, notwithstanding, and not because of, anything contained in the claimant's paper. In Mr Cloke's submission the claimant, for her part, had failed to put before the Tribunal any evidence which went to show that any decision to concurrently resume the temporarily stayed review of funds under the particular methodology was caused by the statements in her draft paper which she sought to rely upon. On the other hand Mr Cloke submitted the second and third respondents had discharged the onus of proof as to causation showing that the reason that Mr McGowan expressed a view that the routine review of funds should be progressed concurrently under existing methodology was because that methodology was the methodology then approved by the ULIM Committee, that the review of funds required to be carried out and that the evidence had shown that the alleged disclosures relied upon by the claimant had played no part in that act. Rather, it had been caused by a combination of the fact that the review of funds was something which could not be suspended indefinitely on the one hand and that the current methodology was, at the relevant time, the methodology approved by the relevant Committees for use in review, on the other.

123. In relation to the second detriment relied upon by the claimant and said to arise from the second disclosure, that is to say the statement contained in the third respondent's email of 22nd November 16 to the claimant, copied at page 257 of the Joint Bundle, viz:-

> "*Kit*
>
> *The fact is that if the paper is not supported by Asset Allocation (and at present it will not be), then it will not be approved by ULIM. That being the case i.e. without support of a Chair), we cannot submit the paper.*",

Mr Cloke submitted that the statement could not be viewed as constituting a detriment because it fell to be read in conjunction with the paragraphs which followed and in terms of which the third respondent went on to identify two options for the claimant to consider under either of which the taking of the paper forward to a stage where it could be submitted, were identified. In Mr Cloke's submission the third respondent in his email did no more than summarise the then present state of fact, which was one of impasse, and then go on to identify/suggest options, for the claimant's consideration, designed to move matters on beyond the impasse. That was something which was very far removed from the accepted definition of "detriment" set out by the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** (No. 15 on the respondent's list).

124. In relation to causation, while Mr Cloke accepted that the third respondent's email of 22nd November 2016, the state of impasse and possible routes forward out of impasse which it identified were related to the content of the claimant's then draft

paper, for the reasons set out by him earlier, the particular statements identified by the claimant in the paper as relied upon by her did not, in his submission constitute a qualifying and thus a protected disclosure and thus, that that relationship signified nothing in support of the complaint.

125. In relation to the third alleged detriment relied upon by the claimant that is the two statements identified by the claimant as forming part of the third respondent's email to her of 23rd November 2016 at page 256 of the Bundle, in Mr Cloke's submission neither statement amounted to a detriment.

(a) In Mr Cloke's submission the email had to be read in the context of its main introductory paragraph, viz

"*In the meantime, I have reflected on our exchange yesterday and thought about what the paper is trying to achieve. Alongside, I remain concerned about whether there is any prospect of ULIM understanding the paper (currently they will not) and how it might be simplified.*

- *ULIM need a clear problem statement written in "customer terms" – which I sketch out below – and a proposal on how we address it*
- *While there is content worth debating in sections 4.3 and 4.4, these are implementation points for IS and E rather than points of principle for ULIM, so can be removed from this paper. We can simply tell ULIM what constraints we have applied and how*

we have modelled AR (or indeed any other asset class) when we return with individual proposals. ULIM can take a view on whether that is appropriate in the circumstances."

My conclusion is as follows: ….."

(b) What follows thereafter is the third respondent's attempted analysis of the aims of the paper (of which he was the sponsor) and an articulation of what he understood the problem statement to be but which he invited the claimant to edit if he had misunderstood the position, in the following terms:-

"● *When we optimise, we take a MAF's current vol and refine the asset allocation to arrive at the optimum model return at that level of vol*

● *This means that vol at drifts over time and is not re-set to a fixed level as a matter of course*

● *The consequence is that MFs can move into different risk categories (as defined by our separate annual risk rating process), as an unintended consequence. This means that the fund may not be aligned to the customer's risk appetite.*

● *Further mis-alignment arises from the time horizons modelled – 3 years v 5 years*

● *We regard greater consistency as desirable and propose to achieve it by taking the following steps …..*

I believe ULIM will agree to the proposal if sketched out along these lines. If we keep going as we are, I do not believe we will get there and I am losing my appetite to keep refining drafts of the paper in its current form. I welcome views on

this approach from Andy and Brian also and if supported, I will ask you to take forward on that basis.

