mf/RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr N Kirk**

Respondents: **(1) Citibank N.A.**
(2) Mr Tom Isaac
(3) Mr Manolo Falco
(4) Mr Ashu Khullar
(5) Mr James Bardrick

Heard at: **East London Hearing Centre**

On: **25-29 March 2019, 2-3 April 2019 &**
(in chambers) 4-5 April,20 May and 1 July 2019

Before: **Employment Judge Goodrich**
Members: **Mrs P Alford**
Mr G Tomey

Representation

Claimant: Miss S Jolly QC (Counsel)

Respondents: Mr B Carr QC (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1 The Claimant was unfairly dismissed.

*** 2 The Claimant's age discrimination claims succeed, to the extent set out below.**

REASONS (RESERVED JUDGMENT)

Background and the issues

1 The background to this hearing is as follows.

2 The Claimant, Mr Niels Kirk, presented his Employment Tribunal claim on 20 February 2018. Before doing so he had obtained ACAS early conciliation certificates naming the first to fourth Respondents covering the period from 21 December 2017 to 21 January 2018; and covering the fifth Respondent with a certificate covering the period from and until 20 February 2018.

3 The dates of employment given by the Claimant were 1 June 1991 to 27 November 2017.

4 The Claimant has brought complaints of unfair dismissal and age discrimination. Accompanying the Claimant's claim form were detailed grounds of claim setting out his claims and providing his account of events. The complaints brought by him were described as being for unfair dismissal, direct and indirect age discrimination, age discrimination harassment, and age discrimination victimisation. The Claimant has been represented throughout these proceedings by Leigh Day Solicitors.

5 Responses were provided on behalf of all the Respondents defending the claims. Detailed grounds of response were given denying the claims and setting out the Respondents' account of events. The Respondents have been represented throughout the proceedings by DAC Beachcroft LLP Solicitors.

6 A Preliminary Hearing was conducted by Employment Judge Russell on 18 June 2018.

7 Prior to the Preliminary Hearing before Judge Russell, the Claimant's solicitors made an application for a strike out or deposit order for the Respondent's ET3 response as regards their defence to the Claimant's unfair dismissal claim.

8 By the time of the Preliminary Hearing the issues in the case had been agreed between the parties and were attached to the Preliminary Hearing summary. Judge Russell decided that she was not satisfied that there should be a further Preliminary Hearing (open) to consider the strike out or deposit order. She considered that it would not be proportionate or in accordance with the overriding objective to conduct such a Preliminary Hearing; she was not satisfied that the pleaded defence was so hopeless that it would necessarily fail as a matter of law; and she stated that there were points which were reasonably arguable. She also made a number of case management orders.

9 Amongst the orders made by Judge Russell were for the Respondents to provide amended responses, which they did.

10 Disputes arose between the parties' representatives as to disclosure of documents; and an application was made on behalf of the Claimant for orders of specific disclosure of documents.

11 A further Preliminary Hearing was conducted on 23 January 2019 by Employment Judge Allen. He made various case management orders, in which he

granted in part the Claimant's application for specific disclosures; and made various other case management orders, including as to the basis on which the parties were asserting privilege documents that had not been provided, or had been redacted. The Respondent's application to re-amend their response was also granted, without objection from the Claimant's representative.

12 The case was listed for this nine day hearing. The first of these days the Tribunal spent reading the witness statements and reading list provided by the parties' representatives.

13 When the parties first attended the Tribunal, on the second day of the listed days for the hearing, the Tribunal checked whether the issues were as listed in the agreed list of issues. They confirmed that they were.

14 The Tribunal also asked whether "Polkey" issues would need to be considered, if appropriate, at this hearing and we were informed that closing submissions would be made on Polkey issues. The Tribunal was informed by Mr Carr, on behalf of the Respondent's that, should there be a remedy hearing, the Respondent's would argue that, pursuant to the case of *Devis v* Atkins, the Respondent's case was that information has come to the Respondents attention that would have led to the Claimant being dismissed for gross misconduct. This hearing is solely to determine liability, not also (potentially) remedy, so any issue of alleged gross misconduct was not one for this Hearing.

15 The Judge also raised with the parties that the Claimant's witness statement did not contain evidence as to consideration, if appropriate, of extending time limits on a just and equitable basis for aspects of her age discrimination case that might be out of time. Agreement was reached with the representatives that some limited examination in chief would be permitted of the Claimant as to his reasons for putting in his claim when he did, rather than at an earlier point.

16 On the opening day, and for some of the subsequent days, press members were present at the hearing. An application was made on behalf of the Respondents for an anonymisation order concerning confidential information as to the Respondents' clients. A draft order was presented to the Tribunal by Mr Carr on behalf of the Respondents, to which both the Claimant's representative and the press representatives consented. In fact, so far as the Tribunal is aware, no evidence was provided at the hearing as to clients of the first Respondent so as to for the restrictions on reporting to be required.

17 Attached to this judgment is a copy of the agreed list of issues; and a copy of the restricted reporting order made by the Employment Tribunal.

The relevant law

Age discrimination

18 Section 5 of the Equality Act ("EqA") provides:

18.1 In relation to the protected characteristic of age –

(a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) A reference to persons who share a protected characteristic is a reference to persons of the same age group.

(c) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

19 The Claimant has brought complaints of direct age discrimination, indirect age discrimination, age discrimination harassment and age discrimination victimisation.

20 In respect of a direct age discrimination claim the Tribunal is concerned with section 13 EqA, when read with section 39.

21 In respect of indirect age discrimination, the Tribunal is concerned with section 19 EqA when read in conjunction with section 39.

22 In respect of the unlawful age discrimination harassment claim, the Tribunal is concerned with section 26, when read in conjunction with section 39.

23 In respect of the complaint of unlawful age discrimination victimisation, the Tribunal is concerned with section 27 EqA, when read in conjunction with section 39.

24 It is recognised that it is unusual for there to be clear, overt evidence of age discrimination and the Tribunal should expect to have to consider matters in accordance with section 136 of the EqA and the guidance in respect thereof which is authoritatively set out in *Igen Ltd v Wong* and others [2005] IRLR 258 (CA) concerning when and how the burden of proof my shift to the Respondent and what the Respondent must prove if it does. The Tribunal has read and adopts the 13 guidelines set out in *Wong*. These aspects are usefully considered through a staged process.

25 At the first stage the Tribunal needs to make findings of primary fact and to determine whether those show, in respect of the Claimant and a real or hypothetical comparator, less favourable treatment (in the case of direct age discrimination) and a difference in age (or discriminatory, or unwanted, or detrimental treatment, depending on the statutory provision concerned). The test here (for direct age discrimination) is whether the Tribunal is satisfied, on the balance of probabilities and with the burden of proof resting on the Claimant, that this Respondent treated this Claimant less favourably than they would have treated a comparable employee of a different age. Comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the Claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these would be matters which will have been in the mind of the person doing the treatment when relevant decisions were made.

26 If the Tribunal is satisfied that there was less favourable treatment and a difference in age (for direct discrimination) in comparable circumstances, we proceed to the second stage. We direct ourselves in accordance with section 136 of the EqA and ask, in respect of each item of less favourable treatment which has been proved, whether the Claimant has proved facts from which the Tribunal could reasonably conclude, in the absence of an adequate explanation, that the less favourable * treatment was on age grounds. Findings of fact which affect whether the Tribunal could so conclude will vary from case to case. Relevant examples include prior or subsequent acts of discrimination; breach of a provision or recommendation in the ECHR's Code of Practice on Employment; some unexplained or hostile conduct towards the Claimant revealed by the evidentiary facts; inconsistent or evasive oral documentary evidence from the employer. Unreasonable treatment on the part of an employer is not necessarily a matter from which the Tribunal will ultimately conclude that there was unlawful age discrimination, but if it constitutes less favourable treatment than a comparator has received, this will be a matter from which the inference could be drawn at this stage, leaving the employer to prove that it had or would have treated a person of another age unreasonably too.

27 If the Tribunal could reasonably conclude, absent a non-discriminatory explanation, that there was unlawful age discrimination, we move to the third stage. In the absence of an adequate explanation, the Tribunal will uphold the complaint that there has been age discrimination. So, the Tribunal now looks to the employer to see whether it provides and proves a credible, non-discriminatory explanation or reason for the treatment in question. In the absence of such an explanation which the Tribunal accepts as proven on the balance of probabilities, we will infer or presume that the treatment was age discriminatory.

28 When the Tribunal is considering a hypothetical comparator, the stages tend to merge or become indistinguishable. Tribunals have often been encouraged to consider the question of why the Claimant has been treated in the ways that he or she has been, in particular whether or not it was on the prohibited ground.

29 Indirect discrimination involves consideration of whether the Respondent has applied to the Claimant a provision, criterion or practice ("PCP"). Consideration is then required as to whether the PCP puts (or would put) persons with whom the Claimant shares a characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it. The Claimant also needs to show that the PCP puts (or would put) the Claimant at that disadvantage.

30 Although direct age discrimination and indirect age discrimination provide a justification defence if the Respondent can show the treatment of the Claimant to be a proportionate means of achieving a legitimate aim, no such defence was relied upon by the Respondent in this case.

31 In respect of cases of unlawful harassment, tribunals have been encouraged to consider the statutory elements of liability for harassment being three-fold: (1) did the Respondent engage in unwanted conduct? (2) did the conduct in question either (a) have the purpose or (b) the effect of either (i) violating the Claimant's dignity or (ii) creating an adverse environment for her – the proscribed consequences? (3)

was the conduct on a prohibited ground?

32 In the case of unlawful victimisation, the Tribunal is concerned with whether the Claimant establishes the detrimental action relied upon, such as dismissal; that the Tribunal finds that the Respondent has subjected the Claimant to a detriment; and that the Tribunal finds that this is because the Claimant has done a protected act, or the Respondent believes that the Claimant has done (or may do) a protected act.

33 The Tribunal must also have regard to the provisions of section 123 EqA. The primary time limit, within which the Claimant must be presented in order to found the Tribunal's jurisdiction, is three months from the date of the act(s) about which complaint is made, but this is subject to qualifications.

34 Section 123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. Case law has explained this further. Such an act may be something done in pursuance of a policy or practice, however informal, or a series of linked or connected acts. It cannot be a few isolated instances spread over time or a single act with continuing consequences.

35 Section 123(3)(b) EqA provides that failure to do something is to be treated as occurring when the person in question decided on it. Section 123(4) provides that in the absence of evidence to the contrary, a person is to be taken as deciding on failure to do something when they do an act inconsistent with doing it, or if no such inconsistent act is done, on the expiry of the period in which they might reasonably have been expected to do it.

36 Section 123(1)(b) EqA provides that the Tribunal may consider a complaint which is out of time if it is just and equitable to do so. This is a wide discretion which must be judicially exercised. The Tribunal will bear in mind that limitation periods ought not without good reason, be disobeyed. The issue of prejudice is very important: how "old" is the claim, have memories faded or become less reliable, are witnesses unavailable, have documents disappeared? Is it unfair to either party to proceed? What explanation is given for delay? Have internal proceedings kept matters alive in the interim? Has the Respondent in any way misled the Claimant or been responsible for the delay? No list can be exhaustive, for the Tribunal must bear in mind all relevant factors.

37 The Tribunal also needs to bear in mind the extension of time provisions contained in the legislation concerning the obtaining of a conciliation certificate from ACAS prior to issuing proceedings.

Unfair dismissal

38 Section 98 Employment Rights Act 1996 ("ERA") provides that, for the purposes of considering whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal: and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

39 Amongst the reasons set out in section 98(2) is that the employee was redundant. The statutory definition of redundancy is contained in section 139 ERA, the relevant definition for this case being section 139(1)(b).

40 Amongst the reasons which have been held to fall within some other substantial reason referred to in section 98(1)(b) ERA is a reorganisation of an employer's workforce that that does not, however, fall within the statutory definition of redundancy.

41 If a Respondent fails to show that the reason or principal reason for the dismissal of an employee is one which falls within sections 98(1) and (2) ERA the dismissal will be unfair.

42 The statutory definition of redundancy is contained in section 139 ERA. This provides:

> "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
>
> (a) the fact that his employer has ceased or intends to cease –
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish."

43 Where an employer has established that they have dismissed the employee for a reason falling within the statutory provisions, a tribunal will consider whether or not the dismissal was fair within the meaning of section 98(4) ERA. The burden of proof in this respect is neutral.

44 Section 98(4) provides:

> "… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and

administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

45 In considering the statutory test posed by section 98(4) ERA, the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair.

