Case No: 2205189/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms. E. Rackow**

Respondents: **(1) Trident Energy Management Limited**
(2) Trident Energy GP Limited
(3) Trident Energy LP
(4) Mr J-M. Jacoulot
(5) Mr E. Descourtieux

Heard at: **London Central** **On: 8-12,15 April 2019**
in chambers 16,17 April

Before: **Employment Judge Goodman**
Mrs. J. Cameron
Ms N. Chavda

Representation
Claimant: Ms C. McCann, counsel
Respondent: Mr T. Kibling, counsel

JUDGMENT

1. The respondents did not discriminate against the claimant, whether for sex or nationality.
2. The respondents did not victimise the claimant.
3. The claimant was not dismissed or subjected to detriment because she had made protected disclosures.

REASONS

1. The claimant, a solicitor, was employed by the first respondent as general counsel from November 2016 until January 2018, when she was dismissed.

2. She has brought claims:

(1) of direct discrimination, whether because of sex, or because of race, in that she is not French,

(2) that she was victimised, the protected acts alleging unlawful discrimination being (a) an email of 21 September 2017 and (b) a conversation on 14 November 2017

(3) that she was dismissed and subjected to detriment because she made five protected public interest disclosures (whistleblowing) between 18 and 23 January 2018.

3. A list of issues was available for the hearing. Twelve acts of detriment (including the dismissal and the decision to dismiss) were identified, all as discrimination, some also as victimisation and whistleblowing detriment. One postdates the dismissal.

4. Liability was denied. The respondent specifically pleads that many detriments are out of time.

5. This hearing was listed to decide liability issues. A further hearing on remedy if required was listed for October 2019.

Evidence

6. The tribunal heard live evidence from:

Evita Rackow, the claimant, who had prepared a witness statement of 126 paragraphs with 32 pages of appendices, and a supplementary statement of 56 paragraphs.

Jean-Michel Jacoulot, fourth respondent, who was CEO of the first respondent and the claimant's line manager, who made the decision to dismiss her. He is also a director of the first and second respondents.

Simon Eyers, who was managing director of Warburg Pincus LLC, the private equity form which created and owns 98% of the Trident Energy Group; he is a director of the third respondent. There was an initial and supplementary witness statement.

Axelle Briere, the first respondent's Head of HR, Tax and Contracts, who started work shortly before the claimant's dismissal.

Eric Descourtieux, fifth respondent, and Chief Financial Officer of the first Respondent. He and the fourth respondent set up the company. He had prepared an initial and supplementary witness statement.

7. **Oliver Byrne**, the claimant's successor as general counsel, had prepared a witness statement, but was not questioned.

8. There was an agreed hearing bundle of over 2,000 pages. The claimant had prepared an additional bundle of nearly 500 pages; some of this contained her own analysis of other material. Other documents were added in the course of the hearing, including a chart prepared by the

claimant of gender pay gap statistics for companies in the oil and gas sector. Disclosure had been occasionally contentious, and on opening the claimant had prepared a 12 page schedule of disclosure failings to which the respondent replied in 18 pages. Various matters on admissibility of statements were resolved on the first morning.

9. Both parties prepared opening notes. At the conclusion of the evidence we read the claimant's submission of 71 pages, with 3 pages of charts, and the respondents' submission of 52 pages. Each side then made an oral submission. Judgment was reserved.

10. It may be clear from this account of the volume of evidence and submission that many matters have been canvassed which do not directly concern the 12 allegations of detriment. In approaching the evidence we have tried to focus on the specific allegations while at the same time bearing in mind other matters in the background from which the claimant invites us to draw inferences. We have not made findings on all the background material, but try in what follows to draw together some of it so the parties understand why we decided as we did. This appears at the start of the narrative of events in these written reasons, but was something that we considered generally in discussion and again as we looked at each allegation in detail.

11. The narrative of the course of the claimant's employment is interspersed with discussion and findings on the allegations of detriment as they occur. For this reason we start with some discussion of law in matters of discrimination.

Discrimination - Relevant Law

12. The Equality Act 2010 prohibits direct discrimination at section 13:

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

13. Sex and race (race as defined includes nationality) are protected characteristics. The treatment invites comparison with either an actual person ("treats"), or a hypothetical comparison ("would treat").

14. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

15. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to

show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

16. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88 -** but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

17. We were reminded of the factors from which we can draw inferences, such as, statistical material, which may "put the tribunal on enquiry" – **Rihal v London Borough of Ealing (2004) ILRLR642**, where a "sharp ethnic imbalance" should have prompted the tribunal to consider whether there was a non-racial reason for this. **McCorry v McKeith (2017) IRLR 253** noted that "reluctant, piecemeal and incomplete nature of discovery" could be a factor indicating discrimination, as can omissions and inaccuracies - **Country Style Foods Ltd v Bouzir (2011) EWCA Civ 1519**.

18. **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases of hypothetical comparators, tribunal may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120**, and **Efobji v Royal Mail Ltd 2017 IRLR 956**, reminded tribunals that the respondent's explanation must be "adequate", but that may not be the same thing as "reasonable and sensible".

Findings of Fact

19. Trident Energy group is a start-up, founded in August 2016 by the fourth and fifth respondents with funds from Warburg Pincus, a large private equity firm. The focus is on acquiring midlife oil and gas assets with a view to redeveloping them to operate more productively and profitably by finding efficiencies. Such assets are often in foreign jurisdictions and there may be substantial risks of expropriation and corruption. Acquiring the asset will also require approval of the government owner.

20. The third respondent is a limited liability partnership in the Cayman Islands. The second respondent, a Cayman Islands limited company, is the general partner of the third respondent. The first respondent, a UK registered company, employs all the staff and provides services to the second and third respondents.

21. The fourth and fifth respondents are French nationals with many years' experience in the oil and gas industry, and for 17 years they worked together in a French private (family) firm, Perenco.

22. The claimant is a German national who speaks excellent American English, and several other languages. Her higher education and legal training were in London. She completed a training contract with Herbert Smith, and then worked for them for 2 further years in the oil and gas sector, then joined BG Group in October 2014, an oil and gas company of some 6,000 employees. In February 2016 Shell took over BG, and the claimant was being offered a contract there when on 2 October 2016 she was approached by the respondents in connection with the post of general counsel for the respondent group. Four candidates were interviewed, three men and one woman. The claimant was the least experienced, but chosen on the basis that she was impressive, and would grow and develop into the business.

23. She started on 1 December 2016 with a salary of £110,000, plus a bonus of 36% salary if target was achieved, and various other benefits including private health insurance, and "carry", an employee share ownership incentive scheme. In her previous employment the salary was £98,000 with a substantial bonus and pension contribution (there are no documents about her previous pay so it was not clear to us how big a step up this was). We know from her contemporary notes that she did not name the figure she required, instead informing the respondent what she had recently been offered by Shell, and that she "wanted to be reasonable".

24. At the time, Trident had 11 other employees, including the fourth and fifth respondents. It had not yet acquired any oil and gas assets to operate.

25. Of these 11 employees, the fourth respondent (CEO) was paid £450,000, had a bonus target of 100% and a carry of 22.5%. The fifth respondent, (Chief Financial Officer), and Francois Raux, (Chief Operating Officer), were each paid a salary of £350,000, plus 100% bonus and 8.25% carry. All 3 are French and had previously worked in Perenco.

26. Then there was a technical team, led by John Crick, Subsurface Manager, who was on £240,000, with 25% bonus and 2% carry, and reporting to him, Edwin Lopez, Subsurface Engineering Manager, on £175,000, with 71% bonus and 2.5% carry. In turn, reporting to Edwin Lopez, were Matthew Drake, Matthew Brooks and John Pim, on £100,000, £90,000 and £90,000 respectively, each with 67% bonus and 1% carry. None of the technical team were French. Jon Crick, Edwin Lopez and Matthew Brooks had previously worked at Perenco.

27. Next, the Business Development Manager, Thibault d'Argent, who is French, and was previously at Perenco, was paid £90,000, with 67%

bonus and 1% carry, and reporting to him a business development analyst, Stevie Meagher, not French, paid £70,000 plus 43% bonus plus 0.5% carry. Finally, there was a personal assistant to the CEO, who is not French, and was at the time the only other woman beside the claimant. She was paid £36,000 plus 20% bonus, and had no carry.

28. Later, after the company acquired an asset to exploit, there were further hirings: Stuart Seymour, not French, as treasurer, on £120,000 plus £30,000 bonus, plus 1% carry; a finance manager, Yann Wacquez, who is French, on £100,000 plus 10% without carry, and further technical team members and support staff on various salaries and bonus and without carry. By the end of 2017 there were 21 staff, of whom 16 were men and 7 French. On the technical side there was only one woman in a team of 9, a geologist, reporting to Matthew Drake, the lead geologist,.