Regards,

Ian"

126. In Mr Cloke's submission, the sending of that email by the third respondent did not fall within the definition of or otherwise constitute a detriment to which the claimant was being subjected. It was what it bore to be, namely:-

(a) the provision of some guidance from the third respondent, in his capacity as the claimant's second Line Manager and the sponsor of the paper to the ULIM Committee, on how the matter might be taken forward and the paper put into a form which would be capable of being understood by the ULIM members; and,

(b) his attempt at articulating what he understood to be the underlying problem which the paper was designed to address while at the same time;

(c) inviting the claimant and the other two addressees to comment on/edit his articulation if she/they considered his understanding of it to be incorrect.

127. Regarding causation, in Mr Cloke's submission, on the evidence presented to it the Tribunal should be satisfied that the second and third respondents had discharged proof of causation by showing that the sending and content of the email were acts

on the part of the respondents in exercise of the third respondent's legitimate interest and responsibilities as second Line Manager and sponsor of the paper and were not because of anything said by the claimant rather, they were designed to assist in articulating the position to and obtaining the approvals of the members of the relevant Committee, ULIM,

Victimisation

128. In relation to the claimant's section 27 Equality Act 2010 complaint Mr Cloke acknowledged that the logging by the claimant with the respondent of her complaint, directed against the third named respondent, in terms of the respondent's internal harassment policy on 14th March 2017 (which is produced at 381 of the Bundle, constituted a protected act in terms of section 27(2)(d) of the 2010 Act – "making an allegation (whether or not express, that A or another person has contravened this act".

129. In Mr Cloke's submission however, none of the four acts or omissions identified by the claimant as detriments which she alleges she was subjected to in consequence of her submitting her grievance fell to be regarded as such.

130. Regarding as to her detriment, the holding of the claimant's bonus meeting in the meeting room closest to the team and available to the third respondent and in which the 3rd respondent conducted all of the bonus meetings with the other team members other than his three direct reports, was, in Mr Cloke's submission, not a

view which in the circumstances was a reasonable view for the claimant to hold (in this case in circumstances of receiving a lower than average bonus).

131. Neither he submitted was it a reasonable view to hold in relation to the third respondent sitting down at the bank of desks at which the claimant sat, on 12th September 2017 in order to speak to a contractor, who was also sitting at that desk, separately about relevant work matters.

132. In relation to the second and third alleged detriments Mr Cloke submitted that the claimant had failed to put before the Tribunal any evidence which went to establish that the third respondent had discussed the claimant's complaint with any third person other than the work colleagues who accompanied him to internal Hearings.

133. Finally, the fact that the third respondent appeared, in the claimant's observation or perception, to conduct himself in a manner which did not reveal that he was concerned about the complaint which he had made about him, let it be assumed that the Tribunal considered that the evidence supported such a Finding in Fact which in Mr Cloke's submission it did not, fell far outwith the definition of something capable of amounting to a detriment.

134. Separately, in relation to all four alleged detriments founded upon for the complaint of victimisation, in Mr Cloke's submission the claimant had placed before the Tribunal no evidence going to show a causal connection between the making of her complaint on the one hand and any of the four acts/omissions which she attributed to the third respondent. On the other hand in Mr Cloke's submission the third respondent had discharged the burden of proof of causation in relation to the

first two matters founded upon by the claimant and had shown, on the balance of probabilities, that the reasons for holding the claimant's bonus meeting in the available meeting room near the team desks and for his sitting down to talk to a contractor at the bank of tables at which the claimant also sat on 12th September 17, were for legitimate reasons wholly unconnected with the fact that the claimant had made a complaint against him. In the former case the meeting room was the one used by the third respondent to have the bonus meetings with all of the team members regardless of the level at which he had fixed their bonuses. It was the meeting room available and whereas any other meeting room in another part of the building would have had to have been (a) available and (b) located in the team's area would have had to have booked specifically for such a meeting at a particular time, as opposed to allowing the bonus meetings to be progressed at a time when team members were expecting to be advised of their bonus, rather than delayed.

135. In relation to the second matter he needed to speak with the contractor on matters wholly unconnected with the claimant and was reasonably entitled to take the opportunity of doing so which was afforded by the temporary absence of Mr Lukas from the table adjacent to whose seat the contractor was sitting.