46 In the case of *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT, guidance was given that in cases where employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

46.1 The employer will seek to give as much warning as possible of impending redundancy so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

46.2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with these criteria.

46.3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which, so far as possible, do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience or length of service.

46.4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

46.5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

These principles should be departed from only where some good reason is shown to justify such departure.

The evidence

47 On behalf of the Claimant, the Tribunal heard evidence from the Claimant himself.

48 On behalf of the Respondents the Tribunal heard evidence from:

48.1 Mr Tom Isaac, Head of Corporate Banking for Europe, Middle East and Africa ("EMEA").

48.2 Mr Ashu Khullar who, at the relevant times, was Co-Head of Corporate Banking for Europe, Middle East and Africa ("EMEA") with Mr Isaac.

48.3 Ms Cecila Senecaut who, at the relevant times, was senior HR Adviser for Corporate Banking EMEA.

48.4 Mr James Bardrick, Citi Country Officer for the UK and CEO of Citigroup Global Markets Ltd and UK Branch Manager for Citi Europe plc.

48.5 Ms Jennifer Irwin, Employee Relations Ops Specialist.

48.6 Mr Zdenek Turek who, at the relevant times, was Head of Corporate Banking for EMEA.

48.7 Mr Paolo Arnaldi, Head of HR for EMEA Institutional Clients Group.

48.8 Mr Craig Wallace, who at the relevant times, was Chief Administration Officer for Corporate and Investment Banking in EMEA.

49 In addition, the Tribunal considered the documents to which it was referred in four lever arch bundles of documents.

Findings of fact

50 The Tribunal sets out the findings of fact we consider relevant and necessary to determine the list of issues we are required to decide. We do not seek to set out each detail provided to us, nor to make findings on each dispute between the parties as to what occurred. We have, however, considered all the evidence provided to us and we have borne it all in mind.

Background information

51 The Claimant, Mr Niels Kirk, was employed by the first Respondent, Citibank N.A. from 1 June 1991 until he was notified verbally of his dismissal on 20 November 2017. This dismissal was confirmed by a letter dated 20 November 2017, in which the Claimant was given notice that the effective date of termination of his employment would be 27 November 2017, with the balance of his notice being by way of pay in lieu of notice.

52 The Claimant's date of birth was 23 July 1962, the Claimant being aged 55 at the date of his dismissal.

53 As might be expected for an employee with the length of service of the Claimant, he held numerous roles within his 26 years of working for the first Respondent namely: -

53.1 From 1991 to 1993 he was working within Chemicals, Petroleum, Mining and Minerals with the job title of Corporate Finance – Relationship Management New York.

53.2 From 1993 to 1994 he was working for Energy and Project Finance Department, with the job title of Oil and Gas, Power, Mining, Infrastructure, Pulp and Paper, for Europe, Middle East and Africa ("EMEA").

53.3 From 1994 to 1998 he was working for Project Finance (Infrastructure, Power, O & G), with the job title of Senior Transactor, EMEA.

53.4 From 1998 to 2003 the Claimant was working within Power and Utilities, with the job title of Regional Head, EMEA.

53.5 From 2003 to 2008 the Claimant was working within Power, Energy, Chemicals, Metals/Mining with the job title of Managing Director and Regional Industry Head.

53.6 From 2008 to 2009 the Claimant was working within Global Energy with the job title of Managing Director and Global Industry Head.

53.7 From 2009 to 2011 the Claimant was working within Strategic Capital and Corporate Finance Group, with the job title of Managing Director, EMEA.

53.8 From 2011 until the date of his dismissal the Claimant was working within Energy and Natural Resources, with the job title of Chairman and Managing Director EMEA.

54 The Claimant was responsible for managing a team of around 16 individuals.

55 The Claimant was, therefore, a senior employee with the Respondent. It was accepted by various witnesses of the first Respondent that he was a high performing employee.

56 So far as the Tribunal was made aware, at no time was the Claimant subject to disciplinary or capability procedures.

57 The Claimant's employer, the first Respondent, was Citibank N.A.

58 The Respondent's representatives failed to fill in box 2.7 of the ET3 response forms which asked how many people the organisation employs in Great Britain. In

answer to a question from the Judge, Ms Irwin, from the Respondents' HR department, gave an estimate that approximately 5,000 were employed in Great Britain, mostly situated in Canary Wharf.

59 As might be expected with a large organisation such as the Respondent, they have their own human resources department (which had various specialist divisions), in-house legal department and a range of human resources policies. When cross-examined, Mr Arnaldi (a Head of HR), described the Respondent as having a "human capital strategy" involving a mix of employee relations and within it a rewards team, having a sub-team in charge of the regulatory part, and having a diversity team.

60 Part of the Claimant's case is that there was a culture whereby corporate and investment bankers (such as himself), as opposed to more senior managers (such as the individuals below) were expected to make way and move on for a new, and younger, generation of senior managers as they progress into their mid (and later) 50s.

61 The hierarchy, and ages of various of the Respondent's main witnesses at the relevant times were as follows: -

61.1 From March 2014 until early 2016 the Claimant's line manager was Mr Turek.

61.2 From April 2016 until September 2017, the Claimant's immediate line managers were Mr Isaac and Mr Khullar, the second and fourth Respondents, who managed the Claimant jointly. From September 2017 until the Claimant's dismissal, his immediate line manager was Mr Isaac.

61.3 The manager of Mr Turek (when he was the Claimant's manager), Mr Khullar (when he was jointly the Claimant's manager) and Mr Isaac was Mr Falco, the third Respondent.

61.4 The senior HR adviser for the EMEA department in which the Claimant was placed was Ms Senecaut. She was primarily responsible for advising the Claimant's managers during the time leading up to the Claimant's dismissal, until she relocated to Switzerland in January 2018.

61.5 Ms Senecaut's manager was Mr Arnaldi, whose job title was described as Head of HR for the Corporate Investment Bank ("CIB") and the Institutional Client's Group ("ICG"). Mr Arnaldi's manager (who was not a witness at this Tribunal) was Ms Grey.

61.6 Mr Wallace, at the relevant times, was Chief Administration Officer for Corporate and Investment Banking in EMEA. Mr Wallace's line manager was Mr Falco.

61.7 Between 2009 and 2014, Mr Falco jointly ran a part of the business

with Mr Bardrick (who was to conduct the Claimant's appeal against dismissal, to which we refer later). From 2014 Mr Falco became sole head of CIB for EMEA. Mr Bardrick is the fifth Respondent in these proceedings.

61.8 The Employee Relations Officer who was to provide HR advice to Mr Bardrick for the Claimant's appeal against dismissal was Ms Irwin.

61.9 The Tribunal understands that Ms Olive was aged 51 at the time of the Claimant's dismissal, Mr Falco was 53, Mr Isaac was 55, Mr Khullar was 52, and Mr Bardrick was 55.

62 When the Tribunal refers in these findings of fact to "the Respondent" it is referring to the first Respondent, Citibank NA, the Claimant's employer. The Tribunal refers to the second, third, fourth and fifth Respondents by their individual names.

63 In addition to its (approximately) 5,000 employees working in Great Britain, the Respondent is a huge multinational company with offices in many parts of the world. A brief reference to this was made in the Claimant's witness statement in which he described Citibank as being part of a global investment, corporate and retail banking and financial services group headquarter in New York (known as "Citigroup" or "Citi").

64 Mr Isaac described Citi's Corporate Bank Services as servicing large corporations, public sector organisations and financial institutions, and deploying capital to support these clients in driving their agenda for growth and expansion. Mr Isaac went on to state that the Corporate Bank ("CB") works very closely with the Investment Bank ("IB") and other business areas within Citi in order to facilitate the cross sale of Citi products, such as debt, origination, foreign exchange hedging, cash management and interest rate derivatives etc. He went on to state that the role of the "Corporate Banker" had evolved from traditionally being regarded as the gatekeeper of the client relationship to operating as a true internal partner who can seamlessly connect the client to Citi's wide range of products and services in order to cement relationships and generate revenue.

65 At the relevant times the Claimant's post formed part of the Respondent's Energy, Power and Metals and Mining franchises. Mr Kirk's job title was described as EMEA Head of CB Energy, Managing Director. The power part of the franchise was led by Mr Hanen, whose job title was EMEA Head of CB Power, Managing Director. The Metals and Mining part of the franchise was led by Ms Olive, whose job title was described as EMEA Head of CB Metals and Mining, Managing Director (the job titles of the various individuals are different from those traditionally associated with British companies- they were far from being the most senior employees of the Respondent).

66 Up to the time of the events that give rise to this litigation, the Claimant never considered that he had been subject to any form of age discrimination, or that he had any reason to doubt the Bank's commitments to diversity.

67 All the above findings we set out by way of background and, so far as the Tribunal was made aware, there was no dispute about them.

Allegations 8(a) and 8(b)- the awarding to the Claimant ("C") of a lower grade in his 2015 and 2016 performance review than in 2014 – direct age discrimination complaints

Allegations 8(c) and 8(d)- the provision of information which led to the Claimant being awarded a lower grade in his 2015 and 2016 performance reviews- direct age discrimination complaints

Allegations 11(b) and 11(c)- awarding lower grades in 2015 and 2016 performance reviews because of long service- indirect age discrimination complaints

68 An important element of the Claimant's overall pay package (and that of many employees of the Respondent) was performance related pay.

69 The performance ratings graded the Claimant (and other managers) as between one to five. One was the best rating, classified as "exceptional". Two was the next best rating, classified as "highly effective". Three was a rating of "consistently strong". Four was a rating of "partly effective". Five was a rating of "not effective".

70 The Claimant gave unchallenged evidence that in every year from 2006 to 2013 he received a rating of 2, i.e. highly effective.

71 Although the Tribunal was not informed as to how much of his overall remuneration consisted of the performance related pay attributable to which of the performance ratings the Claimant was provided, it was a substantial element of his overall remuneration.

72 The Claimant's total remuneration for the years in question was as follows: -

72.1 2013: £901,669;
72.2 2014: £937,313;
72.3 2015: £597,636;
72.4 2016: £534,613.

73 The Respondent has a sophisticated annual performance rating scheme for its senior managers, including the Claimant.

74 The Respondent's annual review process comprises several different elements. Although from year to year there were slight variations in the different elements of the process, broadly they were consistent for the period 2014 to 2017.

75 The different elements of the performance assessment criteria and the percentages allocated to each element were as follows: -

75.1 A category of "drives culture" which counted for 20% of the assessment.

75.2 The category of "drives client value" had a value of 25%.

75.3 The category of "delivers results" consisted of 12½% attributable to "revenue"; and 12½% to "year on year growth".

75.4 A category of risk control having an allocation of 30%, of which risk amounted to 15%, control to 7½% and capital management also of 7½%.

76 The ratings given to the managers concerned were also dependent on a target "bell curve" which had the aim of having the following percentages for the different categories of performance assessment: -

76.1 An "exceptional" rating of 1 for the top 10%.

76.2 A "highly effective" rating of 2 for the next 25%.

76.3 A "consistently strong" rating of 3 for the next 55%.

76.4 A "partially effective" rating of 4 for the next 7%.

76.5 A "not effective" rating of 5 for the last 3%.

77 The effect of the bell curve was that managers ratings could be adjusted up or down in order to achieve the bell curve target.

78 The data that was compiled for considering the performance of the Claimant and other managers at a similar level was compiled by the team led by Mr Wallace, the Chief Administration Officer for Corporate and Investment Banking. The data was a combination of such factors as, for example, the financial performance of the Claimant and his team on such matters as the revenue generated by the Claimant or the transactions that were directly attributable to the banker concerned.

79 As described above, the categories of "drives culture" and "client effect" contributed to a total of 45% of the overall assessment. Key factors in these assessments were matters such as the effectiveness of the banker at accessing their clients at senior levels and winning their client's business; and "partner feedback" from the Respondents' product or partner teams who work closely with the Corporate Bankers. The partner ratings fed into and were used by managers and the calibration committee to determine the "drives culture" and "drives client value" categories.

80 It was accepted by various of the Respondents' managers, and the Tribunal finds, that there was an element of subjectivity, or judgment, on the Claimant's line managers part as to these ratings, particularly as to the ratings for "drives culture" and "drives client value". For example, Mr Isaac accepted in the course of being cross-examined that even where so-called "hard data" was concerned there was an element of subjectivity on the manager's part. Mr Khullar accepted when cross-examined that the categories of client effect and drives culture had an element of

management discretion in the rating number given by the manager; and Mr Falco and Mr Wallace also accepted that elements of the process involved subjective assessment.

