EMPLOYMENT TRIBUNALS

Claimant: **Ms Anca Lacatus**

Respondents: **(1) Barclays Execution Services Limited**
(2) James Kinghorn
(3) Avneesh Singh

Heard At: **East London Hearing Centre (by Cloud Video Platform)**

Before: **Employment Judge John Crosfill**
Members: **Ms G Forrest**
Dr L Rylah

On: **12, 13, 14, 19, 20, 21, 22, 26, 27, 28, 29 January 3, & 4 February (hearing days) and 5 February & 15 March 2021 (in chambers).**

Representation

Claimant: **Ms I Ruxandu of Counsel (Direct Access and Pro Bono)**

Respondent: **Ms S Berry of Counsel instructed by Dentons LLP**

JUDGMENT

1. **The Claimant's claim that the Respondent failed to make reasonable adjustments to her hours of work brought pursuant to Section 20, 21 and 39(5) of the Equality Act 2010 succeeds against the First Respondent.**

2. **The Claimant's claim of sex discrimination by the Second Respondent using the expression 'birds' in the workplace and brought under sections 13 and 39 of the Equality Act 2010 succeeds as against the First and Second Respondent.**

3. **All the Claimant's other claims brought under sections 13, 15 20 & 21 and 27 of the Equality Act 2010 fail.**

4. **The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.**

5. **The Claimant's claims for breach of contract and/or unlawful deduction from wages fail and are dismissed.**

6. **The issue of what remedy the Claimant is entitled to because of these decisions will be decided at a separate remedy hearing.**

REASONS

Introduction

1. The Respondent is a company that is a part of the Barclays Bank Group and is a service company providing technology, operations and functional services across the Barclays' business. We shall refer to that company as 'Barclays'.

2. The Claimant worked as an Analyst in Barclays' Rates Options Structured Trading Middle Office department ("ROST IB MO") from 8 June 2016 until her dismissal which took effect from 13 April 2020. She was initially engaged under a contract between herself and Resource Solutions before being employed directly the Barclays from 2 January 2018.

3. The Second Respondent, James Kinghorn, was the Claimant's direct line manager from the commencement of his employment in October 2017. At all material times he reported indirectly to the Third Respondent, Avneesh Singh.

4. Avneesh Singh has been employed by the Respondent for 15 years. In 2016, although he was not initially one of her line managers, he was involved in the Claimant's engagement in the ROST IB MO team (which we shall refer to as the ROST team unless we need to be more specific). Avneesh Singh later took on the managerial responsibility for the ROST team and in that role, he managed the Claimant's manager and in turn the Claimant.

5. During the Claimant's engagement (to use a neutral term) she experienced increasingly debilitating symptoms of Endometriosis as well as a deterioration in her mental health. In December 2019 she commenced a period of sick leave.

6. While the Claimant was on sick leave Barclays announced that it was making redundancies within the ROST department. The Claimant issued her first claim at that stage. In that claim the Claimant brought claims for

discrimination, victimisation and harassment relying on the protected characteristics of disability, race and sex. She has also brought claims for equal pay where she relies upon James Kinghorn as a comparator. She also includes a claim for unauthorised deductions from wages.

7. The Claimant was scored against other employees at the same grade and was ultimately told that she had been displaced from her role. The Claimant's employment ended after a period of displacement leave which included her notice. She then presented her second claim which included a claim of unfair dismissal but also included further claims under the Equality Act 2010.

References to 2 non-parties

8. Prior to the Tribunal hearing evidence Ms Berry drew attention to the fact that the names of two individuals featured frequently in the evidence but, in the claims that had been permitted to advance, neither were said to have committed any unlawful act. One of these individuals was a former team member with the Claimant. She had been seriously unwell before being made redundant. Ms Berry was, in our view correctly concerned, that it was not necessary or desirable for this individual's health difficulties to be a matter of public record. We agreed that her identity was not relevant to anything the Tribunal needed to decide.

9. The second individual had been the Claimant's first line manager. The Claimant said that she had been mistreated by this person who she said had discriminated against her on the grounds of her nationality. The Claimant had not included any such claim in her ET1 and was later refused permission to amend the claim. The Tribunal was not required to ascertain the truth of the Claimant's allegations against her line manager but only whether her complaints about what occurred amounted to protected acts for the purposes of victimisation claims. The Respondent had not sought to call this individual as a witness. She had left their employment some time before. Ms Berry suggested that it would be unfair to link this individual's names to allegations where she had no standing in the proceedings, nor was she a relevant witness.

10. In the exercise of our power to limit the evidence we heard to that strictly necessary to determine the claims we directed, with the consent of the parties, that references to anything done by these individuals be restricted to referring to them as 'Colleague A' and 'the Claimant's First Line Manager'. That is how they are referred to in these reasons. We do not believe that it was necessary for the Tribunal to invoke its powers under rule 50 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 but, if it were necessary, we consider that the balancing exercise required by that rule falls decisively in favour of anonymising the names of these two individuals.

The hearing

11. In advance of the hearing there had been several case management

hearings. The Claimant had completed the claim form in her first case 3201295/2019 by herself and it was not entirely clear what the scope of the claims were. The case had been listed, with standard directions, for a 3-day hearing in July 2020. At a preliminary hearing on 12 September 2019 the Claimant represented herself. Employment Judge Gardiner set out case management orders aimed at clarifying the issues and directed that there be a further preliminary hearing on 2 December 2019.

12. On 2 December 2019 the matter was again listed before EJ Gardiner. There had been some progress in identifying the issues prior to the hearing itself but the list was not agreed. EJ Gardiner only had sufficient time to deal with the claims of direct discrimination (based on the protected characteristics of race and sex) and some of her victimisation claims. EJ Gardiner considered that some of the issues raised by the Claimant required permission to amend her claim. He permitted some of those matters to proceed but refused permission for some others. Amongst the amendments that were not permitted were allegations of discrimination by the Claimant's First Line Manager. EJ Gardiner made further orders aimed at resolving the remaining disputes about the issues in the case. He fixed a further preliminary hearing for 27 February 2020 and listed the matter for a final hearing commencing on 13 January 2021.

13. The hearing on 27 February 2020 took place with the Claimant appearing by telephone because she was too unwell to attend in person. It became apparent that the Claimant wished to add further claims. EJ Gardiner directed the Claimant to make a formal application to amend and give guidance on what was required. The Claimant duly applied to amend her ET1. Regrettably there was a significant delay in bringing this to EJ Gardiner's attention.

14. On 2 November 2020 there was a preliminary hearing before EJ Gardiner principally to make case management directions in the light of the fact that the Claimant had by that time been dismissed and had brought a second claim. EJ Gardiner directed that the two claims be heard together and extended the length of the final hearing to accommodate that. He noted that the application to amend remained outstanding and directed that it be dealt with on paper by him or some other judge. The Claimant had by this time secured the assistance of Ms Ruxandu.

15. Ultimately the matter came before me on 14 December 2020. The matter was listed only for 1 hour. After the hearing I dealt with the application to amend together with an application by the Claimant for specific disclosure of a large number of documents. I made case management orders that would allow the hearing to remain effective.

16. My decisions on amendment finally determined which claims were before the Tribunal and the parties were, by agreement, able to finalise the list of issues.

17. We heard from the Claimant first. We then heard from the respondent's witnesses. We do not list them in the order we heard them for technical reasons

and to accommodate witnesses' professional responsibilities several witnesses were interposed. We heard from:

17.1. Avneesh Singh, the third Respondent and who, at the time the Claimant was directly employed, managed Darren Gilhooley who was the 'Vice President' of the ROST IB MO team and who in turn managed James Kinghorn; and

17.2. Jade Green who was the Vice President of the ROST IB MO team when the Claimant first started before Darren Gilhooley took over that role.

17.3. Stephen Lane, who was the Assistant Vice President of the ROST IB MO team when the Claimant first started working in that team; and

17.4. James Kinghorn, the Second respondent who succeeded Steven Lane and who was, until 2020, the Assistant Vice President of the ROST IB MO team; and

17.5. Fiona Nichols who was the HR professional directly responsible for the ROST IB MO team; and

17.6. Karen McGoldrick who was the person appointed to deal with the Claimant's first Grievance; and

17.7. Duncan Lord, who was the person that considered the Claimant's appeal against her selection for redundancy; and

17.8. Johnny Hughes, who was the person appointed to deal with the Claimant's second grievance.

18. At the conclusion of the evidence we received written submissions from both parties. We also had oral submissions which gave us the opportunity to understand how the parties put their respective cases. We mean no discourtesy by not setting out the entirety of the submissions but have referred to the salient points below.

The Issues

19. As set out above the issues in the case were finally agreed shortly before the hearing. An agreed list of issues was provided by the parties. The list of issues runs to 9 pages and we shall not incorporate it into these reasons. However, where below we deal with the claims, we use headings with paragraph numbers which cross-refer to the list of issues.

Adjustments for witnesses

20. We have set out below our findings in respect of the Claimant's health. At the outset of the hearing we discussed how we could assist the Claimant give her best evidence. The Claimant asked that we break up the day into short

segments. We were able to accommodate that without any great difficulty. Later in the hearing the Claimant asked that instead of breaking for lunch at 1pm we take an earlier lunch. Again, we were able to do this without any difficulty. The Claimant's evidence was heard on either side of a long weekend and the break gave her some respite. Unfortunately, whilst giving her evidence the Claimant became increasingly fatigued and on one occasion, we stopped the proceedings in order that she could seek medical assistance. On one further occasion we had a late start to accommodate a medical appointment. We made a point of checking with the Claimant after every break in the proceedings that she was sufficiently well to continue. Once she had given her evidence the Claimant told us that it would assist her if she turned off her video and observed the remaining part of the proceedings lying down. This presented no difficulties for us and we were told that the Claimant was in touch throughout the proceedings with Ms Ruxandu.

21. We had to make a minor adjustment for Karen McGoldrick who is adversely affected by screen flicker. She asked us to give her breaks from using a screen which we were able to accommodate, and this coincided with the Claimant's needs.

The structure of this judgment

22. We have set out below under a heading 'General Findings of Fact' our findings of fact about the general employment history. We do this both to set the scene but also to set out for any third party the key events in the Claimant's employment history with the Respondent. Below that we deal with the various statutory claims. We set out the applicable law before reaching our conclusions. In some cases, it was necessary for us to make additional findings of fact (in particular the reasons for the treatment we have found proven). We intend any additional findings of fact to be read with our general findings of fact. We shall endeavor to identify where that is the case.

The delay in providing this judgment

23. The tribunal met and concluded its deliberations on 15 March 2021 by CVP. It has taken the Employment Judge a considerable amount of time to provide this judgment and reasons. An apology is extended to both parties for this delay and the anxiety that it will inevitably have caused. In part this delay has been caused by the very high caseload in the Tribunal system. However, as may be seen from the length of the judgment, the Claimant brought a very large number of claims indeed. In our deliberations we had to discuss each individual claim and thereafter the Employment Judge has needed to set out the conclusions reached on every claim. This has taken a considerable time. Without being unduly critical of the Claimant, who formulated her claims without the assistance of Ms Ruxandu, hindsight might suggest that a more tightly focused approach may have resulted in much less delay in providing these reasons.

General Findings of Fact

The Claimant's recruitment

24. The Claimant graduated with a first-class degree in economics from the Bucharest Academy of Economic Studies before coming to London in 2014 to complete a master's degree in Investments and Finance at Queen Mary University. She then went on to do two further courses obtaining a distinction in her Finance Trading Program Certificate. At this point she started looking for work in investment banking.

25. On 30 March 2016 the Claimant was contacted by James Flavin. He sent her a job description for a role as an analyst in the IB Middle Office. His e-mail footed described him as a 'Direct Recruiter' and he had an e-mail address utilizing the Barclay.com domain name. The footer referred to Barclay's head office and the Barclay's 'value statements'.

26. The Claimant was asked to attend an interview which took place at the Barclay's offices at Canary Wharf. The Claimant was interviewed by Avneesh Singh and the person who would become her first line manager. The Claimant gives an account of that interview at paragraphs 28 and 29 of her witness statement. She says that she was told (our emphasis added) *'it was an analyst position equivalent to BA4 corporate grade on a contracting role renewed at 3 months with a view of it becoming a permanent position after 6 months subject to my performance'*.

27. The Claimant goes on to say that Avneesh Singh told her that the working hours would be a shift pattern of either 9:00-17:00 or 11:00-19:00 and went on to say, *'don't worry we will not overwork you'*. Avneesh Singh does not deal with the issue of working hours in his witness statement. When he had prepared his witness statement (and signed it) he had given an account of the Claimant having applied for some other role and, when unsuccessful being offered the role in the ROST team. When he saw the Claimant's statement, he recognised that this was incorrect and served an amended statement retracting that account. We consider that that was a surprising error. That is not to say that we believe that it was an attempt to deceive the Tribunal, the differences were not of great significance. However, it does demonstrate a degree of carelessness or failure to take the proceedings sufficiently seriously that was later further evidenced by the fact that Avneesh Singh had failed to disclose a number of relevant documents. Those were introduced in a piecemeal manner during his evidence.

28. Below we deal with the issue of working hours in more detail. Here, it is sufficient to say that at the time the Claimant was recruited, there was a practice of allowing team members who worked on specific tasks that usually involved working until 19:00 to start work at 11:00. We would expect that this was mentioned. The Claimant has recalled being assured that she would not be overworked. It was Avneesh Singh's position during a later grievance process that the hours worked by the Claimant were not excessive. We accept that he believes that to be the case (although we disagree with him). This, together with the Claimant's evidence is enough to support a finding that it is more likely than not that he gave some assurance to the effect suggested by

Claimant.

29. The Claimant has suggested that even in this first encounter her first line manager was hostile. Avneesh Singh agrees that the first line manager said little during the interview. He goes on to say that they did both agree that the Claimant's application should progress. We accept that this was a joint decision. The Claimant was then interviewed for a second time by Jade Green (who was at that time the 'VP' of the ROST IB MO team) and Hadrian Mademba-Sy (an 'AVP' who worked in the team). The interview was a success and the Claimant was made a job offer the following day. The Claimant was offered a daily rate of pay of £180 by James Flavin which she accepted.

30. The Claimant was contacted by Carmen Wong who sent e-mails from an address from the Barclays.com domain (using the Barclays footer). In an e-mail sent on 15 April 2016 there was a summary of the offer. That summary gives the job title as 'Rates Flow IB MO Analyst'. It identifies a gross daily rate and describes the pay status as 'Limited Company Contractor'. There is reference in that offer to terms which might ordinarily apply if the Claimant was offering her services through a limited company.

31. The Claimant had to undergo a screening process before a contract was offered to her. That caused some delay because of the Claimant's involvement with a Romanian company but finally all difficulties were resolved. The Claimant was then asked to sign a contract digitally. The parties to that contract are stated to be the Claimant and Resource Solutions.

32. It is the Claimant's case that she should be treated as having been engaged by the First Respondent. It is therefore necessary for us to make findings in respect of the various ways in which people who work for the Respondent are engaged. Avneesh Singh (as well as other witnesses) gave a clear account of the recruitment practices which was consistent with the documents in the bundle. Whilst the Claimant had a strong belief that she had always worked for Barclays she had no basis to contradict what Avneesh Singh said about this.

33. Avneesh Singh told us, and we accept, that for budgetary reasons Barclays takes central decisions as to the overall number of employees that it employs in the various regions where it operates. A manager who identifies the need to recruit is required to seek permission to expand the headcount. Recruiting in this way is not popular with local managers. Given a choice they would prefer to recruit directly as this gave the benefit of longer notice periods. Despite this, local managers are required to seek permission to recruit directly. Avneesh Singh's evidence about the authority of managers over decisions about recruiting directly was supported by the evidence of Jade Green. Their evidence was also supported by contemporaneous documents. When the Claimant was offered a permanent position, it was to fill a vacancy created when another permanent employee left. The requirement for approval to fill that position is demonstrated by an e-mail sent on 9 May 2017 which shows that Avneesh Singh needed prior approval to replace that individual.

34. The solution that has been adopted to deal with staff shortages, due to a lack of central approval to offer permanent employment or otherwise, is to use contractors. From the original offer sent to the Claimant we infer that one means of engaging a contractor is by using a limited company controlled by the contractor herself. The other means that is common is to engage the contractor through Resource Solutions. Resource Solutions are a substantial company providing outsourcing services to companies.

35. Avneesh Singh believed that the individuals who had sent the Claimant e-mails about her job offer and screening process were employees of Resource Solutions. We find that that is most likely to be the case. Their use of the Barclay's e-mail and footer may suggest otherwise but what became clear, and some documents disclosed late in the hearing reinforced this, is that Resources Solutions supply many contractors to Barclays. We find that, as Avneesh Singh suggested, they have a dedicated Barclay's team operating from Barclay's offices for the purpose of recruiting and supplying workers.

36. Whilst the Claimant may not have been familiar with the terminology it is clear to us that during the first interview the role on offer was that of a contractor. When it transpired that the Claimant did not offer her services through a company the contract that was drawn up was between her and Resource Solutions.

37. The contract with Resource Solutions is typical of the sort of agreement used for agency workers. Clause 2.2 of that agreement provided that the agreement did not give rise to a contract of employment either between the Claimant and Resource Solutions or with any Client she might be supplied to. She was to be paid under the PAYE scheme with tax and national insurance being deducted by Resource Solutions. The Claimant had believed that she was paid by Barclays. That belief was not supported by the documentation. The agreement provided for Resource Solutions to pay the Claimant making appropriate deductions. The Claimant supplied her bank details to Resource Solutions and later, when offered permanent employment, to Barclays.

38. The Resource Solutions contract provided that the Claimant would be entitled to 33 days annual leave. The mechanism adopted to ensure that any annual leave that accrued was either taken, or paid at termination, was to enhance the 'base rate' by 14.54%. This enhanced rate of pay would be held back until either holiday was taken or the agreement terminated. We infer that this arrangement was intended to improve on the use of 'rolled up holiday pay' because it allows for payment when holidays are taken. However, what it does not guard against is an employee not taking any holiday in order to benefit from an enhanced salary (albeit one only realised on termination). Variations of 'rolled up holiday pay' are typical features of contracts for agency workers as it is a convenient way of remunerating transient workers.

39. The Resources Solutions contract included a provision that it was not obliged to offer any work to the Claimant and, if any client she was supplied to did not require her services, there would be no further obligations. Either party could terminate the agreement without notice (unless there was any further

agreement to the contrary – the assignment schedules we have seen did not impose any conditions on giving notice).

40. Under clause 7 of the agreement the Claimant was required to supply timesheets to Resource Solutions. We find that she did complete some time sheets although it appears that these provisions were not strictly enforced.

41. On any assignment the Claimant was required to submit to control by any Client (here Barclays). Clause 8.1.1 provided that she would accept the direction, supervision and control of any responsible person in the organisation

42. The Claimant points to the fact that when she was initially engaged she was required to sign a document entitled 'Personal Undertakings and Confidentiality Agreement'. This is, and is plainly intended to be, an agreement between the Claimant and Barclays. We are not surprised by this. Whilst the contract between the Claimant and Resource Solutions has some similar provisions it makes good business sense for Barclays to have a directly enforceable contract to protect its confidential information and intellectual property. The Claimant points out that within that agreement Clause 1 includes a declaration that she is an employee of Barclay's Capital Services Limited. That company name has been inserted manually into the contract. The use of that company name is inconsistent with many parts of the agreement when read as a whole. In particular, the confidentiality agreement includes references to the 'Supplier'. Insofar as the Respondents' witnesses were able to give an explanation for the reference to the Claimant as an employee they thought that it must have been an error. We agree. The purpose of the pro-forma document is quite clearly to impose personal obligations on a worker where otherwise none would exist.

43. The Claimant says, and we accept, that when she was completing the process of signing her contract with Resource Solutions she was required to indicate whether she wished to opt out of the 48 hour per week limit on working otherwise imposed by the Working Time Regulations. She told us that the electronic forms she was required to complete had a section for signature on both an opt out and a refusal to opt out section. She says that she tried to sign the refusal to opt out choice but the form was rejected because she had not signed the opt out section. She sought help from the individual who had sent her the form and was advised that if she signed both sections the form could be uploaded and that she would not be taken as having opted out of the maximum 48-hour limit. The Claimant intimated that there might have been a deliberate ploy to encourage people to opt out. The evidence provided by the Claimant is insufficient in our view to support this. It appears that there was a software glitch as the Claimant was told. The Claimant was expressly reassured that signing both documents would not be taken as her consent to work for more than 48 hours per week.

44. The Claimant's initial assignment was stated as being for a period of 3 months.

45. We have concluded that the role that the Claimant was interviewed for

and was engaged in was always intended to be a role filled by a person who would have the status of a contractor. That is that they would supply their services either through their own limited company or through Resource Solutions. Despite our reservations about Avneesh Singh's approach to these proceedings, we do accept that neither he, nor any other manager, had authority to offer any applicant a permanent position.