136. Regarding the reassignment of the optimisation review in January 2017 without first communicating that fact to the claimant, Mr Cloke submitted that the evidence of both the third respondent and Mr MacRae concurred in demonstrating that that was something the reasons for which were in no way connected to the claimant having made a complaint. On Mr MacRae's evidence, which the claimant had not effectively challenged and which he invited the Tribunal to accept, it was his

intention that he himself communicate that matter to the claimant and it was the third respondent's understanding that he, Mr MacRae, had communicated that matter to the claimant. In fact, due to his then sickness, Mr MacRae had not communicated the fact of the reassignment decision to the claimant and when meeting with the claimant for wholly unrelated purposes on the 26th of January, the third respondent was unaware of that fact and thus saw no reason to mention it.

137. In relation to the allocation of her bonus that was a matter falling properly within the discretion of the third respondent and was based upon the claimant's then relevant first Line Manager's view and assessment of her performance across the year together with his own. The output of the calibration meeting held with first Line Managers was not made available to any other employee. As he was going on sick leave and thus the task of communicating bonus decisions to his team members required to be delegated by him upwards to the third respondent, Mr McReady set down in bullet point form the input which he had given to the calibration meeting in relation to each of his team members, for use by the third respondent during the bonus meeting. In the course of his meeting with the claimant the third respondent having tried to communicate and he believed ultimately having communicated, those bullet points to the claimant, the claimant subsequently made enquiry of him as to how she went about appealing against the allocation of bonus. To the third respondent's knowledge there was no formal process for doing so and he had advised the claimant that she should therefore make contact with the Human Resources Department directly in relation to the matter in order to take their advice.

138. Regarding causal link as between the alleged third disclosure, under reference to number 10 on the list of authorities, **Bolton School v Evans**, Mr Cloke submitted that statute protects disclosures but not other conduct by the employee even if connected in some way to that disclosure. In this context Mr Cloke further submitted that the decision as to the level of the claimant's bonus was one which had been informed by her performance in the relevant year including her performance in relation to the preparation of a draft paper for submission to ULIM. While the claimant's performance/conduct in that respect might be something connected in some way to the disclosure upon which she sought to found, it was not of itself protected. He submitted separately that the respondents had discharged the burden of proof of causation and that the evidence before the Tribunal did not justify a Finding in Fact that the decision to fix the claimant's level of bonus below the average was something which was caused by her making such a communication.

139. Regarding the time taken by the second respondents to bring the claimant's internal harassment complaint to an internal Hearing (11 weeks), Mr Cloke submitted that that was within the 12 week period indicated in the relevant harassment policy as being the aspirational period. He further submitted that insofar as that length of time might fall to be regarded as a detriment there was no evidence before the Tribunal which went to show that the length of time taken resulted from the fact that the claimant had made the complaint. On the other hand, in his submission the second respondents had laid before the Tribunal in the evidence of the Investigating Officer the real and he submitted entirely legitimate and incredible explanations for the period of time taken including, not least the

absence of the Investigating Officer on pre-arranged leave during the period. In this regard he submitted that no causal connection had been established.

140. In relation to the remedy sought by Mrs Lucas in the context of her protected disclosure claim Mr Cloke invited the Tribunal to find, on the evidence, that the claimant who continued to remain in the respondents' employment had suffered no future loss of earnings, that no stigmatisation or blacklisting had been applied to her by the respondents and that she remained free to apply for any advancement or promotion opportunities which arose. There was no evidence before the Tribunal that her reputation had in any way been lost or diminished there never having been any dispute regarding her technical skills.

141. In relation to bonus, Mr Cloke submitted that the £857 in respect of which the claimant sought recovery and which represented the difference between the bonus awarded to her and the average bonus, was not properly recoverable it being an example of something which was the consequence of the claimant's conduct in the preparation of her paper which conduct, although it may be connected to the disclosure was not of itself protected.

142. In a submission which he directed to remedy in respect of all three categories of complaint advanced by the claimant, Mr Cloke invited the Tribunal to reject Mrs Lucas's submission that the compensation for all or any of the claims, let it be assumed they were established, would lie in the top band of the revised *Vento* scale submitting to the contrary that the award would sit most appropriately in the first band that is £800 to £8,400.

143. He further submitted that the claimant had led no evidence of mitigation of her loss, separately and in any event should be held contributed to the occurrence of any detriments established by reason of her own conduct and that any award should be accordingly reduced to reflect the same in terms of section 49(5).