81 The process by which the Claimant, and other managers at a similar level, were assessed was as follows.

82 The first stage was the collecting and collation of the relevant data, which was the responsibility of the team managed by Mr Wallace.

83 The next stage was the line manager's assessment of the information provided by Mr Wallace's team and the translation of this data into the relevant performance ratings for each of the categories. The line manager for the years in question was Mr Turek in 2013 and 2014; Mr Isaac and Mr Khullar in combination for 2015 and 2016. In the course of reaching their assessments they had discussions with their manager, Mr Falco. Mr Falco also had discussions with other managers about the individuals concerned.

84 The line manager, after reaching their assessment on the individual's performance rating, would present that assessment to two "calibration" meetings.

85 The first of the calibration meetings was conducted in London.

86 The London calibration meetings took place around October or November and approximately 15 managers of a senior level were present.

87 The last stage of the process was the New York calibration meeting which ***** consisted again with senior managers, although slightly less than for the London calibration meeting (Mr Isaac referred to 9 managers being present at the New York calibration meeting).

88 Mr Falco was present at each of the calibration meetings for the years in question, as were the Claimant's immediate line managers.

89 Outside the calibration meetings individual managers performance would be discussed. For example, Mr Arnaldi stated when cross-examined that there were discussions about the Claimant's performance ratings between Mr Falco and Mr Roberts (a more senior manager than Mr Falco).

90 Numerous individuals were assessed at the calibration meetings, Mr Wallace stated whilst being cross examined that, on average, five minutes per person were allocated to discussion of a manager's grade, although some individuals would take longer for discussion and some individuals a shorter time. If any notes were produced of the calibration meetings none were produced to the Employment Tribunal.

91 The Claimant's performance rating for 2014 was an exceptional rating of 1. For 2015 and 2016 his rating was 3, namely consistently strong. Although, as indicated earlier in our findings, we are unsure exactly what effect the drop of 1 to 3 had on his overall remuneration, it appears to have been substantial as it formed at

least part of a drop of £339,677 from 2014 to 2015. As the Claimant had achieved a rating of 2 for the years from 2006 to 2013 and 1 in 2014, the drop in performance assessment calls for scrutiny of the Respondent's explanations for this.

92 Mr Turek's explanation for the Claimant receiving a rating of 1 in 2014, when he was the Claimant's line manager, was as follows.

93 Mr Turek described the Claimant as having a very strong financial performance in 2014 for "impacted revenue" which was the revenue attributable to his work. This put the Claimant into the top quintile of managers and gave him a 1 rating for revenue. The growth rating was less strong, getting a rating of 3, attributable to the growth in revenue for the Claimant's department only increasing by 0.1%.

94 Mr Turek also described the Claimant's partner ratings as being strong. This assessment is questionable (and witnesses for the Respondent were questioned on this) as, when looking at the ratings for the following years in 2015 and 2016, at least to a considerable extent, the comments of the partners and clients concerned were, for the most part, not dissimilar.

95 Part of the explanation for what appears to be not dissimilar comments receiving a different score was given by Mr Turek who described the Respondent as placing a greater emphasis on the development of relationships between the institutional clients and partner teams within Citi. He described this initiative as being borne in the middle of 2014 but not rolled out until the end of 2014 so that it fed its way into the performance assessments for 2015 and 2016, rather than 2014. The Claimant himself accepted when cross-examined that there was a greater emphasis on this culture in 2015 and 2016.

96 In summary, Mr Turek's explanation for the Claimant receiving an exceptional grade of 1 in 2014 and a lower grade of 3 in 2015 and supported by the evidence of Mr Falco was as follows:-

96.1 He had an exceptional year in terms of impacted revenue i.e. the revenue for which he was personally responsible for generating. This put him into the top quintile of managers.

96.2 The overall growth of the department he managed was, however, less strong, being growth of only 0.1% which gave him a grading of 3 for this factor.

96.3 His partner feedback was positive.

96.4 Overall, looking from factors as a whole (we do not set them out in great detail) he had an exceptional year.

96.5 Mr Turek's explanation, again supported by Mr Falco, for the Claimant receiving in contrast a performance grade of 3 in 2015 was, in summary, as follows:-

96.5.1 The Claimant's statistics for impacted revenue were less strong for 2015 than 2014, dropping him from the first quintile to the second quintile.

96.5.2 His year on growth dropped to the fourth quintile because there had been a drop in overall revenue of 10.6%.

96.5.3 There was also a drop in his partner feedback.

97 Mr Turek explained that not only were there some continued negative comments, that had been present in the previous year, such as "sometimes abrasive internally"; but he also pointed to feedback elsewhere (not placed in the 2015 year end summary report) in which one element of feedback included a comment that Mr Kirk needed to "cure his narcissistic behaviour as its counter productive and a nightmare for others".

98 In each of the three years to which we were referred (2015 and 2016) the recommendations of 1 and 3 were approved by the calibration meetings. As no written records were produced to the Employment Tribunal of any of the discussions at any of the calibration meetings, unsurprisingly none of the Respondent's witnesses could give any great detail as to the discussions that took place about the Claimant's ratings in those years.

99 Mr Khullar and Mr Isaac were the managers with the prime responsibility for allocating a performance rating for the Claimant in 2016, although as described above, the process was one involving a great number of individuals including the two calibration meetings.

100 In summary, the evidence of Mr Khullar and Mr Isaac was that they gave the Claimant a three rating because:-

100.1 Firstly, they looked carefully at the data provided to them in what was described as Mr Kirk's "book"; i.e. the data that was collected and collated for Mr Kirk (and other MDs).

100.2 They decided, having read the book and in consultation with others such as Mr Falco and the team led by Mr Wallace (we understand that Mr Prentice was the individual providing the book to Mr Khullar and Mr Isaac), that 2.7 was the correct overall score to give to the Claimant.

100.3 They decided to round down the score to 3. Mr Khullar explained that they might have rounded up to a score of 2 if the Claimant's overall score had been 2.5 or better, but that it would have been difficult to justify a rating of two where their overall score was 2.7.

101 The Tribunal was taken to an email from Mr Prentice to Mr Khullar, dated 4 November 2016, giving examples of individuals, whose ratings went up significantly from their calculated scores (for example, individuals with ratings of 1.75 to 1.85 being rounded up to a rating of 1). There were also many individuals who, consistent with the Claimant, had their scores rounded down to the nearest number

below their calculated score, including individuals with scores of 2.45 and 2.5 being rounded down to 3 and another, for example, on 2.125 being rounded down to 3. The Claimant, therefore, was by no means alone in having his score rounded down.

102 Part of the Claimant's case on age discrimination is that data provided by him as an index to his witness statement, produced on disclosure by the Respondent, supports his case that the Respondent has a culture or practice in which Corporate or Investment bankers, as distinct from senior management, are expected to make way and move on for a new and younger generation of senior managers as they progress into their mid and later 50s; and that part of the way that this is done is by downgrading the performance assessments of the bankers themselves.

103 The statistics provided to the Tribunal, following disclosure requests or applications on behalf of the Claimant, show that in 2015 there were 48 Managing Directors and in 2016 there were 51.

104 In the 2015 analysis the overwhelming majority of the 48 (44 out of the 48) were in the age categories between 41 and 46. There was only one individual in the 57 to 60 categories and none in the 61 to 64. The 2016 statistics showed an influx of Managing Directors between the ages of 37 and 40 (7, as opposed to 2 in the previous year) and the overwhelming majority being in the age groups between 37 and 56 (49 out of the 51, with 2 individuals being aged between 57 and 60).

105 So far as performance ratings by age groups is concerned for years 2015 and 2016 the ratings were as follows:-

105.1 For those aged 37 to 40 for 2015, an average of 3; for 41 to 44 an average of 2.4; for 45 to 48 an average of 2.5; for 49 to 52 an average of 2.3; for 53 to 57 an average of 2.5; and for 57 to 60 an average of 3.

106 For 2016 the figures were as follows:-

106.1 For those aged 37 to 40 an average of 2.6; for 41 to 44 an average of 2.4; for 45 to 48 an average of 2.4; for 49 to 52 an average of 2.5; for 53 to 56 an average of 2.6; and for 57 to 60 an average of 3.5 (the Respondent gave an explanation for this particular individual).

107 The Tribunal has considered what weight to give the data on variations in performance ratings by age group. There is some indication of a downward trend for those aged 53 and over, although the statistical analysis is not based on a very great number of individuals and the variations are not large enough for the Tribunal to have confidence that the variations were sufficient for us to give great weight to them.

108 The Respondent does not collect data on the ages of its workforce. It does, however, collect data on its workforce, such as gender; and Mr Arnaldi stated during cross examination that there is an issue as to under representation of women in senior management of the Respondent.

109 The Tribunal attaches more significance to the age ranges of Managing

Directors within the Respondent's workforce in that they show a marked decline of Managing Directors aged 57 onwards. The Tribunal does not, however, have any information about the reasons for the decline and, as previously stated, the Respondent has provided and keeps no data analysis on age. Other than the Claimant and Mr Graham (an individual to whom we will refer later) the Tribunal is not aware of the reasons why there was a significant decline in Managing Directors ("MDs") aged 57 and over.

110 Also in support of his case, the Claimant relies on remarks made by Messrs Turek, Falco and Bardrick or attributed to them which, the Claimant considers, show an underlying attitude of those individuals as to age.

111 In Mr Turek's year end assessment for the Claimant for 2015, he stated:

> "The team is stronger, with the time coming to provide the next level of bankers with more opportunities to demonstrate the quality and depth of their customer relationships and deal management capabilities."

There is a dispute between the parties as to whether this comment was suggestive of the Claimant needing to make way in the future for younger generation of bankers (as he says); or whether merely shows that he was expected, as any manager would be, to develop and improve the skills of those within his team (as the Respondent says).

112 In Mr Turek's year end assessment of the Claimant for 2015 he stated:

> "Overall, Niels continues to be one of our most seasoned and experienced sector bankers and I have encouraged Niels to take some of the development feedback in a very constructive way while continuing to apply his strengths in terms of industry, knowledge and customer management.".

113 The Claimant also referred to an article in the Financial Times, in April 2016 in which Mr Falco was quoted in comments he made about the recruitment of a Mr Davison, aged 42. Mr Falco was quoted as saying:

> "Pearce has a lot of time ahead of him in his career and brings a lot of experience that will fit in with our culture … I think he will do well and be a part of the next generation of senior bankers."

114 In November 2016 an article was published in the Evening Standard in which Mr Bardrick (an individual to whom we will refer later, who heard the Claimant's appeal against dismissal) was quoted as saying the following:

> "You might get a group of people who grown up in the industry over the last 20 years, and since the crisis have felt things are more difficult. They might complain the markets are harder, the regulations are tough. Well, they've either got to get over that and look forwards and upwards, or perhaps they've had their time and we've got to move on and leave them behind."

Allegations 8(e), 8(f), 8(g), 8(h), 8(i), allegation 11(a), allegation 19(a) – allegations concerning the provision of information or opinions and skill set leading to or relied on in deciding to dismiss C; the dismissal of C, allegation of a practice of dismissing employees because of long service – allegations of direct age discrimination, indirect age discrimination and harassment relating to age

115 Soon after Mr Isaac and Mr Khullar were appointed Co-Heads of Corporate Banking for EMEA, they were given the task of considering ways of achieving operational efficiency and growing the overall business of the Corporate Bank.

116 Mr Khullar and Mr Isaac made a proposal to consolidate the franchise of Energy, Power and Metals and Mining; and, in so doing, to reduce the number of MDs from 4 to 2. At the time the MD for Energy was the Claimant; the MD for Power was a Mr Hanen; and the MD for Mining and Minerals was Ms Olive. Mr Husband was also an MD although he reported to Ms Olive.

117 Although a written report and documentation was provided by Mr Khullar and Mr Isaac for their proposed restructure, the restructure they proposed did not in fact take place. Mr Isaac's explanation for not proceeding with that restructure proposal was that they implemented a number of restructurings and related headcount reductions within those franchises; and, in view of these changes, agreed with Mr Roberts that they would not proceed with the proposal at that time because they were making adequate costs savings and efficiencies in other areas of the Corporate Bank and did not want to destabilise the teams by making too many changes at once.

118 At no point did Mr Isaac or Mr Khullar discuss with any of the four Managing Directors that would have been affected the proposed restructure.