46. Below we set out our conclusions as to whether these contractual arrangements gave rise to an employment relationship between the Claimant and Barclays from the outset of her engagement. Before doing so we make findings about how the arrangement worked in practice.

<u>The working practices affecting the Claimant from the outset of her employment.</u>

47. There was no dispute before us that the way the Claimant was treated and worked was in numerous respects identical to those employees who had contracts of employment with Barclays. The Claimant was:

47.1. given a building access pass with her name and picture on it; an

47.2. she was assigned a desk in an open plan office within Barclays offices at 5 North Colonnade; and

47.3. she was given a Barclays identification number; and

47.4. she was allocated an email address using the Barclays.com domain name; and

47.5. she was given a profile on the intranet Phonebook website which details her grade and position within the organisational chart and showed her as a member of the ROST team.

47.6. She reported initially to her first line manager and thereafter to other AVPs.

47.7. She was trained and allocated work in exactly the same way as directly employed employees.

47.8. She was able to use the same facilities as those individuals employed by Barclays.

48. As we have set out above the Claimant was not paid by Barclays but by Resource Solutions and she did not have many of the benefits which were given to Barclays permanent employees. The Claimant did fill out timesheets at least initially.

<u>The Claimant's relationship with her first line manager and her reports to her managers</u>.

49. The person responsible for training the Claimant was her first line

manager. We heard evidence from both the Claimant and Jade Green about the way the first line manager conducted herself. The Claimant says that her first line manager treated her differently to other employees. At paragraph 54 in her witness statement she says this:

> *'[My first lime manager] frowned and appeared disgusted when speaking to me, she sometimes refused to train or support me as a new joiner, she raised her voice at me, and often did not answer when I called her name, she often ignored me when I asked her a question. [My first lime manager] chose to sit out social events because I was attending and she acknowledged this reason when people asked her why she was not coming. She clearly said in response: "because of her", and pointed at me. She intimidated me through her tone and spiteful looks. She did not however have this attitude towards [Employee A] and was nice and kind to her.'*

50. Jade Green told us in his witness statement that the Claimant's first line manager had a combative communication style and that the feedback that he had about her was that she was aggressive. He said that this was general feedback from a number of employees. Avneesh Singh also said that the Claimant's first line manager was aggressive. He did not approve of the way the Claimants first line manager spoke to members of her team. In particular, he accepted that she would stand over people while telling them what to do and raise her voice. He was under the impression that the Claimant's first line manager thought that the Claimant was a slow learner although he did not necessarily subscribe to that view himself. However, in the later grievance process he is recorded as saying that the Claimant had a shallow learning curve and that the first line manager required a quicker uptake giving rise to conflict. In his oral evidence he was keen to stress that he was passing on the First Line Manager's opinion and not expressing his own. He is further recorded as saying that the first line manager worked well with other team members. We find it more likely than not that Avneesh Singh did not take enough care during the grievance process to make it clear where he was expressing his own views and where he is reporting the views of the Claimant's first line manager.

51. In the Claimant's witness statement, she says that her first line manager asked in November 2016 whether she had access to the Internet in Romania. She says in her witness statement that she perceived that question as being derogatory. The context was a discussion about planning leave for the holiday season. We find that it is unsurprising that a manager who was dealing with the question of an employee working whilst out of the country might enquire about the quality of the Internet connection. This is the only time that the Claimant says that there was any direct reference to her country of origin.

52. We do not have to decide whether the Claimant's account of her treatment at the hand of her first line manager was entirely accurate. We do accept that the relationship was extremely difficult due to the first line manager's abrasive management style. We accept the evidence of Jade Green and Avneesh Singh that the Claimant's first line manager had very high standards coupled with an aggressive nature and poor managerial skills. Whilst

the Claimant may have borne the brunt of this, we accept Jade Green's evidence that she was not the only person to be treated in the same way.

53. Both the Claimant and Avneesh Singh agree that they spoke in November 2016 about the Claimant's first line manager. At paragraph 66 of her witness statement the Claimant says that she told Avneesh Singh about the treatment she had been receiving from her first line manager and that she found it *'unwarranted and discriminatory especially when viewed against the treatment of others'*. Avneesh Singh says in his witness statement that whilst he spoke to the Claimant about her first line manager's managerial style the Claimant did not relate her complaints to her nationality. In her witness statement the Claimant does not say that she said anything about her nationality. She simply refers to discrimination which is equally consistent with a suggestion that she was complaining about being singled out for poor treatment.

54. There is not much difference between the account of the Claimant and that of Avneesh Singh in respect of what he advised her to do. The Claimant says that she was told by Avneesh Singh that the first line manager *'operates with high standards'*. That is consistent with what he said during the grievance process. He says that he was empathetic and encouraged the Claimant to speak to Jade Green as her line manager. He says that he later spoke to Jade Green about the issue. Jade Green supports his account and we accept that it is correct. Jade Green also has no recollection of the Claimant suggesting that there had been any race discrimination.

55. The Claimant sets out an account of her meeting with Jade Green in her witness statement. She describes him as having a very different attitude to Avneesh Singh. She says that he told her that she done the right thing by speaking out and that he would take action immediately. The Claimant does not say in terms that she ever told Jade Green that she specifically believed that the treatment of her by her first line manager was connected with her race or nationality.

56. The Claimant describes an unpleasant incident which we accept occurred in the manner she has set out in her statement. Her first line manager had clearly spoken to Jade Green and inferred that the Claimant had complained about her. Somewhat aggressively she had attempted to question the Claimant about what she might have said and did so whilst throwing a ball against a wall. This must have been an unpleasant incident for the Claimant.

57. We must decide whether, during the meetings with either Avneesh Singh or Jade Green, the Claimant alleged that there had been a contravention of the Equality Act 2010. Taking the Claimants witness statement at its highest the Claimant says that she complained only to Avneesh Singh about discrimination. However, she does not go as far as to suggest that she said that there was discrimination because of race or nationality as opposed to being singled out for other reasons. Had the Claimant gone that far we find that Avneesh Singh and/or Jade Green would have been far more concerned than they actually were. They would have recognised the gravity of such an

allegation and would not have proceeded on the informal basis that they did. We find it more likely than not that the Claimant did not relate the treatment she was complaining of to her race at this stage.

58. The Claimant's first line manager tendered her resignation having found an alternative position outside of Barclays. Jade Green believed that she did so having been told that her managerial style was causing conflict and that her future progression at Barclay's was in some doubt. She was not dismissed nor was any formal disciplinary action taken against. The Claimant says that she was told by Jade Green that her first line manager was stripped of her managerial responsibilities. We find that is incorrect. Jade Green would not have said that because it was not true. It is the case that during her notice period the Claimant's first line manager no longer had managerial responsibility for the team as she was replaced by Stephen Lane. It may be that the Claimant has misinterpreted what she was told.

The Claimant's duties and hours of work

59. The Claimant gives an outline of the work of the ROST IB MO team in her witness statement that broadly aligned with that given by the Respondents. The function of the team was to support the business of trading in 'rates options'. There was a variety of products that were traded. There were straightforward products referred to as 'vanilla options'. In addition, there were more complex products referred to as 'exotics' or 'structured' products. The vanilla options were traded by one trading desk and the structured products by another. The Job Description for the Claimant's role provides an accurate summary of what the team did. It says:

> *'The team works closely with sales and trading, market risk and infrastructure partners (finance, IT and post Trade Services) to ensure that all trades are captured as accurately and quickly as possible, and all regulatory commitments are met.*
>
> *The team also specialises in providing technical assistance on a variety of programmes and initiatives (regulatory build and execution, regulatory controls, Basel III, Leveraged balance Sheet etc.)'*

60. 'Capturing' the trades accurately required the completion of fixed daily tasks. These needed to be completed on every working day. Once completed the tram members had to complete a check list on the Intranet referred to as 'bchecks'. If those checks were not completed that would trigger an alert to a senior manager who would then seek an explanation. James Kinghorn gives examples of those daily tasks at paragraph 7 of his witness statement and refers to them as BAU ('business as usual') tasks. We accept his broad description and shall use BAU to describe these duties.

61. The tasks that the team members were required to undertake were divided between them using a roster. This roster was either drawn up by the AVP managing the team or more commonly simply agreed between the team

members. An example of that roster was included in the bundle of documents. The shifts shown were (1) Fixings, (2) New and Amends, (3) Delta Close and (4) Vanilla Options. In addition, the roster refers to 'Compressions'. This was essentially an audit of transactions that was carried out from time to time.

62. Whilst many of the BAU tasks could be started during normal working hours there were some which could only be completed at the end of the trading day. When the Claimant first started there was a practice in place that the team members assigned to the tasks that always required working beyond 5pm would start work at 11am and be expected to finish at 7pm. This was principally the 'Vanilla Options'. That was the evidence both of the Claimant and of Stephen Lane. The other team members would be expected to work between 9am and 5pm. The Claimant has referred to this as a shift pattern. We find that this pattern was never formalised but was adopted to address the reality of the situation that there were some tasks that could never have been completed within the usual office hours of 9am – 5pm.

63. On a number of occasions issues would arise that would require the Claimant, and other team members to work well beyond 7pm. These could be issues with a particular trade or IT issues that required to be resolved before the BAU tasks could be completed. What Stephen Lane says about this in his witness statement is broadly consistent with the account given by the Claimant. He says:

> *'In reality, however, there was an expectation that we would stay until the work was completed. For example, if the traders finished their work late, we could not finish until we had received data from them. Waiting for the data from traders wasn't something any of us liked. However, there were also times when we could finish early.'*

Staffing levels

64. We accept the Claimant's evidence that throughout her employment the ROST team was always stretched. A number of employees left the team and recruitment of replacements appears to have been slow.

65. When the Claimant started the team consisted of her first line manager, an Analyst on the same grade and Hadrien Mademba-Sy. Hadrien Mademba-Sy held the grade of an AVP. Generally, Barclays would expect any AVP to have managerial responsibility. Hadrien Mademba-Sy was an exception to this. He had been promoted to the position of AVP in recognition of his technical abilities rather than his managerial responsibilities. He undertook a great deal of project work but also contributed to the BAU tasks to assist the team.

66. In July 2016 a further analyst 'Employee A' was recruited to join the team. The Claimant's case is that she was treated more favourably by being appointed as a directly employed permanent employee from the outset. We accept the evidence given by Avneesh Singh that Employee A had in fact been employed by the Barclays businesses since May 2006. His evidence is

supported by a document signed by Employee A where she indicates that she was a permanent employee and had been given an Employee's Handbook in 2008. We accept that, as an internal appointment, there would be no question of her being appointed as a contractor through a third party.

67. In November 2016 Stephan Lane was appointed as the AVP for the ROST team. As we have said above the Claimant's first Line Manager had given her notice but continued to work with the Team until around February 2017. At around the same time there was further recruitment. Two further Analysts, Linh Thi Tyuy Luong and Matteo Pansini were recruited, both of whom were directly employed.

68. Avneesh Singh told us that Linh Thi Tyuy Luong had been employed by Barclays since 2 September 2015. The Claimant was unable to contradict that statement. We were provided with a letter dated 3 October 2018 addressed to Linh Thi Tyuy Luong which confirmed her promotion to an AVP role. The statement of terms and conditions attached included details of her start date which accorded with Avneesh Singh's account. We accept that Linh Thi Tyuy Luong was appointed to the ROST team as an internal candidate.

69. Any vacancy, whether open to only internal candidates or external candidates was advertised on the Barclay's Intranet. The Claimant had access to that and was in a position to apply for any external vacancy that was advertised. In June 2017 the Claimant did express an interest in an internal position as a Junior Portfolio Manager. In her e-mail of 14 June 2017, she asked if she was eligible to apply as a 'non-permanent employee'. She was told that she could not apply at that stage. This demonstrates that she had access to the Intranet and details of vacancies. From this we have concluded that the Claimant was as well placed, if not better, than any external candidate to apply for any role.

70. In around October 2016 Matteo Pansini was recruited by Barclays. Avneesh Singh told us and we accept that authority had been given to recruit a permanent employee into the IBMO FX Options team. That is a separate team to the ROST team. Avneesh Singh's evidence was supported by the offer letter made to Matteo Pasini which set out the position he had been offered. The offer does include a stipulation that Barclays reserved the right to change the role. Avneesh Singh says that it was only at the point that Matteo Pasini started work that a decision was made to allocate him to the ROST team. In the light of the documents we were referred to, we accept that was the case.

The Claimant's role in training other staff members

71. It was not disputed that the Claimant was asked to assist with the training of any new joiners to the ROST team. That was the case whether the joiners were Analysts or the AVP leading the team. Both James Kinghorn and Stephen Lane told us that they considered that this was entirely normal and expected. They explained that in their view the best people to explain the details of the tasks that the team undertook were the team members who undertook the role on a daily basis. Barclays has produced a 'Competency

Framework' for its BA grades. Whilst that document is somewhat aspirational in tone it includes a section entitled 'developing others' which makes it clear that an Analyst is expected to share their knowledge and offer help and support to others.

72. We accept that the high level of turnover in the ROST team meant that there was more training and skill sharing that needed to be done than would have been the case had the team been more stable. However, we do not accept that the entirety of the burden fell on the Claimant. James Kinghorn and Stephen Lane told us that whilst the Claimant has assisted them in understanding the tasks she performed, others had done so as well. As time went on, the Claimant became less tolerant of being expected to assist newcomers to the team.

73. From around December 2016 Employee A became increasingly unwell. She asked for and was given permission to work from home for 3 days a week. The Claimant says, and we accept, that this meant that Employee A's contribution to the team's work was significantly reduced. Unsurprisingly the Claimant was not told the details of Employee A's health condition. The Claimant suggests that she had to cover for Employee A. We accept that there would have been an increase in her workload but do not find that that burden fell exclusively on the Claimant as she accepts in her witness statement. The Claimant did raise what she considered was a lack of contribution by Employee A with both Stephen Lane and Avneesh Singh. She was not given any explanation and Avneesh Singh suggested that she talk to Employee A herself. Had the Claimant known of the reasons why Employee A was not working at full capacity we expect that she would have been less critical, but we consider that it was appropriate to respect Employee A's confidential information about her health.

74. The fact that the ROST team was working regularly until 7pm and beyond was a matter known to senior managers. A solution had been proposed that the ROST Team in New York could take over any remaining tasks at 18:30. Whilst steps were taken to introduce this, it was very slow and occasionally ineffective (such as days when there were public holidays).

75. By April 2017 the Claimant was unwell and was becoming very tired. We deal with her health issues separately below. The fact that she was becoming increasingly tired is evidenced by a text exchange with her father sent on 27 April 2017. In this text she also complains about not having the same rights as permanent employees.

76. We accept that by the summer of 2017 the fact that the ROST team is overworked was a matter of frequent discussions. The Claimant has referred us to a text exchange between her and Stephen Lane that took place shortly before 9pm on 14 June 2017. The Claimant is still in the office working. Stephen Lane is sympathetic and suggests a 10:30 start in the morning. He also raises the hope that a US handover could be organised for the Vanilla Options. He *notes 'it won't go down well but we can't have this every day'*. It is clear from this that he shared the Claimant's view that the demands on the

team were excessive.

77. Towards the end of 2017 both Stephen Lane and Linh Thi Tyuy Luong decided to leave. With Employee A on long term sickness absence this left only the Claimant and Matteo Pasini as full-time team members. The Claimant says, and we accept that this placed a huge burden on an already overstretched team.

The Claimant's direct employment

78. There is no dispute that the Claimant's assignments were extended every 3 months until she was finally offered a permanent position. Where there is some dispute is whether she had pressed for such a post. The Claimant says that she spoke to Avneesh Singh in December 2016 and asked him about the possibility of a permanent position and was told that it was *'not possible at the moment'*. We find that it is more likely than not that there was some such conversation and that Avneesh Singh was simply informing the Claimant that at that point in time there was no authority to increase the headcount. He would have been doing no more than explaining the situation. The departure of Linh Thi Tyuy Luong did permit Avneesh Singh to seek authority to replace her. We have already referred to the correspondence that supports that.

79. Avneesh Singh suggests that once direct employment was a possibility there was some reluctance by the Claimant to apply for a permanent position. In his witness statement he says that contractors get paid more than permanent employees. His basis for doing so was to multiply the daily rate by the total number of working days in the year. In doing so he overlooks the fact that the daily rate includes holiday pay. When that is factored in a contractor is paid much the same as a direct employee, but the direct employees have a significant benefits package including pension, sick pay and health care.

80. We find that the Claimant was concerned about her pay. We reach that conclusion relying on the fact that when offered direct employment the Claimant conducted a negotiation about her pay. However, being concerned about pay and wanting permanent employment are not mutually exclusive. It is clear from the Claimant's text exchange with her father that she wanted permanent employment.

81. The Claimant says, and Avneesh Singh agrees, that he drew the Claimant's attention to the fact that a permanent position was to be advertised on the internal jobs board. He encouraged the Claimant to apply. The Claimant did apply, and she was interviewed by Avneesh Singh. He decided that she was the best candidate.

82. Avneesh Singh then had to deal with the somewhat bureaucratic business management team who, in an e-mail dated 6 November 2017 suggested that additional approval was necessary to appoint a contractor to a permanent position. We understand, having seen some of the documentation, that this might have been prompted by a concern that a fee might have been due to Resource Solutions. Avneesh Singh proactively fought to recruit to

Claimant. He responded in the following terms:

> *'The contract position is only funded until the end of the year, that's when Anca's contract runs out. Rolling this contract isn't an option.*
>
> *We have already gone through the external sourcing process and Anna is the most: eligible candidate (contractors are not eligible for internal positions)*
>
> *I don't really understand why I need to go through a temp to perm conversion process.*
>
> *We are not converting her roll to a permanent position; we are ending her contract and filling an approved permanent position*
>
> *Can you please elaborate a little more here?'*

83. In October 2017 James Kinghorn was recruited to replace Stephen Lane.

84. The Claimant says that when she was interviewed by Avneesh Singh he told her that he could not offer a salary of more than £47,500. He does not accept that he ever made a firm offer. It is clear that pay was discussed as Avneesh Singh recalls that the Claimant was concerned about pay. We accept Avneesh Singh's statement that no firm offer was made although an approximate figure may well have been. The Claimant says in her witness statement that she was sent a contract giving a salary of £46,000 and that, despite asking, James Kinghorn said it could not be changed. We find that that is not correct. On 28 November 2017 a contract was prepared and sent to James Kinghorn for his approval. That had a salary of £45,000. It is clear from the e-mail exchange that James Kinghorn is unaware of what might have been agreed with Avneesh Singh. We find that he then discussed the terms with the Claimant and then reverted to the HR department with a counter proposal that can only have come from the Claimant of £46,000. That was the sum finally agreed. We accept the evidence of Avneesh Singh that this was towards the top of what would usually be offered to Analysts at this grade.

85. We find that there was no reluctance by Avneesh Singh at this stage to offer the Claimant a permanent role. Indeed, he appears to have pressed for her to be recruited. Negotiations about salary have been dealt with by what appears to be a respectable compromise.

86. In her witness statement the Claimant suggests that she sought at that stage for her previous engagement to be taken as the start of her employment. Whilst she refers to documents in the bundle these do not support her assertion. She is asked to undertake ID checks and she did provide details of her bank account in order that she could be paid. She signed a copy of her contract of employment which gave the start date as being 2 January 2018. There is no documentary evidence that at this stage she believed that she had

the same status as directly employed persons. That would be inconsistent with what she had told her father some months before.

The Claimant's initial dealings with James Kinghorn

87. The Claimant says that during her first 1-2-1 meeting with James Kinghorn on around 17 October 2017 she told him that she was exhausted and that she had had daily panic attacks since July 2017. She also says that she told James Kinghorn that she had asked Stephen Lane's permission to work from home due to issues with her periods. James Kinghorn does not address that specific meeting in his witness statement but he does acknowledge that at other times the Claimant did raise the issue of the workload. When he gave evidence he was asked about a passage in a draft response to the Claimant's grievance written by Karen McGoldrick [Supplementary bundle page 170]. The particular passage James Kinghorn was taken to read as follows:

> *'Anca mentions a number of times that she went into significant details regarding her medical conditions. James confirms this was the case however he says he did not (ever) ask Anca to provide the level of detail she offered, in fact he was a little embarrassed by it. He did not want to interrupt Anca when she was explaining as he felt it would be rude.'*

88. James Kinghorn accepted that the Claimant used to talk to him about her health concerns. The thrust of his evidence was that these became more detailed as time went on. We accept that it is more likely than not that as the Claimant's health progressively deteriorated, she talked more about this. However, we do find that it is likely that the Claimant did discuss the impact of work on her health from a very early stage. There are text message exchanges in 2018 that demonstrate that the Claimant has no hesitation in referring to her bowels or gynaecological issues. For example, on 21 May 2018 she referred to urinating blood adding the words *'apologies for frankness'*. These later exchanges give us confidence that the Claimant would have discussed other issues with Janes Kinghorn. We find that the Claimant would have mentioned her periods during meetings as early as October 2017. The context for this would have been her explaining that from time to time she needed to work from home. James Kinghorn accepted that the Claimant did wish to work from home for that reason.