Direct Discrimination

144. Under reference to section 136(2) of the Equality Act 2010 and to **Madarassy v Nomura International Plc** (number 11 on the list of authorities) and to **Igen Limited v Wong** (number 12 on the list of authorities) Mr Cloke reminded the Tribunal that the burden of proof would not shift, in terms of section 136(2) of the EqA 2010 Act, to the employer simply on the claimant establishing a difference in status (i.e. protected characteristic) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material on which a Tribunal "could conclude", on the balance of probabilities, that the respondent had committed an unlawful act of discrimination. He submitted further that at that initial stage, subject only to the statutory "absence of an adequate explanation", the Tribunal needs to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the claimant were of like with like as required and available evidence of the reasons for the differential treatment.

145. In Mr Cloke's submission proper consideration of the evidence before the Tribunal identified no evidence that might amount to the "something more" required for there to be established primary facts from which the Tribunal could draw an inference as to discriminatory motive. The claimant, for her part, relied entirely on the provisions of section 136 of the 2010 Act, as she was entitled to do, but she did so in circumstances where there was no evidence of the primary facts necessary to cause a switch of the burden of proof. Separately, and in the alternative the respondents, for their part had provided clear evidence, let it be assumed that the burden of proof was transferred, by which that burden in relation to causation was discharged in respect of each of the three instances of allegedly less favourable treatment upon which the claimant sought to rely, these being:-

(a) That in early 2017, in the circumstances of Andy MacRae's absence on sick leave for an uncertain period the respondents and in particular the third respondent had not considered any member of the team other than Krispal Bhachoo to act up on a temporary basis as Team Leader and in particular had not considered and or chosen the claimant for that temporary point.

(b) The respondents had not produced a spreadsheet reflecting the outcome of the calibration meeting for all employees and had thus put her in a position where she was unable to compare the computation and fixing of her bonus with that of other employees within the department for which the third respondent had managerial responsibility.

(c) Asking Harry Lukas to take over the lead in the PIA review thus leaving the claimant free to focus on taking forward the paper and work on optimisation methodology which her Managers regarded as a priority in circumstances where they judged that it would be neither practicable nor reasonable to expect that both tasks be left with the claimant.

146. Mr Cloke further submitted that in relation to the selection of a temporary Team Leader, in respect of which the claimant relied upon a hypothetical comparator, the correct hypothetical comparator would be a white male of the same experience and performance level who had also expressed an interest in promotion.

147. That in relation to the allocation of bonus the correct hypothetical comparator would be a white male with the same performance rating as the claimant and in relation to the allocation of tasks as between the PIA review and the optimisation methodology paper and review that the correct hypothetical comparator would be a white male with the same skill set as the claimant.

148. In Mr Cloke's submission, the evidence before the Tribunal went to show that the respondents would have treated such hypothetical comparators in the same way that they treated the claimant and that accordingly, the claimant had not been treated less favourably by the respondents for the purposes of her section 13 complaint.

149. On an *esto* basis let it be assumed that the Tribunal considered that in any of the acts or omissions relied upon by the claimant she had been less favourably treated

for the purposes of section 13 and further let it be assumed that the burden of proof had passed to the respondents, the respondents had in each and every case discharged the burden of proof of causation:- in the case of selection of a temporary Team Leader the third respondent's evidence was that he chose Krispal Bhachoo because in terms of year end assessments Mr Bhachoo had been identified as someone with the potential and declared desire to discharge the responsibilities of promoted tasks. That the appropriate process in place for such an appointment placed it at the discretion of the responsible Manager and that in not considering the claimant the respondent had equally not considered any other member of the team whether male or female, of Asian nationality or otherwise.

150. At the relevant times the team comprised some six or seven individuals including three females of whom two, including the claimant were of Asian nationality in addition to Mr Bhachoo.

151. In relation to apportionment of tasks Andy MacRae the then Line Manager whose evidence Mr Cloke invited the Tribunal to accept was clear that the next task or the next major task in the PIA Review was one which involved heavy data lifting in respect of the in-house utilisation of external software and that Harry Lukas was ideally suited to such tasks. That the claimant's technical skills suited her to the optimisation review which in the assessment both Mr MacRae and the third respondent was something which required to be given priority and, the issues underpinning the review having been issues flagged up by the claimant, she was best placed to give articulation to and to recommend changes in methodology and to address those in a paper. Further that as at the untimely death of the claimant's

husband he, Mr MacRae, had been very conscious of the need to avoid overloading the claimant which he undoubtedly considered giving both tasks to her would amount

152. Regarding remedy for discrimination, let it be assumed that direct discrimination was established Mr Cloke adopted the same submissions as those made in relation to remedy for detriment caused by a protected disclosure both in relation to financial loss and injury to feelings.