119 It was not made clear to the Tribunal exactly when Mr Isaac and Mr Khullar started to discuss the restructure of the EMEA departments they jointly managed other than that it was once Mr Hanen (Head of the CB Power part of the franchise) had decided to take up a new role with the Respondent in Dubai. When cross-examined on the point, Mr Isaac said that they had decided to combine the franchises in early August.

120 The Claimant, meanwhile, had no inkling that any such restructure was being contemplated, nor that his manager's views of his partnership working would be stated to be a factor in his imminently being selected for redundancy. Indeed, the Claimant's notes of a mid-year review meeting held with him by Mr Isaac and Mr Khullar show the Claimant having noted under "partnership" getting the feedback "all signals good" and reference to having improved; and Mr Isaac agreed when cross-examined that this was discussed at that meeting.

121 Mr Isaac's explanation for restructuring the franchises that he and Mr Khullar (Mr Khullar until September 2017) managed was that they would not look to replace Mr Hanen as Head of Power but use this as an opportunity to save costs, review and streamline the current operating model.

122 They proposed to create a consolidated natural resources team led by a

single senior MD.

123 Unlike with the proposed 2016 restructure, no similar written documentation or structure chart was produced to explain their proposed restructure and the reasons for that.

124 There was no documentation produced by the Respondent to show records of meetings between Mr Isaac, Mr Khullar and Mr Falco; nor any to record meetings Mr Falco said that he had with other senior managers, such as Mr Roberts, to discuss the restructure proposals.

125 In the case of discussions between Mr Isaac, Mr Khullar and Mr Falco, this is less surprising as they, the Tribunal was informed, had adjoining offices. In the case of discussions with human resources it is more surprising, as, the Tribunal was informed by human resources witnesses, that notes of such meetings and discussions would usually be recorded.

126 Mr Isaac and Mr Khullar, having considered that the consolidated natural resources team should be led by a single senior MD, considered whether they believed the Claimant or Ms Olive to be the more suitable for the position.

127 Mr Isaac's explanation for preferring Ms Olive for the role was that Ms Olive's role included the role of Global Head of Commodities and that they did not wish this to be impacted by the proposed restructure. Mr Isaac also explained that Mr Khullar and he had concerns about the Claimant's partnership skills based on the feedback they had received as part of the 2015 and 2016 performance review processes.

128 The Tribunal has some scepticism about these explanations. When pressed in cross-examination that the Global Head of Commodities role occupied a maximum of 5 to 10% of Ms Olive's working time, Mr Isaac stated that he would put it "slightly higher"; and accepted that both Mr Kirk and Ms Olive had the ability to be the head.

129 As regards partnership skills, the data showing feedback given on Ms Olive's partnership skills, to which the Tribunal's attention was drawn, was not unequivocally positive, but also had some mixed feedback. Additionally, although neither Mr Isaac or Mr Khullar was Ms Olive's manager, they did not consult with her manager (Mr Parker) for his feedback on her performance and suitability for the role in question.

130 Mr Isaac and Mr Khullar discussed their proposals with Mr Falco. Mr Falco, in turn, discussed the proposals with other senior managers, such as Mr Roberts. Mr Falco gave Mr Isaac and Mr Khullar the "go ahead" to proceed with their proposals. Mr Isaac and Mr Khullar asked Ms Senecaut to prepare a job description for the new position. Ms Senecaut accepted that she was asked to do this after Mr Isaac and Mr Khullar had decided, at least provisionally, that Ms Olive would be the preferred candidate for the position.

131 Mr Isaac subsequently carried out what he described as a "stress testing" exercise by comparing Ms Olive's and Mr Kirk's skills and attributes side by side. In dispute between the parties was whether the stress testing exercise was meaningful and genuine (as asserted by Mr Isaac and Mr Falco); or pointless, as the decision

had already been reached (as contended for by the Claimant).

132 The Tribunal finds that, by the time Mr Isaac and Mr Falco met the Claimant on 25 September 2017, they had already decided that Ms Olive would be appointed to the post and the Claimant would be made redundant. We so find from consideration of all the evidence provided to us, including the following:-

132.1 The evidence of Mr Isaac and Mr Falco in particular appeared unconvincing and at times evasive when questioned on this topic. The Tribunal had the impression that we were not being given the full story as to whether their consultation with the Claimant was genuine.

132.2 No paper trail, such as the structure chart produced in 2016 (to which we referred further above in our findings of fact), or written explanation for the restructure was provided by any witness of the Respondent.

132.3 Written records of any meetings or discussions conducted between July and September 2017 are scant, to the point of being almost non-existent, as to discussions about the proposed restructure. It is less surprising that there are no such records of discussions between Messrs Khullar, Isaac and Falco, as they had adjacent offices. It is more surprising that no such records were kept of discussions with human resources as the Tribunal was informed that frequent discussions and meetings were taking place during this time between Mr Isaac, Mr Khullar and human resources. As, the Tribunal was informed, human resources would usually keep records of such meetings or discussions; it is surprising that none had been produced (even allowing for the possibility that parts of such meetings might have been excluded on the basis of legal advice privilege).

132.4 Mr Isaac and Mr Khullar had decided that Ms Olive was more suitable for the post before they asked Ms Senecaut to draw up a job description for the post and before the so-called “stress testing” of their decision.

132.5 Before Mr Isaac and Mr Falco met with the Claimant on 25 September 2017 to notify him of the proposed restructure, they had already met Ms Olive to inform her that she was their preferred candidate for the position and check that she wanted the role.

132.6 There was a lack of effort on the Respondent’s part to seek to find alternative employment for the Claimant, to which we refer further below. This suggests that, once the Claimant had been selected for redundancy, the Claimant’s managers were not interested in retaining him within the organisation by engaging with him as to the possibility of finding him suitable alternative employment.

132.7 The Claimant’s franchise, energy, was the largest revenue generator of the franchises being consolidated. As referred to above, the

Tribunal had some scepticism about the explanations given for the restructure and their responses when cross-examined on the issue.

132.8 Mr Falco was asked in cross-examination whether he had a perception that Mr Kirk could not change and replied: "I tried my best – he had a lot of opportunities to change".

132.9 Mr Falco's initial response to questions as to whether there was any point in the stress testing being carried out appeared to the Tribunal to be evasive. The Tribunal formed the impression from his evidence, and that of other witnesses for the Respondent that the stress testing was undertaken to seek to give credence to a decision that had already been made, rather than being an open minded inquiry as to which of the two individuals was better suited to the role.

132.10 In an interview conducted by Mr Bardrick for the Claimant's appeal against dismissal, Mr Falco stated, in response to being asked about the Claimant's opinion that the decision was a fait accompli, Mr Falco replied that he personally would have preferred a more direct conversation but HR did not allow it.

132.11 When cross-examined about this interview and the meeting on 25 September, Mr Falco's reply included that they had really thought about their decision and once they were in the room (i.e. on 25 September, a meeting to which we will refer shortly) "we were very certain that's what we were going to do". This suggests that by 25 September the decision to make the Claimant redundant was, as the Claimant believed, a fait accompli.

132.12 The Tribunal agrees with the Claimant's case that once meetings were conducted with the Claimant from late September until November, the Claimant's responses to the consultation were not addressed in an open-minded way.

132.13 The manner in which the Claimant's complaints of age discrimination were dealt with by the Respondent were surprising for an organisation professing to take equal opportunities seriously.

133 Mr Falco and Mr Isaac wanted to notify the Claimant of the proposed restructure before they undertook consultation with the employee representative body, which included an individual managed by the Claimant. They wanted the Claimant to know before other individuals, particularly those within the team he managed. They decided to have what they described as a "heads up" meeting that would be in advance of the formal consultation process and would not form part of such formal consultation.

134 Present at the meeting were Mr Falco, Mr Isaac and the Claimant.

135 Ms Senecaut had been present in the room when the Claimant arrived, having prepared a short script to assist Mr Isaac for the meeting, but left the room as the

Claimant entered.

136 The Claimant was given no advance notice that the meeting would be to discuss proposals for his job being at risk. He was informed that the meeting was to discuss his team, rather than his individual position.

137 Very much in dispute between the parties is whether, at the meeting on 25 September 2017, Mr Falco made age discriminatory remarks to the Claimant. In particular, did Mr Falco say: "you're old and set in your ways?"

138 On the balance of probabilities, the Tribunal finds that Mr Falco did say: "you're old and set in your ways" at the meeting on 25 September. We so find from our consideration of the written and oral evidence of the three witnesses concerned and consideration of all the evidence provided to the Tribunal in the case. Our reasons for so finding include:-

138.1 The Claimant, on the whole, was (as referred to above) the most convincing of the three witnesses. His evidence was succinct, straightforward, calm, appeared plausible and not to be evasive. As referred to above, the evidence of Mr Isaac and Mr Falco appeared to the Tribunal to be less convincing.

138.2 That the Claimant was set in his ways appeared to be what Mr Falco thought about the Claimant. We refer for example to his comment (referred to above) "I tried my best – he had a lot of opportunities to change".

138.3 The Claimant did make a written record of the meeting at the time it was being held. Mr Isaac accepted, when cross-examined on the point, that the Claimant was taking notes of the meeting. It was not put in cross examination of the Claimant that the notes the Claimant produced, that he said he had written during the meeting on 25 September, were not the notes he had written during the meeting, or were false.

138.4 Mr Isaac's evidence was that he threw his contemporaneous note of the meeting into the confidential waste bin. This was surprising to the Tribunal for someone being extensively advised by human resources. Mr Isaac's evidence also changed as to how many days after the meeting he took his recollection of what was said at the meeting.

138.5 The Tribunal has some concern about the length of time the Claimant took to make the allegation as to these remarks. Initially, he made only generalised references to assuming that age discrimination was a factor in the decision, rather than referring to the specific remarks. His explanation for not making the specific allegation sooner was reasonably plausible, i.e. that he was fighting to keep his job, rather than jeopardise it. In the Tribunal's experience sometimes such an explanation (the delay in making the allegation) is genuinely through giving priority to try to save their job, sometimes it is, as suggested by

Mr Arnaldi when he was cross-examined, a tactical decision to make such an allegation to bolster their case.

138.6 Mr Isaac's explanation for not challenging the Claimant's allegation when he first heard the Claimant make it in a telephone conference call was slightly less convincing. We accept that he was in his hotel room which was not the best of circumstances for responding to such an allegation. It is nevertheless surprising that, if he was indignant about the allegation as he said he was during his evidence, that he did not challenge the Claimant about his allegation when he first heard it. Another possibility is that he did not challenge the remark when it was first brought to his attention because he knew that Mr Falco had said it.

138.7 The Tribunal also has some concern about the authenticity of the remark because of Mr Falco's evidence, for whom English is not his first language, that: "set in your ways" is not an expression he would ***** use. Had we felt more confident in Mr Falco's evidence as a whole, we would have given more weight to this evidence of Mr Falco, although we have borne this part of his evidence in mind when weighing up all the evidence with which we were provided on this dispute of fact.

138.8 We also have some concern about a point referred to in cross-examination of the Claimant as to the Claimant may be adding the comment in a subsequent written note he made of the meeting, in that remark appears to have been inserted between two lines.

138.9 We accept that, as asserted in closing submissions and in Mr Arnaldi's evidence, that it would have been a stupid remark for Mr Falco to have made, particularly as a Mr Graham had previously made similar allegations against Mr Falco as those of the Claimant. Nonetheless, in the Tribunal's experience, individuals do from time to time say foolish things; and this was a meeting where no-one from human resources was present.

138.10 The remark appeared to the Tribunal to be the kind of throwaway remark Mr Falco could make.

138.11 The Tribunal does not give great weight to the fact that Mr Graham brought an age discrimination against the Respondent and attributed the age discrimination as being by Mr Falco. The case was settled so no findings of fact were made one way or another at a Tribunal hearing for his case. Nonetheless Mr Graham was another individual who considered that Mr Falco had discriminated against him because of his age, including as to his dismissal; and he felt strongly enough to bring Employment Tribunal proceedings against the Respondent.

139 The Claimant took handwritten notes of the meeting contemporaneously. These notes included the following:-

139.1 The energy market was going through change and there would be a new unit consisting of power, energy, commodities and mining. There would be a reduction of three MDs to one MD, with Marcel (Hansen) going to Dubai.

139.2 Mr Falco told him that there was a choice down to two, Ms Olive of him.

139.3 Ms Olive is the one.

139.4 The purpose of the meeting was that his position is at risk.

139.5 The proposal would go to the LCF (London Consultation Forum) on 27 September 2017.

139.6 Decision was taken in consultation with senior business partners, naming who they were.

139.7 The Claimant recorded "your many years in the bank and hands on style counted against me. You are old and set in your ways" – recording that the remark was made by Mr Falco.