29. Hired in November 2016 from Deloitte, but only starting in January 2018, was Axelle Briere as Head of Tax and Contracts. She is French; she had not worked at Perenco. She was paid £150,000 salary, plus 50% bonus, and carry of 0.5%. She had been offered 1% carry, but declined the offer for tax reasons; there are no documents about the negotiation, but we accept her evidence that she was offered 1% and that her reasons for wanting less than she was offered, (which relate to the tax treatment of carry), were rational.

30. The claimant prepared and drafted company policies and share documents. She also dealt with HR and administration. She reported to the CEO and to the board.

31. In May 2017 a prospective asset in Equatorial Guinea was identified and work began acquiring it. There was also preliminary discussion about an asset in Tunisia operated by ENI. By July 2017 the first asset looked likely, and work began in earnest to acquire it.

32. Before moving on to the main story, or considering any specific allegation, we set out our findings on various background matters we are asked to take into account to draw inferences.

Pay Statistics

33. We were asked to consider the evidence of the gender pay gap in the oil and gas sector generally, but we did not find this especially helpful. The smallest companies for which there is evidence are in the 250-499 bracket, while the larger companies in the table, such as BP and Shell, will have more workers on land, as in filling stations, than exploration companies do, so proportionately more women. The respondent is so small – less than a tenth of the smallest company in the survey - that even tiny differences will register as large percentages. Such percentages will not be significant. Further, women are underrepresented in technical subjects (as geology) at both school and university, and work that is carried out abroad or offshore is likely to discourage female participation. These factors make discriminatory disadvantage generally, and at the respondent in particular, difficult to identify from the figures. It is not surprising that a small oil exploration company is led by and mainly

employs men, and no reliable inference of discrimination could be drawn from that. We can make inferences from matters specific to that company but cannot draw much from that is useful from the industry picture as a whole.

Other Background Material

34. We were asked to note unconscious bias against women in the following matters:

    34.1 The way the individual respondents looked the claimant up and down. That men do this is not uncommon; by itself it means little, but in conjunction with other behaviour it may be a useful indicative piece in the factual jigsaw.
    34.2 Francois Raux on one occasion made comments about DSK (sexual harassment by a prominent Frenchman widely reported in the media); this is said to have been banter.
    34.3 There was a comment (denied by the fourth respondent) about the difficulty of working with small children. A single comment about working with children could be seen as a simple statement of fact, as many women do find it difficult, but we understand how a boss saying this to a woman employee of childbearing age would cause her concern as to his thoughts about her prospects of progression.
    34.4 We were asked to note that all the women hired by the first respondent were young and unmarried, but the sample is small, and we have no information about the age and marital status of the men being hired.
    34.5 There was a remark about not improving maternity policy at a time when the business had no productive assets for cash flow, but we do note that the claimant devised the policies and did not herself recommend better terms, and that she had been strict in interpreting statutory paternity policy for an employee who wanted to split his statutory leave. We did not consider that having a maternity policy that kept to the statutory requirements indicated that managers did not respect or value women employees.

35. Third parties in negotiating meetings said awkward things: on one occasion a third party in a business meeting spoke in the claimant's presence about a street in Frankfurt's red light district, and she was embarrassed when she understood the connotation; there was also a patronising remark made by a third party to the claimant in a meeting - though we note that many men also found the responsible individual obnoxious. These isolated examples, taken from a period of work of over 12 months of work were hard to evaluate, but serve to indicate how at a senior level, at least at other companies in the sector, it could be a man's world and working culture.

36. Within the company, Francois Raux apart, there was only a curious allegation that the fourth respondent, when tucking his shirt into his trousers, let his hand linger there, both in her presence and in the presence of others (men). She thought he was touching his penis. She did not challenge him, though we accept it would be a tricky thing for a young woman to take up with her boss in the absence of any senior woman

intermediary, and we cannot draw an inference from that. Other witnesses confirmed the shirt tucking habit as a nervous tic, without noting the lingering hand. The claimant, as we noted, did not allege sexual harassment then, but neither, more surprisingly, does she now. We observe that, even if factually true, this could be interpreted as that far from taking advantage of her female presence, the fourth respondent might be unconscious of the difference in sex, or at least unaware that she might find the habit unnerving when to men it was unremarkable.

37. None of this was, on its own, especially persuasive that there was a discriminatory mindset in the treatment of the claimant compared to men.

38. On disclosure, we note that inter party frustrations about disclosure are very common, including negotiations about redaction, and the often contested boundary of what is both relevant and necessary. We note the respondents' comment that the claimant sometimes asked for disclosure of material she had already seen under a DSAR; we note too that Oliver Byrne was managing a large disclosure exercise at the same time as his other duties, that disclosure has been very extensive, and that by the last preliminary hearing most material necessary had been disclosed. The only interesting gaps are the absence of any texts, emails or messages between fourth and fifth respondent exclusively, and of any between Eric Descourtieux and Axelle Briere about her carry terms. On the former, it is possible that there are none of relevance, on the latter it is possible that all was conducted, as they say it was, by phone or face to face; we note too that it was peripheral to the pleaded issues. On another omission, the respondent was asked by the tribunal to produce the letter of instruction to the share valuation expert, to assist in understanding the report, and it was disclosed; such omissions are not uncommon when parties adduce expert evidence, and often occur by oversight as much as deliberate concealment. The expert's report itself was long and full. Overall, we could not discern glaring omissions or delays which would persuade us that the respondents were seeking to obstruct a fair hearing by withholding relevant documents.

39. For these reasons, while bearing in mind the claimant's isolation as the sole woman at senior level, until Ms Briere arrived, in a male dominated industry, where she had to negotiate with other parties in the sector, we gave most weight to the core facts of what was alleged, and the respondent's explanations.

Detriments 1 and 2 – Bonus and Carry

40. The first allegation of detriment is that the claimant was only granted 1% in respect of the management incentive plan, "carry". The second allegation is that she received a lower bonus. Both are said to have been because she was a woman or not French. The named comparators were the fourth and fifth respondents and Francois Raux, the chief operating officer, but in the course of the hearing, the claimant abandoned these comparators, and we were asked to identify a hypothetical comparator only. Because the respondents' decisions about bonus and carry were made at the same time, and because both involve mapping others as evidential comparators,

these allegations are discussed in tandem.

41. First, a note about "carry".

41.1 The Respondent issued A shares which are in the nature of equity, and which senior employees had the opportunity to purchase at a subscription price of $10. The claimant did purchase such shares, and neither this nor their redemption are contentious.

41.2 In addition, there were B shares, in 3 grades, effectively the order of preference if cash available at exit was limited, known as "carry". These were allocated free to senior staff in the percentages identified above. At a future "exit" date, meaning either when the business was sold to private equity or there was an IPO, the shares would be redeemed for cash. Management collectively could thus "capture" up to 20 to 25% of the company's profits at that point, provided a minimum profit threshold was met on exit.

41.3 Employees did not receive all their share allocation at the outset, but only 15%, with a further 15% vesting on each anniversary of employment up to 75%, leaving the final 25% to vest on exit. Only vested shares have any value. They cannot be sold to anyone else, and will be repurchased by the company on termination of employment. The scheme encourages staff to commit for the long term and to work for the new company's eventual success. As we understand it (no witness or document explained the structure in simple terms), the vesting structure means that the sooner each employee acquires shares, the more they are worth on exit.

41.4 Not all the shares were allocated at the outset, as some were held back in a pool for future employees.

41.5 The claimant reported an explanation that value was diluted as the company acquired each asset (and therefore the prospect of a valuable exit increased). Simon Eyers' evidence was that B units were offered to employees: "in amounts that reflected their anticipated contribution to the first respondent and (to some degree) the risks that they were taking in joining at an early stage".

41.6 "Carry" is a reward for effort long term if the company as a whole is successful, so differs from bonus, which is a percentage of annual salary paid to reward effort in that year. It is a form of bonus, with the risk that it may not be paid ever, or may not pay much, if the company does not succeed as anticipated.

42. Taking bonus first, the claimant, on closing, denies that Thibault d'Argent, who has higher bonus, did comparable work to her, as he did not report to the board, while the respondent said he was comparable. We considered the following relevant to comparison. He is a man, and French. We compared the overall annual remuneration, as she had higher salary but lower bonus than him. If each earned 100% of their bonus, their remuneration was the same - £150,000 for the year. They did not play similar roles in the success of the business. His task was to identify governments and possible sellers of mid-life assets and persuade them to

negotiate with a view to a sale. It is very common for companies to structure sales teams' remuneration to emphasise payment by results, as it is otherwise hard to identify whether their effort is applied in the right places. By contrast, the claimant's effort, in say, compliance, or contracts, had to be applied consistently, whether assets were acquired or not, though some bonus was appropriate, as once a prospect was identified she must be involved and on hand in the negotiation. In terms of value to the company, especially starting up, a business development manager is essential, at least as essential as general counsel, even if he does not report direct to the board. Both were line managed by the CEO. Each had an assistant, the claimant's being seconded from Herbert Smith. In the event, the claimant (as will be seen) was given an extra 50% over her expected bonus (so was paid £60,000 rather than £40,000) because she asked, and because she had worked so hard on the acquisition in the autumn of 2017.