89. Shortly after the meeting on 17 October 2017 the Claimant attended her GP. The GP records record that the presenting problem was '*getting panic, deja-vu phenomenon*' she reported doing the work of 2-3 people and being tired and unable to sleep. The Claimant was given a MED3 diagnosing work related stress. Text messages in the Supplementary Bundle show that the Claimant contacted James Kinghorn as soon as her appointment concluded. She asked him to call her. Later she sent him a copy of the MED3 by e-mail. We find that it is more likely than not that there was a discussion about the Claimant's reasons for her absence from work. From this we find that James Kinghorn knew that the Claimant was suffering from 'stress at work' and that

the Claimant was concerned about the amount of work she was expected to do. We consider that James Kinghorn's text messages are appropriately sympathetic. In particular, when the Claimant is due to return to work, he discussed what shifts she would prefer. The tone of all of these messages demonstrates a genuine concern for the Claimant. However, he did not conduct any formal back to work interview or seek any assistance as to whether he should offer more support to the Claimant. We find that he was unaware of any process that he might have followed.

The contract of employment

90. The contract of employment provided to the Claimant together with an offer of employment indicated that the employment commenced on 2 January 2018. The provisions in respect of the hours of work were as follows:

> *'Your average working hours are 35 per week, plus such additional hours as are required for the proper performance of your duties (including public holidays). The normal working hours are 9am — 5pm, Monday to Friday. Your working hours can be varied by the Company at its discretion, with reasonable notice.'*

91. The contract expressly deals with the question of payment for overtime. The relevant provisions say:

> *'Overtime:*
>
> *It is a condition of your employment that you work in addition to your normal hours of work as needed to meet Barclays business requirements. You will not receive any additional remuneration or time off in lieu for work performed in addition to your normal hours of work.'*

The move towards a New York handover

92. In February 2018 during a team meeting James Kinghorn discussed reverting to normal working hours. This included abandoning the practice of allowing team members to start work at 11am if they had worked a late shift. James Kinghorn told us that by February 2018 an agreement had been reached that if there were tasks outstanding in London these could be handed over to NY. The Claimant suggested that this would not always be possible. We accept that the handover system was not perfect, but we find that it was introduced specifically to address the unusual working pattern imposed on the ROST team and was introduced primarily for their benefit. The benefit for Barclays was that there would be greater consistency across teams and that there would be visibility of when the team were working.

93. Despite the introduction of the NY handover there were still a number of occasions where the Claimant, and others needed to work late into the evening. Within the bundle were records of when the Claimant and others entered and left the Barclay's offices. These show that the Claimant commonly

worked until 7pm even after the NY handover had been organised. However, the records also show that there were a large number of occasions when the Claimant started work late in the morning.

94. James Kinghorn's evidence was that he wished to be as flexible as possible. Despite the change in policy that was announced in February 2018 we find that there remained a very high degree of flexibility where the ROST team continued to balance their late evenings with a later than usual start in the morning.

95. In early 2018 Hadrian Mademba-Sy left the ROST team. He had been working on two tasks an ICE Swap Review and Totem runs. These tasks were added to the work that the Claimant and Matteo Pasini were expected to do. Whilst these were additional tasks that the Claimant was expected to do, they were not of themselves particularly onerous. The tasks were monthly and were not particularly time taking.

96. James Kinghorn decided to revert to the practice of doing 'Compressions' that had been a part of the work of the ROST team. The Claimant complains that she was required to be trained on how to do this. James Kinghorn did not dispute that he had asked the Claimant to undertake this training. The Claimant suggests that James Kinghorn called her to come over to the Training Desk and implies that this was done in a rude or abrupt manner. We have seen considerable amounts of correspondence between the Claimant and James Kinghorn. At all times James Kinghorn is courteous and polite. Whilst we accept that the Claimant was told that she needed to be trained on Compressions we do not accept that she was called over to the Training desk in a manner that was rude or inappropriate. The Claimant was reluctant to do the compressions themselves as they were usually an evening task followed by an early morning. We accept James Kinghorn's evidence that, whilst he understood that the Claimant did not want to do the Compressions themselves, she needed to know how they were done so she could, if necessary, assist during the working day. The Claimant accepted that she never in fact did any of the Compressions. We find that where James Kinghorn was aware of a problem, he would attempt to accommodate the Claimant. In this instance James Kinghorn made an exception for the Claimant as all other team members were required to do Compressions.

<u>James Kinghorn – sexist language</u>

97. In her witness statement the Claimant says that James Kinghorn referred to a female employee as a *'bird'* in February 2018. She says that she immediately suggested that he should not be using that phrase. She goes on to say that James Kinghorn continued to use that expression in order to make her feel uncomfortable. She says that on one occasion James Kinghorn said that *'she should not report him to HR'*.

98. James Kinghorn accepted during the investigation into the Claimant's subsequent grievance that he had used the expression *'bird'*. In his witness statement he suggested that he had done so on perhaps two occasions but

had stopped when the Claimant had said it was inappropriate. He thought that the Claimant had recognised that he was being light-hearted. He acknowledged that he had probably made a joke about not reporting his behaviour to HR.

99. We need to decide how often James Kinghorn used the expression *'bird'*. When Ivet Draganova was interviewed as part of the grievance process she was asked about whether she had heard any sexist remarks she is recorded as saying that there is occasional banter on the floor which has occasionally made her feel uncomfortable but that she could not recall any specific examples. The Claimant has drawn our attention to text messages in which a female colleague appeared to endorse the view that there was some sexist behaviour. Given that Ivet Draganova did not start work until April 2018 it seems likely that there was some 'banter' that persisted over at least a number of months.

100. We accept that James Kinghorn's use of the phrase *'bird'* was intended to be humorous. We find that that is consistent with him saying *'do not report me to HR'*. It is very unlikely that that second expression would be used by a manager as intelligent as James Kinghorn if he thought that there was any real possibility of being reported for his language. We find that that possibility never crossed his mind. The use of the phrase *'bird'* was a misplaced use of irony which inadvertently caused offence. We accept that when this was pointed out to him, he ultimately got the message and stopped trying to be funny. We should record that we consider that it was very foolish to assume that anybody else would find this language amusing. We find that it is likely that it took some time before the Claimant was sufficiently blunt that the message hit home. It is therefore likely that the expression was used more often than James Kinghorn is prepared to admit. We do not accept that James Kinghorn set out to deliberately offend the Claimant. That is inconsistent with the generous way in which he dealt with the Claimant generally.

101. The Claimant also complains that both James Kinghorn and Matteo Pasini referred to a colleague in Japan in what she says were sexist terms. What she says is, that it was well known that this colleague worked very long hours in order to overlap with the hours in London. She says that James Kinghorn had said words to the effect of *'that's how it should be'*. She infers from that that he was suggesting that women should always be available. Whilst we accept that the Claimant drew the inference that this was a sexist remark it is certainly not obvious that it was or that that was what was intended.

<u>The recruitment of Ivet Draganova</u>

102. In April 2018 Ivet Draganova was recruited to make up the short numbers in the ROST team. She was initially recruited on a short-term contract as a contractor. Her first day of work was 30 April 2018. The Claimant accepts that she had not been involved in her recruitment in any way. That role was left to people at AVP level or above. On 30 April 2018 James Kinghorn was not at work and it fell to the Claimant to meet Ivet Draganova and show her around the building. She helped her set up her workstation and talked her through the

work done in the ROST team.

103. The Claimant says that she ended up training Ivet Draganova because James Kinghorn did not have the knowledge to do so. We find this is partially correct. The Claimant was well placed to train Ivet Draganova as she was seated directly beside her and she had by then accumulated experience with the BAU work she undertook. As we have set out above it was commonplace for analysts to pass on their knowledge to new recruits. That was how Barclay's expected people to be trained on day-to-day tasks.

104. Throughout the summer of 2018 the Claimant became increasingly frustrated at having to train Ivet Draganova. We find that this was in no small part caused by the decline in her own health and the toll that it was taking on her. Training Ivet Draganova was an additional task that added to a workload that the Claimant was finding it extremely difficult to cope with.

105. We record that on a personal level the Claimant and Ivet Draganova had a good relationship. They continued to exchange friendly text messages until at least early 2019. However, it is clear that the Claimant considered that she was carrying Ivet Draganova.

106. The Claimant suggests that Ivet Draganova was particularly slow to pick up the skills needed in the ROST team. We accept the Claimant's evidence that Ivet Draganova asked her lots of questions. However, we do not consider that is necessarily an indication that she was struggling with their training. James Kinghorn did not share the Claimant's view. His evidence was that Ivet Draganova was performing well. That opinion was one which was later shared by his manager and Avneesh Singh during the redundancy selection process. Having regard to all of the evidence we have concluded that Ivet Draganova was not particularly slow at picking up the tasks she was required to do. We do accept that because she would talk to the Claimant about her work and ask questions the Claimant perceived her as being slow.

107. The Claimant says that between 12 and 14 September 2018 she had a discussion with James Kinghorn about training Ivet Draganova during which he *said 'if I cannot trust you guys to split the work I will have to assign it myself and I do not think you are going to like that! I will be monitoring you very closely and I will be requiring much stricter deadlines*'. James Kinghorn accepted in his witness statement that he did instruct the Claimant that she needed to co-operate more with Ivet Draganova, but he did not accept that he used the words attributed to him by the Claimant. Where there is written communication between James Kinghorn and the Claimant, James Kinghorn is invariably polite. There is no suggestion of any difficulties in their working relationship. Having regard to all of the evidence we find that there was a conversation during which James Kinghorn told the Claimant that unless she could co-operate with Ivet Draganova he would need to intervene. We do not accept that he proposed '*much stricter deadlines'* as this was not consistent with the way in which the BAU work was undertaken (there was no real room for any stricter deadlines). We find that the reason James Kinghorn spoke to the Claimant about this was that he had become aware of the increasing difficulties

in the professional relationship between the Claimant and Ivet Draganova and he wanted to encourage an improvement. We find that it is more likely than not that he suggested that it would be unfortunate if he had to impose a solution.

Working from Home

108. The Claimant complains that she was not allowed to work from home as often as she felt was needed to cope with her ill-health. James Kinghorn says that he was prepared to allow the Claimant to work flexibly. He accepted that he would expect at least some of the team to work in the office. He explained that in general it was much easier to work in the office given the need for multiple screens. However, his evidence was that when asked he would always allow an employee to work from home if at all possible.

109. In support of her case the Claimant says that when she was working from home on 2 January 2018 having fallen ill in Romania, Avneesh Singh had sent out an email about the expectations of Barclay's in respect of homeworking. She says that she felt targeted. Whilst the Claimant's feelings may be genuine it is difficult to see why that was the case. The document attached to Avneesh Singh's email was simply a set of instructions about how employees working from home could forward telephone calls in order that they were visible and could remain in contact. We find that this document supports James Kinghorn's evidence that working from home would be accommodated provided that the business needs were met.

110. We were taken to a number of emails and text messages in which the Claimant asked to work from home. There was not a single instance where her request was actually refused although on one occasion when James Kinghorn asked why she needed to work from home the Claimant ended up coming into the office. We find that in general, the Claimant was permitted to work from home whenever she needed to. On some occasions, requests were associated with her health whereas on others she was allowed to work home to accommodate her ordinary domestic activities.

111. We accept James Kinghorn's account of how he and the Claimant's previous line manager Stephen Lane approach the question of working from home. We find that this would be accommodated unless there was a real business need for somebody to work in the office. Where health was identified as an issue an employee would ordinarily be allowed to work from home. We do not think that the fact that the Claimant always asked before working from home contradicts that evidence in any way. It would always have been necessary to have let her line manager know where she was working.

112. In making the findings above we have had regard to the Claimant's own evidence. She suggests in her witness statement that her requests to work from home were commonly refused. We have not accepted that. We do not believe that the Claimant has sought to mislead us, but she has convinced herself that many requests were refused when that is not the case. Given that the Claimant commonly made such requests by text of message, had there been a pattern of refusals we would have expected it to be evidenced in those

messages. It was not.

The Claimant's working hours in comparison to James Kinghorn

113. The Claimant suggests that, in comparison to her, James Kinghorn expected her to work longer and harder than he did. This is one of her complaints of discrimination. In support of that she says that he regularly left work on a Monday in order to play football. She also says that he commonly came in late.

114. James Kinghorn accepts that he would always try to get home early enough to play football on a Monday during the football season. He further accepts that he would usually come in shortly after 9 o'clock. He has twin daughters and he delivers them to school before coming into work.

115. We have seen the electronic entry records for James Kinghorn for the period 5 September 2018 to 5 January 2019. Those records show that James Kinghorn commonly came in to work between 9 and 10 o'clock as he says. His departure time was not consistent but there are numerous occasions when he works late into the evening as does the Claimant. The Claimant was taken through these records when she was cross-examined by Ms Berry. It was put to her that despite James Kinghorn's wish to play football on a Monday there were a number of occasions when he did not leave work in time to do so. We find that this must be the case based on the records that we have seen.

116. The Claimant complains of one particular occasion on 3 September 2018 when she was working remotely from Romania. She accepted that she had agreed that, if she was working from Romania, she would work to the UK office hours. There is a two-hour time difference and so she was inevitably working in the evening. She was due to fly home the following day but, as was not uncommon, an issue arose which made completing the business as usual tasks difficult. The Claimant complains that James Kinghorn said to her *'what you want me to do'* and suggested that it was not his problem. We were referred to a 'bChat' which is the internal messaging system. At about 4 o'clock on 3 September 2018 James Kinghorn explained that he needed to leave at about 4:30 in order to pick up his children from nursery. We can see that this was a commitment that was difficult for him to avoid. It is clear that there was a telephone call that followed on from that and it seems likely that James Kinghorn would have explained he wasn't in a position to directly assist. James Kinghorn then checks back in again at about 10:30pm. He thanks both the Claimant and Ivet Draganova for their hard work in resolving the issue. To complete this task the Claimant had to work very late in local time. She was travelling the next day and this made the late night particularly inconvenient and tiring.

117. We have also seen the electronic entry records for Ivet Draganova. Those records show that of the team members on average she was the 1st to arrive and the last to leave. We were told that her husband also worked for Barclays. They would tend to arrive and leave together. The Claimant did not accept that she was necessarily working during all the time that she was in the

building. It seemed to us that the Claimant was speculating about that. During the redundancy selection process Ivet Draganova's willingness to work long hours was a matter that was commented upon favourably. We heard evidence that Ivet Draganova tended to study and conduct research whilst waiting for her husband to finish work. We find it more likely than not that she was working or conducting work related tasks throughout the time that she was present in the building.

The Claimant's request for a reference

118. The Claimant says, and we accept, that she was very unhappy with her working conditions at this time and that she was keen to find another position. There is a reference to this in the Claimant's GP records when she attended on 18 September 2018. On 12 September 2018 the Claimant had asked James Kinghorn if he could give her a reference. James Kinghorn agreed to do this. It was not disputed by James Kinghorn that he did not ever do this despite the Claimant repeating her request. The Claimant says that the reasons for this were unlawful. It is necessary for us to make some findings of fact about the surrounding circumstances.

119. Unbeknown to the Claimant, Barclays has adopted a reference policy very much in line with modern practice. An employee can request a reference from the HR portal, but that reference will be impersonal giving only details of the employee's role and their starting date. We find that James Kinghorn was unaware of the details of this and he never informed the Claimant how she could get a reference for herself.

120. The Claimant says, and we accept, that when James Kinghorn was asked to provide a reference he readily agreed to do so. There was no evidence of any reluctance to assist the Claimant. At around the same point the Claimant had taken and failed an online test required for promotion to an AVPO position. The Claimant says, and we accept, that she asked James Kinghorn to intervene and asked that she be afforded a second opportunity to take the test. She says that he did this for her. Again, we find that there was no reluctance by James Kinghorn to assist the Claimant with a career move.

121. At the end of October 2018, the Claimant wanted to apply for a further AVP post (having by then passed the test). She needed James Kinghorn's approval as she had not been in her existing position for long enough to apply internally without approval from her existing manager. On 25 October 2018 James Kinghorn wrote a supportive e-mail that gave his permission for the Claimant to apply for another internal role. There is no suggestion he was reluctant to do so. That e-mail followed a conversation on the internal messaging system. The tone of the messages is, both ways, friendly and constructive. When agreeing to do as the Claimant asked James Kinghorn said *'you best be nice to me!'*. The Claimant considers that that was intimidating and called for an explanation. We disagree. The Claimant asked for something and James Kinghorn promptly agreed to assist her suggesting that the Claimant be grateful (which is how we understand the message in its context) was, we find, intended as being light-hearted.

122. On 31 October 2018 the Claimant sent James Kinghorn an internal message asking whether he minded if she reminded him about her reference request. His response was to say, *'absolutely not'*. Whilst the reminder did not actually prompt James Kinghorn to take any action his response was positive. On 5 November 2018 the Claimant chased James Kinghorn once again. He replied with an emoji which we take to be an embarrassed face promptly followed by a message saying *'sorry'* and then another saying, *'don't I owe you chocolate with a side of bagel for that'*. The conversation continues in a friendly and light-hearted manner and ends with James Kinghorn encouraging the Claimant to remind him if he did not follow through with a reference. On the evidence before us the issue of a reference is not raised again before the Claimant commenced long term sickness absence.

123. As a part of the grievance process James Kinghorn was asked why he had not provided the Claimant with a reference. The explanation he gave was that he did not know how to go about doing that – which should have been submitting a request via the HR Portal. We accept that that was the principle reason for this omission. In addition, we find that James Kinghorn, in common with the whole team, was busy with the day to day work and that, distracted by this, he forgot to deal with this despite his assurances that he would do so. Whilst the Claimant can rightly feel aggrieved by James Kinghorn's failure to do what he had promised the overall tone of the communications, coupled with James Kinghorn's interventions to assist the Claimant in obtaining a new position, do not support the suggestion that he was consciously or subconsciously influenced by any protected characteristic.

<u>The Claimant's request for overtime payments</u>

124. On 21 November 2018 the Claimant sent an e-mail to James Kinghorn attaching a time log and asking to be paid overtime for any time spent working in excess of seven hours a day. She had compiled that time log using the access details provided by the Security Control Room. In a later email sent on 4 December 2018 she asked to be paid for 272 hours of overtime. James Kinghorn promptly sought advice from HR. In an email sent on 8 November 2018 he said:

> *'One of my directs believes that she is able to claim payment for any hours worked outside of 9am to 5pm, which she is planning on doing essentially for the whole year. She says she was in contact with HR who mentioned that this was indeed the case, providing all the relevant evidence etc is provided. However my understanding of the contracts were that 9—5 was the base hours plus any extra hours needed to complete the job essentially. Now clearly we don't want people to work unnecessarily long hours but I believe the flexibility we offer around working from home and coming late / leaving early essentially compensates for that fact, however we wanted to get some guidance on exactly what the situation is if that is something you are able to pls opine on?'*

125. The response from the HR department was initially to advise that the Claimant was entitled to overtime payments. James Kinghorn was surprised by this and sent a further email on 9 November 2018 in which he said *'I am a little surprised as we do work in the IB it is virtually impossible to complete our jobs* between *9—5! Typically we will work 9 -10 hour days'*. After that query another individual explained that whilst paid overtime was available to certain employees it was not payable to those employees in the Investment Bank. Simply put, it depended on the type of contract that had been given. Generally speaking, employees in the Investment Bank were given a contract which expressly excluded payment for overtime. The correspondence referred to the clauses that dealt with overtime in the Claimant's contract which we have set out above.

126. It is a part of the Claimant's case that she was required consistently to work for more than 48 hours per week. The number of hours she actually worked was reviewed by Karen McGoldrick during the grievance procedure. The spreadsheet that the Claimant submitted in support of her claim for overtime claimed bought 272 hours of additional work. To come up with that figure the Claimant assumed that she started work either at 9 am, 10am or 11am and then took the exact time that she left the building as the time she stopped working. The Claimant's figures are not entirely accurate. Karen McGoldrick did a comprehensive analysis of the touch in touch out records. She produced table giving the hours spent in the office in every week in 2018. We accept that the calculations are reasonably accurate. On her calculations the Claimant had in 25 weeks worked for in excess of 35 hours. She calculated that in those weeks the Claimant had worked an additional 153 hours and six minutes. In the remaining weeks the Claimant had worked in the office for less than her contracted hours.