139.8 The Claimant further recorded that MCO (Ms Olive) had been chosen, that there was no role for him, that his style does not open doors.

140 Later that day the Claimant made typed notes of the meeting.

141 Later that day the Claimant sent an email to Mr Falco and Mr Isaac. The Claimant disputed the decision to select Ms Olive rather than him for the position and complained that he was the best qualified candidate and that the decision appeared to be a predetermined decision. In the course of his email the Clamant stated "… I can only assume that your decision to pass me over for this particular CB role or any other CIB EMEA role does not have anything to do with skills or sector experience/expertise but rather my age (which is strange as I have as much energy and commitment as ever)." The Claimant did not, however, make a specific allegation that Mr Falco had told him that he was old and set in his ways. His explanation for not doing so was that he was trying to keep his job, or at least a job, with the Respondent; and that being confrontational at that stage might have been counter-productive.

142 The Claimant sent a further email to Mr Isaac, copied to numerous individuals including Mr Arnaldi, Ms Senecaut, and Mr Falco. He continued to complain of the decision to allocate the role to Ms Olive being a predetermined position at the meeting; and repeating his allegation that the decision to pass him over had nothing to do with his skills or sector experience and expertise but rather his age. He complained that it felt like an attempt to dismiss him based on age discrimination.

143 Mr Isaac made a brief response to the email, disputing that there had been a predetermined decision; and notifying him that he would be consulted individually.

144 The Claimant also made longer handwritten notes after his meeting on 25 September. He was challenged when cross examined on his note "old and set in your ways", it being put that it appeared to have been added by him later in that part of what he had written was space in the line immediately before the paragraph below, rather than with a line between the paragraphs (as was the case with the other paragraphs).

145 Mr Arnaldi was questioned in cross-examination about his response to the Claimant's allegations of age discrimination. His responses were, the Tribunal finds, unimpressive, in particular:-

145.1 He denied strenuously that any age discrimination existed with the Respondent, which appeared to be part of his justification for not taking the Claimant's allegations of age discrimination seriously. When asked about the emails the Claimant wrote alleging age discrimination, he referred to them not being credible, to age discrimination not being part of the bank's culture, to seeing "phantoms". In short, he appeared to have dismissed the Claimant's allegations of age discrimination out of hand without making any real attempt to investigate them.

145.2 In contrast, when challenged, he accepted that he would have investigated an employee complaining of race or sex discrimination.

145.3 He gave further justifications that he perceived the Claimant's complaint as being a strategy. Although this was a possibility, Mr Arnaldi appeared to be assuming this to be the case from the outset.

145.4 Additionally, he stated that the redundancy process had already started. This was not particularly convincing as, according to the Respondent's witnesses, the 25 September meeting was a "heads up" meeting only and not part of any formal consultation, which started at a meeting on 17 October 2017.

145.5 The Tribunal found Mr Arnaldi's dismissal of the Claimant's allegations out of hand surprising when he was aware at the time that Mr Graham had issued legal proceedings also alleging age discrimination against Mr Falco. The Tribunal would have expected an experienced and senior human resources professional to have a more open mind as to whether age discrimination might be a factor in the decision to dismiss the Claimant.

145.6 The impression given to the Tribunal by the evidence both of Mr Arnaldi and Ms Senecaut was of seeking to do the bidding of Mr Falco and Mr Isaac and to find ways of making their decision stand

up, rather than be willing to stand up to them and challenge them to satisfy themselves that age discrimination might not be a factor.

146 The outcome of Mr Graham's age discrimination litigation was that the proceedings were settled prior to the hearing, on terms on which the Tribunal is unaware.

147 A consultation meeting was held with the Claimant on 17 October 2017. Ms lSenecaut and the Claimant were present at the meeting, with Mr Isaac making a telephone call from New York to lead the meeting.

148 Mr Isaac was provided with a script by Ms Senecaut to assist him in leading the meeting. Prior to that meeting Ms Senecaut had written to the Claimant to notify him that he was at risk of redundancy; and that, subject to consultation, there was no longer a need for his role as Head of Energy.

149 In the course of the discussion, the Claimant alleged that he had been told at the meeting on 25 September that he was "old and set in his ways". Neither Mr Isaac nor Ms Senecaut challenged him as to his remark. Mr Isaac's explanation for not doing so was that he was finding the conversation on the telephone somewhat difficult to follow and decided against engaging with the point at that stage. Ms Senecaut's explanation was that she had misheard what the Claimant had alleged he had been told about being old and set in his ways.

150 Prior to 17 October 2017 meeting, the Respondents' proposals were submitted to the London Consultation Forum for comments.

151 The Consultation Forum representative emailed Human Resources to ask whether the proposal would be discussed at a LCF meeting and also that he had been asked questions about the timing of next steps by colleague concerned about the proposal. He was told that as the proposal impacted to employees there was no requirement to discuss it at an LCF meeting and that any queries should be directed to HR. There was a short exchange of emails between the LCF representative and Human Resources.

152 The transcript of the meeting reflects Mr Isaac and Ms Senecaut's parts as following the template script prepared by Ms Senecaut for the meeting, without making any meaningful response to the Claimant's complaint about being told that he was old and set in his ways; or his challenges to the rational of the decision.

153 On 24 October 2017 the Claimant sent two detailed emails to Mr Isaac, copied to various individuals including Mr Falco, Ms Senecaut and Mr Arnaldi. Most of the email was spent challenging the decision to select him for redundancy. He complained about the consultation not being genuine as the decision appeared to be a foregone conclusion, challenged the criteria and rational for the decision and put himself forward as the best candidate for the position, rather than Ms Olive. In one of the emails he also referred to Mr Falco telling him that the decision to remove his role and not to appoint him to the new role, that Mr Falco referred to his age and

many years' service counting against him; and also that he had stated "you are old and set in your ways".

154 No response was made to the Claimant's emails of 24 October prior to a meeting that had been arranged for 26 October 2017.

155 In preparation for the meeting a script had been prepared for Mr Isaac by Ms Senecaut. The note had sections under headings of the business context for the decision, the selection criteria and points of information. Included in the section on the selection criteria was a statement to confirm that the proposal to reorganise was a non-pool selection; and a script for what to do if the Claimant pushed on the selection criteria process and the rational for keeping the global commodities role. There was also a statement that Mr Isaac firmly disagreed with the statement that he was told at the meeting on 25 September that he was old and set in his ways.

156 The transcript produced to the Tribunal of the meeting on 26 October shows Mr Isaac as following Ms Senecaut script for the meeting. Of note during the meeting (and referred to in Ms Jolly's closing submissions) were at least four occasions when Mr Isaac referred to the need for a more "agile" approach and for greater "agility", the point being asserted that agility is a characteristic or associated with youth.

157 Also of note is that throughout the Respondents consultation process no efforts were made by Mr Isaac or Human Resources to look for alternative employment for the Claimant. Mr Falco, when cross-examined, referred to having spoken with some colleagues about possible alternative roles. The Tribunal doubts whether Mr Falco had any such discussions in any meaningful way. He made no reference in his witness statement to discussing possible alternative employment for the Claimant. He referred in his witness statement to discussing the proposed 2017 restructure with senior colleagues in his witness statement, but made no reference to discussing alternative employment possibilities. Even, however, if he did have any such conversation, he gave no inclination of this to the Claimant, nor did he discuss with the Claimant whether he would like alternative employment to be considered and what sorts of positions he thought he might be suitable for.

158 A further meeting took place on 9 November with Mr Isaac, Ms Senecaut and the Claimant.

159 Mr Isaac had been provided with a script for the meeting by Ms Senecaut. He covered the points in the script. The Claimant complained that the points he had raised had not been addressed, but the rational repeated and he had been given more colour on the selection process. Mr Isaac's response included that he thought they had answered the key questions – namely that it was a non-pool situation; he referred to cost reduction; and made more use of the word "agility". He referred to a side-by-side skilled benchmarking having been undertaken between him and Ms Olive and that she had prevailed. He also disputed that the Claimant's age, years of service or commitment had been mentioned or questioned.

160 The Claimant was dismissed, by letter dated 20 November 2017 from Ms

Senecaut. Amongst the points made in the letter of dismissal were:

160.1 His employment would be terminated by reason of redundancy on 27 November 2017, with the Respondent exercising its right under his employment contract to make a payment in lieu of notice.

160.2 Stating that it was their policy to try to find alternative employment; and that if he had identified the position internally or applied for a role to let them know.

160.3 Notifying him of his right of appeal.

160.4 Notifying him that a discretionary redundancy payment would be offered subject to the signing of a compromise agreement.

161 The Claimant appealed against his dismissal.

Issue 8(i)- Allegation- the comments allegedly made to the Claimant by Mr Baldrick in the appeal meeting on21 December 2017 -allegation that Mr Baldrick questioned the Claimant at length about why he felt that the bank would have discriminated against him because of his age, despite the fact that it was the Claimant's clear account that Mr Falco had expressly stated this to him –(allegation of direct age discrimination and (allegation 19(b) age discrimination harassment)

Issues 22a and 22b: Allegations as follows:

– the Respondent was resistant to agreeing any internal or external statement with the Claimant and the Claimant given no control over what statements were made.

– failure to provide documents on compensation plans and benefit schemes and return of his personal property.

– resisting the Claimant's subject access request.

- refusal to bring someone from outside the business as his companion to appeal hearing.

(all the allegations forming part of issues 22a and b are allegations of age discrimination victimisation)

162 Unhelpfully, issues 22a and 22b cross refer to paragraphs in the Grounds of Claim. We have summarised above what the Tribunal understands to be the allegations to which the list of issues refers.

The Claimant's appeal against dismissal and his request for a companion to appeal meeting

163 The Claimant, by letter dated 24 November 2017, appealed against his dismissal. He sent a detailed, reasoned letter disputing the reasons for his dismissal. Amongst his grounds of appeal and complaints were the following:

163.1 He disputed the business context and rational for the decision and that none of the points he had made in response to the business rational given to him were properly addressed by Mr Isaac. He complained that the decision was based on a perception of him being "old" and "set in his ways" and seen as the opposite of being "agile" and "flexible".

163.2 He complained about the selection criteria, including as to not having been placed in a selection pool with Ms Olive that the reasons given to him for selecting him for redundancy had changed on many occasions and that the points he was making in his consultation responses had not been addressed.

163.3 Making complaints about Mr Falco's comments about age (that he had said that the Claimant was old and set in his ways).

163.4 Challenging that Ms Olive's role as Global Head of CB Commodities was a proper justification for giving her the new role.

163.5 Complaining that a decision to make him redundant had been made prior to 25 September 2017 and before consultation.

163.6 Complaining about a lack of information or cooperation about the next steps.

164 Mr Bardick was assigned to consider the Claimant's appeal, supported by Ms Irwin from Human Resources.

165 An appeal meeting was arranged for 21 December 2017.

166 The Claimant wrote to Ms Irwin, by email dated 14 December 2017, asking if he could bring someone outside the business to accompany him to the appeal. Ms Irwin refused his request, advising him that he could bring a work colleague or trade union representative to the appeal hearing. Her explanation for refusing the Claimant's request was that this was in accordance with the Respondent's policy and that only in very exceptional circumstances would they permit someone other than a colleague or trade union representative to attend.

167 The appeal meeting lasted for about one and a quarter hours. In the course of the meeting there was a discussion of the Claimant's complaints.

168 The Claimant's perception of Mr Bardrick's response to his complaints of age discrimination was that he was dismissive of them and hostile to the possibility that there could be a culture of age discrimination within Citibank. The Claimant felt

upset at what he felt to be a dismissive response to his appeal and to his complaints of age discrimination in particular.

169 Mr Bardrick's perception of his response was that he was trying to get to the bottom of the Claimant's allegations.

170 The relevant parts of the notes of the appeal meeting and Mr Bardrick's replies to questions in cross examination showed some incredulity on his part that age discrimination could be part of the culture of the bank. He asked the Claimant why length of service or age would count against him. He told the Claimant that there was quite a lot of evidence that age and years of service do not count against people. His explanation, when cross examined on why he was expecting the Claimant to explain what was in the mind of the (alleged) discriminator was that he was trying to understand what the Claimant was feeling; and that he was surprised when he first heard of the allegation.