43. In context, the technical team, led by Edwin Lopez, were highly rewarded, and had high bonus. On them depends the company's success identifying assets with potential for efficiency, checking oil well by oil well. It is not surprising they were men. None (at the time of the claimant's hiring) was French.

44. We were taken to evidence of subsequent hiring of two production engineers, one French man and one non-French (Bolivian) woman, who worked in rotation, so presumably with the same duties and responsibilities, where the woman earned 20% less. The respondent says this is because the man had more practical experience. We examined their employment profiles. Both have relevant higher degrees and had done internships or assistant jobs. Once qualified, she had spent 2 years lecturing, while he had been on site, so the explanation that he had more relevant site experience is not implausible. It is argued that this shows that women were offered less because they were women. We do not know what each asked to be paid, which may have been a factor in the decision on what pay to offer at recruitment .

45. We concluded that the nature and importance to the company of the roles of the claimant and Mr d'Argent were not dissimilar, that they earned the same, but with a different structure (which might disadvantage him if he did not earn 100% bonus) and that there were good job reasons why he would receive more in bonus but less salary. His assistant, paid less salary, had less bonus than him, but a higher percentage than the claimant. This too may reflect the importance of incentivising the acquiring of assets to exploit. It does not mean that he was paid more than her: he earned less than his boss and less than her.

46. The claimant's successor as general counsel, Oliver Byrne, was both better paid and had higher bonus (75%), but he had twelve years post qualification experience, all in energy, including 6-7 years in-house in oil and gas, so twice the claimant's experience, and (as will be seen), the respondent had by then concluded that they needed more a more experienced general counsel for acquisition negotiations, and that hiring a younger and less experienced person had been a mistake. Someone with more - and relevant - experience will be able to command a bigger

package in the market. His higher bonus must be viewed in that context. We accepted that longer experience meant he was not a useful comparator; having to pay more to recruit a lawyer with more experience provides a non-discriminatory explanation for the bonus difference.

47. Finally, Axelle Briere is relied on as showing preferential treatment for the French over other nationalities. Our difficulty is not knowing what a tax specialist can command in the open market. She has two degrees in business law. She had 14 years' experience in international taxation of companies, nearly 10 of them in the oil and gas sector. Her starting salary and bonus in January 2018 were both higher (by then the claimant had £122,000 as against her £150,000); the claimant's bonus had been increased to £60,000, (so 54.5% of her 2017 salary, not dissimilar from Axelle Briere's 50%).

48. Out of all this we could not conclude that the claimant was less favourably treated than if she had been French or a man.

    48.1 She was remunerated in line with Mr d'Argent, though with a different split between salary and bonus, and we are not persuaded that his work was less responsible or important; they were broadly comparable. It is common for the pay of sales and marketing staff to be structured with substantial incentive elements.

    48.2 Her successor (a man but not French) was recruited at a different level because the respondent wanted someone with greater experience, which accounts for greater remuneration.

    48.3 It cannot be said that Axelle Briere received more because she was French, rather than because of the going rate for tax experts of her experience.

    48.4 The only unexplained factor is the difference between the two production engineers, but the technical field is apart from the support staff, like the claimant, and the respondent has an explanation which we considered adequate.

    48.5 Finally we considered whether she had, as was argued, been recruited in preference to three more experienced men because she could be paid less, but we doubt it, as the respondent knew a strong and committed team was essential for the success of the start-up, and while employers would say 40 years ago that with hiring a woman they could get more brains for the money, and while unequal pay is stubbornly persistent, this is unlikely still to be true at the more junior end of the pay scale where qualifications and experience are more directly comparable; all the male candidates were more experienced, so justifying more pay regardless of sex. It does not support a finding that she was paid less because she was a woman, or not French. She could be paid less than the other candidates because she had less experience.

49. Moving to carry, the pattern shows substantial carry for the three senior officers, who are no longer comparators, then 2 and 2.2% for the seniors

in the technical team. Everyone else, male or female, French or (largely) not French, got (or in Ms Briere's case, was offered) 1%, in a salary band ranging from £90-110,000. More junior people got 0.5% or none at all. We did not see the claimant as out of line. The only difference requiring an account is that her successor Oliver Byrne got 1%, and had started after an asset had been acquired, so potentially bore less risk and more assured value, and if that factor played any part in allocation, he should have had less. We note that as he was hired later, less of his 1% share will have vested on exit within five years from her start than would the claimant's share. At best we are invited to say the claimant should have had more than 1%, possibly as much as the 2- 2.5 % carry of the much more highly rewarded Jon Crick and Edwin Lopez. Given the clear pattern of banding at 1% for all staff below the senior officers and technical managers at the time of hire, we could not conclude that sex or nationality had anything to do with this decision.

Detriment 3 – Lunch

50. The third allegation is that the claimant was not routinely invited out for lunch with colleagues, from September or October 2017, whereas male and French members of the management team would often go out for lunch together. This is based on the claimant's perception; there was no specific factual evidence of lunches from which she was excluded. The respondents' evidence was that in the first half of 2017 the senior team used to go out for lunch together, including the claimant, but that as the pace and urgency of the Equatorial Guinea negotiation increased, with its peak in September 2017, they ceased going out for lunch together at all, instead eating sandwiches at their desks, and that the claimant, with an office by the door, might think they were going out together as they came down in the lift to get sandwiches. Mr Jacoulot and Mr Descourtieux would still occasionally lunch together, but they were old friends and close colleagues. After the deal was signed at the end of October, the claimant took some time off, and on resumption in mid-November was seen by the fourth and fifth respondents to cease contact with them by choice (see on). We accepted the respondent's evidence that team lunches simply ceased, rather than the claimant being excluded because she was not French or male.

Detriment 4 – Health Cover

51. The fourth allegation is that the claimant was the only member of the management team excluded from the first respondent's international health insurance cover.

52. Five people, four of them French (Jacoulot, Descourtieux, Raux, d'Argent) had international health cover with Allianz. The fifth was Edwin Lopez, who is Guatemalan. All five had previously worked for Perenco.

53. Everyone else, claimant included, and all but her, at the time, men, got BUPA UK health insurance. They also benefitted from comprehensive medical cover when travelling abroad on business.

54. The claimant discovered this distinction in September 2017 when cover

was being renewed, and details were circulated by the HR manager, Samantha Sogolo (not French). The claimant concluded that French people were getting preferential treatment - indeed, this episode may have been the foundation of this claim. Ms Sogolo said it was because they had been expatriates or had prior conditions to cover, which the claimant doubted, as many had long been settled in the UK, and only two to her knowledge had dependants with prior conditions. We assume a new insurer would be reluctant to insure individuals with prior health conditions or would want a higher premium. Neither side supplied more detail of either policy.

55. The respondent says the difference was because they continued the Perenco package for the senior managers when they were recruited from Perenco, as the individuals hired wanted to continue it, except for Jon Crick, who is British but Swiss resident, who did not require it. Axelle Briere, French, hired later, got the BUPA cover.

56. In this allegation we were concerned to identify the detriment to the claimant, not otherwise explained in her witness statements. When asked by the tribunal, her counsel said the detriment was that with a UK package she must seek specialist treatment through a GP rather than approach a specialist direct. This put paid to our speculation that it was because she was sometimes in Germany with family, for example, when she was ill at the beginning of November 2017, and that that was why she had taken out her own cover in July 2017; that must remain mere speculation. Without more, we are not convinced that a UK resident with comprehensive travel cover was at a disadvantage that is more than trivial, knowing that in the UK a private paying patient will be referred by a GP to a specialist same day or next day if required, and if there is now a wait to see an NHS GP there are private GPs. We have not seen either policy to show there was detriment.

57. If there were a detriment, we do not think it was because the claimant was not French. The reason for the difference was that the Allianz group had been hired from Perenco, where it happened that most employees were French, but included a non-Frenchman who had equal treatment. Other French staff (as Ms Briere) who were hired later got the BUPA cover. The claimant has not proved facts from which we could conclude nationality was the reason; in any case the respondent's explanation is good, and there is no material inconsistency with the account given to the claimant at the time by Ms Sogolo.