127. Karen McGoldrick recognised that looking at the hours spent in the office would not necessarily be fair as the Claimant had on occasions worked from home. She had asked the Claimant how often she had worked from home and the Claimant had estimated that she had worked from home for 15 days. Karen McGoldrick was prepared to assume that the Claimant had worked for 10 hours a day on these occasions. She concluded that even allowing for this the Claimant had not worked in excess of 48 hours per week on a regular basis.

128. We find that Karen McGoldrick's analysis is broadly correct. What it shows is that there was at least three weeks in which the Claimant worked in excess of 48 hours. It also shows that the Claimant regularly worked in excess of her ordinary hours of 35 hours per week. On Karen McGoldrick's analysis the figure would be around 40 hours per week. That is likely to be on the low side because it ignores the fact that the Claimant had periods of annual leave (which have the effect of reducing the average), some sick leave and the text messages show that occasionally the Claimant conducted work before and after attending the office. We have regard to the fact that James Kinghorn estimated that staff worked 9 to 10-hour days (we assume he included what was meant to be a lunch hour in that figure). We find that on average the Claimant worked somewhere between 40 and 48 hours per week but only

rarely in excess. That finding is not intended to diminish our conclusion that the Claimant worked hard, for many hours a week and far too frequently until late in the evening.

Further events in November/December 2018

129. In November or early December 2018, the Claimant saw Ivet Draganova using James Kinghorn's log in details to access his computer. James Kinghorn told us, and we accept, that on each occasion he was working remotely and that he asked Ivet Draganova to log in to his computer in order to resolve an IT difficulty. Ivet Draganova told the Claimant that at the time. The Claimant told us, and it appears to be common ground, that this was a breach of standard procedures and should not have happened. James Kinghorn accepted that this is what had occurred when it was later raised by the Claimant during the grievance process. We do not consider that the Claimant was disadvantaged in any way by these actions. She was correct in respect of her strict adherence to IT security but when the breach of procedure was eventually raised it was in our view unsurprisingly treated as not being particularly serious. What the Claimant seeks to draw from this is a suggestion made at paragraph 207 of her witness statement that both James Kinghorn and Ivet Draganova *'still required my supervision'*. We do not consider that this incident supports the Claimant's assertion. The fact that she followed IT security policy more strictly than James Kinghorn says very little about his overall competence.

130. In December 2018 the Claimant had a series of medical appointments to address the endometriosis. She attended one such appointment on 3 December 2018. The Claimant says and we accept that this was a difficult appointment both physically and mentally. The Claimant had intended to go to work after the appointment but was advised that working long hours under pressure was unwise. She did not return to work on that day. She sent James Kinghorn a text message that evening. The following day James Kinghorn sent an internal message asking how the appointment went. There is nothing in what we have seen in the text messages or heard that would suggest that James Kinghorn said or did anything that the Claimant could reasonably believe amounted to disapproving of her not returning to work. The Claimant had a further appointment on 17 December 2018. At this appointment she discussed the results of her MRI scan. This was unsurprisingly upsetting for the Claimant. We have set out more detail below, but the MRI scan showed that the endometriosis had spread further than the Claimant would have anticipated.

131. The Claimant has complained that she was removed from a project called 'Exotics Desktop' which was reassigned to Ivet Draganova. James Kinghorn disputed this. He said that the project work was piecemeal and allocated to anybody perceived to have capacity to do it. He accepted that the Claimant had been involved with the Exotics TLO project but that her involvement had not progressed very far. He accepts that Ivet Draganova was asked to do work on that project but says it was an entirely separate piece of work to that done by the Claimant. Later on, the Claimant was asked to do

more work on the project but that did not actually take place because the Claimant fell ill. The Claimant suggests that she was asked to involve herself again as Ivet Draganova proved incompetent. James Kinghorn did not accept that this was the case. We accept James Kinghorn's account. We find that the allocation of project work turned on capacity. There was nobody allocated to this project on a beginning to end basis, but ad hoc work was required. This was shared between the team. The Claimant's impression that Ivet Draganova was not competent to assist with this project is just that, her impression. We accept what James Kinghorn told us that Ivet Draganova carried out the work that she was asked to do competently. It may be the case that Ivet Draganova asked the Claimant about this work, but we do not find that that meant she was incompetent. The Claimant says, and we accept, that she told Ivet Draganova what she would no longer support her.

132. The Claimant refers to incidents on 17 and 18 December 2018 when she had to deal with issues raised by Ivet Draganova. She then had a meeting with James Kinghorn. We find that at this meeting the Claimant did express her frustrations about the amount of work that she was expected to do and her perception that she was expected to train and mentor Ivet Draganova. We accept James Kinghorn's evidence that there had been a gradual decline in the working relationships towards the end of the year. Despite the decline this was more professional than personal. The Claimant and Ivet Draganova continued to maintain a good personal relationship which was evidenced by text messages after the Claimant took sick leave.

133. We find it more likely than not that the Claimant's health concerns coupled with her frustration about the amount of work she has had to do led her to focus on training and assisting Ivet Draganova as a bigger issue than objectively justified. It is common ground that James Kinghorn at this meeting or previously, used language that suggested that if the working relationship could not be repaired collaboratively, he would impose a solution. The Claimant has suggested that James Kinghorn instructed her that she needed to carry on training Ivet Draganova. We find that it is more likely that he emphasised the need to work together which would have included offering assistance if required. It is the Claimant's case that Ivet Draganova attempted to enter the meeting room. She may well have done so recognising that the meeting concerned the team working together. The Claimant suggests that she was prevented from walking out. There is no evidence that would support a finding that she was deliberately physically prevented from leaving. We would accept that the meeting did nothing to resolve the Claimant's concerns.

<u>The Claimant's end of year appraisal and bonus</u>

134. In common with many large financial institutions Barclays undertakes an annual appraisal of its employees. The rating given in that appraisal may result in the payment of a bonus. Each employee is measured against two standards. The first is *'What'*. This is said to be the measurement of performance against objectives. In the language of the Performance Management Policy the *'my objectives are aligned to business strategy, to*

show how I contribute to the success of Barclay's'. The second criteria is the *'How'*. This is said to be how the values of the business are demonstrated. Against each criterion there are three possible evaluations. These are 'improvement needed', 'strong' and 'outstanding'. The policy provides for these to be assessed on a yearly basis and to provide the framework for end of year conversation.

135. The assessment of the manager is recorded on the 'PLT' system. Once an assessment has taken place the manager is required by the policy to share the assessment with the employee. The only mechanism for challenging the manager's assessment is through the grievance procedure.

136. In common with many appraisal processes, the first stage required the Claimant to set out her views on her own performance. Thereafter there are comments by James Kinghorn. James Kinghorn assessed the Claimant as being strong in both the what and the how criteria. Once the appraisal was complete it was sent to the Claimant. Whilst the appraisal took place in early December 2018 the Claimant did not sign it until 14 February 2019 by which time, she had started what became a long-term sickness absence. The Claimant did not at that stage dispute the ratings that she was given.

137. We were told that the vast majority of the employees received a grading of strong in both criteria. It was intended that the other grades should be reserved for employees who were clearly failing to meet the necessary standards or who were exemplary employees. We accept that evidence. We were provided with a number of documents relating to the redundancy selection process. Within these we could see that the majority of employees were indeed given ratings of strong. Where ratings of outstanding had been given there was some evidence of exemplary achievements.

138. We have read the comments made by both the Claimant and James Kinghorn in the appraisal. We find that where the Claimant has set out her achievements in the 'What' section of the form to a very great extent she has described undertaking the duties she is required to do as part of her job description. There is no dispute that she did those very well indeed. James Kinghorn's comments reflect that. He described the Claimant as a strong performer in the team. He goes on to say that she is diligent and has a great deal of attention to detail. He refers to positive feedback received from stakeholders. In order to be rated as outstanding the evaluation document states that outstanding will be given when *'Objectives and core responsibilities delivered, far exceeding the high standards expected in terms of quality, quantity, timeliness and efficiency'*.

139. In terms of the *'How'* criteria what is required in order to be awarded an outstanding is that the employee *'Acts as and consistently is an inspirational role model for all our Values; behaviours reflect and far exceed the high standards expected in the Values in Action framework.'*

140. The Claimant writes a lot less about how she has met or exceeded the *'How'* criteria. This is in contrast to what she wrote in the *'What'* criteria section

where she was able to list a large number of tasks that she had undertaken. James Kinghorn's comments are again positive and he sets out some positive feedback that the Claimant has received. He starts by saying that the Claimant had delivered a quality of service in line with the expected thresholds and the five core values. Whilst that is positive it is entirely in line with his conclusion that the rating should be strong rather than outstanding. A strong employee as we understand it will meet the expected criteria whereas an outstanding employee will far exceed those criteria.

141. As a tribunal we have some sympathy for the Claimant. It would have been very hard for her to have demonstrated that she was an outstanding employee against the criteria she was being measured against in circumstances where she was inundated with doing the day-to-day tasks that needed to be completed. We find that is particularly reflected in the 'What' section of the form.

142. It is not the role of the tribunal to assess for ourselves what grade we would have given the Claimant. What we need to do was assess whether the grade was discriminatory. For those purposes we need to assess whether there is anything surprising about the grades that were given. We find that there is not. We accept the evidence that was given by the Respondents' witnesses that outstanding grades are rarely awarded. This means that the employee is performing very well indeed is likely to get the same grade as an employee who is just ticking over. On the evidence presented by the Claimant in the appraisal form we find that the grade that was given by James Kinghorn was a conclusion he could reasonably have reached. We consider that James Kinghorn has gone out of his way to make positive comments about the Claimant. In the concluding part of the appraisal form he comments that it has been a pleasure working with the Claimant and that he very much appreciated her effort, hard work and skill. He goes on to make a number of positive comments about how the Claimant has contributed during what had been a challenging year. Without in any sense being negative he goes on to say that he would like to see the Claimant challenging herself further in order to progress her career. Those comments are entirely consistent with the Claimant being given a rating of strong against both criteria.

143. When James Kinghorn gave evidence, he explained his rationale for awarding the grades that he did. In his witness statement he describes her as a very solid business analyst. He explained not giving her a rating of outstanding because she had not gone beyond her job description. We are satisfied that James Kinghorn honestly believed that he had awarded the Claimant an appropriate grade. In the Claimant's grievance letter of 1 April 2019, she did complain about her bonus and refers to it as being discriminatory, but she does not suggest that the ratings of strong/strong were of themselves inappropriate.

144. Having completed the appraisal James Kinghorn was not responsible for the level of bonus set. The Claimant received a bonus of £1,600 at the end of February 2019. She learned of this in a telephone call with Avneesh Singh.

145. Karen McGoldrick when investigating the grievance asked for an explanation as to how a bonus was calculated. We find that she was an entirely honest witness and acted upon what she was told. The conclusion in her grievance outcome letter was as follows:

> *'I found that annual incentive awards are non-contractual and discretionary. There is no set calculation or formula for bonuses as this is discretionary. The guidelines state that higher performers receive a higher bonus recommendation. Employees rated Strong/Outstanding, Outstanding/Strong or Outstanding/Outstanding according to their end-of-year performance review - which grades employees on the 'what' and the 'how' according to the performance review of their objectives and Barclays values - would receive a higher recommendation than employees rated Strong/Strong, which was your performance rating.*
>
> *As per the annual pay review, the same set of employee data is visible to the Reward team and business. This means that neither employee nationality nor gender are visible and therefore cannot form part of the bonus award calculations.*
>
> *I have investigated your concern and can confirm that the Reward team have reviewed the discretionary incentive award made for 2018, and were comfortable that the recommendation is in line with your peers at BA4/Analyst level across Global Markets Operations (GMO) rated as Strong/Strong. Recommendations are made and owned by the business but are subject to consistency checks by the Recommending Manager, Reward and the HR team.*
>
> *In conclusion, I will not be upholding this point to your grievance on the basis that any incentive award or 'bonus' is entirely discretionary. The Reward team (who act impartially and independently to both line and departmental management) have reviewed your discretionary incentive award and are comfortable that the recommendation is in line with others at BA4/Analyst level across GMO rated Strong/Strong.'*

146. The impression that is given by that passage is that the appraisal rating is the only matter that is considered when assessing the level of any bonus. As the level of bonus is set without access to any information about nationality that would suggest that the only risk of discrimination would arise at the point that the appraisal was undertaken and not at the time the bonus was calculated. In good faith, Karen McGoldrick made that point in her witness statement.

147. The cross examination of Avneesh Singh was spread over a number of days. As he was asked questions it became apparent that the disclosure that had been given by the Respondents did not include all the relevant documents. In particular there were numerous iterations of the matrix used to assess who would be selected for redundancy. In all some 344 pages of documents were disclosed by the Respondents in the course of the proceedings. Whilst we

admitted all of those documents into evidence, we find that there had been a failure particularly by Avneesh Singh to draw attention to documents some of which were clearly relevant to the issues we had to decide.

148. Amongst the documents disclosed during the proceedings were e-mails and spreadsheets that have a far clearer picture of how the employees' performance was assessed. Those documents showed that in addition to the appraisal process and grading there was what was described in e-mails a 'quintile/ranking process'. The process is described in an e-mail sent to Avneesh Singh and others on 5 December 2018. The following passages are material:

> *'Salary*
>
> *- Any pay rises will be pre-figured (ex-BA4 London, as this is driven by UNITE and not something we have say on). You can each move amounts around WITHIN CURRENCY only. Please take the assumption around our quintile/ranking process, which I would say is 1/Outstanding highest up in total, 2, up slightly, 3 flat, 4 down, 5/NI zero.*
>
> *Bonus*
>
> *- All above based compensation, I will give you a Pool per region. This can be used across currencies (for example, Avneesh you will have GBP, EUR and ILS), you just need to not go over the allocation amount.*
>
> *- Jim, you need to be mindful of OT, when you make your total reward decisions.*
>
> *Please do it based on performance and ensure fair and differentiated based on that, aligned with the firms remuneration policy, it is not one size fits all.'*

149. Managers were instructed to moderate any grades given during the appraisal process. The expectation was that that would result in a distribution of 15% outstanding, 75% strong and 10% needs improvement. In a series of e-mails in early November Avneesh Singh endeavours to match the assessments of his VPs and AVPs to that distribution. This appears to be very much a matter of negotiation. The e-mails show input both from managers and HR. There is some resistance to grading employees as Needs Improvement when they had initially been thought to meet the requirements of *'Strong'*.

150. We understand that the reference to 'quintiles' in a banding at 20% intervals. We were shown a number of documents that rated the AVPs and Analysts with figures of 1 to 5. Whilst the two criteria and 3 possible grades produces 5 possible combinations this was not the way in which the quintile score was necessarily calculated. We were shown an e-mail sent to Avneesh

Singh at 9:51 on 7 November 2018 where it is said that a score of Outstanding/Outstanding would not necessarily be a requirement for quintile 1.

151. An e-mail from Daren Gilhooly sent to Avneesh Singh on 5 November 2018 at 6:23pm and marked 'Secret' discloses that the senior managers ranked the employees from strongest to weakest. Daren Gilhooly includes in his ranking all of the Analysts in the UK ROST team. Of the four, Matteo Pasini is ranked top (with a 4), the Claimant is below him with a 3, Ivet Draganova below her but also with a 3 and Employee A at the bottom of the list.

152. Given that the discussions between Avneesh Singh and Darren Gilhooly appear to take place in November before the appraisal was due to take place it seems likely that the senior managers may have instructed the AVPs including James Kinghorn what grade they were expected to allocate.

153. What these documents show is that there was considerably more discretion given to the managers than simply setting a bonus based on the (relatively transparent) appraisal scores. We asked Karen McGoldrick, who had listened to Avneesh Singh give his evidence, whether she thought that she had been given the full picture when she made her enquiries. She was quite emphatic in her response telling us that she did not consider that she had been given the whole truth. We agree.

154. We are unimpressed that the Respondent was not be prepared to be more open about how it awards bonuses. However, the absence of transparency may give an opportunity to allocate bonuses in a discriminatory manner, but it does not necessarily follow that that was the case. Having been told by Karen McGoldrick that her bonus was in the appropriate range for an employee with a strong/strong rating the Claimant had asked what the average figure was. It transpired that the Claimant was given a bonus just below average. This indicated what we find to be the case that it was not simply the rating that determined the bonus.

155. Avneesh Singh told us that it was difficult to come up with an average because bonuses were allocated differently depending on local terms and conditions across the Middle Office worldwide. We accept this as it is supported by contemporaneous documents. We find that the factors that determined the amount of any bonus were, the overall cap imposed and within that the local agreements, the grading and finally the ranking. The ranking process was a matter of discretion and judgment and was in this case delegated to Avneesh Singh. We entirely reject the suggestion that this is a 'blind' process. There is ample scope for favouritism and/or discrimination in the administration of the scheme.

<u>The start of the Claimant's absence from work</u>

156. The Claimant had a further meeting with James Kinghorn on 14 January 2019. We accept her account that during this meeting she complained of the hours of work, discussed her health and again raised her complaints about assisting Ivet Draganova. There are no minutes or records of that meeting.

157. On the next day the Claimant was unwell. She never in fact returned to work. On 21 January 2019 James Kinghorn sent her a text message enquiring whether she would be returning to work. The Claimant categorises this as uncaring. The initial message included James Kinghorn saying that he hoped that the Claimant was better. When the Claimant replied saying that she was not, the response appears to us to be considerate. The Claimant was told that she would need a medical certificate, but James Kinghorn urged the Claimant to visit her GP for the sake of her health and also proposed working from home if that would assist the Claimant. We do not consider that exchange suggests any callousness on the part of James Kinghorn.

Late January 2019 and the issue of contractual sick pay.

158. Through January the Claimant was given specialist advice in respect of the endometriosis. She had the benefit of private medical insurance provided by Barclays as a benefit. The Claimant was in receipt of company sick pay. She became concerned that this would soon cease. The Claimant had discussed the issue of sick pay with James Kinghorn, but we find that she got no definitive answer about how long she was entitled to be paid. She found out for herself that she was only entitled to 8 weeks of full pay before reverting to statutory sick pay.

159. The Claimant was advised that she needed a significant operation including a resection of the bowel creating a stoma. It was suggested that a further operation would be required after 3 months to reverse the stoma. We accept that the Claimant was distressed and concerned about the nature of the medical treatment proposed but also concerned about how she could support herself financially during any treatment. In February 2019 the Claimant was told that she would be paid a bonus of £1,600.

160. The Claimant says in her witness statement that she did not know how she might bring a grievance. She was able to access the Intranet and access the sick pay policy. She was able to speak to HR. We do not accept that there was any real difficulty for the Claimant bringing a grievance if she wished to do so. In her own text messages, she had referred in conversations with her colleagues to speaking to HR.

161. The Claimant discovered that the sick pay policy provided for sick pay to be paid for an extended period at the discretion of Barclays. The Claimant contacted James Kinghorn and asked him about this. James Kinghorn was unaware of this policy but undertook to find out about it. The Claimant sent a text message to James Kinghorn about this on 20 February 2019. James Kinghorn then contacted the Claimant on 2 occasions asking for information about the day she started as a temporary worker and asking for information about her treatment plan. On 28 February 2019 James Kinghorn sent an e-mail to Personal & Corporate Banking HR. The content of that e-mail shows that James Kinghorn had already spoken to ER Direct and HR Operations who had not been able to tell him anything about a discretionary extension to the contractual sick pay. He gave the following account of the Claimant's position:

> *'One of my team is currently off on long term sick leave, beginning 15th January, as she has stage 4 endometriosis and is expecting surgery relatively imminently and the associated recovery period. She has only been a permanent employee at Barclays since the beginning of Jan 2018 (she was a contractor prior to that since June 2016) and as such is officially only entitled to 8 weeks full pay before rolling on to the statutory amount, with the 8 weeks ending on the 12th March. She will not have undergone the surgery by the point and of course there is the post op recovery period to take into account as well. I believe she is also not eligible for the insurance as yet as she needs to have been permanent for a minimum of 2 years.'*

162. James Kinghorn wrote a further e-mail to Personal and Corporate Banking HR on 5 March 2019. He explained that the Claimant would need about 3 months to recover from the initial surgery and then would need further surgery. He said that it was unclear how long the recovery from the further surgery would take. He pointed out again that the Claimant would not benefit from any income protection insurance. He said, *'we are looking to see if there is anything we can do…'.* He said that the Claimant would be able to supply all relevant medical documents and referrals if it was necessary.