171 As regards the allegation that Mr Falco told the Claimant that he was old and set in his ways, on the face of it, he appears to have agreed with the Claimant that these remarks were made. The minutes of the meeting contain his words "… I don't think there's much or there doesn't appear to be much doubt that Manolo (Falco) made statements about 'You're old and set in your ways. I don't think he said 'Your role is redundant and you're not considered for other roles because you are old', but I wasn't there." When cross examined on this point, Mr Bardrick denied that this was his intention, but that he was replying to what the Claimant said.

172 It was put to Mr Bardrick in cross examination that he would not have questioned someone making an allegation of having had a directly racially discriminatory or sexually discriminatory remark in such a way, to which Mr Bardrick responded that he was trying to understand. The Tribunal found Mr Bardrick's answers when cross examined on these points unconvincing. His starting point appeared to be that age discrimination could not have occurred. This denial of the possibility of the occurrence of age discrimination, and apparent ignoring of any consideration of whether Mr Graham's complaint against Mr Falco might be similar to the Claimant's and be even a possible concern, was consistent with a disparity in how the Respondent's human resources department would have dealt with a complaint of race or sex discrimination.

173 Mr Bardrick was aware, when dealing with the Claimant's appeal, that Mr Graham had made complaints of age discrimination against him by Mr Falco, that his grievance had not been upheld, and that he intended to take the Respondent to the Employment Tribunal.

174 Following Mr Bardrick's appeal hearing with the Claimant he carried out further investigations, although he did not inform the Claimant of what he had found out in his investigations, nor give the Claimant any opportunity to discuss or comment on the further information he had obtained.

175 Mr Bardrick interviewed Mr Isaac, Ms Senecaut and Mr Falco after his appeal meeting with the Claimant.

176 The Tribunal has already referred above to some comments made in the interview with Mr Falco about not being allowed a more direct conversation with the Claimant. Mr Bardrick asked questions of the three individuals on such matters as the rational for the restructure that led to the Claimant's dismissal; and as to the Claimant's complaints of age discrimination. Both Mr Falco and Mr Isaac denied that Mr Falco had said to the Claimant that he was old and set in their ways.

177 With the help of Ms Irwin, Mr Bardrick prepared a draft appeal outcome letter and then the letter that was sent to the Claimant. The letter dismissing the Claimant's appeal was dated 2 February 2018.

178 Surprisingly, omitted from the final version of the letter, although present in the draft, were the words of the part of the Claimant's allegation that Mr Falco had told him that he was "set in his ways". Mr Bardrick, when cross examined on this, was unable to give an explanation for this change, other than he could not remember why it was.

179 The outcome of the Claimant's appeal was to uphold the decision to dismiss him and to reject his complaints of age discrimination. Mr Bardrick decided that ***** Mr Falco had not said that he was old (as stated above, he did not refer to the allegation that he had also said that the Claimant was set in his ways). When questioned as to why he preferred what Mr Falco and Mr Isaac denials that this had been said to the Claimant's allegation that it had been, together with his contemporaneous note, he said that he preferred what he heard from Mr Falco and Mr Isaac.

180 Shortly after the dismissal of the Claimant's appeal, on 21 February 2018, there was a Financial Times article stating that Citi had created a new position to oversee its corporate banking activities in natural resources across Europe, the Middle East and Africa, to be filled by Marie-Christine Olive; and also announcing the appointment of William Husband as EMEA Head of Metals and Mining reporting to Marie-Christine. This was a promotion for him from his previous role as a managing director within EMEA.

Internal and external statement about the Claimant's departure

181 Later on 20 November, after he had told the Claimant of his dismissal, Mr Isaac met Ms Olive. He informed her that the Claimant's role was redundant and that he would update the teams as soon as possible that week.

182 Also on 20 November, Ms Senecaut sent an email to the Claimant. She included in the email details of what they proposed to say to the energy teams and clients about his departure. She stated that if he had any thoughts on messaging they would be happy to listen to them.

183 There was an exchange of emails between the Claimant, Mr Isaac and Ms Senecaut. On 20 November the Claimant sent an email to Ms Senecaut, copied to Mr Isaac, notifying them that he would be appealing and stating that, in the meanwhile, it did not seem appropriate for him to comment further on communications to clients and team members. He did not wish an announcement to

be made until after the outcome of his appeal.

184 The Claimant wrote another email the following day expressing concern that they were proposing to make an announcement to colleagues and clients before they had reached agreement on it and while his appeal was outstanding. He stated that his understanding was that attempts were made to reach agreement before an announcement was made; and suggested that they were not doing so because he was challenging the decision and had made a complaint of age discrimination. He did not wish to

185 In response, Ms Senecaut replied that the opportunity for the Claimant to comment was being extended to him as a courtesy, not something that was a normal part of the redundancy process and that she and Paulo (Arnaldi) were around if he "would like to reach out."

186 Mr Isaac wrote an email to the Claimant offering to meet him to discuss any suggestions he might wish to make as to the wording of the announcement, but complaining that the Claimant had made no concrete suggestions.

187 Mr Isaac decided that the teams needed to be informed. He and Ms Senecaut met the teams, and told them that on an interim basis and that they were continuing to work with Mr Kirk and would make further announcements in due course.

188 The Claimant did not take up the offer to meet and discuss the wording of the announcements. Instead he sent a further email on 24 November with his proposals for what should be communicated.

189 On 28 November Ms Senecaut sent the Claimant a proposed form of wording for notifying clients of the restructure, which appeared to include at least some of the wording the Claimant had set out in his earlier email.

190 Viewing the email exchanges, the tone of those of Ms Senecaut and Mr Isaac appeared to be constructive, of trying to work together with the Claimant to discuss the wording, whilst also conscious both of the need to do so promptly and also not wanting to be seen to be doing anything that would prejudice his appeal. The Claimant's emails, understandably having just been dismissed, displayed hurt and anger and he did not take up the offers to meet to discuss the wording.

Provision of compensation plans for the Claimant and return of his property

191 Following his dismissal, by email dated 29 November 2017, the Claimant wrote to Ms Senecaut asking amongst other points, for details of various benefits and compensation schemes provided by the Respondent; and as to how his personal property would be returned to him.

192 Ms Senecaut spoke with Ms Irwin, who was to be the Human Resources input to dealing with the appeal, as to which of them would deal with the requests. Ms Senecaut sent an email to the Claimant, dated 4 December 2017, responding to the points made by the Claimant. She gave him the names of contacts for specific

questions about benefits; and stated that they would arrange for his property to be returned to him.

193 There was a further exchange of emails between the Claimant and Ms Senecaut during December, with Ms Senecaut giving some further details, but with the Claimant's property still not having been returned to him.

194 On 17 January 2018 the Claimant's solicitors wrote to the Respondent, stating that their client had made substantial efforts to obtain copies of the incentives and benefit schemes that applied to him and asking for them; and stating that some remaining items of his property had not been returned to him, including business cards and books.

195 The recipient of the email, a Ms Nelson, responded that she would follow up. She sent an email two days later giving details of the different individuals to contact as to different elements of the schemes he was asking for details of; and that the request for contacts was being looked into and should be resolved shortly. Most of the contact details had already been provided by Ms Senecaut.

196 The Claimant's solicitors sent follow up emails complaining about the delay in returning the remainder of the Claimant's personal property. On 13 February an email was sent to the Claimant, stating that his items would need to be boxed up and asking him when it would be convenient to send them to his home. The team managed by Mr Wallace was responsible for reviewing and sending items to departing employees and were the ones who approved the Claimant's request to be sent his business cards.

197 When Mr Wallace was challenged in cross examination about why the Claimant was not sent his belongings until February 18 by the members of his team, he accepted that there was a delay, but could not explain what caused it. He disputed that it was the case that the Claimant's age discrimination allegation was the reason for the delay.

Data subject access request

198 The Claimant's case is that the Respondent was extremely obstructive and ultimately did not comply with his data subject access request; and that this was because he had raised complaints of age discrimination.

199 On 7 December 2017 the Claimant wrote to Ms Nelson from the Respondent with a data subject access request. Ms Nelson's job title was General Counsel for the EMEA division of the Respondent. The Claimant accepted in cross examination that his subject access request was broad, potentially covering his twenty six years of employment with the Respondent; and that it was not unreasonable for the bank to try to reduce the scope of the request.

200 Ms Nelson gave a brief acknowledgement of the Claimant's request four days later; and Ms Irwin gave a more substantive response on 15 December. She complained that the request was too broad in scope to be reasonable and proportionate; and asked for additional information, such as the specific custodians

who may have been involved in the personal data he was seeking.

201 On 18 December, the Claimant sent an email replying to Ms Irwin's email. He gave a list of 53 individuals involved in processing his data; and agreed to limit the data request to 1 January 2010.

202 Ms Irwin replied on 20 December, complaining that their duty was to carry out a reasonable and proportionate request and that his request, involving 53 employees would be immense. She also complained that the timescale from 1 January 2010 was too extensive to be reasonable and proportionate and made further requests and explanations.

203 The Claimant wrote to Ms Irwin on 21 December, agreeing to restrict the scope of his request to 20 individuals, naming who they were, and to limit the scope of his request to five years. Ms Irwin responded that, initially, the request would be limited to a three year period going back from December 2017; and that the volume of data retrieved would then be evaluated as to the cost and time implications of retrieving data for a further two year period; and would seek to respond within the statutory 40 day period with effect from the previous day.

204 On 29 January 2018 Ms Irwin wrote to the Claimant, notifying him that they were taking steps to process and review in excess of 187,000 electronic items identified through the electronic search; and sending him the hard copy of his personnel file in partial compliance with the request.

205 In late January and early February there was an exchange of emails between the Claimant's solicitors and Ms Nelson, in which the Claimant's solicitors were complaining about the delays and asserting that the Respondent was in breach of the Data Protection Act; and that the delays were because the Claimant had made complaints of discrimination. She replied that she understood that 54,000 emails had been retrieved and that they had to review them.

206 On 16 February 2018, DAC Beachcroft wrote to the Claimant's solicitors, notifying them that they had been instructed by Citibank in connection with the subject access request; stating that they seeking to comply with the request as soon as reasonably practicable; and would expect to be able to do so on or before 2 March.

207 On 2 and 9 March the Respondent's solicitors provided documents, although the Claimant's solicitors were not satisfied with the extent of the documents provided. By then the Claimant had issued Employment Tribunal proceedings (on 20 February 2018); and the Claimant's solicitors also made a complaint to the Information Commissioner that that the Respondent had not complied with the requirements of the Data Protection Act ("DPA").

208 The Information Commissioner responded in May 2018. They stated that it appeared to be unlikely that the Respondent had complied with the DPA within the required 40 day timescale. They stated that would need further evidence as to whether they had still not provided all the evidence to which they were entitled.

209 On 13 July 2018 the Respondent's solicitors wrote to the Claimant's solicitors, asserting that their client had complied with their obligations under the DPA; acknowledged that part of their response had been outside the 40 day period; and disputed that this was because the Claimant was pursuing legal proceedings.

210 The data subject access request then appears to have merged with disclosure requests in this litigation. As referred to in this judgment, the parties representatives disputes as to disclosure of documents was considered by Judge Allen, who granted in part the specific disclosure applications on behalf of the Claimant (see paragraph 11 above).

Claimant's explanation for not bringing his claims earlier

211 The Claimant's explanation for not bringing his claims earlier was that he was not aware of any age discrimination against him until the meeting he had with Mr Falco and Mr Isaac on 25 September 2017. He stated that only in the follow up and review of documents through the consultation, appeal and disclosure did he become aware that his age had played a role in the 2015 and 2016 performance reviews.

Closing Submissions

212 Both parties' representatives provided typed and oral closing submissions. They had an opportunity to read and comment on each other's typed submissions before giving their oral submissions, whilst stating that failure to respond to a particular point did not mean agreement with it.

213 Both representatives also referred to time pressures and that missing a point out would not mean that it had been abandoned.

214 Both representatives gave submissions as to the relevant law; and the facts the Tribunal was invited to find.

215 We do not repeat the submissions in detail. We found them helpful, however, and have borne them in mind.

Conclusions

Complaints of age discrimination

216 Although Issues 8 list 10 different alleged acts of less favourable treatment, various of them can conveniently be considered together. 8 (a) and (c) can be grouped together; 8 (b) and (d) can be grouped together; as can 8 (e), (f), (g) and (h). It was the information provided as part of the 2015 and 2016 performance reviews that was the Respondent's explanation for, the Claimant's lower grades in 2015 and 2016 than in previous years; and it was a provision of information and skillset (also described as "stress testing") that was the Respondent's explanation for, the Claimant's dismissal.