58. As for being a woman, so many men got the BUPA package that the claimant does not prove sex was the reason.

Detriments 5 and 7 – Team Slides

59. Allegations 5 and 7 concern the claimant's picture and biography not being included in the power point slide of the management team in the material presented to external stakeholders (such as banks and investors) and other third parties; it was also used internally.

60. The first part of allegation 5 is about inclusion on the company website.

She was not included on the company site until October 2017. The Respondents' explanation is that the website was set up in September 2016, before the claimant was hired, and so only included staff in place then. No thought was given to revising the website until Sarah Gestetner at Warburg Pincus circulated an email about updates to the website in October 2017, including asking if there were any people omitted who should be there. We assume from the timing that this was a revision prompted by the impending deal on Equatorial Guinea, the first asset acquired by the respondent, which might attract publicity. The claimant then suggested she should be included, and attached a biography she had prepared for a team slide in May 2017. This was then added to the website without question. The claimant herself said apologetically to Sarah Gestetner at the time that this had been "low down on my to-do list". To us this reinforced the respondent's explanation for not putting her on the website before then - it was low down on their to-do list too. We credit the explanation that inertia was the reason for the omission, not any difference in sex or nationality. We might have found differently if the claimant had noted the omission earlier, asked for inclusion, and there had been a failure to act.

61. Turning now to the part of allegation 5, and allegation 7, that concerns slides in PowerPoint presentations to external stakeholders and internal staff, the team slide shows six men, five of them senior, namely the forth and fifth respondents, Mr Raux, Mr Crick, Mr Lopez, and then Thibault d'Argent, who in our finding is on a level with the claimant, and in her view was junior to her. We note that all had worked several years in Perenco and so would be known in the industry. Of these six, two, Mr Crick and Mr Lopez, are not French. The respondent says the purpose of the slide is to emphasise the company's length of experience in oil and gas: a telling remark was that they needed to demonstrate that they were "not just a hedge fund", that is they needed to convince government and stakeholders that they would be able to increase productivity, and so generate higher royalties for the government. For that reason they would front the engineering team, and those with a known track record in the industry, rather than the support staff, however senior. They did not need to include the claimant, because any stakeholder would assume they had competent lawyers or general counsel. Mr d'Argent was included because he would already have been in touch with third parties for preliminaries and to set up the meetings. The respondent points out that a list of key contacts in the same presentation includes the claimant as general counsel, and an organisation chart shows the general counsel position and her name – so she was not airbrushed out, it was just that her name and biography did not appear on the same slide as the others.

62. We cannot see any reason for *excluding* the claimant, though inclusion might make the slide a little crowded. It was suggested by the claimant that Mr Jacoulot simply did not notice the lack of a woman- the claimant - on his slide, because he did not notice women or deem them important. This is suggested because he had earlier prepared a schools' presentation where all the examples of successful entrepreneurs were male until someone suggested that some women should be added – which he then did. The claimant had provided a photo and her biography for the schools' presentation, so the material was available if required.

63. We accept the respondent's explanation that the 6 men portrayed on the slide are the senior team and the business manager, so as to demonstrate the depth of experience and expertise in oil and gas exploration. The same presentation was used internally simply for convenience. She was not omitted because she was a woman or because she was not French.

64. If we had found a discriminatory reason, we would have found it a detriment, as it was more than trivial to be impliedly downgraded in the eyes of colleagues when Mr d'Argent was included.

Detriments 6 and 8 – Business Trips to Tunisia

65. The facts of 6 and 8 are the same, but the former is alleged as victimisation and discrimination, the latter because she made protected disclosures. The detriment is that the claimant was excluded from business trips to Tunisia in December 2017 and January 2018. This was to persuade the Tunisian government to permit a deal by which ENI, an Italian company based in Milan, would pass on the operation of certain oil wells to the respondent. There were three visits in the space of a month. The first was requested by the Tunisian government at short notice for December 25 to 26, though successfully postponed by one day, all while the claimant was herself on holiday in Costa Rica. The next two meetings were also held at short notice.

66. The respondents say that these were commercial meetings, where general counsel was not needed. The claimant says this is not the case, as a lawyer was included on the government side. There was local political hostility to ENI's departure; the government's lawyer, Karim ben Rondone, is said to have been there as he was government liaison officer with ENI, not for any legal work.

67. We note that in the Equatorial Guinea deal which preceded these negotiations, parallel meetings took place between the commercial arm in New York and the lawyers in London. The claimant attended the latter. We also heeded that 6 months before, in June 2017, she had attended a preliminary meeting in Milan with ENI following, which it was reported by Mr d'Argent that ENI had said she was aggressive and arrogant. We have no idea why this may have been said, and the claimant does not mention this in her supplementary statement prepared after seeing the respondents' statements. It was another reason not to include her on the later Tunisia meetings.

68. It is not shown that the omission of the claimant from these meetings was discriminatory. We consider later whether either was victimisation. As for whistleblowing, two of the trips occurred before she made any disclosure; and it is not shown how there was any need for general counsel to be included in the third meeting when she had not been included in the first two. Whistleblowing causation is not shown.

Dismissal, and detriments 9, 10 and 11

69. Allegations 9,10 and 11, are about the dismissal, while allegation 12 is

about the repurchase of her B units (carry) after termination. For this we resume the factual narrative from September 2017, when negotiations on the acquisition of the Equatorial Guinea assets became intensive.

70. Trident was negotiating as part of a joint venture with Kosmos, a listed US company. The seller was Hess. The fourth respondent was negotiating in meetings in New York, in parallel with the parties' lawyers meeting in London, where the fifth respondent was.

71. At the beginning of September the claimant had identified a historic breach of anti-corruption and bribery legislation which would present difficulty for Trident if it acquired the business; a problematic gas leak had also been identified. The claimant thought the lenders funding the acquisition should be informed of the difficulty. The fourth and fifth respondents were horrified, saying this would kill the deal; in their view this was a problem that could be negotiated (we assume either by an indemnity or an adjustment to the price). By 15 September friction was apparent, against a background of tension between Trident and Kosmos, the major partner, who had a difficult lead negotiator. Hess were threatening to find another buyer if matters did not move quickly, and wanted to close the deal by 20 September. The claimant worked hard on the due diligence, in conjunction with external lawyers, and produced what was said on 15 September by the fourth respondent to be a "good summary, good work by Evita". By Saturday, the fifth respondent was under pressure on a tax settlement issue, and the claimant was reporting she needed 2 full days to work through issues. On Sunday the fourth respondent sent an encouraging email. As the claimant worked all hours, she messaged her boyfriend on 19 September:

> "I might not go into the office today. I hate them so much".

Next day the meeting with the seller's legal team was set for 5pm. The claimant was reluctant to separate the legal and commercial issues, but came under pressure from the fourth and fifth respondents to go ahead with the meeting. The fourth respondent understood from the fifth respondent that she was refusing to go into the meeting. From New York the fourth respondent emailed her at 3.56:

> "the meeting will take place without you. It is already complicated, don't add complexity and stress. You have plenty of legal stuff to discuss, starting with ABC. Close the points that can be closed. You tell him if you plan to attend",

and at 4.15:

> "we are close to a breakdown here, so please at least show goodwill on the legal side".

The fourth respondent added that they had to meet even though the seller's approach was unreasonable.

72. The claimant messaged her boyfriend:

"my CEO sent me an unacceptable email, I will ignore it",

but in the event, and under pressure from the fifth respondent who was there, she did go into the meeting, and emerged later reporting she had "survived" and that she had been "insulted by the counterparty" (who called her "Miss Evita").

73. This day's events informed the fourth and fifth respondent's impression that the claimant was not up to the pressure of acquisition work. They were worried that she had had to be pushed into the meeting, and that the deal could have broken down if she had not. The emails show the situation was tense on all sides. The tribunal concluded that the fourth and fifth respondents' belief was genuinely held; this is not a finding by us that the claimant was at fault, or not up to the job.

First Protected act

74. It was against this tense background that the claimant engaged in a prickly email exchange with the HR manager, Samantha Segolo, about the health insurance (see paragraph 50). An email in this exchange is the first protected act for the victimisation claim.

75. On 14 September Ms Segolo told all staff about impending renewal of health cover and had asked if any changes were required, bearing in mind it was a taxable benefit. On the morning of 20 September, the claimant replied in a tone that in our reading was critical and hostile, asking why some got Allianz cover and not others, and said: "how do we make sure there is no discrimination". Ms Segolo replied with explanations, and said that she was researching options, and later, possibly resenting the suggestion she was not doing her job, with a long list of the work she was engaged on. Next day (21 September) the claimant came back to her, copied to fourth and fifth respondents. This is the first protected act on which the victimisation claim is based):

> "as discussed and for the benefit of all - this is a discrimination issue and as such should have been raised with Jean-Michel and Eric in your capacity as HR manager. I do think that this should have been remedied as soon as HR or Legal knows about it. I had raised it in our meeting with Jean-Michel, François and you in early August. It is not about "me managing you" but about how we all work together towards what is best for the company. Compliance with our policies matters. It was what I was getting at with my email below and all I have to say on it. It is your role to take it forward."