163. On 12 March 2019 James Kinghorn received an e-mail which followed up on a telephone call. That e-mail was from an HR Business Partner in New York. It said:

> *'Coming back on our conversation earlier today … I've verified that there is no mechanism to extend sick pay except in very exceptional circumstances which this wouldn't meet. As mentioned, it would set a precedent which would be difficult to manage equitably which is why we need to hold firm to our policies. Please continue to manage the case via ER Direct for support on staying connected and supporting Anca in her return to work when she is ready'*

164. We find that James Kinghorn had accurately summarised the Claimant's employment status, her diagnosis and had relayed the timescales of any expected treatment. We also find that it is clear that James Kinghorn had taken the trouble to contact a number of individuals on the Claimant's behalf in order to see whether an exception would be made. His second e-mail offered to supply any further medical evidence if it would make any difference. James Kinghorn relayed that decision to the Claimant. The Claimant told James Kinghorn of her disappointment and compared her treatment with that afforded to Employee A. James Kinghorn had no information about Employee A and could not comment. We find that as Employee A had been employed for longer than the Claimant, she would have had a greater contractual right to sick pay and would also have had the benefit of income protection insurance.

165. The Claimant asked James Kinghorn for the name of the person in New York who had made the decision not to extend the contractual sick pay. It was

common ground that James Kinghorn refused to provide this. He gave the reason to the Claimant at the time that he thought that he could not disclose that. In a further conversation James Kinghorn informed the Claimant that the decision would not be revisited. The Claimant was paid in full up to 12 March 2019 and thereafter was paid statutory sick pay.

Redundancies in the ROST Team

166. Barclays recognises Unite for the purposes of collective consultation in respect of proposed redundancies. It has adopted a redundancy policy which it makes available on the Intranet. It has also produced guidance for managers on how to conduct individual consultation as part of any redundancy process. Those procedures set out that there will be collective consultation in advance of any general announcement about potential redundancies. Following the general announcement there will be individual consultation. The policy envisages an initial one to one meeting with a follow up 2 weeks later. If an employee is displaced from their role, they would usually be permitted to take a period of displacement leave during which alternative employment would be explored. At the end of that period an employee who had not found alternative employment might be dismissed.

167. Barclays has in previous redundancy processes agreed selection criteria. These take the form of a matrix. The initial scoring is based on the score given at the annual appraisal for the previous 2 years . One point is given for a 'needs improvement' 5 for a 'strong' and 8 for an 'outstanding'. The final year is given a double weighting. Then the employees are scored for competencies. The assessed competency depends on the grade but for an Analyst the assessed competency is 'Customer Focus'. There is then a third element 'Technical Competency'. A footnote suggests that this third element will only be used in the event of a tie break.

168. The management guidance for individual consultation indicates that any selection scoring would be discussed at the first one to one meeting. That indicates that it was envisaged by the policy that there would not be any consultation on the selection criteria themselves and that the scoring would have been undertaken in advance of the first individual meeting. As we set out below that is what happened in this case.

169. Avneesh Singh told us, and we accept that in early 2019 Barclays was conducting a review of its *'location strategy and global footprint'*. We find that what was being undertaken was a review of where Barclays wanted its employees to work. Barclays had offices in Pune in India. We accept Avneesh Singh's evidence that a decision was taken to move 10 Business Analyst roles from London to Pune. His evidence is entirely consistent with what happened as part of a significantly wider reorganisation affecting not only Business Analysts but many other employees including AVPs such as James Kinghorn. It was implicit, and Avneesh Singh accepted, that a part of the rational was the reduction in cost.

170. The Respondents had disclosed and included in the bundle e-mails,

individual scoring sheets and spreadsheets where the individual scoring sheets were complied. The Respondents solicitors had redacted the names of any individual not specifically referred to in these proceedings. That gave rise to some difficulties comparing the individual scoring sheets to the spreadsheets. It became apparent that there were various versions of some documents. In particular the excel spreadsheet that summarised the scores and then was gradually updated during the redundancy process. The Respondents, and in particular Avneesh Singh had not paid sufficient attention to their obligations to disclose each version of a document. We were drip fed various versions throughout the hearing. We do not find that there was any deliberate attempt to conceal documents. Avneesh Singh eventually brought documents to the attention of his solicitors and they were disclosed. We accept that the spreadsheets were 'live' documents and that there may be different versions in existence depending on who had edited them. We find that the Respondents have made a particularly poor job of explaining how each version was created and by whom. However ultimately none of these criticisms have prevented us from making the findings of fact necessary to determine this case.

171. By no later than 12 March 2019 a decision had been taken that the redundancy exercise would be undertaken by identifying a number of pools from which employees would be selected for redundancy. It was decided that the 16 BA4 Analysts in the UK middle office would be placed in one selection pool. In the documentation we were provided with it was clear that a number of pools had been identified but the documentation was not consistent in that the identification of the pool numbers varied from document to document. One document, disclosed only in the course of the proceedings, and sent to the Tribunal in an unredacted form had a file name AS Employee line by line GMO_01042019. That document showed the Claimant listed in one section (called Macro Rates EM) with 15 other BA4 Analysts. The document suggests that that group along with others has been described as pool 3 and it does support Avneesh Singh's evidence that 16 Analysts were placed in one pool.

172. An e-mail chain included in the bundle between Avneesh Singh and an unidentified person in 'Group HR' show that Avneesh Singh was asked to score individuals in the teams affected by the redundancy situation on 12 March 2019. At that time a version of the 'line by line' spreadsheet was first introduced. On 12 March 2019 at 22:36 Avneesh Singh sent an e-mail saying that he had completed the scoring of pools 7 and 8. We find that at that stage Pool 8 was the pool of 16 Analysts that included the Claimant.

173. The following day 14 March 2019 the individual in Group HR responded. Avneesh Singh is told that he had not completed the competency sections for the employees and that he had used scores other than 1, 5, or 8 for the scores to be given based on the annual appraisals. The e-mail contained the following passage:

> *'With regards to the last section on the customer focus and technical competency, please can you give some more information for Yvet, Sean and Sarah around this specific to the employee and how they*

demonstrate a key custom focus, I think the bulk of it is there, we just need more information around this.'

174. There was no employee called Yvet referred to in the spreadsheets where the names had not been redacted. We find that the reference to Yvat is in fact a reference to Ivet Draganova. The implication from this E-mail is that Avneesh Singh has given Ivet Draganova and 'Sean' and 'Sarah' a high score for Customer Focus. Support for that can be found from the unredacted spreadsheet which shows that an employee 'Sean' was awarded 8 for customer focus.

175. The following day 15 March 2019 Avneesh Singh attached copies of the individual scoring sheets for 15 employees in pool 8. These included the scoring sheets for the Claimant, Employee A and Ivet Draganova.

176. The Respondents had disclosed and included in the bundle 15 individual scoring sheets. Those sheets showed the following:

176.1. That the Claimant has been allocated a score based on a hypothetical strong/strong rating for 2017 and an actual strong/strong for 2018 giving her a score of 30. She had been given a score of 5 for both the Customer Focus competency and the Technical competency – a total of 40.

176.2. The score sheet in the bundle showed Ivet Draganova getting exactly the same scores as the Claimant in common with 8 other employees.

176.3. Employee A had a total score of 36 (having received a 1 for the Technical competency).

176.4. 4 employees had a score over 40.

177. The individual scoring sheets were not entirely consistent with the spreadsheets that were produced by the Respondents. In some, but not all of those spreadsheets Employee A has a score of 40. One employee has a score of 23 (having been given a 'needs improvement' for the What criteria in 2018 and a 1 for customer focus). Two employees have scores of 43 including Ivet Draganova who is shown as having a score of 8 in some versions of the spreadsheets for Customer Focus and for Technical skill in some other versions.

178. In the course of his evidence Avneesh Singh produced a further copy of the scoring sheet for Ivet Draganova which, consistent with some versions of the spreadsheets, showed her being allocated a score of 8 for Customer focus. At the Claimant's request the Respondent disclosed the electronic metadata for this version and the scoring for the Claimant. That showed that both documents had been created on 12 March 2019 and last edited on 19 March 2019.

179. From this confusing picture it is necessary for us to decide whether, as suggested by the Claimant, there has been any manipulation of the scores in particular the score given to Ivet Draganova. The document trail was unimpressive. We find that there are numerous errors such as misidentifying the relevant pool. There are certainly two versions of the scoring sheet for Ivet Draganova. Avneesh Singh suggested that there must have been a mistake or typing error.

180. We accept that the score sheet for Ivet Draganova showing a score of 8 for Customer focus was produced no later than 19 March 2019. That is what the meta data shows. We find that that version must have been attached to Avneesh Singh's e-mail of 12 March 2019 or at least a version where a score of 8 is given for customer focus. The response from HR makes no sense unless that was the case.

181. We cannot be sure whether the version showing a 5 for customer focus was the result of a typo or a change of heart. Ultimately it does not appear to us to be as significant as it first appeared. It would not be in any way improper for Avneesh Singh to have reflected on the scores and changed them if he thought it appropriate to do so. The issue for us is whether he scored the pool in good faith and in a manner that did not discriminate of victimise the Claimant.

182. The scoring sheets required Avneesh Singh to include comments justifying the scores given for the two competencies. His comments for the Claimant's score for customer focus were as follows:

> • *Hardworking SME supporting the Vanilla Options and Structured Rates trading desks.*
>
> • *Able to engage well with Trading desk, infrastructure partners as well as IT support*
>
> • *Committed to delivering on all support requirements, willing to put in more hours if needed*
>
> • *Go-to individual for all internal queries from internal counterparts*

183. For Ivet Draganova the comments were as follows for customer focus (on both versions of the scoring sheet):

> • *Ivet is a relatively new joiner to the Rates Middle Office team but has been able to pick up quickly on the job*
>
> • *She is diligent and hard working and has been able to deliver on the objectives set out for her*
>
> • *Her 'customers' are internal (Trading/ Risk / Finance/ Ops) and being able to execute her controls/ processes accurately and correctly result in the right delivery to her 'customers'*

184. We shall make further findings of fact below when we deal with the Claimant's complaints about the scoring in the context of the claims she has brought. In particular we make findings about whether the Claimant's score was unlawfully reduced or that of Ivet Draganova unlawfully inflated.

185. On 18 March 2019 Avneesh Singh sent an e-mail to a number of recipients with a subject line 'Employees on long term sick leave'. The question he asked was whether the Claimant and Employee A were *'still part of our budget i.e. on the payroll'.* He was advised that the Claimant's salary was still included as a cost in the budget whereas Employee A (who had by then exhausted her company sick pay). By an e-mail sent on 19 March 2019 an unidentified individual in Ops Business Management (GLA) said *'Anca will be in our start of year cost and therefore will realise savings, Emma would not'*. In response on 19 March 2019 an unidentified individual in the Exchange Administrative Group responded to this information by saying *'Thanks Avneesh, this helps make certain decisions for us'*.

186. Ms Ruxandu put it to Avneesh Singh that the 'certain decisions' were the question of whether these two employees would be made redundant. Avneesh Singh denied this. His explanation was that the chain of e-mails was concerned with setting a budget and not with the redundancy process itself. He suggested that there was a 'use it or lose it' approach to budgeting. That explanation was consistent with one e-mail in the chain sent by an individual called Danny Smith. His e-mail said *'therefore from a Budget perspective, we need to find another fte to fill the budget gap as [sic] cannot utilise Emma. Is this correct?'.*

187. We initially shared Ms Ruxandu's concern about these e-mails. They could be read in the way Ms Ruxandu invited us to understand them namely that there were savings to be made by dismissing the two employees on long term sick leave. However, we are persuaded that this was not the meaning or purpose of these e-mails. There was no cost saving dismissing either of the two employees as both had exhausted their company sick pay. The reference to the budget in the e-mail chain supports Avneesh Singh's account that the concern was to ensure that the overall employee costs met the budget. We have already found that by 13 March 2019 the 'desktop scoring' exercise had already taken place. We find that the decision that led to the Claimant being displaced from her role had provisionally been taken subject only to the search for volunteers. We have therefore concluded that the 'decisions' referred to in the final e-mail of the chain were not decisions about who would be made redundant.

188. By 13 March 2019 Avneesh Singh and other managers had been supplied with a script thought necessary to make the general announcement that redundancies were contemplated. We have seen a chain of e-mails that discuss the general timing of the announcement and specifically when the Claimant and Employee A were to be contacted. The reason that is given in the internal e-mails for treating these two employees differently is that they were both absent from work due to ill health. On 13 March 2019 Avneesh Singh was sent an e-mail from somebody in the Group Centre which set out advice

in respect of the approach to be taken. That e-mail said:

> *'For the two on long term sickness, please seek advice from ER Direct to check it's appropriate to make contact before doing so. In many instances of long term sickness we will choose NOT to communicate until they return in case the message exacerbates their recovery, and that puts Barclays at risk. Please get confirmation before communicating anything to these two. If your ER Direct advisor cannot confirm then please speak with myself..'*

189. A decision was taken not to contact the Claimant until getting the go ahead from 'ER Direct'. We understand ER Direct offer specific employment advice to Barclays. The other employees were informed of the reorganisation on 13 or 14 March 2019. On 22 March 2019 Avneesh Singh contacted the Claimant by telephone. Using the same script as he had used for the other employees, he informed her of the reorganisation and in particular the fact that some Analyst roles were being relocated to Pune. He told her that Barclays was initially asking whether there were any employees interested in voluntary redundancy. The Claimant says in her witness statement that she referred to her ill health and the fact that she was not in receipt or sick pay. We accept her evidence in that respect. These were the matters at the forefront of the Claimant's mind at that time. The Claimant suggests that it was not clear that her role was at risk of being moved to India. We find that if the Claimant misunderstood what was said it was not because the explanation was unclear but because she was stressed and unwell. We are satisfied that Anveesh Singh made it clear that the Claimant's role was at risk of redundancy. Avneesh Singh informed the Claimant that he would send her an e-mail including information about the process and a 'preference form' to indicate if she was interested in voluntary redundancy. He sent that e-mail later on the same day. The attachments included; a guide for employees at risk of redundancy, the redundancy policy, the managing change policy and the preferencing form.

190. The Claimant responded to Avneesh Singh on 25 March 2019. She said that she was in a very difficult position having fallen ill . She referred to the fact that losing her employment would put her health insurance in jeopardy. She completed the preference form stating that she did not want to take voluntary redundancy. The e-mail clearly indicated that the Claimant was distressed and worried by the developments. Avneesh Singh responded promptly.]e asked if the Claimant would benefit from a further referral to Occupational Health in order to assist her *'if the stress associated with the message is not manageable'*. We find that that was a sensible suggestion and one intended to assist the Claimant.

191. On 1 April 2019 the Claimant sent an e-mail to Fiona Nichol. The purpose of that e-mail was to find out where the Claimant should send a grievance to. The content of that e-mail shows that the Claimant was familiar with the terms of the Grievance Policy and that she did not want to submit her grievance to James Kinghorn as her line manager as she was, in part, complaining about him.

192. We shall deal with the Claimant's grievance separately below. However, at the end of the grievance the Claimant referred to the redundancy exercise. Fiona Nichol responded to that part of the Claimant's grievance by sending an e-mail in which she explained the rationale behind the reorganisation exercise. She said that despite the fact that the Claimant was away from work there remained an obligation to consult with her. She made it clear that the exercise potentially impacted the Claimant's role. She said that if insufficient people volunteered for redundancy there would be a selection process using agreed criteria. This was perhaps somewhat incomplete as the scoring exercise had already taken place. Fiona Nichol included a further copy of the redundancy policy and drew attention to the right to appeal any decision to make an employee redundant.

193. After all of the affected employees had completed their preference forms there were insufficient volunteers for redundancy (in fact only one individual volunteered to leave from the pool of 16). On 1 April 2019 Avneesh Singh was sent a further script for use at individual consultation meetings. Avneesh Singh did not follow that script with the 6 employees who had scored the highest in the selection exercise. They were told that their role was 'not impacted'.

194. On 3 April 2019 Avneesh Singh endeavoured to contact the Claimant. He tried to call and followed that up with a text message. That prompted the Claimant to send a further email to Fiona Nichols. She said that she was confused because she had been told by her line manager to expect a telephone call from Avneesh Singh to be informed of the outcome of the preference stage *'and I think also decisions'*. She suggested she was later told that that would not be taking place. She asked that all further information be conveyed by email. Fiona Nichol corresponded with the Claimant by email and sought to persuade her to engage in either a face-to-face meeting or a telephone call with Avneesh Singh. The Claimant responded on 4 April 2019 repeating her request to deal with matters in writing and asking that matters be dealt with expeditiously.

195. On 9 April 2019 Avneesh Singh sent an email to the Claimant. He said that further to the Claimant's request he was continuing to consult with her in writing. In his letter he started with a review of the process to date. He gave a brief explanation of the rationale for the changes. He then turned to the impact on the Claimant herself. He reminded the Claimant of the conversation that had taken place on 22 March 2019 and informed her that there were insufficient volunteers for redundancy to avoid a selection process. He informed her that she had been entered into a selection pool with other BA4 Analysts across the Macro team. He told her that being in a selection pool meant that she and the other impacted colleagues had been assessed and scored against an agreed set of selection criteria based on performance and competencies. He informed her that unfortunately she had been selected as being at risk of redundancy. The remainder of his letter set out the entitlement to support in finding alternative employment and the process of being placed on displacement leave. The letter closed with a description of the next steps which started with the fact that the Claimant would be invited to an Outcome meeting which might

result in her role being declared redundant. The Claimant was referred to the Barclays' Employee Assistance Program and to the local Unite trade union representative. Avneesh Singh included a copy of the Claimant's individual scores.

196. On 11 April 2019 the Claimant responded to Avneesh Singh in a detailed email. She did not take issue with that part of the matrix which was based on the previous year's appraisal but did take exception to the scores she was given for Customer Focus and Technical Competency. It is sufficient for these purposes to say that the Claimant expressed her opinion that she was far away the most knowledgeable member of the ROST IB MO team.

197. Discussions took place between Avneesh Singh and Fiona Nichol about how to best address the concerns raised by the Claimant. Fiona Nichol formed the view that as the Claimant had brought a grievance and Karen McGoldrick had been appointed to investigate that grievance it would be best to place any further consultation on hold pending the outcome. In the light of that decision Avneesh Singh decided not to respond to the Claimant's criticism of his scoring. On 23 April 2019 Fiona Nichol sent an email to the Claimant informing her that further conversations about the potential impact of the redundancy process will be placed on hold until the grievance procedure was concluded.

198. The Claimant was not satisfied with that proposal. On 24th of April 2019 she responded. She said that other colleagues had been informed of their decisions as early as 2 April 2019 she complained that she had only had update on 9 April 2019. This was correct but only because she felt unable to communicate other than in writing. Avneesh Singh had attempted to contact her on 3 April 2019. The Claimant said that she further awaited Avneesh Singh's response to her email of 11 April 2019. Fiona Nichol responded on 26 April 2019 and suggested setting up a meeting with Avneesh Singh to discuss the concerns in relation to the desktop scoring. She acknowledged that the Claimant had asked the communications by email but suggested a face-to-face meeting would give an opportunity to ask any further questions at the same time. She was aware that the Claimant had agreed to meet with Karen McGoldrick at the Respondent's offices and propose having a meeting the same day. In further correspondence the Claimant was asked again if she would like to have a meeting with Avneesh Singh about the scoring. The Claimant did not respond directly to that last email.

199. On 9 May 2019 the Claimant issued her first claim.

200. Other than in connection with the Claimant's grievance there was no further communication about the redundancy process for a considerable period. Karen McGoldrick completed her investigation into the Claimant's grievance on 4 July 2019. On 1 August 2019 Fiona Nichol wrote to the Claimant pointing out that the redundancy consultation process had not been completed and in particular the concerns raised by the Claimant about the scoring exercise had not yet been addressed. She repeated the offer to have a face-to-face meeting at any suitable location or in lieu of that to take place by telephone. She suggested a further alternative if the Claimant wished to attend

a meeting via a representative. Finally, she said that if the Claimant wanted to proceed only in writing she should send any additional written submissions or information she liked be considered by 8 August 2019. She went on to suggest that the Claimant attend a further Occupational Health appointment. Finally, she asked whether the Claimant would be assisted by the provision of a named point of contact for her dealings with Barclays.

201. The Claimant responded on 4 September 2019. She informed Fiona Nichol that she had had emergency surgery on 28 July 2019 and had had a difficult recovery. She complained about a lack of contact with her line manager and about the process followed in the grievance investigation which she described as corrupt. The Claimant robustly took issue with the suggestion that Barclays needed any information from Occupational Health. She did not engage with the various proposals to hold a meeting but asked that any further communication be by e-mail. We accept that the Claimant was under a great deal of stress at this time and that goes some way towards explaining the combatative tone of this particular e-mail.