217 For most of the issues listed as complaints of age discrimination there is no

dispute that the Claimant received detrimental treatment. For example, he received lower grades than in previous years, he was dismissed, he wanted a companion at his appeal meeting other than a trade union member of colleague and was refused this, there was an admitted delay in returning his property, the Respondent accepted that the Claimant did not receive the information provided in response to his subject access request within the required timescales. The Respondent disputes that at least one of the allegations of age discrimination amounted to detrimental treatment, namely Mr Bardrick's questions of the Claimant at the meeting to consider his appeal against being dismissed. The key issue in this case is, therefore, whether the Claimant was treated less favourably than his comparator, or a hypothetical comparator, because of his protected characteristic, namely his age.

218 The Tribunal has considered whether the Claimant has proved, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act or acts of age discrimination of which the Claimant complains.

219 The Tribunal has also considered, as it has been encouraged to do in many cases (such as *Nagarajan v London Regional Transport and Shamoon v Chief Constable of the Royal Ulster Constabulary*) why the Claimant received less favourable treatment. Was it on the proscribed ground or was it for some other reason?

220 The Tribunal has concluded that the Claimant has proved such facts, at least for the allegations concerning the Claimant's performance reviews and his dismissal, including because:

220.1 Mr Falco's remark "you're old and set in your ways," was an act of age discrimination in itself.

220.2 As recorded in the Tribunal's findings of fact the remark by Mr Falco represented his view of the Claimant, for example, by his response in cross-examination "I tried my best – he had a lot of opportunities to change".

220.3 The Claimant received a rating of 2 every year from 2006 to 2013, then a rating on 1 in 2014. His drop by two grades calls for an explanation. Additionally, the differences in the feedback received for the Claimant as an important part of the explanation for dropping two grades from 2014 to 2015 and 2016 appeared relatively similar during the three years in question (although as highlighted in the findings of fact there were some differences).

220.4 Taking together, some of the statements made by Mr Turek, Mr Falco, Mr Isaac and Mr Bardrick could show, possibly unconsciously, the presence of age discrimination. We refer to our findings of fact earlier above, such as Mr Turek's comments in the Claimant's performance review document, to Mr Falco's comments

quoted in the Financial Times concerning the recruitment of Mr Davison, to Mr Bardrick's comments published in the Evening Standard and to Mr Isaac's frequent references to the word "agile" as part of his explanation for selecting the Claimant for redundancy.

220.5 The statistical information provided to the Tribunal shows that during 2015, out of 48 managing directors, only one was 57 or more; and out of 51 managing directors in 2016 only two were 57 or over.

220.6 The Claimant's complaints of age discrimination were treated less seriously than a complaint of sex or race discrimination would have been treated, as described in our findings of fact above. The explanation given for not investigating the Claimant's allegations of age discrimination independently of the consultation process leading to his dismissal did not stand up. According to the Respondent's case, the consultation process with the Claimant did not start until the meeting on 17 October, by which time the Claimant had already complained of age discrimination. It was dismissed out of hand, at least until the Claimant's appeal against dismissal. The Respondent's witnesses responses as to why they did not consider it relevant that Mr Graham had made complaints against Mr Falco or age discrimination were evasive.

220.7 More generally the Respondents' witnesses treated with some incredulity that there could be the existence of any age discrimination within the Respondent. Although a large organisation, they do not monitor age to investigate the possibility of age discrimination.

220.8 Although Mr Bardrick expressed surprise during the Claimant's appeal hearing as to the Claimant's allegations of age discrimination, he appeared to have agreed that Mr Falco made statements about the Claimant being old and set in his ways; and the words "set in your ways" that were in his draft appeal outcome letter were removed from the letter that was sent to the Claimant.

220.9 As set out below the Claimant was unfairly dismissed. Unfair or unreasonable treatment is not necessarily discriminatory treatment. Neither, however, would we assume that the Respondent habitually dismisses its employees unfairly regardless of their ages. Dismissing an employee unfairly calls for an explanation as to the employer's motives for doing so.

Provision of information leading to, and the awarding of lower grades for the Claimant in his 2015 and 2016 performance reviews

221 Why did the Respondent provide the information which led to the Claimant's lower grades and give him the lower grades concerned? Was it on the prohibited

ground or was it for some other reason? Alternatively, to ask the question in the way indicated in the case of *Igen v Wong,* has the Respondent proved, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of age?

222 ***** The Tribunal finds and concludes (narrowly) that the treatment was not on ***** the prohibited ground and was in no sense whatsoever on the grounds of age including because:

222.1 The Claimant, up to the time of the events that gave rise to this litigation, had never considered that he had been subject to any form of age discrimination, or that he had any reason to doubt the bank's commitment to diversity. He was employed by the Respondent for approximately 26 years. If there was a systematic policy of awarding lower performance grades to employees progressing into their 50's with a view to subsequently dismissing them, there is at least a possibility that the Claimant would have heard of it during these years, whether through gossip or other means.

222.2 The Respondent has a sophisticated appraisal system with a large number of different factors taken into account; and more sophisticated, the Tribunal finds from its experience of hearing cases involving other large financial institutions, than others to whom our attention has been drawn.

222.3 A considerable amount of the data provided was objectively measurable, for example the revenue generated by the Managing Director concerned and by the team managed by the Claimant, the written feedback provided by clients and partners (some of whom were self selected by the Claimant, some were not).

222.4 The calibration teams that considered the performance ratings proposed involved a wider number of individuals within the organisation than the individual team that the Claimant and his manager was in, so that any overtly discriminatory marking would have been at risk of challenge from the wider members on the calibration teams in London and New York.

222.5 The calibration teams involved a Human Resource presence. Although the Tribunal was not impressed with the evidence of the Respondent's Human Resources witnesses, the Tribunal considers that their presence would make it less likely that any overtly age discriminatory remarks would have been made. This does not rule out the possibility that age discrimination did take place.

222.6 Although the calibration meetings were a counter balance to the ability of individual managers to decide the ratings of those they managed, the fact that an average of five minute allocated to each rating suggest that, on the whole, the managers recommendations

were accepted without extensive scrutiny or discussion at the meetings.

222.7 It was surprising to the Tribunal that someone who had got markings of 2 from every year from 2006, including during the financial crisis when, the Tribunal was informed, there were great changes within the workforce, that the Claimant's rating would drop down from 1 – 3 for the two following years.

222.8 The fact that Mr Turek was a manager presenting the Claimant as meriting a performance rating of 1 in 2014 does not suggest that age discrimination would be a factor in him proposing a rating of 3 for the following year.

222.9 Mr Turek, Mr Khullar and Mr Isaac discussed their proposed ratings for the Claimant with Mr Falco and with others, such as Mr Wallace and Mr Prentice. Mr Falco in turn discussed performance ratings with other managers outside the calibration meetings. The Tribunal accepts the Claimant's case, therefore, to the extent the Mr Falco could have influenced the Claimant's performance assessment. Managers, on the whole, in the Tribunal's experience, will be mindful of the views of their line manager. Additionally, although objective hard data was provided in the performance assessments, as referred to in the findings of fact above, there was also room for individual judgment or discretion from the managers giving their scores for the individuals they were assessing.

222.10 The partner and client feedback for the Claimant for the years to which the Tribunal was referred had a sufficient degree of similarity to suggest that the Claimant was more harshly marked in the latter two years than the previous years. For instance, in many years he had both positive and negative feedback, including comments about being "abrasive at times".

222.11 There was additional reference in the 2016 performance review data to the Claimant being described as "narcissistic", showing that at least one manager had a particularly poor opinion of the Claimant. There was some contradiction in the Respondents' witnesses evidence as to how this kind of feedback should be treated, with Mr Isaac referring when cross-examined to treating such feedback with scepticism, whereas Mr Turek appeared to attach considerable weight to that remark.

222.12 The Claimant during cross-examination appeared to accept that his grades in 2015 and 2016 should have been at least 2, rather than arguing with any force that they should have been one. To the extent that he did so, and that he accepted that there was a greater emphasis on the Respondent's part of partnership he gave at least some limited support to the Respondent's case.

222.13 We accept, nevertheless, that there was less of a difference in partner and client feedback for the years to which the Tribunal was referred and one would expect for factors that count for 45% of the overall scoring where the difference in feedback was less marked than seen to justify the difference in score.

222.14 Nevertheless, the reference to the Claimant being "narcissistic" and "a nightmare to work with" is a strongly negative comment, even although Mr Isaac accepted in cross-examination that the remarks made were to be taken with a degree of scepticism.

222.15 As the Tribunal explores further below the age discriminatory remarks and dismissal of the Claimant appeared to the Tribunal to be more in the nature of an opportunistic response to the events in 2016 (Mr Hansen moving from his position as a Managing Director in the EMEA division in which the Claimant was also a Managing Director, rather than a long standing strategy).

222.16 The Tribunal considers that the Respondent's explanation of partnership working carrying more weight for the 2015 performance assessments than those in 2014 does have some force. Not only did various of the Respondents' witnesses refer to this change in emphasis, that the Claimant, when cross-examined, also referred to it. This was a reasonably plausible explanation for why the Claimant's performance ratings dropped in 2015 and 2016 compared to earlier years.

223 These complaints of the Claimant, therefore, fail.

Issue 19A – comments allegedly made to Claimant by Mr Falco in the meeting on 25 September 2017 – harassment relating to age complaint

224 Mr Falco's remark to the Claimant "you're old and set in your ways "was unwanted conduct – it upset and angered the Claimant. He complained about the remark subsequently. It was a negative, age specific, remark and clearly related to his age.

225 Whether or not Mr Falco's remark had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, it certainly had that effect. It was reasonable for the conduct to have that effect. It was humiliating and insulting for the Claimant, who had had a long and successful career with the Respondent, to be told that he was old and set in his ways as part of the justification for favouring Ms Olive in preference to him for the new role being created.

226 ***** This complaint, therefore, succeeds against the First Respondent and Mr Falco.

Issues 8E, 8F, 8G, and 8H – provision of information and opinions leading to Claimant's dismissal, skillset document, the decision to dismiss the Claimant and the Claimant's dismissal – allegations of direct age discrimination

227 As with the issues concerning the Claimant's performance grades in 2015 and 2016 the Tribunal has considered both "the question why" and the guidance outlined in *Igen v Wong*. We do so in considering all the other issues, although we avoid repeating ourselves in each of the subsequent allegations.

228 The Tribunal considers and finds that the information leading to, the skillset document, decision to dismiss the Claimant and the Claimant's dismissal were, at least to the extent of having an important effect on the outcome, on the prohibited ground of the Claimant's age including because:

228.1 Mr Falco's perception of the Claimant was that he was old and set in his ways and that Ms Olive was not.

228.2 Mr Isaac shared Mr Falco's perception of the Claimant, although probably not to such a conscious extent. He supported Mr Falco's denial of the remark and did not challenge him. * He perceived the Claimant as being less "agile" than Ms Olive and thus less suited for the position in question.

228.3 The Claimant's age was not, however, the only factor in the decision to dismiss him. The Tribunal accepts that Mr Isaac and Mr Khullar did want to reorganise the department as, in the Tribunal's experience, many incoming managers do. The opportunity for a reorganisation was presented by Mr Hanen leaving his position and moving to another part of the Respondent's organisation.

228.4 The Tribunal considers and finds, therefore, that the decision to make the Claimant redundant, and the process undertaken to seek to give credence to the decision was an opportunistic response to the circumstances presented in 2016; rather than a long standing desire and plan to prepare the ground work in earlier years, through the performance reviews in 2015 and 2016, in order to dismiss him in 2017.

228.5 There are compelling reasons, set out above, for why the burden of proof shifted to the Respondent to disprove age discrimination in respect of the processes leading to the Claimant's dismissal and the dismissal itself. The Respondent has fallen a long way short of satisfying the Tribunal, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

228.6 The Tribunal also concludes that Mr Bardrick's upholding of the decision to dismiss the Claimant was tainted with age discrimination, although possibly unconscious. Whether consciously or

> unconsciously, he agreed with, or at least wished to support, Mr Falco and Mr Isaacs views of the Claimant and to close his mind as to the Claimant's ground of appeal that he was being dismissed because of his age. As set out in the Tribunal's findings of fact above there is a strong possibility that Mr Bardrick did believe that Mr Falco had made the remark in question although, if that was his opinion, there is a contradiction between how he questioned the Claimant and what he truly believed had happened. His questioning of the Claimant at the appeal meeting suggested incredulity at the possibility of age discrimination on the Respondent's part, rather than an open mind. When conducting further investigation of the Claimant's allegations he accepted Mr Falco and Mr Isaac's denials without any great scrutiny and chose to support Mr Falco with whom he had had a close working relationship for the years when they had a joint managerial responsibility. It suggested a possible desire on his part to support Mr Falco's version of events, despite believing that Mr Falco had telling the Claimant that he was old and set in his ways as part of his explanation for preferring Ms Olive for the role in question.