76. The claimant, as we know from this claim, was concerned that French people got different treatment. It can also be inferred from a contemporaneous comment to her boyfriend on 19 September about hiring practices, when she said they were hiring:

> "more French nationals than anyone else. We are even hiring an accountant from France and paying hotel costs or 3 months – an accountant – can you explain that???!!".

This hiring does not feature in her witness statement, and we have no other evidence on it. What is not clear is whether it was made explicit to Ms Segolo, or any respondent, that she was concerned there was discriminatory treatment of non-French nationals. She just said it was a discrimination issue, without spelling out how it might relate to a characteristic protected by statute. Nor is it clear whether they would have understood that this was her concern. It cannot be inferred from the text of the email, and there is no evidence of what was said in the meeting in early August that it referred to. The 20 September email reads as a concern that, without a coherent rationale for why some had a different health cover, discrimination might be perceived (a valid point for legal counsel to make), not an allegation that there was discrimination in health insurance benefits. The respondents did not know the claimant had in fact purchased her own cover in July, which could have suggested an allegation of discriminatory treatment.

77. The fourth and fifth respondents' evidence was not that they thought she was alleging any breach of the Equality Act, but that they thought she was unreasonably unpleasant to Ms Segolo. The tone and wording of the email suggests to us this view was entirely justified. Because of the state of negotiations at that time she was probably on edge.

78. We concluded that the email could not reasonably be read as an allegation of discrimination on grounds of nationality. At best it was flagging up by general counsel, whose job it was to protect the company from the risk of proceedings, that the respondent must be clear about reasons why some got one package and others another, in case it was perceived as discriminatory on grounds of some protected characteristic or other and led to a claim.

79. If we are wrong about that, there is no evidence the respondents did understand anything other than the claimant being unpleasant to Ms Segolo, a pattern which continued for some months, without any further reference to discrimination, which means it is difficult to see how an allegation of discrimination could operate on their later decisions.

Resumption of Dismissal Narrative

80. The fourth respondent had flown back from New York on 21 September. He was concerned the deal was on the point of collapse. That evening Simon Eyers (Trident's funder), who had been involved in the email exchanges on the difficult afternoon of 20 September, called the claimant about the day's events. He then told the fourth respondent to tell Hess not to treat his staff so rudely.

81. The fourth respondent's evidence was:

> "I started really thinking that this wasn't going to work",

meaning the working relationship with the claimant as general counsel, after the refusal to go into the meeting, but says he took no action at the time because they remained busy with the Equatorial Guinea deal, signed off at the end of October and closed on 28 November. They needed her.

82. After the deal was signed at the end of October the claimant was away from work on the 1 to 8 November 2017. During this period she was in Berlin, in bed, exhausted. She did not answer emails, to the point where the fifth respondent became concerned about her well-being, and wondered if her silence was due to stress. He was right: the claimant's evidence is that she was "depressed… close to quitting", exhausted from the emotional stress of the deal.

83. On return to work she self-certified as sick for the period, and says she felt "totally exploited and then a bit intimidated". On 10 November she asked Simon Eyers for a discussion, which he fixed for when he was next available, 14 November. The claimant's contemporary messages to her friends note: "I had enough. I will only speak with CEO and CFO in his presence after that" (that being the meeting with Simon Eyers, it is Mr Eyers's presence that is meant). On 11 November she messaged a friend discussing a (sexual) harassment claim and saying she: "will now fight very hard".

Second Protected Act

84. The 14 November meeting with Simon Eyers is the second protected act on which the victimisation claim is based.

85. The claimant's preparation notes include:

> "(1) tendency to recreate Perenco. Cultures and companies. Hiring pool. WP strategy?
> (2) relationship worsened – work environment not pleasant any more which is hard for me as I take pride in my work".

86. The claimant's evidence of what she said at the meeting is that one woman had been hired out of 30 for the Equatorial Guinea project since August 2017, many were French nationals, and that Simon Eyers had commented that some things were easier for him as an older man. Simon Eyers's evidence was that the meeting lasted an hour and a half, that he had tried to "calm her down", and he had advised her to speak to the fourth or fifth respondent about her relationship with them, as they were her employers, not him. He said she spoke of resignation, and he interpreted this as a cry for help. She asked if she was not being taken seriously because she was a woman. He suggested that she ask them for help with her difficulties, not tell them they were wrong. On the resignation issue, he here mentioned the contrast between a large corporation and the Mittelstand, the word for typical German middle-sized family companies - both the claimant and Simon Eyers are native German speakers – meaning, he thought, that given her experience was with large corporations, she may be more comfortable with their process-related way of doing things. The claimant explained to the tribunal that she understood this to be a reference to family companies cutting corners, unlike in a large corporation. Simon Eyers's evidence was to the contrary: that he meant that she might be more comfortable in a large corporate, adding, drily, that cutting corners was "not a stereotype of Germans I would recognise". (The tribunal adds that this stereotype of German

rectitude has of course been knocked by the car emissions scandals coming to light, but those occurred in large corporations, not the Mittelstand, so do not support the claimant's interpretation of his remark).

87. Following this meeting he telephoned the fourth respondent to suggest that he "give her space and listen" to mend the relationship. The fourth respondent then invited her to lunch, which on his account was successful; he understood the discussion to be amicable, saying he "tried to put things behind us" and believed they had done. He put the relationship difficulties down to the stress of the deal.

88. The tribunal has to decide on the basis of the evidence whether, firstly, the claimant stated or indicated to Simon Eyers that she believed there was discriminatory hiring on the basis of nationality, and secondly, if she did, whether he communicated that to the fourth respondent, as both he and the fourth respondent deny that this content was communicated.

89. We concluded there was a discussion about hiring, in the context of replicating Perenco, as Simon Eyers said to her that they hired people they knew. We are not clear that he understood this to be an allegation of discrimination on the basis of nationality, but we are sure that if he did understand that, he did not communicate it to the fourth respondent. He was not the claimant's employer. He had suggested she needed to speak to her employer about any difficulties. We believe that once he had intervened to advise the fourth respondent she was clearly upset and that there should be a discussion between them, he left the subject matter of that discussion to the claimant and the fourth respondent. His interest was only to "clear the air".

Bonus meeting.

90. From then on the claimant and the fourth and fifth respondents seem to have had less, even little contact. We can see for example that the fifth respondent was asking the claimant for information about terms of business and billing accrued to date with external lawyers, Wilkie Farr. She did not respond promptly, and when he queried the size of the bill, she only said it was not payable until January. It appears she had not negotiated terms, and then sought a reduction of the bill. She was then late sending their December invoice to accounts, and it had to paid at the last minute. This looked to us like lack of cooperation with legitimate queries from the CFO about the company's liabilities.

91. Relations with Ms Sogolo continued to be poor, shown in emails between them, for example on 9 and 29 November. The claimant was contemptuous and curt, and Ms Sogolo objected to her tone.

92. We understand from the emails (for example on 26 November) that the fourth and fifth respondents were now considering a replacement for the claimant, and explored contact with the others they had interviewed when she was hired; none was interested in the job within their timescale. We can see one such reply on 19 December. Another potential replacement had a discussion with the fifth respondent on 22 December, and emailed afterwards to say he might be able to consider it in February, but not

before. It is not clear when the respondents made a firm decision to dismiss, but it is clear that towards the end of November (when the Equatorial Guinea deal was now final) they were looking for a replacement. This suggests that the dismissal itself may have been a matter only of timing. That was the evidence of the fourth respondent – that he wanted to get through Christmas, and await the arrival of Ms Briere, due to start in early January, before approaching the claimant about leaving. They did not consider Ms Sogolo adequate to the task of dismissing a senior lawyer.

93. The eventual dismissal was on 29 January 2018. We discuss later when the decision was made and for what reason.

94. Annual performance reviews took place in December. The fourth respondent spoke to the claimant on 11 December. She was told her performance was good and that she had worked very hard. She was to have a 10% increase in salary and 100% of her bonus (i.e. 36% of salary). The claimant was disappointed at the bonus, and said she was happy if he felt this was a fair reflection of her work. She then asked if her carry could be increased.

95. His evidence is that on reflection he considered she had been at the sharp end of the autumn's negotiations, and he decided to increase her bonus by half as much again. He told her this next morning. He also told her that the carry curve distribution would be discussed at the next board meeting.