202. Fiona Nichols responded on 6 September 2019. She addressed the reasons why she felt that it was sensible to obtain assistance from the Respondent's occupational Health advisor. She suggested a named individual for further communications. Finally, she invited the Claimant to attend two meetings to discuss the redundancy process. She invited the Claimant to suggest any alternative dates and locations including agreeing to the meetings taking place on the telephone. Fiona Nichol asked for a response by 16 September 2019. The Claimant did not respond by that time.

203. A decision was taken to proceed with the redundancy process without any further meetings. On 1 October 2019 the Claimant was sent a letter notifying her that her role was redundant and telling her that unless any alternative employment could be found her employment would terminate on 12 January 2020. The period from 12 October 2020 would be treated as 'displacement leave' but the Claimant was given the option to defer this for 3 months or to the end of any sickness leave if earlier. The letter contained information about the redundancy payment that would be made and informed the Claimant that she had a right of appeal.

204. On 3 October 2019 the Claimant sent an email to Fiona Nichols. She protested that she had sent numerous requests to conduct the consultation process in writing and asserted that these requests had been ignored. She suggested that was both discriminatory and victimisation. She said that she continued to await a response from Avneesh Singh to her email dated 11 April 2019. She asserted that there had been new hires in the IB MO ROST team and that this negated the need to make redundancies.

205. Fiona Nichol responded on 10 October 2019. She informed the Claimant that she would treat her email as an appeal. Duncan Lord a senior director was then appointed to conduct that appeal. Fiona Nicholls acknowledged that the Claimant had indicated that she prefers communications be in writing but again offered a meeting either in-person or

by telephone. The Claimant responded on the same day making further allegations of discrimination and victimisation. She indicated that she thought the final outcome to the redundancy process should be declared void and a consultation process take place in writing.

206. In accordance with the published policy, once the Claimant had been notified of her redundancy, steps were taken to assist her in finding suitable alternative employment. Barclays has an internal redeployment team called Internals First who contact employees who have been made redundant. An individual called Julia Killian was appointed to assist the Claimant.

207. In the course of his evidence James Kinghorn said that in his experience the sort of reorganisations that had taken place at Barclays were commonplace within the banking industry. He said that they were a sad fact of life and that many employees became used to being displaced from roles considered no longer necessary. He indicated that the expectation was in most cases employees would find other employment. James Kinghorn of course came with more experience than the Claimant. This was her first role in the UK banking industry, and it is unfortunate that she did not recognise that the redeployment process was far and away her best chance of obtaining a new role. From the spreadsheets presented by Avneesh Singh we were able to see that the majority of displaced employees were able to secure some alternative position including one particular employee who had scored very badly in the redundancy selection process. Had the Claimant engaged in this process we suspect that she would have secured alternative role although whether she could have taken that role up would have depended on her health.

208. Julia Killian contacted the Claimant on 21 October 2019 and offered her assistance in finding a suitable alternative position. Unfortunately, the Claimant viewed this offer of assistance as prejudging the outcome of her appeal. On 11 November 2019 she responded to an email sent by Julia Killian on the same day reminding her of the assistance that was available. The Claimant suggested that she must know the outcome of the appeal for any investigations were even conducted. We consider it unfortunate that the Claimant did not realise that her appeal did not preclude her investigating alternatives. Fiona Nichols wrote to the Claimant on two occasions in an attempt to disabuse her of this notion, but the Claimant did not engage with the process. Despite this Julia Killian continued to send her details of suitable vacancies.

209. The Claimant had elected to defer her displacement leave for the maximum possible period of 3 months. By a letter sent on 24 October 2019 that election was acknowledged and the dates for the commencement of the displacement leave and the termination dates were adjusted. The Claimant believed that it was improper to have sent her the letter of 1 October 2019 referring to the earlier dates in circumstances where she had not yet made her election. If she was right, it was promptly rectified.

210. On 15 October 2019 the Claimant set out the basis for her appeal. Essentially, she said that in the absence of any consultation, any decision was void. She then repeated her previous comments that she was the last person

in the team who was vulnerable for selection for redundancy. She went on to say that it was unfair not to have dealt with the consultation in writing. She made the point set out above that the letter of 1 October 2019 contained dates based on an assumption that she would not defer any displacement leave. Finally, she suggested again that new people had been hired in the London ROST IB MO team.

211. Duncan Lord spoke to Avneesh Singh on several occasions and also to Fiona Nichols. He rejected the Claimant's appeal. He found that the reorganisation was for sound business reasons. He decided that the selection criteria were fair and that they had been agreed with Unite. He identified that there were 16 BA4 roles affected by the proposals and that 10 roles were being relocated to Pune. Only one person accepted voluntary redundancy.

212. Duncan Lord's conclusion on the question of whether the Claimant had been scored unfairly in comparison to Ivet Draganova was succinctly set out in his witness statement and we accept that it reflects his honest opinion formed as a consequence of his investigations. He said:

> *'I also considered the fact that Ivet had been employed for a shorter period of time but was not selected for redundancy. It seemed clear to me that Anca was a good performer but she was in a pool with other good people. Avneesh explained to me that Ivet was already showing that she was a really good performer and she grabbed every opportunity which was offered to her. This did not seem unusual to me. It quite often happens that you can have a good steady performer and a new colleague joins who has greater capability. There is no doubt that Anca was a good steady performer and that is reflected in the positive comments within her scoring. However, Avneesh was of the view that Ivet was performing at the same, if not higher level, and had more potential. Avneesh told me that Ivet was already a very strong performer and that she was very proactive and grabbed every opportunity which was available to her. He told me that she had shown great potential in the role and a real desire to make a success of the role.'*

213. We note that the Claimant in her own witness statement refers to Ivet Draganova putting herself forward for opportunities. She said:

> *'Because James had not actually managed Ivet, he assigned her to the Exotics Desktop TLO project without knowing what she could and could not do. His decision was also sudden. Ivet perceived this as encouragement and she sought to take on other challenging tasks. Because she was still some time away from being independent she simply did not know how to complete the tasks and asked me how to do them.'*

214. Duncan Lord noted that the Claimant had been offered many opportunities to meet and discuss the scores she had been given. He had asked Avneesh Singh whether he had taken account of the Claimant's e-mail

of 11 April 2019 and was satisfied that he had done so. He decided that there was no failure to accommodate the Claimant's disability. He noted that the position relating to displacement leave had been corrected once the Claimant had asked for it to be deferred.

215. Duncan Lord notified the Claimant that he was not upholding her appeal on 2 December 2019. He set out his conclusions in a letter. The Claimant responded by e-mail. She complained in strong terms that Duncan Lord had failed to deal with her point that new people had been hired in the London team. Duncan Lord agreed to deal with that point and reverted to the Claimant after the Christmas holidays. Having conducted further investigation Duncan Lord wrote to the Claimant. His finding was that no new employees had been offered employment in roles that had been identified as redundant in the London Offices. The Claimant had named two individuals who she believed were doing these roles, but Duncan Lord found that neither were doing any of the work that had been relocated to Pune. We make our own findings about that separately below but have found that Duncan Lord is correct.

The Grievance Process – 1st grievance

216. Whilst the bundle of documents contained numerous documents that related to the grievance brought by the Claimant the list of issues agreed between the parties refers only briefly to the grievance process. There is a single claim brought under Section 27 of the Equality Act 2010 which suggests that the grievance was unfair because the Claimant was denied access to the internal computer system. We have referred elsewhere to the information gathered during the grievance process some of which was useful and relevant in determining complaints about the events described. However, as there is only a very limited complaint about the grievance procedure itself, we shall deal with the process fairly shortly.

217. On 1 April 2019 the Claimant made e-mail enquiries directed at ascertaining the identity of an HR Partner to whom she could send a grievance. She received a response from Fiona Nicholls on the same day who confirmed that any grievance could be sent to her in the first instance. The Claimant then sent a long letter in which she set out a number of grievances. The Claimant complains of being asked to undertake excessive duties and long hours. She described her health issues and complains that these had not been accommodated. She made a further complaint suggesting that Barclays only promotes white British (principally) men. In a concluding section the Claimant says that she had not been paid a salary commensurate with the work she had done. Finally, she complained about being considered for redundancy saying that she had been targeted for redundancy because of her ill-health.

218. Fiona Nichols responded promptly on 2 April 2019. She sent the Claimant a copy of the grievance policy by e-mail and informed her that she would write separately in respect of the redundancy situation (we have referred to that above). On the same day Fiona Nicholl sent a formal acknowledgement of the Grievance indicating that in line with the policy a meeting would be held with an independent manager.

219. On 15 April 2019 the Claimant sent an e-mail to Fiona Nicholls essentially complaining that she had not been notified of the identity of the independent manager who would meet with her to discuss her grievance. Fiona Nichols responded informing the Claimant that Karen McGoldrick had been appointed to hear the grievance and that she would shortly contact the Claimant to arrange a meeting. The Claimant responded asking when she would be contacted. Her e-mail complains of the delay. Karen McGoldrick sent the Claimant an email on 18 April 2019 inviting her to a grievance meeting. In Karen McGoldrick's witness statement there was an explanation of the delay. She explained that initially another manager had been asked to deal with the grievance but had then indicated they did not have sufficient capacity to deal with it. Karen McGoldrick was then appointed. Barclays' grievance procedure suggests that *'The Grievance Manager will invite the employee to a meeting as soon as is reasonably practical and normally within 20 working days. An update of progress will be provided to the employee within10 working days'*. We find that the short delay in Karen McGoldrick contacting the Claimant was unsurprising given the issues raised in the grievance and the fact that in common with most organisations, managers need to fit the additional duty of hearing grievances around their ordinary duties.

220. Karen McGoldrick proposed meeting with the Claimant on 2 May 2019 at Barclays' offices in Canary Wharf. She reminded the Claimant of her right to be accompanied at such a meeting. The Claimant responded on 21 April 2019. She pointed out that the proposed meeting date was outside the 20 working days envisaged by the grievance policy. She proposed that she was accompanied by a friend at the grievance meeting. In subsequent correspondence Karen McGoldrick told the Claimant that she was unable to bring the meeting forward she also informed the Claimant that she would not permit her to be accompanied by a person other than a colleague or trade union representative. She did propose that any companion other than a colleague could attend nearby in order to provide assistance to the Claimant outside of the meeting. The outcome of this subsequent correspondence was that the Claimant indicated that she would not attend a meeting and proposed that the matter be dealt with in writing. We find that the Claimant was strictly correct that the date of the proposed meeting was 2 working days longer than envisaged. However, we find that the Claimant was unduly critical of this short delay. The tone of her correspondence undoubtably reflecting the difficult personal circumstances she found herself in. We find that Karen McGoldrick dealt with the Claimant courteously and promptly.

221. Once the Claimant had indicated that she wished the process to proceed as a paper exercise Karen McGoldrick invited her to submit any further representations in respect of her grievance. On 3 May 2019 the Claimant presented an "Additional Written Submission". In this document the Claimant amplified and expanded her grievances. Karen McGoldrick then wrote to the Claimant asking her what she desired by way of an outcome and then later wrote summarising her understanding of the complaint and asking whether the Claimant wished to provide any documentary evidence. The Claimant responded on 16 May 2019. We find her response was not as constructive as

it could have been. Karen McGoldrick's requests were perfectly reasonable. Rather than providing a comprehensive response the Claimant questioned the purposes of requests and added further complaints to those already brought. Further correspondence between the Claimant and Karen McGoldrick was aimed at providing Karen McGoldrick with a clear understanding of the complaint.

222. Karen McGoldrick then undertook what we consider to be a comprehensive investigation. She interviewed Avneesh Singh, James Kinghorn, Darren Gilhooly, Ivet Draganova and Stephen Truong. She obtained records of when the Claimant had attended the Barclay's offices and conducted a thorough analysis of those records. She was not able to interview every individual named by the Claimant in her complaints because some had left the organisation. A written record was made of all interviews.

223. Before Karen McGoldrick sent an outcome letter to the Claimant, she sent a draft to ER Direct in order to seek advice as to whether her letter was appropriate. It is clear from the correspondence between Karen McGoldrick that, having concluded that the Claimant had worked in excess of her contracted hours (although not as much as the Claimant has claimed), she thought that the Claimant ought to be remunerated for this work. She indicated in her correspondence that she understood that there had been a recent change in policy that BA4 Analysts in the Investment bank would be paid overtime. We find that she was advised that making a retrospective payment would not be appropriate. She accepted this in her outcome letter.

224. Despite the fact that the Claimant was kept informed about the progress of her grievance she sent a series of e-mails in which she complained vociferously about delay.

225. An outcome letter was sent to the Claimant on 4 July 2019. We find that in her outcome letter Karen McGoldrick attempted to deal with all of the Claimant's complaints as she understood them. She upheld the complaint that the Claimant had been overworked as the result of short staffing and high turnover. She found that this applied across the team and that the Claimant was not singled out. She agreed in part that the Claimant had worked in excess of her contracted hours and made recommendations that the matter be addressed in the future. She dismissed all other aspects of the Claimant's grievance. In dismissing the Claimant's complaint about the level of her grievance Karen McGoldrick relied upon what she was told by Avneesh Singh. We have already commented that his account was not a complete account of how bonuses were awarded.

226. We find that Karen McGoldrick carried out a through investigation and that her conclusions were generally fair and thoughtful. Our own conclusions in respect of the extent to which adjustments ought to have been made and our conclusions about the use of the phrase 'birds' differ from Karen McGoldrick's. We can see that Karen McGoldrick was persuaded not to recommend a retrospective payment of overtime. We do not consider that these matters separately or together with all of the other evidence are sufficient

to displace the overall impression that Karen McGoldrick did her level best to understand the Claimant's complaints and come to a just conclusion based on the evidence before her. Given the wide-ranging nature of the complaints made we find that the time taken to provide an outcome was entirely reasonable.

The Claimant's access to the Intranet during her absence from work

227. The Claimant has brought a number of claims that concern her access to the intranet. We make the following findings about that.

228. On 10 May 2019 the Claimant discovered that she had no access to the Intranet. She sent text messages to Ivet Draganova and ascertained that an employee Steven Throng was logged in to her workstation. This had the effect of preventing her having access to her computer. Her text messages show that she inferred that this had been done deliberately and that she assumed that Steven Throng was a new hire and that this undermined the suggestion that there was a genuine redundancy situation. The Claimant attempted to ring Steven Truong, but he did not immediately answer her call. She, and Ivet Draganova, assumed that was deliberate and on the instructions of James Kinghorn. There is no evidence that this was actually the case.

229. On the same day the Claimant sent an e-mail to Karen McGoldrick complaining of her lack of access to the Intranet. Fiona Nichols responded informing the Claimant that her access had been restored and, after further correspondence, assuring the Claimant that this would not happen again.

230. The explanation given by the Respondent for these events was consistent with what Karen McGoldrick concluded having investigated this matter as a part of the Claimant's grievance. She found that Steven Truong had been employed by Barclays for some time but in a different area working on a different floor to the ROST team. His reporting line had been changed and he was to report to James Kinghorn. He was assigned the Claimant's desk on 10 May 2019 because it was convenient to do so.

231. We find that Steven Throng had been employed by Barclays in a different area and accept the evidence that when his reporting line was moved to James Kinghorn, he was asked to move to sit near him. We find that it was not entirely surprising that he sat at the Claimant's desk. We find that this was not a deliberate attempt to restrict the Claimant's access to the Intranet.

The 2nd Grievance

232. The Claimant brought a second grievance in a series of e-mails sent between 3 and 22 January 2020. The Claimant does not say that there was anything unlawful about the process that was followed, and we can deal with this matter very briefly. Johnny Hayes was appointed to hear the Claimant's grievance. There were no meetings and the matter was dealt with on paper. The only matter that is relevant to our decisions below is that the Claimant had challenged the fact that her access to the IT system had been cut off on 22 January at the start of her displacement leave. Johnny Haynes provided us

with an explanation of this in his witness statement and he dismissed the Claimant's grievance about this for the same reasons. He told us, and referred us to the relevant parts, that the Respondent's redundancy policy makes it clear that IT access is restricted during displacement leave. He explained that this was to preserve security in circumstances where an employee was at risk of leaving the business. No other parts of that grievance process are relevant to the decisions we need to make.

Law, Discussions and Conclusions

233. In this section we reach conclusions in respect of the claims that we have been asked to determine. There are a large number of claims and we have elected to follow the structure of the list of issues in setting out our conclusions. As the claims are grouped by the type of claim, we have set out the legal principles to be applied at the outset before discussing each issue. As we indicated above, to resolve some issues, we need to make further findings of fact. We have endeavoured to make it clear when we have done so.

The burden and standard of proof under the Equality Act 2010

234. The standard of proof that we must apply in every case is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

235. The burden of proof in respect of all claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

> *136 Burden of proof*
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

236. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*
>
> *He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.*

237. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

238. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar* [1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377,** CA**.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred"* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279** per Sedley LJ at para 19.

239. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford*** and ***Qureshi v Victoria University of Manchester and Another*** **(Note) [2001] ICR 863, EAT**.

240. The burden of proof provisions need not be applied in a mechanistic manner **Khan *and*** another ***v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said:

> *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*

241. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Equality Act 2010 - Statutory Code of Practice

242. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011 ('the code'). Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

> *The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.*

Direct Discrimination

243. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) If the protected characteristic is age then A does not discriminate against B if A can show that A's treatment of B is a proportionate means of achieving a legitimate aim."*

244. In order to establish less favourable treatment it is necessary to show that the claimant has been treated less favourably than a comparator not sharing her protected characteristic. Paragraphs 3.4 and 3.5 of the code say:

> *3.4 To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.*

3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

245. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.

Who will be an appropriate comparator?

3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

Hypothetical comparators

3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the

claimant was less favourably treated than a hypothetical comparator would have been treated.

3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

246. An explanation of the differing ways in which treatment might be because of a protected characteristic was given in ***Amnesty International v Ahmed*** **[2009] IRLR 884** by Underhill P (as he was). He said

'33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. James v Eastleigh [Borough Council [1990] IRLR 288] is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p.294, paragraph 36), "gender based". In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in James v Eastleigh decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which Nagarajan is an example – the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions) …'

247. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the

treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572.**

248. The reason for the unlawful treatment need not be conscious but may be subconscious. In ***Nagarajan*** Lord Nicholls said:

> *'I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'*

249. ***Amnesty International v Ahmed*** is authority for the proposition that conduct can amount to unlawful discrimination despite it being imposed for benevolent reasons.

Direct Race Discrimination contrary to Sections 13 and 39 of the Equality Act 2010.

250. Paragraph 1 of the list of issues sets out the claims made by the Claimant that she was less favourably treated because of her race. Nine separate allegations are made although within that the redundancy process is said to have been discriminatory in six different ways. Given the broad range of ***ways*** in which the Claimant says she was the victim of discrimination it is particularly important for us to bear in mind the principle we have set out above that derives from ***Anya v University of Oxford***. Of necessity we need to deal with each individual allegation. When we did so, we had regard to the whole of the evidence including the evidence of discrimination in other ways (sex, disability etc). Despite the fact we set out findings as if they were made in isolation that does not reflect our approach to the decisions that are set out below.

251. Before proceeding to deal with each allegation of discrimination in turn we make the following additional general findings of fact. The team in which the Claimant worked was multicultural. The Claimant is from Romania. Ivet Draganova originates from Bulgaria. Avneesh Singh is of Asian origin. Whilst we were not told directly of the national or racial origins of all the other employees their family names would suggest that they came from a variety of backgrounds. James Kinghorn, Stephen Lane, the Claimant's first line manager and Darren Gilhooly are of white European heritage. During the grievance process Karen McGoldrick investigated the racial make-up of the IBMO- Rates Derivatives Organisational Unit. She identified of 17 management posts, 11 were held by non-British nationals. She also looked into

recent promotions which showed that 67.85% of promotions were given to non-British nationals. The figures that Karen McGoldrick gave are not subject to any challenge and we accept them.

252. It was the Claimant's case that she was treated badly in comparison to Ivet Draganova. Whilst they could broadly be described as both being from Eastern Europe, we have disregarded that. Attitudes to race and nationality are complex and it would be an error to conclude that a person who favours a Bulgarian could not at the same time discriminate against a Romanian. We were reminded by Ms Ruxandu, and accept, that Romania was one of the last of the accession countries to the EU and its citizens were initially required to surmount greater hurdles to enter the United Kingdom at a time when there was a pervasive view that the United Kingdom had received more migrants from the EU than it could bear. As such Romanian citizens had not been universally welcomed. We have placed no weight whatsoever on the fact that Ivet Draganova had Eastern European origins.