153. In relation to the recommendations sought by Mrs Lucas, Mr Cloke submitted that these did not sit appropriately within the terms of section 124(3) of the Equality Act 2010 and thus would not amount to appropriate recommendations in that they would not serve the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate (a) upon the complaint or (b) on any other person. He invited the Tribunal, in the event that it held discrimination had been proved to decline to make the recommendations sought in addition to any financial remedy made.

Consideration and Disposal

154. On the evidence presented and the Findings in Fact and in Fact and in Law which it has made, the Tribunal unanimously preferred the submissions of Mr Cloke for the respondents to those of Mrs Lucas, the claimant. On the basis of the oral and documentary evidence presented and for the reasons advanced by Mr Cloke in submission which it has recorded, including his statement of the Applicable Law

with which it agreed, in considering and disposing of the issues before it the Tribunal unanimously determined:-

(First) That the claimant was, from the commencement of her employment and continued to be employed by the second named respondent and not by the first named respondent.

(Second) That the alleged disclosures, ultimately relied upon by the claimant at Hearing, for the purposes of her section 43B Employment Rights Act 1996 complaints were not disclosures qualifying for protection in terms of section 43B(1)(b) of the 1996 Act.

(Third) Separately, and in any event, that with the exception of the fixing of her year end bonus in an amount less than the company average of 15%, and of the alleged detriment of being excluded from further involvement in the PIA review, which latter the Tribunal has not held was founded in fact, the alleged detriments given notice of having been relied upon by the claimant for the purposes of her section 43B ERA 96 complaint, were occurrences (acts or omissions of the respondent) let it be assumed they were proved, which did not constitute detriments for the purposes of the complaint.

(Fourth) In lodging her written grievance complaint, directed against the third respondent, with the second respondent on 14th March 2017, the

claimant carried out a protected act for the purposes of section 27 of the Equality Act 2010.

(Fifth) None of the matters given notice of as founded upon by the claimant as alleged detriments suffered by her in respect of her section 43B ERA 96 and for the purposes of her section 27 EqA 2010 victimisation complaint, were caused by or suffered by the claimant in consequence of her having made any of the disclosures founded upon for the purposes of the section 43B ERA 96 complaint or because of or in consequence of her having carried out the protected act of having lodged her grievance on 14th March 2017.

(Sixth) The claimant was not treated less favourably, because of her protected characteristics of sex and or of race (nationality) by the first, second and or third respondent than the first, second or third respondent treated or would treat a hypothetical comparator whose circumstances were substantially the same as those of the claimant but who did not share the claimant's protected characteristic or characteristics and thus, neither the first, second or third respondent directly discriminated against the claimant in terms of section 13 of the Equality Act 2010.

(Seventh) The evidence presented not going to establish primary facts from which the Tribunal would be entitled, in relation to any of the alleged detrimental acts or omissions, or alleged less favourable treatment at the hands of, the respondents, to infer occurred for a discriminatory reason,

the burden of proof of causation did not pass to the respondents and the claimant for her part has failed to discharge the burden of proof of causation.

(Eighth) Separately, and in any event, had the burden of proof of causation passed to the respondents, on the evidence presented the respondents would have proved and proved, insofar as any of the matters relied upon by the claimant were established in evidence and further amounted to detriments or less favourable treatment in terms of the relevant statutory provisions, that those matters occurred for reasons wholly unconnected with the claimant's protected characteristics of sex and or of race (nationality).

155. While the Tribunal did not doubt the sincerity with which Mrs Lucas recounted in evidence the concerns which she had and the distress which she experienced at the relevant times and which she considered arose from the managerial decisions of the second and third respondents to which she attributed discriminatory motivation, the Tribunal unanimously considered upon the evidence presented the claimant had failed to establish her complaints including amongst other matters a failure to prove, either directly or through the mechanism of section 136 of the Equality Act 2010, discriminatory motive and causal connection in respect of the complaints of direct discrimination and causal connection between the alleged protected disclosures and the protected act on the one hand and the alleged correlative detriments on the other.

156. The Tribunal unanimously held that her complaints fell to be dismissed.

Employment Judge: JG d'Inverno
Date of Judgment: 06 July 2018
Entered in Register: 06 July 2018
and Copied to Parties