96. Thibault D'Argent was also given a salary increase, and his bonus was also increased by 50% to reflect his contribution to the successful deal. His carry was not increased.

97. Axelle Briere started on 8 January 2018, and we have her notes of a discussion that day with the respondents. They are only notes, but show the discussion ranged across whether the claimant had had a warning, and the fact that she had earned her bonus, (indications that Ms Briere was considering the presentation of a reason for dismissal). The respondent wanted someone more senior. The funder (Warburg) was: "OK to find someone else". There was a note that she (the claimant) did not reply to messages when off for 6 days (the November period), and had had arguments with Ms Sogolo. There was then a discussion about whether she should be paid in lieu of notice, or given garden leave, and whether there should be a settlement. The level of detail suggests that the dismissal decision had been made and the discussion was about when and how it should be implemented.

98. Miss Briere wanted to make some calculations about carry. Meanwhile the fourth and fifth respondents were busy with the short notice meetings in Tunisia - as noted the first had been over Christmas and there were two more trips in January.

99. On 16 January the fifth respondent spoke to Marco Gatti at Warburg Pincus about repurchase of the claimant's A and B units. Mr Gatti then corresponded with Ms Briere on the mechanics of this.

100. On 19 January a recruitment consultant responded to a message Ms Briere had left him about finding a replacement general counsel.

101. These steps all suggest a decision to dismiss in the near future had been made.

The Protected Disclosures

102. On 15 January 2018 the claimant spoke before and during a meeting in Paris, at which fourth and fifth respondents were present, about the per diem payments to be made to Equatorial Guinea officials for attending meetings about the development of the offshore oil and gas. Such payments are recognised to be open to abuse as a way of paying inducements to officials, by inflating the cost of the expense of their attendance. The claimant pointed out that as they were in-country meetings the sums involved did not meet government rules. There was dispute about the previous owner's payment levels, and about the budget law, interpreted by a local lawyer as covering these payments, and that they were paid by all oil and gas companies. On 16 January she repeated the substance of this to Francois Raux and another in an email. These are the first, second and third disclosures relied on in the claim.

103. The fourth protected disclosure was on 18 January 2018. It concerned the valuation of respondent's B units for the purpose of taxation. HMRC requires the capital value of such units to be taxed in the current year on their value at a future exit. Accountants had prepared a statement for holders of B units to add to their tax returns saying the current value was nil. This statement was distributed on 4 January. On 12 January Ms Briere updated the claimant on her carry calculations, and said: "just a question, could it be possible to draft the resolution in a way confirming that the units were granted before 28 November (upon signature of contract)? If we do not (do) this there is real risk for HMRC to increase the current face value (USD 10/0) and tax us on it. We will need to do a valuation later back to the acquisition". The claimant suggested they discuss it the following Tuesday. In discussion at the meeting she pointed out that this was wrong, as the respondent had acquired an asset on 29 November, meaning the value would be more than nil. The claimant understood that Ms Briere and Mr Seymour were the only new employees who would be taxed in the UK, so had an interest in the units having a nil value. Both had joined after 29 November. Ms Briere, says the claimant, asked her to state the units were granted at the time of the offer letter, not the start of employment, and the claimant replied that the operative date was when the documents were signed. She had not by that date prepared the documents. She says the fifth respondent then asked her to find a creative solution, saying "lawyers can be very creative".

104. It was evident to the tribunal that the fifth respondent and Ms Briere blamed the claimant for not preparing the documents in time, although as the emails show that she was not asked to prepare any documents until 29 November, she was chasing up Axelle Briere's carry assessments on 10 January, and was not told until 19 January what amounts were to be invested in A shares, it is hard to see how this criticism is justified, unless she was supposed to draft them and have them signed by the proposed

new starters in a matter of hours, but it goes to show that it mattered to the two, and that the claimant is right to think it caused resentment, justified or not, when she was unable to find a creative solution (which she interpreted as finding a way to mis-date the documents or otherwise call black white).

105. The fifth protected disclosure was on 22 January in a board meeting. Trident had received a solicitor's letter warning that Trident's recruitment of so many Perenco employees might involve breach of employee covenants and the position was being carefully watched. The claimant said they should check new employees' contracts in case, but the others treated the letter with derision, given that it blew flames of fire but stopped short of making any claim.

106. The Tribunal accepts that these five disclosures qualify for protection. They contained information, not bare allegations. The claimant asserted matters of public interest - being careful to avoid breach of local anti-corruption laws, not misleading the UK tax authority in their B unit documents for new starters, and being careful not to be inducing breaches of contract by new staff. So far as we can tell, the claimant had a reasonable belief in the truth of what she asserted. The claimant did have a general concern for propriety, and regard for her professional standing. What part these played in the dismissal decision, or the decision not to place value on her B units, will be considered later.

Dismissal

107. On 23 January claimant wrote at length to the fourth respondent. She was following up on her request for more carry when disappointed about her bonus, saying that she had been expecting him to get back to her about carry, after the December board meeting, but had not heard more. She set out her case for a greater share of carry. This included her contribution to Trident's first acquisition of an asset. Her share of carry should be increased; she enjoyed working with the team and saw herself contributing to the company over future years.

108. The fourth respondent sent it on Axelle Briere, with the comment that he had told the claimant he would discuss in Friday, but:

> "the best for me is to tell her on Friday. We need to speed up the process and prepare what I can say or what I can't say..lack of commitment, absence, attitude etc….it will be a shock for her".

The ensuing emails between them show that he still resented her attitude in refusing to go into the meeting on 20 September, had noted conflicts with other staff, and lack of respect for the fourth respondent, her absences (at the beginning of November) and lack of commitment. He wanted a friendly breakup; they should tell her the relationship was broken. The tribunal does not find that the claimant was at fault, as he indicated, or that his concern was justified, but notes it as evidence of what was on his mind at the time. Next morning he amplified this: she had worked hard but "too much focus of process and not enough on substance", she "does not speak to Samantha, had been discourteous to the fifth respondent, and "when we tried to put things behind, it did not

work".

109. Ms Briere replied to him next day, setting out three options "in line with her employment contract". They were to terminate her on the spot and pay her 3 months salary through payroll, to give her garden leave, notice expiring 25 April, meaning she would also receive other benefits for the notice period, or give notice and require her work it. There was also a proposal to pay £30,000 before 1 April as a tax free termination payment. There was discussion about possible competition. As for her A and B units, she was to be given lawyer's letters after termination (whether 26 January or 25 April), buying the A units back at cost, and saying her B units were forfeited for redemption. As for the value of those units,

> "today we say they are worth USD 10 and 0. By end of April, fair market value might be disputed and we will not have had a valuation report for both EG and Tunisia but most probably just EG".

Ms. Briere recommended option 1 (immediate termination):

> " because of the possible impact on the units and potential costs associated to keeping her on the payroll for an extra 3 months (if she is sick or more for example, that could have an impact on premium negotiated today as well as timing (having to keep her longer on payroll)".

They should not change any clause of the contract about competition. She recognised this was the "tough option".

110. She followed up with a draft termination letter. That evening the fourth respondent emailed the fifth: "we push the bottom (sic) as planned tomorrow", commenting, "the last issue on documentation and her absence today is one more example we can't trust anymore."

111. The respondents consulted Simon Eyers on the plan, and sent him the claimant's email of 23 January about carry. His comment on this was: "all this is very different from actual behaviour so either she is being very unrealistic or she is preparing the ground".

112. The dismissal letter is dated 29 January and refers to a meeting that morning telling her that her employment was terminated immediately. The reason for dismissal was said to be "frequent unscheduled and unexplained absence from the office" and the decline in communication levels over recent months, which had caused the respondents to his sin the relationship. They needed "a greater level and consistency of commitment, reliability and communication flow" in a company of this nature and at this stage of its life cycle. They needed more notice of sick leave and homeworking to be able to run the office smoothly.

113. She was escorted from the premises on 29 January. Ms Briere accompanied her while she cleared her office, and allowed her access to the computer before leaving. She also withdrew for a while at the claimant's request. The claimant remained until her boyfriend arrived. Much of this occurred in the presence of the claimant's assistant, as he

shared the office.

Dismissal – Discussion and Conclusion

114. The Tribunal has to consider whether the protected disclosures were the reason for dismissal, or if more than one, the sole or principal reason for the dismissal – section 103A Employment Rights Act. It should be clear from our findings of fact that the respondent had almost certainly decided in principle at the end of November to dismiss the claimant, because of the events of 20 September, and strained relations thereafter, and at any rate by the end of the year. Their efforts to find a replacement at that stage show it was serious, the question was timing. Dismissal was discussed as soon as Ms. Briere started in January. The precipitating cause was not anything the claimant said about per diem payments or employee contracts, but her request for more carry. The fourth respondent had been prepared to increase bonus, but not carry, the decision having ostensibly been deferred to a board meeting. The fourth respondent knew that he could not increase carry, hence his forwarding of her email to Ms Briere stating he would have to tell the claimant about a dismissal at the meeting the coming Friday, arranged to discuss her carry request.