Issue 1(a) - Being repeatedly denied permanent employment

253. The first question for us is whether the Claimant has established as a matter of fact that she has been subjected to anything which might fall within section 39 of the Equality Act 2010. The Claimant says that she was already an employee of Barclays. As such she has described her claim as falling within sub-Section 39(2)(d). For the reasons we have set out below, we do not think she can avail herself of that sub-section as she was not an employee of Barclays at the material time. However, she can bring herself within the scope of sub-section 39(1)(c) which makes it unlawful for an employer to discriminate against a person by not offering them employment. We have therefore considered whether the Claimant has established a failure to offer her employment.

254. We have found that at least in 2017 the Claimant did wish to be offered a directly employed permanent position. We have referred above to the text message exchange with her father which makes it clear that the Claimant recognised that she had less rights as a contractor then she would do as an employee. We consider that that is a matter that she could quite reasonably believe to be to her disadvantage.

255. The Claimant's assignment through Resource Solutions was renewed on a number of occasions. It appears that it is the Claimant's case that she was the victim of discrimination from the outset of her engagement and on each subsequent occasion that her engagement was renewed. Perhaps additionally she suggests that when her three named comparators (Matteo Pasini, Employee A and Linh Thi Thuy Luong) were appointed as permanent directly employed employees there were further acts of discrimination. We consider that we shall do no injustice to the Claimant if we consider each of those possibilities.

256. We draw from our findings of fact set out above. We have found that Barclays operate a system whereby approval is required to appoint anybody to

a directly employed position. Local managers have no authority to make that decision although they would be in a position to request approval. If it is not implicit in our findings of fact above, we make it clear that we have accepted the Respondents' evidence that approval of a request to recruit directly is made before the decision to advertise any particular post.

257. We accept the Respondents' evidence that where an internal candidate applies for a post whether advertised only internally or externally, they would automatically remain directly employed if they were successful in obtaining the position. This makes sense. It would be very surprising if an employee who was already directly employed sort a different position or promotion would have to resign and work through an agency in order to continue working for Barclays. It follows from that we consider that there is an obviously good reason for treating internal candidates differently to an external candidate.

258. We have found above that the role that the Claimant applied for only had approval for the recruitment of an indirectly employed consultant. In other words, there was no approval to increase the headcount of the directly employed staff at that time. Barclays were not looking to recruit a direct employee they were only going to offer the role as a short-term contract role.

259. We accept the evidence given by Avneesh Singh that at no stage until the Claimant was offered a directly employed position in 2017 did he or anybody else have direct authority to recruit anybody into the ROST IB MO team.

260. Whilst we accept that the Claimant could reasonably consider not being directly employed from the outset of her employment to be her disadvantage we do not find that her race played any part in the decisions either to appoint her to a contract role and to renew her assignments, or when decisions were made to directly appoint others. We are able to reach a decision on this point without recourse to the shifting burden of proof. As suggested in ***Laing v Manchester City Council*** have assumed that the burden of showing that the treatment of the Claimant was in no sense whatsoever her race falls squarely on the Respondent. We had regard to all the evidence, but the following matters struck us as being important.

261. The Claimant has maintained during these proceedings that Ivet Draganova has been treated more favourably than her in many respects and particularly during the redundancy process. She accepts that Ivet Draganova was initially recruited as a consultant in the same way as she was. This would tend to suggest that there were business reasons rather than personal preferences behind the decision to engage workers as consultants.

262. We accept that the reason that Employee A and Linh Thi Thuy Luong were offered direct contracts of employment was because they were already directly employed. That reason had nothing whatsoever to do with race.

263. We have accepted the evidence given by Avneesh Singh that Matteo Pasini was not initially recruited to the ROST IB MO team but to a different

team. The process of recruiting is exceedingly bureaucratic. As Mattteo Pasini was an external candidate it would follow that the position which he applied for was advertised externally. That would not have been permitted unless prior authority had been given. Whilst his appointment was to the FX team – as stated in his contract of employment. He was almost immediately required to work alongside the Claimant. Despite this we accept that the approval that was given was not for an appointment to the ROST IB MO team.

264. A further matter that militates against a finding that the Claimant was singled out for treatment because of her race is the fact that when Linh Thi Thuy Luong left opening up a vacancy – subsequently approved for a directly employed position – Avneesh Singh actively pressed for the Claimant to be recruited in the face of bureaucratic obstacles.

265. We accept the explanations given by Avneesh Sing for the difference in treatment between the Claimant and her named comparators. The same reasons are applicable to any hypothetical comparator and any other point in time. The reason that the Claimant was not offered direct appointment was that no authority had been given to increase the number of direct employees. That is a reason entirely unrelated to race.

Issue 1 (b) – not remunerating or recognising the Claimant carrying out the AVP ROST IB MO role

266. We deal with the facts related to this claim in some more detail below when considering the Claimant's claim for equal pay. Rather than repeat those findings we ask that the reader import those findings into these paragraphs.

267. We do not accept that the Claimant was undertaking the role of the AVP for the ROST IB MO team. Furthermore, until she raised the suggestion in her grievance there was no active consideration by anybody as to whether she should receive any additional remuneration.

268. As we set out below the role of the AVP is part operational and part managerial. The AVP has overall responsibility for the Analysts and the work that they do. The AVP reports to the VP and upwards. The Claimant was never appointed to that role.

269. What the Claimant says is that in practice she undertook some, but she does not come close to suggesting all, of the tasks that an AVP undertook. She refers extensively to training and the induction of Ivet Draganova. She implies that she had more knowledge than any of her AVPs (excluding her first line manager) of the day to day work of the team. She does not dispute that the 3 AVPs she reported to had managerial responsibility and allocated tasks to the team members. She accepts that she deferred to James Kinghorn's decisions about whether she could work from home. She says that she gave him information to feed to his managers in meetings but does not suggest that she attended those meetings. She accepts that he was responsible for conducting her appraisal.

270. We do not accept that training colleagues (whether more senior or not) was a role exclusive to an AVP and above. That contradicts the core competencies applicable to Analysts and is contrary to our findings that it was expected that those who undertook any task would show any newcomer how to do it. The fact that so much of the Claimant's time was taken up with this was we find not a product of her acting as an AVP but because of the high turnover of team members.

271. As the Claimant has referred to her excessive workload as a separate claim of discrimination, we feel able to take this allegation as set out in the agreed list. We do not find that the Claimant was acting as an AVP at any time. She was a hard-working Analyst doing the work that was expected of a person of that grade. On this basis this claim fails because the Claimant has failed to establish the detriment that she has asked the Tribunal to consider. However, we shall go on to look at the reasons why the Claimant was not offered additional pay.

272. The Claimant does not say that at any time before she went on long term sick leave, she ever suggested to anybody that she was carrying out the AVP role. To succeed in this claim the Claimant needs to point to some act or omission which is discriminatory. This claim is included in the Claimant's first ET1 (although in vague terms) which was issued before any decision was taken on the Claimant's grievance. It would seem that the Claimant can only be relying on an omission. The list of issues identified Avneesh Singh as the person responsible for any discrimination. It was not suggested that any decision reached by Karen McGoldrick was discriminatory.

273. We find that the reason why the Claimant was not paid the rate of an AVP was that nobody recognised or agreed that she was doing the work of an AVP. Even if they had we find that there would have been no question of the Claimant being paid more. It would have been necessary to have obtained authority to promote the Claimant. We find that nobody ever gave a moment's thought to that. The Respondents all believed that the Claimant was doing the work of an Analyst and was properly paid for that. Whether they were right or wrong, and we find below that they were right, that was their honest belief. It was for that reason and that reason alone that the Claimant's pay was not adjusted. Again, we do not have to resort to the shifting burden of proof. The Respondent has satisfied us that it had a genuine non-discriminatory reason for its treatment.

<u>Issue 1(b) - The Claimant was required to carry out her own work and that of departing team members and train new members until she went off sick.</u>

274. Our findings above include findings that the Claimant was expected to cover for departing team members. The work that needed to be done remained constant and so any departure meant that there was a greater burden on the remaining members of staff. This was at its worst shortly before James Kinghorn joined the business. For a period of 2 months there had only been the Claimant and Matteo Pasini doing the work previously undertaken by 4 people. We have also found that due to the rapid turnover of staff the Claimant

had to train a higher number of newcomers than would have been the case had there been greater stability. In plain language the staff shortages did cause additional work for the Claimant. We should add that she was not the only person who had to take on extra work. Matteo Pasini would also have had to take on additional tasks during the time when the team was reduced to 2.

275. We find that the Claimant could quite reasonably have concluded that the shortage and rapid turnover of team members was to her disadvantage. As such we are satisfied that she has established that she was subjected to a detriment. We turn to the reasons for that treatment.

276. The reasons why the Claimant was required to undertake all the tasks she did was that various team members left, and their replacements required to be trained before they were fully up to speed. The issue for us is whether the reason why the Claimant undertook the tasks she did was anything to do with race.

277. It was not argued that the decision of team members to leave was a discriminatory act. We find that when the team was depleted steps were taken to recruit new team members at least up to the point when there were redundancies in the offing. The recruitment process was slow but there was no evidence at all that linked that with the Claimant personally.

278. The Claimant's case can only succeed if the allocation of work against the background of the staff turnover was because of race. We find that the existence of the background was not connected in any way to the Claimant's race. We find that when the team was short staffed the Claimant was not disproportionally allocated a greater share of the 'BAU' work. She did not suggest that that was the case. Her main complaint was that she undertook a great deal of training and in particular that in 2018 she bore the brunt of training Ivet Draganova. We accept that that was the case.

279. The explanation that was given by James Kinghorn was that the task of training Ivet Draganova on the BAU tasks would be expected to be carried out by any team member or himself. He accepted that the Claimant undertook a large proportion of that training. He explained that Ivet Draganova sat next to the Claimant and that her questions were therefore usually put to the Claimant. That is entirely consistent with the Claimant's evidence. That does provide an explanation why the Claimant continued to have to deal with Ivet Draganova even after she raised this as an issue.

280. The Claimant has complained that when Hadrian Mademba-Sy left she was allocated two tasks that he had undertaken whereas Matteo Pasini was only asked to do one. That needs to be seen against the fact that when the Claimant said she was too busy to do Compressions her wishes were accommodated. The Claimant objected to Ivet Dragonova being allocated work on a project she felt she should have done but at the same time complaining that she had too much to do. The picture that emerges is that tasks were allocated as a fire fighting exercise. Where capacity was raised, some steps were taken to address that (compressions being one such example).

281. We need to ask whether the Claimant has proven facts from which the Tribunal could in the absence of any explanation from the Respondents infer that the work was allocated in a discriminatory way.

282. The Claimant does not suggest that either Avneesh Singh, Stephen Lane or Kames Kinghorn ever said anything about her race or national origins. The only evidence she gave about a manager mentioning her national origins was when her first line manager asked whether she had an internet connection in Romania. She does not complain about the decisions of her first line manager in this allegation. The Claimant gave evidence that James Kinghorn referred to Matteo Pasini as 'the Italian dude'. He did not deny that. The Claimant suggests that this signalled a propensity to discriminatory attitudes. We accept that this language was used. What is lacking is any evidence that the phrase was being used in an unkind or derogatory sense. References to nationality are not inherently offensive. Context is all important. Other evidence given by the Claimant suggested that James Kinghorn and Matteo Pasini were very friendly. The quoted remark in that context provides no real basis for inferring a propensity to discriminate.

283. We have found that James Kinghorn, in a rather puerile attempt to be ironic, used sexist language. We have found that he should have done more to find out about the Claimant's health and adjust her duties and hours of work. Whilst these issues concern other protected characteristics, we are alive to the issues raised by intersectionality.

284. Taking all of the evidence together as well as the particular points set out above, we do not find that the Claimant has established facts from which we could infer that the allocation of work to the Claimant was because of race. As such the Claimant has not established facts which would require the Respondents to show the reason for the treatment found proven.

285. However, in case we are wrong about that we should record that we are entirely satisfied that the reason that the Claimant was asked to do more training than others was that she was the longest serving Analyst and was well placed to do it. In particular we accept that the fact that she sat beside Ivet Draganova made it inevitable that she would end up dealing with the brunt of her queries. Neither of these reasons had anything whatsoever to do with race. In respect of the other tasks that the Claimant says were allocated we find that she was asked to do them because somebody needed to do them and that such tasks were allocated on a fairly random basis unless issues of capacity were specifically raised. Again that is a non-discriminatory explanation which we accept.

<u>Issue 1(d) Being given a rating or 'strong' as opposed to 'outstanding'</u>

286. We have set out above our findings of fact in respect of the appraisal process. Whilst it seems quite possible that the rating of strong/strong that was signed off by James Kinghorn may have been a matter of discussion between him and others we are satisfied that the comments that he made on the appraisal reflected his opinion. The range of strong/strong was very broad and

covered 75% of the employees (or more given the reluctance to give grades of 'needs improvement'). The comments that James Kinghorn makes do reflect the Claimant's hard work and her general ability. However, we find that he could quite reasonably hold the view that whilst the Claimant had stepped up to a challenging situation caused by the turnover of staff that did not merit a grading of 'outstanding'. That grade was reserved for people who went beyond the role rather than doing very well within it.

287. We have had regard to the entirety of the evidence and have concluded that the Claimant has not established facts from which we could infer that the decision to give her a strong/strong grade was because of her race.

288. If we are wrong about that then we are entirely satisfied with the explanation given by James Kinghorn as to the grades he gave. We find that his assessment reflected his genuine beliefs in the Claimant's abilities. Those beliefs formed the entirety of his reasons and race was not taken into account at all whether consciously or unconsciously. In reaching this conclusion we took into account the comments made on the appraisal where James Kinghorn went out of his way to list the Claimant's achievements. We also consider it relevant that the grading itself was not a matter that the Claimant immediately challenged although we do take into account her evidence that her health was rapidly declining at this point.

Issue 1(e) – Being paid a bonus of only £1,600

289. As we have set out in our findings of fact, we were unimpressed at the initial explanation that was given as to the manner in which bonuses were allocated. We have rejected the suggestion that there was a race and gender-blind allocation of an appropriate amount once a strong/strong rating had been given. That is far from the case. Instead there is some informal ranking of employees by managers. That carries with it a real risk that any decisions could be at best unfair and worse discriminatory.

290. Given that the explanation initially given by the Respondents was inaccurate, if not positively misleading, we have no hesitation in concluding that the Claimant has made out a prima facia case. The question is therefore whether the Respondents have satisfied us that race played no part in the decision-making process. We have concluded that they have.

291. Whilst the ranking process was secretive and potentially unfair, we see that when the Claimant is ranked alongside 13 other Analysts at the same grade, she is ranked third. Below her are 6 individuals with family names that would tend to suggest a UK heritage. Above her is Matteo Passini and above him a person with a family name that suggests African heritage. Whilst this ranking, which was undertaken by Darren Gilhooly may not have been the final ranking we note that the quintile allocated to the Claimant did not change.

292. We are satisfied that the Strong/Strong rating given to the Claimant was not discriminatory. Insofar as the ranking was taken into account in allocating the bonus the evidence would suggest that the Claimant is treated better than

most not sharing her nationality. If, as appears likely, those ranked above the Claimant were given larger bonuses (using up a greater share of the bonus pot) then the people below the Claimant would have been disadvantaged in the same way as her. Finally, we are satisfied that geographical factors were also taken into account. Again, the Claimant's nationality was not a material factor as the other UK Analysts would be treated exactly the same.

293. For these reasons we are satisfied that whilst the bonus system was far less transparent than suggested by Barclays the reason that the Claimant received the bonus she did was not materially influenced by her race.

Issue 1(f) – Avneesh Singh's failure to respond to the Claimant's complaint about her first line manager

294. The basis of this allegation is that the Claimant is suggesting that Avneesh Singh ought to have done more about her complaints about her first line manager. She says that her race was a reason for the treatment.

295. We have set out our findings of fact above. Avneesh Singh was not at the time the manager of the Claimant's first Line Manager. As such he had no direct managerial responsibility, but we accept that he could have been expected to act in a responsible way.

296. We have no doubt that the Claimant was treated poorly by her first line manager. Jade Green's evidence was that she was a difficult individual. That said, the extent to which it would have been appropriate for Avneesh Singh to take any action would depend on what he was being told by the Claimant. We have rejected the suggestion that the Claimant said that there had been any discrimination because of race. We do accept that the Claimant indicated that she was being singled out for poor treatment.

297. We have accepted that Avneesh Singh spoke to Jade Green about the matter. We find that it is more likely than not that when the Claimant spoke to Jade Green it was because Avneesh Singh has advised her to as he claims in his witness statement. That is consistent with his actions in putting Jade Green on notice of the issue. The Claimant suggests that when she spoke to Avneesh Singh he praised her work. That would not indicate any indifference to her situation.

298. Given that we have found that the Claimant had not complained of race discrimination we consider that Avneesh Singh's response to the situation was unremarkable. He put the relevant line manager on notice of the situation. That did lead to Jade Green speaking to the Claimant's first line manager who then handed in her notice. Given the nature of the complaints, as Avneesh Singh and Jade Green understood them, we do not find it surprising that they did not take any further action. The Claimant is intelligent and resourceful. In later text messages between her and her colleagues she refers to the HR department. Had the Claimant considered that there were further steps that Avneesh Singh should have taken she could have brought a grievance or made a complaint at the time. She did neither. We consider that the Claimant's view of Avneesh

Singh's conduct in this respect has been coloured by later events. In the light of these conclusions we do not find that the Claimant has established any conduct that a reasonable employee would consider to be to their disadvantage.

299. Less we are wrong about the conclusion above we shall go on to consider whether race played any part in Avneesh Singh's decisions about what he ought to do. It would be for the Claimant to establish facts that, absent of any explanation by the Respondents, would allow the Tribunal to draw an inference of discrimination. We have had regard to all the evidence including the criticisms we have made of Avneesh Singh's approach to giving his solicitors relevant documents and his explanation about the allocation of bonuses (which was originally wrong if not misleading). We do not find that there is any basis upon which we could draw an inference of discrimination.

300. If we are wrong about that we turn to Avneesh Singh's explanation. He explained that he did listen to what the Claimant told him. He advised her to speak to Jade Green (which she did) and he took the time to advise Jade Green himself. He thought that was good enough. We accept that he did not do anything else because he genuinely believed that his response was all that the situation demanded. We find that he reached that conclusion without any considerations about race. We note that after this Avneesh Singh offered the Claimant a directly employed position and fought against the bureaucracy in order to push through her appointment. That is difficult (although we accept not impossible) to reconcile with a suggestion that he harboured any negative views of Romanian nationals.

Issue 1 (g) The redundancy process applied to C in -

i. Placing C at risk of redundancy on 22 March 2019; [R1 and R3]

ii. Failing to consult with C regarding the redundancy; [R1 and R3]

iii. Failing to tell C that she would be scored by R as part of the redundancy process; [R1, R2 and R3]

iv. Giving C a low score in the redundancy process; [R1 and R2]

v. Failing to notify C of the stages of the redundancy process at the same time as her colleagues; [R1 and R3] and

vi. Failing to notify C of the outcome of the redundancy process at the same time as her colleagues which was on 2 April 2019. [R1 and R3]

301. These same allegations are made in respect of other direct discrimination claims and the claims of victimisation. The reader will note a degree of repetition and in some passages, we have used the same findings of fact and reasoning. There has been some use of cut and paste. We are alive to the fact that each protected characteristic needs separate consideration and that is how we approached the matter despite the repetitious nature of our

findings.

(1) i. Placing C at risk of redundancy on 22 March 2019; [R1 and R3]

302. We understand that this is a separate allegation to the suggestion below that informing the Claimant after the other employees was discriminatory. This allegation appears to be that placing the Claimant at risk of redundancy at all is discriminatory. Equally we assume that this is intended to be separate to the allegation that the Claimant's selection score was discriminatory.

303. We would accept that being told that your role was at risk of redundancy is something that a reasonable employee could view as a disadvantage. As such we are satisfied that there was a detriment.

304. We then turn to the question of whether there was any less favourable treatment. Drawing on our general findings of fact we have accepted the Respondents' evidence that there were a large number of employees who were told that their roles were at risk of redundancy. 16 Analysts were informed of this and a number of more senior employees. We are entirely satisfied that this was a genuine exercise in the sense that business decisions had been taken to relocate work to Pune. Apart from the timing the Claimant was treated in exactly the same way as all of the other employees.

305. Where we to identify a comparator that person would be some actual or hypothetical BA4 Analyst. As a matter of fact, all of the BA4 Analysts were treated in exactly the same way. We have no doubt that a hypothetical comparator, who would also have to be a BA4 Analyst working in London would have been treated in the same way as well.

306. We do not need to rely on the burden of proof. We find that the reason that the Claimant was at risk of redundancy was that was a consequence of the business decision to relocate roles to Pune. That reason is entirely independent of any protected characteristic and in particular independent of race. It is in no sense discriminatory and the claim fails on that basis.