229 ***** These complaints of the Claimant, therefore, succeed against the First Respondent, Mr Isaac, Mr Falco and Mr Khullar.

Issues 11A, 11B and 11C – the awarding of lower grades in 2015 and 2016 and dismissal of employees because of long service

230 As described above the Tribunal does not find that there were any such practices.

231 The statistical information with which the Tribunal was provided was insufficient, as set out in the findings of fact above, for the Tribunal to consider that there was a practice of awarding lower grades because of long service. Additionally, as set out above, the Tribunal does not conclude that the Claimant's awards were directly age discriminatory.

232 Nor does the Tribunal conclude that there was a Practice, Criterion or Practice ("PCP") of dismissing employees because of long service. As described above the Claimant's dismissal was an opportunistic response to events, rather than part of a PCP to dismiss employees in general because of long service.

233 The indirect age discrimination complaints, therefore, fail.

Issue 8J and 19B – comments allegedly made to Claimant by Mr Bardrick in the appeal meeting of 21 December 2017 – direct age discrimination complaint, alternatively age discrimination harassment

234 The Tribunal considers that this allegation is better considered as a direct age discrimination allegation than an age discrimination harassment allegation.

235 The threshold of a humiliating etc environment under section 26 EqA is a higher threshold than that of detrimental treatment required by section 13 together with section 39.

236 The Claimant was taken aback by the content and manner of Mr Bardrick's questioning of him about his age discrimination allegations. He was upset by them. The Tribunal is not convinced, however, that the questions went so far as to create the environment required under section 26 EqA.

237 In respect of Mr Bardrick's questioning, did he treat the Claimant less favourably than he would have treated a younger employee making a complaint of direct age discrimination?

238 The Tribunal considers that he did; or at least the Respondent has failed to prove, on the balance of probabilities, that he did not, including because:

238.1 His decision to uphold the dismissal of the Claimant was tainted by age discrimination, as set out above.

238.2 His mindset, as described above, was to support Mr Falco, rather than to have an open minded attitude to the Claimant's age discrimination complaints.

238.3 He possibly did believe that Mr Falco had made the remarks, although at the same time expressing surprise, or incredulity, that there could be any age discrimination involved in the decision to dismiss the Claimant.

239 This complaint of the Claimant succeeds, therefore, as a direct age ***** discrimination complaint against the First Respondent and Mr Bardrick.

Issues 22A and 22B – age discrimination victimisation allegations

240 The Tribunal has considered whether Ms Irwin's refusal of the Claimant's request to bring someone outside the business to accompany to the appeal was an act of age discrimination victimisation. In view of the facts found by the Tribunal for this complaint, it is doubtful whether the burden of proof shifts to the Respondent on this issue.

241 Whether or not the burden of proof passes to the Respondent to disprove unlawful age discrimination for this issue, the Tribunal has concluded that no age discrimination was involved. Firstly, the Respondent's policy was to permit only a trade union representative or work colleague to such a hearing. Secondly, the policy was in line with the statutory requirements of Employment Relations Act.

242 Thirdly, the Tribunal has not reason to doubt that a similar response would have been given to any employee in such circumstances, whether they had made a complaint of age discrimination or not, as their policy was as stated above.

243 This complaint, therefore, fails.

244 The second allegation of age discrimination victimisation the Tribunal has considered was the statement announcing the Claimant's departure.

245 As referred to in the Tribunal's findings of fact, Ms Senecaut and Mr Isaac were willing to consider the Claimant's suggestions and, at least to some extent, did take account of them. They were also under time pressure to tell the Claimant's team and clients of his departure, whilst also conscious that he had an appeal pending. The Claimant on his part did not take up the offer to meet with Mr Isaac and discuss the wording of the statement.

246 The Tribunal is also doubtful whether the burden of proof shifts to the Respondent for this particular allegation. If it does, the Tribunal is satisfied that the treatment in question was in no sense whatsoever on the prohibited ground, for the reasons above.

247 The Tribunal has considered, next, whether the delay in sending the Claimant information about his benefits and in delaying his belongings was an act of age discrimination victimisation.

248 The Tribunal does not find or conclude that they were. Ms Senecaut was in correspondence with the Claimant about his benefits package. Both she and Ms Nelson gave details of who to contact as to the different elements of the schemes- the Tribunal does not consider that they were being deliberately obstructive towards the Claimant, but seeking to help him get in touch with the people who could give him the information he wanted.

249 This complaint of the Claimant, therefore, fails.

250 As regards the return of the Claimant's belongings, this was dealt with by the team managed by Mr Wallace.

251 The Tribunal agrees with a submission made by Mr Carr in his closing submissions that it would have been vindictive on the part of the individuals concerned to have been delaying the provision of the details requested and the return of the Claimant's belongings. The Tribunal does not believe, or find, that Ms Senecaut was being vindictive towards the Claimant in these respects. Nor does it find that Mr Wallace, who made a reasonably good impression in his evidence, was being vindictive towards the Claimant as regards the return of his belongings. Nor does the Tribunal consider, or find, that the more junior individuals in Mr Wallace's department would have had any such vindictive motivation.

252 These complaints fail.

253 The Tribunal has also considered the Claimant's data subject access request – was the manner of the treatment of it an act of victimisation?

254 The Respondent failed to comply with the Claimant's request within the time limits required under the Data Protection Act, as appeared to have been conceded by the Respondent's solicitors. This failure is probably sufficient to shift the burden of proof to the Respondent to prove that their responses to the Claimant's subject access was not on the prohibited ground.

255 The Tribunal accepts the Respondent's explanation for the delays in providing the Claimant with subject access information. His initial request was very wide. The individuals in the Respondent concerned wanted, not unreasonably, to narrow the scope of their search to make it more manageable. They entered into negotiations with the Claimant and his solicitors to narrow the scope of it. During the course of the negotiations, the Claimant presented his claim and the Respondent's solicitors were dealing both the subject access request and disclosure of relevant documents required to comply with case management orders made in this litigation. The representatives did not agree with the extent of disclosure required and, as referred to earlier above, Judge Allen considered the Claimant's application for specific disclosure of documents. He granted the request some elements of the application and refused others.

256 This complaint of the Claimant, therefore, fails.

Unfair Dismissal Complaint

257 The Respondent's pleaded case was that redundancy was the reason for the Claimant's dismissal, or alternatively some other substantial reason, namely a re-organisation of responsibilities. The Claimant's pleaded case was that the Claimant was not genuinely redundant and his dismissal was an act of age discrimination.

258 Has the Respondent shown that the reason or principal reason for the Claimant's dismissal was redundancy, or alternatively some other substantial reason, namely a re-organisation of responsibilities.

259 The Respondent did not provide the Tribunal with a structure chart either of its proposed re-organisation that led to the Claimant's dismissal, or as to the members of the EMEA teams before and after the Claimant's dismissal.

260 Shortly after the dismissal of the Claimant's appeal Mr Husband was promoted from the position of Head of Metals and Mining, albeit reporting to Ms Olive rather than, as the Claimant had done, to Mr Isaac. Although the Tribunal was not provided with details of Mr Husband's position after his promotion, the description of the announcement in the Financial Times referred to in the findings of fact above suggests that he may have taken over the management and responsibilities of the position held by the Claimant, although being under the management of Ms Olive, rather than reporting directly to Mr Isaac, as the Claimant did. The work of the particular kind performed by the Claimant may, therefore, have been done by Mr Husband's. The Tribunal is also unaware of whether, in turn, the Respondent recruited someone to fill the role that had previously been performed by Mr Husband.

261 The Tribunal is not clear, therefore, whether the requirements of the business for employees to carry out work of a particular kind did in fact cease or diminish, so as to fulfil the statutory definition of redundancy, on order potentially for this to be the reason or principal reason for the Claimant's dismissal.

262 The Respondent has shown, however, that there was a re-organisation of the Energy, Power and Metals and Mining franchise where the Claimant worked. Mr Hanen was one of the managing directors and, on his leaving his position in the summer of 2017, the position was not filled. Nor, even if Mr Husband was promoted to a position that wholly or mainly filled the role carried out by the Claimant, was his line manager Mr Isaac. He continued to have Ms Olive as his line manager, as he had prior to his promotion.

263 The Tribunal is satisfied, therefore, that there was a re-organisation. The question is then whether the re-organisation was the reason or principal reason for the Claimant's dismissal, in view of the Tribunal's finding that the Claimant's dismissal was an act of age discrimination.

264 As described in the Tribunal's findings of fact, the Respondent's dismissal was a response to the events that presented themselves on Mr Hanen's departure, rather than part of a long standing plan to remove him because of his age. It was one of the reasons for dismissing him, but not the principal part.

265 The Tribunal is satisfied, therefore, that the Claimant was dismissed for some other substantial reason, namely a re-organisation, a fair reason for dismissal within the meaning of section 98(1) ERA.

266 The Tribunal has gone on to consider whether the Claimant's dismissal was fair or unfair within the meaning of section 98(4) ERA.

267 In the circumstances of the case (including the size and administrative resources of the Respondent) did the Respondent act reasonably or unreasonably in treating the re-organisation concerned as a sufficient reason for dismissing the Claimant, in accordance with equity and the substantial merits of the case? The Tribunal has concluded that neither the procedures adopted by the Respondent nor the substantive decision to dismiss the Claimant fell within the band of reasonable responses a reasonable employer might have adopted, including for reasons set out in our findings of fact and for each of the following reasons:-

267.1 The dismissal of the Claimant was an act of unlawful age discrimination.

267.2 The Claimant was not given any warning as to the proposed re-organisation until after the decision to re-organise had been made and, as set out in the Tribunal's findings of fact, the decision to select the Claimant for dismissal on the (stated) grounds of redundancy had been made. The so called consultation with the Claimant was not genuine consultation, for the reasons set out in the findings of fact above.

267.3 If any efforts to seek alternative employment were made for the Claimant which, as set out in our findings of fact, we doubt, they were inadequate. The Claimant was an employee for over twenty six years. He was trying to keep his job, or be placed in the position for which Ms Olive was to be appointed. No effort was made by the Respondent to have a meeting to discuss with him what might be possible areas of interest for him to work in and for which he might be suited.

267.4 The Claimant's complaints of age discrimination were, in effect, ignored until the Claimant's appeal although, in view of the Respondent's policy they should have been considered as they were made before the Respondent's so called consultation had started.

267.5 The conducting of the Claimant's appeal by Mr Bardrick was also an act of age discrimination, as described above.

267.6 After meeting the Claimant to discuss his grounds of appeal, Mr Bardrick carried out further investigations. He did not reconvene the meeting or give the Claimant any opportunity to comment on the outcome of his further investigations before reaching his decision on the outcome, to dismiss the Claimant.

268 The Claimant's dismissal was, therefore, unfair.

Time limits considerations

269 The Claimant's ACAS certificates for the first to fourth Respondents were first received by ACAS on 21 December 2017. As all the matters for which the Claimant has made successful claims against these Respondents took place less than three months before then, they are all within time, without needing to consider whether they were acts extending over a period. The complaint against Mr Bardrick relates to an act which took place less than three months before the Claimant's claim form was presented, so is also within time.

272 The earlier matters about which the Claimant has complained, namely relating to his 2014 and 2015 performance reviews were unsuccessful, so it is unnecessary to consider the issue of time limits.

Next steps

273 The parties are encouraged to seek to settle matters themselves.

274 Although submissions were made as to whether the Claimant would, or might, have been dismissed if fair procedures had been followed, and the Tribunal has considered them, we have decided to leave judgment on that until the remedy hearing (if the parties have been unable to settle the case). As referred to in paragraph 14 above, we understand that the Respondent will seek to contend that the Claimant committed gross misconduct after his dismissal. We have decided to

consider remedy as a whole at any remedy hearing, rather than deal with part of it now.

274 Meanwhile, a two hour Preliminary Hearing (closed) will be conducted by Employment Judge Goodrich on **Monday 5 August 2019, at 10.00 am**, listed for two hours, to discuss case preparations needed for a remedy hearing. The parties should bring with them dates of availability/unavailability, so that the remedy hearing can be listed on that date. The Judge has in mind listing the remedy hearing in October or November.

Employment Judge Goodrich

2 January 2020