115. The fourth disclosure (18 January), about B unit valuation, probably played *some* part, as it explains the reference to "documentation" on 25 January, which the tribunal interprets as a reference to blaming the claimant for not preparing documentation dated from before the Equatorial Guinea acquisition, but we could not find that it was the sole or principal reason. It was a makeweight in a decision made for other reasons.

116. We comment that the reasons set out in the termination letter are not the real reasons. They express a loss of goodwill and the relationship breakdown. The termination is stated to be for those reasons to avoid conflict and ill feeling. Our finding is that while the claimant was hard to get hold of at the time (she had a number of medical appointments and flat viewing) the respondents decided to dismiss the claimant because they had concluded she was not up to the job of tough, critical negotiation of acquisitions, and that they needed someone more experienced, not aided by the breakdown in relations with colleagues. That there was in fact such a breakdown is shown by the claimant's message to family after the dismissal: "the nightmare is over". It is clear from Ms Briere's advice to the respondent that she knew the claimant could not bring an unfair dismissal claim, as she lacked qualifying service, and Ms Briere did not believe she could bring a discrimination claim, so that, in effect, it did not matter what reasons the claimant was given. They were cosmetic. That they were not the real reasons does not however mean that the claimant was dismissed for making protected disclosures.

117. We do not hold the claimant was dismissed as an act of victimisation either. In our view the respondent did not understand there was an allegation of breach of the Equality Act, and did not get whatever message on this she sought to convey to Mr Eyers. The only possible impact of the 20 September protected act was in the way the respondents read it as unpleasantness to Ms Sogolo, which continued into December, independently of any protected act, and noted by the respondents. That

affirms that it was the poor relations with Ms Sogolo, not any allegation of breach of the Equality Act, that fed into the decision to dismiss.

118. For similar reasons we do not find the dismissal was discriminatory. There is no reason to think the respondent lost confidence in her ability to be general counsel in tough negotiations because she was a woman or not French, and there is no reason to think that if a man or a French national had acted as she did in September and November (refusing to go into an important meeting despite being urged to do so, stopping talking to the respondents, keeping her distance from them, not informing them of her whereabouts for 6 days in early November, treating the funder, Simon Eyers, as a confidant and buffer between her and her employers) the decision would have been the same. Until these events the claimant had been trusted and respected. That she had worked very hard was recognised by the increase in bonus.

119. The manner of dismissal is alleged as detriment because of protected disclosures and victimisation. The Tribunal view is that what was done, though brutal, and often experienced by employees as a humiliating end to their careers, is now, regrettably standard practice, in what one of the lay members describes as "insurance culture", so as to not to afford an outgoing employee any opportunity for sabotage of an IT system, leaking confidential information, or demoralising other staff. Permitting her time to access the computer – and leaving her alone for a while at her request – was humane by the standards of some employers. We do not hold that what took place occurred because of protected disclosures, or any allegation of breach of the Equality Act. If Ms Briere resented the claimant's part in the dating of documents granting Ms Briere's B units, this played no part in the way the claimant left the premises.

120. At this point we return to whether the exclusion of the claimant from business trips to Tunisia was victimisation (detriment 6). To the reasons already given why this occurred (her absence on leave, the meeting being called at short notice, some difficulty with ENI at the Milan meeting in June), we add (1) that the respondent had already decided to dismiss her, (2) their confidence in her ability to manage negotiation was shaken. Any resentment of the claimant that may have existed for the first protected disclosure related to her ongoing treatment of Ms Sogolo, not the disclosure in September. That had no material influence on this decision.

Valuation of B Units

121. It remains for us to consider the final detriment in the claims of direct discrimination, victimisation and protected disclosures, which is the nil value attributed to the claimant's B units, as notified to her in a letter dated 16 February 2018. By that date 30% of her B units had vested. The tribunal is not asked to make any finding as the actual value of these units, only to assess if there was detriment, and the reason for that.

<u>The Restricted Unit Agreement</u>

122. On 20 December 2016 the claimant, and a number of other staff, signed a Restricted Unit Agreement which covers the issue of the B

shares. Section 1 states that they have a threshold value of $0.

123. Section 4 deals with Forfeiture and Repurchase Rights on termination of employment. If termination was "without cause" , then "the employee shall forfeit to the partnership, for no consideration, all unvested series B units", and for B units already vested, "for a period of one year from the termination date, the General Partner on behalf of the partnership shall have the right to repurchase, in accordance with section 5 and at the sole discretion of the General Partner, any or all of the series A units and/or vested series B units held by the employee at Fair Market Value of such units on the termination date".

124. Section 5 sets out procedure for repurchase of vested series B units. The General Partner is to deliver a repurchase notice which includes his determination of the purchase price. Closing of the repurchase is to be not less than 16 days nor more than 30 days after the notice. The parties acknowledge that series A units and the different B units may each have a different market value. The General Partner's determination of the purchase price is final. Disputes are to be resolved by arbitration by a UK citizen in New York.

The respondents' Fair Market Value

125. Assessing what is a fair market value is difficult, because neither A nor B units are traded on any market. The limited partnership agreement provides that *fair market value* is a determination by the general partner of:

> "the cash value of specified assets that would be obtained in a negotiated arms-length transaction between an informed and willing buyer and an informed and willing seller, such buyer and seller being unaffiliated, neither such party under any compulsion to purchase or sell, and without regard to the particular circumstances of either party."

126. According to Eric Descourtieux, the fifth respondent, *he* made the decision as to what constituted fair market value of the A units, in consultation with Simon Eyers. Simon Eyers' evidence was silent as to the valuation process. In his first witness statement Mr Descourtieux explained that at the time the claimant left, the fair market value was $10 for the A units, and that there was a formula stating that if the A units were $10, the B unit value was nil. The tribunal did not understand from his evidence how this formula was reached. After reading the claimant's witness statement in which, in appendix 9, she sets out a calculation method for A units, based on some scant information gleaned from the limited disclosure available to her in January 2019, he went into more detail in a supplementary witness statement. Here he explains the A units are similar to the shares in a public company, but as they are not traded, they are high-risk, because the investor will not be paid unless and until there is an exit. A units are issued as and when Trident requires funds from those who have committed to invest, when it makes a capital call. The first capital calls were made between September 2016 in July 2017 for working capital. In November 2017 a further call was made to finance the acquisition in Equatorial Guinea (EG). The purchase from Hess was made at arms length, he says, and the call based on $10 a unit, "reflected the

market value of the EG acquisition which was a signed transaction at that point". (The Claimant had invested $10,040 and got 1004 A units).

127. In August 2017, a French investment company called Fimalac discussed going into partnership with Trident, and did become a partner. In March 2018 they paid up, at $10 per A unit. We were told the joint agreement negotiated in August 2017 states that the Fimalac investment is pursuant to the terms of the original 2016 unit subscription agreement between investors and the second respondent, which set the unit subscription price at $10. The agreement makes it plain that all purchases by existing or future investors will be at the subscription price. He stated that when the price was set in August 2017, Fimalac knew about the upcoming Equatorial Guinea acquisition, and so had already factored in that success, so $10 per A share was a market price. In tribunal we were told the price was set in an auction run by Goldman Sachs, but we did not have any detail and there are no documents.

128. On B units, he explains that their value is linked to the financial performance of the A unit. Their value is a function of the profit of the group at exit. When the claimant left it was only 2 months after conclusion of the acquisition of Equatorial Guinea; Trident had not yet implemented their plans to increase supply; there was no guarantee that these plans would succeed. It was also a very high risk jurisdiction. By January 2018 none of these uncertainties had been "de-risked", and "this is the true context in which I was required to decide what an arm's-length investor considered to be a fair market value of the A units in January 2018". He considered it entirely logical and correct to ascribe the value in November 2017, only $10 per A unit. He stated that as of 31 December 2017, the book value of the A units given by Warburg Pincus to their investors, arm's-length third parties, was $10 per unit, and this had been communicated to him and Ms Briere verbally by Marco Gatti of Warburg Pincus. He adds that to date no dividend has been paid on the A shares. When A shares are $10, B shares are nil.

<u>Parmentier Arthur Tax Valuation – Open Market Value</u>

129. In January 2018 staff who already held B units (as with the claimant, whose shares were issued in December 2016) had to declare their value on their 2016/17 tax returns, due to be submitted before the end of that month. They would be taxed on the value of B units at the date of acquisition (in the claimant's case, December 2016). They were provided with a standard text drafted by external accountants which stated the units had been acquired at nil cost, and that they had invested *before the fund made its first investment* – emphasis added. The unrestricted market value (at the date of acquisition of the shares) was stated to be nil.

130. Early in 2018 Ms. Briere was engaged in issuing B unit documentation to new staff. She was also getting a valuation for these B units for UK tax purposes. This could not now be assumed to be nil, as Trident had now acquired an asset to exploit. For this purpose, she arranged to meet Parmentier Arthur Valuation Services Limited on or just before 1 February. HMRC values management incentive schemes on the expected returns method, aiming to place present value on management's share of

potential exit proceeds. The valuers were asked to aim to report so as to support: "the lowest value we believe can be placed on the B units without sacrificing credibility". This was because tax is paid now on the value of the shares, factoring in the return expected at a later date. Ms Briere had in the past herself paid tax on shares whose value had never materialized, and was anxious not to repeat this experience (that was why she had asked for less 'carry' and the chance to acquire more A shares).

131. On 15 February Ms. Briere confirmed that Trident wished to go ahead on the estimate and outline provided after a first meeting and after the valuer had read the preliminary documents. There is a formal engagement letter dated 19 February. Emails show the work started then. It was complex, and involved discussion of cash flow and forecasts. There was little pressure on time as it was not anticipated to be needed before returns for 2017/18 had to be filed in January 2019.

132. The final report is dated 29 August 2018, and valued the B units issued on 6 March 2018 (which is five weeks after the claimant left, and 3 weeks after the date of the repurchase notice valuing her B shares at nil). It records that on 6 March the 6 new staff had subscribed for shares at $10 for A, $0.84 for B1, $0.58 for B2 and $0.02 for B3. This was determined by the general partner as the market value.

133. The tribunal has no evidence on who set these subscription prices, or how long before 6 March any calculation was made. It does not seem to follow the A 10: B 0 formula used by the fifth respondent.

134. The report's analysis ranged over expected case flow, likely exit date, the abandonment of Tunisia but some hope of a third project, a weighting of net present value for likely scenario, a discount for risk in EG, and a final 70% discount for minority interest and unmarketability, all as at 6 Marc 2018, concluding that the actual market value of B1 was 0.76, B2 0.50 and B3 0.02. Referring back to the basis of instruction, this was the lowest considered credible, and it was possibly viewed as the starting point of a negotiation with HMRC.

135. The statutory definition of *open market value* is in the Taxation of Chargeable Gains Act 1992, which at 273(3) states that for unquoted shares, it is postulated that:

> "there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length".

136. As with fair market value, this is a hypothetical exercise designed to mimic a real market. The respondent argues that this is a separate concept to fair market value. Though the two definitions do not use the exact same words, the tribunal found it hard to understand any difference of significance.

Detriment 12

137. The tribunal concludes that the claimant's B shares were worth more than nil as of 16 February 2018, the date of the repurchase notice. The reasons for so finding are:
(1) if they were worth nothing before Trident acquired an asset, as stated for HMRC, they must be worth more when it had its first asset, even if the expected income had not yet been realised
(2) the formula of A10:B0 used by the fifth respondent is not explained, and does not fit with the Parmentier Arthur assessment, which is more than nil
(3) in any case the explanation of $10 being the market value of A shares negotiated in August 2017 is hard to understand as at that stage the deal was not yet in the bag, as shown by the respondents' anxiety in the 20 September 2017 negotiations, unless, which was not explained, the price only operated if the deal was concluded, or it was not an arms length transaction as it related to Warburg Pincus clients
(4) the open market value of 6 March was based on the loss of the expected Tunisia asset. It is not known when that became firm, and what were its prospects on 16 February. It was still on the cards at the end of January; the market price at that time when Tunisia was a likely prospect may have been higher.
(5) it is unexplained why the letter of 16 February could not wait for the Parmentier Arthur valuation even then being commissioned, as the respondent had a year in which to issue a repurchase notice
(6) within 3 weeks of the nil valuation of the claimant's shares the new issue of B shares was being subscribed for (a market value) at more than nil; we have no evidence of how that value was calculated
(7) the Parmentier Arthur report was disclosed extremely late, while the letter of instruction and preceding emails which showed that it was being commissioned at the same time as the claimant's shares were valued were not disclosed until after the start of the hearing and at the request of the tribunal. This is disclosure on an issue – valuation of B units – which was pleaded from the beginning. We can infer that it was something the respondents did not wish to be examined closely.

138. That being the case, there was a detriment to the claimant, and we must assess the reasons for that, and in particular, whether it was because she was a woman, or not French, or because of protected acts, or because of protected disclosures.

139. We start with the material between the fourth and fifth respondents and Ms Briere from 23 January 2018. The fourth respondent asked her on 25 January it the claimant could be allowed to keep her B units, but was told that was not an option. Ms Briere herself advised on 25 January that valuation of B units was a reason to terminate employment without garden leave: "Today we say they worth USD 10 and 0. By the end of April fair market value might be disputed and we will not yet have a valuation report for both EG and Tunisia but most probably just EG". It is not known where she got the 10 and 0 figures, but probably from Mr Decourtieux, who said it was his decision. So the decision was made by the fifth respondent, or Ms Briere, or both.

140. It seemed us improbable that being a woman or not French had any influence on this decision. The decision to dismiss was made by the fourth respondent, but the fifth respondent agreed with it, and further resented her failure to keep him informed on lawyers' bills in the last few months and weeks, as well as the behaviour on 20 September which he had witnessed first hand. As we have found, these were sufficient reasons, unrelated to nationality and sex. The claimant's assessment of the fourth respondent's attitude to women does not assist her on this issue, as he wanted her to keep the B shares.

141. For reasons already set out, we do not find that either protected act influenced this decision. Recapping, the first was too remote in time, and was associated with her behavior towards Ms Sogolo rather than its content, and unrelated behaviour to Ms Sogolo in later weeks and months was more to the front of their minds than the September disclosure. The second was not, we found, communicated to the respondents. It is possible Mr Eyers played some part in the valuation, but the conversation had indicated to him not any allegation of discrimination but that the relationship with her managers needed mending, on which he had acted.

142. We consider the protected disclosures. They were close in time and could have operated on their minds. There must be some suspicion about the debate between 12 and 18 January 2018 about "creativity" in the dating of the grant of B units to new starters Seymour and Briere, as it would leave them likely to pay tax on units whose value had just increased, and they will have resented what they saw as her lack of cooperation. It confirms that Ms Briere was apprehensive that the old valuation would be revised for shares issued after the EG acquisition (as she made explicit on 25 January when arguing for immediate termination).

143. Why would the respondent value the B units at nil? They would of course have less to pay. That would operate independently of any protected disclosure. Ms Briere herself, concerned about paying tax upfront, may well have hoped to present a case that when she acquired her shares they were worth little, which might be reinforced by the claimant's having been valued at nil then. She may also genuinely have believed that the shares were worth next to nothing until EG came on stream, which was still some way away. Another factor is the desire for a clean break: Ms Briere knew how complicated valuation was, and that it was likely to take some time before a full valuation could be achieved if termination left to the end of April when it would be clearer they had some prospective value. The respondents also argue that they acted in good faith, as to be seen to undervalue shares on repurchase would undermine the trust of other staff who had been issued with B units, something they would want to avoid as it destroyed the value of having an incentive scheme. That is right, but people are not always rational actors when they feel strongly about a departing employee.

144. Weighing these up, we concluded that the claimant's assertion that the date of vesting was the date of the documents, not the date of the offer to grant them, is unlikely to have played a material part in the decision to value the B units as nil. Ms Briere believed, perhaps wrongly, that the 0

valuation was correct as at January, and so a reason not to give her garden leave until April. In this there was financial advantage to the company. It is quite possible this was a decision made in bad faith, rather than through misapprehension, or the desire for a clean break, but if so, it was against the wider background of feeling that the claimant had let them down in September and gone absent in November, and resenting the claimant's poor relations with Mr Descortieux and Ms Sogolo. We could not conclude that the decision to value at nil was based on malice because the claimant would not find a creative solution to Ms Briere's her own vesting date.

145. It follows that none of the claims succeed.

146. For that reason, we have not gone back to consider the arguments about time, which affect detriments 1-11, that is all up to and including the dismissal, as the claimant went to ACAS for early conciliation on 16 May 2018, 3 months after the repurchase notice which is detriment 12. We would have considered whether the protected disclosure detriments were all part of a series, and whether there was conduct extending over a period, and if not, whether it was just and equitable to extend time.

Employment Judge Goodman

Date 5 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 June 2019

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FOR THE TRIBUNAL OFFICE

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