(1) ii. Failing to consult with C regarding the redundancy; [R1 and R3]

307. The Claimant has not been entirely clear about what element of consultation she says was not undertaken. We have set out our findings above. Avneesh Singh did explain the rationale behind the Respondent's business decisions to the Claimant. He also sent her copies of all relevant policies. There would ordinarily have been a first individual consultation meeting after a general announcement. That did not take place because the Claimant asked for matters to be dealt with in writing. Avneesh Singh sent the Claimant a detailed explanation of the Respondents' position and provided the scores that had been given to the Claimant. That prompted the claimant's e-mail of 11 April 2019 where she questioned those scores. We would accept that thereafter the Claimant asked for her comments to be addressed and that she got no formal response to the specific points she raised. She did not ask for the matter to be placed on hold pending her grievance. We would accept that she could

reasonably believe that this placed her at a disadvantage. As such we accept there was a detriment in this respect. In case we have approached this too narrowly we shall take a broader approach when looking at whether this was discriminatory.

308. We consider that the proper comparator would be a person not coming in to work but not sharing the Claimant's race or nationality who declined to attend any meetings either in person or on the telephone. That person would also have raised a grievance in which they referred to the redundancy exercise. We find that such a person would have been treated in exactly the same way as the Claimant. The Respondent has satisfied us that the reason that the Avneesh Singh did not respond to the Claimant's e-mail of 11 April 2019 was that he was advised by Fiona Nichols that the Claimant's grievance would be dealt with first. That was a decision which, whether wise or not, we are satisfied was not because of race.

(1) iii. Failing to tell C that she would be scored by R as part of the redundancy process; [R1, R2 and R3]

309. In our findings above we set out that, following his initial conversation on 22 March 2019 Avneesh Singh sent the Claimant a copy of the redundancy policy together with other documents including *'A Guide for Employees at risk of redundancy'*. A fair reading of those documents makes it clear that where there were not sufficient volunteers for redundancy a selection process might take place using agreed criteria. On 2 April 2019 Fiona Nichols sent an email to the Claimant in which she set this out very clearly indeed. We find that the Claimant was told that she would be scored as part of the redundancy process, if there were insufficient volunteers . This finding means that this claim cannot succeed.

310. In case we are wrong, we shall deal with the issue of whether Avneesh Singh treated the Claimant less favourably because of race. Any less favourable treatment under this heading could only occur during the telephone call that took place on 22 March 2019 and in the subsequent correspondence. The Claimant was told that she had been scored on 9 April 2019. We have found that the scoring had been started before any employee was notified of the potential redundancy situation. All employees were treated the same in that respect and we find that the decision to get the scoring process underway had nothing whatsoever to do with race. By 22 March 2019 Avneesh Singh would have been aware that unless a large number of people volunteered for redundancy the Claimant's score meant that she was likely to be displaced from her existing role. He did not tell her that during the course of the meeting. We shall assume that that is capable of amounting to a detriment falling within this allegation. Avneesh Singh used a script that was generic and used for all announcements to the affected employees. He was sent that script and did not author it himself. We are satisfied that that script did not mention the selection process that had been started. As such all employees were treated exactly the same and the Respondent has satisfied us that race did not play any part in the decision not to expressly discuss scoring with the Claimant.

(1) iv. Giving C a low score in the redundancy process; [R1 and R2]

311. The Claimant has identified James Kinghorn as being the individual responsible for this claim. On the evidence before us James Kinghorn had no direct part in scoring the Claimant. That exercise was undertaken by Avneesh Singh although the process did draw on the end of year appraisal which was conducted by James Kinghorn. To do justice to the Claimant's case we shall consider whether either of the individual respondents acted unlawfully.

312. The Claimant categorises the score she got as being 'low'. If that is intended to suggest that she was assessed as being a poor employee that is not the case. 10 analyst roles were being moved to Pune. There were 16 analysts who were placed in a pool. One took voluntary redundancy which meant that 9 analysts out of the 16 were going to be displaced from their roles. Only 6 Analysts were going to be retained in their roles. The Claimant's score was not good enough to remain in her role, but it was not an obviously low score.

313. We would accept that being given the score that Avneesh Singh allocated meant that the Claimant was going to be displaced from her role and in that sense, she was subjected to a detriment.

314. We turn to the question of whether the treatment was because of race. It is important to note that the question is whether the score given to the Claimant was because of race or nationality and not whether the score given to Ivet Draganova was because of (the Claimant's) race or nationality. The Claimant did not put her case in that second way nor in our view would it have assisted her to do so. The pool of potentially redundant analysts contained 16 people. The Claimant was not competing only against Ivet Draganova but against all the other employees in the pool. Giving Ivet Draganova a higher score than she merited would disadvantage all of the people with the same score as the Claimant regardless of their race. We shall therefore deal with the claim as it has been set out and analyse whether the score that the Claimant received was because of disability.

315. The Claimant passionately believes that she was the most knowledgeable and long serving member of the team. However, James Kinghorn considered that in her end of year appraisal her performance merited a strong-strong assessment. We accept that he genuinely believed that assessment was fair. We have set out the basis for that above in considering the claim for a bonus payment. When Avneesh Singh was conducting the scoring exercise he did so drawing on information provided by others including Darren Gilhooly. The score given to the Claimant was examined by Duncan Lord we have set out his conclusions above. He considered that the Claimant was a good solid analyst but was competing against other very good employees. We are not bound by his views but have taken them into account in assessing whether the score given to the Claimant failed to reflect her abilities.

316. We find that Avneesh Singh, drawing on the information he was given

and from his own knowledge gave the Claimant the score which he genuinely believed reflected her abilities measured against the competencies in the matrix. He was of the view that the Claimant was a strong but not outstanding performer. We proceed on the basis that it is for the Respondents to satisfy us that disability did not play any material part in the decision-making process. We have had regard to all of the evidence and not just the evidence in relation to the scoring. We are satisfied that the reason that Avneesh Singh gave the Claimant the score that he did was because it reflected his genuine belief that it reflected her abilities that has nothing whatsoever to do with her race of nationality.

317. We also consider whether James Kinghorn gave the strong/strong rating because of the Claimant's race or nationality. Again, we assume that the burden is on him to show that it was not. We are satisfied that the only reason that James Kinghorn gave the Claimant the rating that he did was because he did not believe that her performance met the definition of 'outstanding'. He has satisfied us that race played no part whatsoever in his assessment of the Claimant. Accordingly, this particular claim fails on either basis.

(1) v. Failing to notify C of the stages of the redundancy process at the same time as her colleagues; [R1 and R3]

318. The Claimant (and Employee A) were not told about the redundancy process at the same time as employees who were at work. We accept that an employee could reasonably believe that to be to their disadvantage even if the delay was for benign motives.

319. We need to consider whether this treatment was 'because of' race or nationality. We consider that the fact that Employee A was treated in exactly the same way provides overwhelming evidence that race played no part in the decision not to inform the Claimant of the redundancy situation at the same time as her colleagues. Drawing on our findings above, we are satisfied that the reason that the Claimant and Employee A were notified of the potential for redundancies later than the other employees was that each was on long term sick leave and a decision was taken to investigate/consider whether notifying them of the potential for redundancies would impact on their recovery. That is a decision contemplated by the Barclays guide *'A Guide for Employees at risk of redundancy'* which provides that it is usual for employees off sick to be notified at the same time as others but expressly states that this will depend on individual circumstances.

320. In respect of being notified of the outcome of the scoring exercise we find that Avneesh Singh did attempt to telephone the Claimant on 3 April 2019 to inform her of this. The reason she did not speak to him was her request to be informed in writing. We find that the reason for the delay was that request and nothing whatsoever to do with race or any other protected characteristic.

321. We find that this reason is not 'because of race or nationality'. An employee absent from work would have been treated the same way whatever their nationality.

322. For these reasons we are satisfied that the reason for the treatment complained of was not the Claimant's race or nationality.

(1) vi. Failing to notify C of the outcome of the redundancy process at the same time as her colleagues which was on 2 April 2019. [R1 and R3]

323. This allegation focusses on 'outcome'. We find that the employees who scored sufficiently highly to avoid displacement had no one-to-one meetings at all. The employees whose scores placed them at risk of redundancy were notified of that fact on or around 2 April 2019 (we do not know if every employee had a meeting on 2 April 2019). The Claimant was not informed of her scores and that she remained at risk of redundancy until 9 April 2019. It is clear from the e-mails sent by the Claimant that she was aware that other employees had been informed. We accept that this would have made her more anxious than she already was and could reasonably have been regarded as a detriment.

324. On 3 April 2019 Avneesh Singh did attempt to contact the Claimant by telephone and then by text. We find that his purposes in doing so was to convey the outcome of the selection process in exactly the same way as he had with the other affected employees. The Claimant then contacted Fiona Nichols who proposed a meeting with Avneesh Singh in person or by telephone. The Claimant then asked for communication in writing.

325. We proceed on the basis that the Respondents must show a non-discriminatory reason for the delay in notifying the Claimant of the outcome to the selection process. We find that Avneesh Singh was ready willing and able to speak to the Claimant and would have done so had the Claimant not indicated that she wanted communication in writing. We find that the delay was caused by this request. We are satisfied that this reason is in no sense whatsoever because of race or nationality. As such this claim does not succeed.

h. Denying C business updates and communication with R2, her line manager, from April 2019 onwards in breach of R1's Ill Health Policy. [R1 and R2]

326. We have dealt with this matter below as an allegation of victimisation. There is some repetition, but we are obliged to consider each matter separately (and as a whole) and there are some distinctions between a direct discrimination and a victimisation claim.

327. We accept that from April 2019 there was no contact between the Claimant and James Kinghorn. He remained her line manager during this period. The Claimant referred us to the Barclays absence management policy which envisages a manager keeping in touch with an employee on long term sick leave.

328. We would accept that ordinarily an employee would want to be kept abreast of developments in the workplace and discuss their absence with their manager. As such a failure to do so might ordinarily amount to a detriment.

Here the situation is different. The Claimant considered James Kinghorn responsible for numerous matters which she set out in her grievance. In particular she was particularly distressed about the failure to extend her sick pay. On 1 April 2019 she put all of these matters in a grievance. In that grievance the Claimant complains extensively about James Kinghorn. In those circumstances we are troubled by the suggestion that the Claimant considered the failure of James Kinghorn to contact her to be a disadvantage and therefore a detriment for the purposes of Section 39 of the Equality Act 2010.

329. We shall assume that the Claimant did feel that she was disadvantaged. We shall also assume that the Respondents need to show the reason for any treatment. We find that James Kinghorn never gave any thought to following the absence management policy. He had scheduled regular 1-2-1 meetings with the Claimant but cancelled the electronic invitations once the Claimant commenced long term sick leave. Once the Claimant had sent her grievance letter of 1 April 2019 (which was a protected act) James Kinghorn knew that the Claimant had made a series of complaints against him.

330. We find that there were mixed reasons why James Kinghorn did not contact he Claimant. He was entirely unaware that this was something that was expected of him. In respect of developments within the business he knew that Avneesh Singh had opened up a line of communication with the Claimant and he believed that it was not his place to discuss the changes. Finally, we find that he believed that the Claimant would not welcome any contact from him. We consider that to have been a reasonable assumption in the circumstances.

331. We find that the Claimant's race played no part at all in the conscious or sub-conscious decision (or omission) of James Kinghorn not to stay in touch with the Claimant. The reasons that we find James Kinghorn had were nothing whatsoever to do with the Claimant's race. We accept that these were the full reasons that he had.

<u>i. Denying C income protection pay starting from July 2019. [R1, R2 and R3] [Claim No. 3201137/2020 (the "Second Claim")]</u>

332. The Claimant has brought a similar claim as a claim of victimisation putting the matter on a slightly broader basis. We would ask that the reader has regard to our findings and reasons which we import into this section.

333. The Claimant accepted that in order to be entitled to the benefit of the income protection scheme operated by Barclays it was necessary that the employee had 2 years' service prior to falling ill. The Claimant says that she did have 2 years' service. We disagree. We have set out our conclusions on that when dealing with the claims of breach of contract/unlawful deduction from wages.

334. The conclusions we have reached about the Claimant's length of service permit us to turn directly to the reason for the treatment that is complained of. The Claimant asserts that she was not given this benefit because of her race. We assume that the Respondent bears the burden of showing the reason for

the treatment. We are satisfied that the reason that the Claimant was not placed on the income protection scheme is that that scheme requires employees to have 2 years of service with Barclays before they have access to that benefit and that they cannot have access if they are already off sick from work. There was no evidence that the Claimant's race or nationality had any part to play in this decision and we find that it did not.

Direct Sex Discrimination contrary to Sections 13 and 39 of the Equality Act 2010

335. We have set out the legal principles applicable to a claim of direct discrimination above. For these purposes, those same principles apply where the protected characteristic is sex.

Issue 2(a) not being remunerated or recognised as an AVP ROST IB MO

336. We have dealt with the issue of whether the decision not to recognise or pay the Claimant as an AVP was because of race above. Here the Claimant puts an alternative case that the same treatment was because of sex. She has also brought an equal pay claim where she compares herself to James Kinghorn an AVP ROST IB MO. Section 71 read with Section 70 of the Equality Act 2010 has the effect of excluding pay claims from the sex discrimination provisions of the Equality Act 2010 save in circumstances which have no application to the present case. We deal with the equal pay claim below. Our conclusions in that claim are sufficient to explain that the failure to pay the Claimant the salary of an AVP was nothing whatsoever to do with her sex. Accordingly, even if the Claimant was entitled to complain about her contractual remuneration under Sections 13 and 39 her claim would not succeed for the reasons that we have given in the equal pay claim. We accept that being paid and being recognised as an AVP are not necessarily the same thing.

337. Above, where we deal with the same allegation relying on race, we set out our conclusions about why the Respondents acted as they did. We have made a positive finding as to the reason for the treatment. In short, the Respondents did not recognise that the Claimant was doing the role of an AVP. For the same reasons as we have given in respect of the race discrimination claim the sex discrimination cannot succeed. The reasons for the treatment were nothing whatsoever to do with sex and the claim must fail.

Issue 2(b) expecting the Claimant to work until 7 PM on Monday nights in contrast to James Kinghorn leading at 6pm.

338. James Kinghorn accepted that wherever possible he would attempt to leave work on a Monday evening in order to play football. When the Claimant was cross-examined, she was taken to documents that showed that that there were a number of occasions when James Kinghorn was unable to leave at 6pm. Nevertheless, we accept that there were a reasonable number of occasions when James Kinghorn left on a Monday evening before the Claimant did so.

339. We would accept that working beyond ordinary office hours could be seen by a reasonable employee as a disadvantage.

340. The Claimants case is that it was James Kinghorn who discriminated against her. That is not unimportant. Had the Claimant suggested that somebody above James Kinghorn had taken the decision to permit him more latitude than her then the case would have to be analysed in a different way. On the evidence before us it was James Kinghorn who took or at least oversaw the management decisions about who should stay and who could leave work. If there is a claim to be made it is therefore correctly made against James Kinghorn.

341. This is a case where it is important to properly analyse whether there is any less favourable treatment. We need to ask how a hypothetical male comparator would have been treated by James Kinghorn. James Kinghorn told us that from time to time he would undertake some of the BAU tasks. However, in the main those tasks were done by the Analysts. An Analyst who had been allocated a particular duty would normally be expected to complete it. Accordingly, if the Claimant had been working on vanilla options for the day it was almost inevitable that that work would take her past 6 o'clock.

342. The Claimant has been critical of James Kinghorn for, as she sees it, insisting on leaving to play football. Equally she has criticised him for coming in late which he accepts he does from time to time because he delivers his twin daughters to school. Whilst James Kinghorn has managed to achieve a slightly better work-life balance than the Claimant we do not think he can be criticised for trying to maintain a social life or looking after his children. We accept that his team could reasonably feel aggrieved if he did not pull his weight. We do not accept that James Kinghorn did not pull his weight. We accept his evidence that whilst he did some BAU work he had a number of other responsibilities. The analysts did mainly BAU work. The door entry records show that James Kinghorn frequently works late as did everybody else in the ROST team.

343. The proper comparator in this situation is an analyst who had been allocated the same work as the Claimant but who was male. The question we must ask is whether James Kinghorn would have left at 6 PM if the team members remaining were male. We have no doubt whatsoever that had James Kinghorn been managing an exclusively male team he would have behaved in exactly the same way. In reaching that conclusion we have regard to the fact that at least one team member was male but accept that that is not in itself conclusive. James Kinghorn did his very best to play football on Monday nights because he wanted to do so and because as a manager, he was able to organise his duties around that. It may not be fair that a manager has more freedom than the team they manage but, in this case, we find it had nothing to do with the gender of the team or specifically the gender of the Claimant.

344. We can arrive at the same result by simply asking why James Kinghorn treated the Claimant as he did. The answer is much the same. He did so because wanted to play football and he was able to organise his work to allow him to usually leave early on Monday nights. The fact that this impacted more

on women does not mean that this was the reason for the treatment. We find that James Kinghorn did not give a moment's thought about the gender of the individuals who were working after he had left when making the decision to go.

Issue 2(c) - requiring the Claimant to carry out her own work the work of others and training

345. This issue raises the same factual matters as issue 1(c) above where the Claimant relies upon the same detriment but says that her treatment amounted to discrimination because of race. Here the Claimant says that the treatment is because of gender. We have found above that the shortage of team members and the regular turnover generated additional work for the Claimant to do. We have accepted that she could reasonably have considered this to have been a disadvantage.

346. We held above that the facts giving rise to the staff shortages and turnover, which we have referred to as the background, were not themselves anything to do with race. We find that the same is true with regards to gender. Gender played no part whatsoever in the decision of people to leave or the speed at which people could be recruited. When people were recruited that gave rise to an additional task of showing them how to undertake the business as usual activity (training them). We have accepted that the Claimant was asked to do a high proportion of the training than others.

347. We need to consider whether having regard to all the evidence the Claimant has proved facts from which we might infer that the reason that the Claimant had to do all the tasks that she undertook was because of sex. Below we find that James Kinghorn did on a number of occasions use a sexist expression 'bird(s)'. We have found that he did so in a misguided attempt to be humorous/ironic. Whilst that does not provide strong support for the suggestion that he held generally sexist attitudes we treat the burden of proof as having passed to the Respondent.

348. As we have found above the Respondent has satisfied asked that the reason that the Claimant was expected to do the work of others was because of the turnover of staff. The amount of work was constant and when the team was under resourced all team members were overworked. We have also found above that the reason that the Claimant was asked to do training at all was because that was normal. Analysts were expected to train incoming team members on the business as usual tasks. As the Claimant soon became the most senior Analyst, she was the best placed person to be asked. We accept that Matteo Pasini was employed shortly after the Claimant and also had the skills to train any newcomers. The evidence before us was that he did when he was asked to do so. We have found above having been seated next to Ivet Draganova she almost inevitably bore the brunt of her training. She was genuinely believed to be the person best placed to do it. We are satisfied that the Respondents have shown a reason for the treatment complained of which was in no sense whatsoever the sex of the Claimant.

Issue 2(d) - making comments about female workers

349. The Claimant raises two separate complaints under this heading, and it is necessary to deal with each separately.

350. The first complaint relates to the fact that James Kinghorn used the expression 'birds' in respect to women. As we have found above there was no dispute that he used the expression. The only disputes were about how often the expression was used, whether James Kinghorn desisted when the Claimant objected and whether or not she was actually offended. We rely on our findings above but make further findings of fact below.

351. We have found that James Kinghorn used the expression 'birds' on occasions over a number of months. He accepts in his witness statement that it is quite likely that he quipped 'don't tell HR' or words to that affect. From the context and from James Kinghorn's description we find that his use of the expression was intended to be amusing. In the cold light of the tribunal room he readily accepted that his language had been inappropriate. We find that his use of this language was an attempt at irony which fell flat. It is common ground that the Claimant objected. That is consistent with the reference to 'don't tell HR'.

352. The Claimant says that James Kinghorn continued to use this language throughout 2018. She also suggests in her witness statement that this was done deliberately to make her feel uncomfortable. In 2018 in an unrelated text message the Claimant makes it clear that she is aware that concerns at work might be elevated to the HR Department. She did not raise these allegations with any manager at the time. We find that James Kinghorn has sought to minimise his use of this expression and that the Claimant now remembers him as using it more often than he did. That is unsurprising given the subsequent events. We find that the use of the expression continued over the early months of 2018 but ceased at some point when it dawned on James Kinghorn that the Claimant was genuinely offended.

353. We accept that the Claimant was offended by this language. The Claimant ought not have been expected to appreciate that derogatory language can be used in an ironic manner. When Ivet Draganova was interviewed by Karen McGoldrick she described being made to feel uncomfortable although she had no specific recollection of what might have been said. That does not undermine the Claimant's account in any way and in our view supports it. We find that the use of this expression amounted to something a reasonable employee could consider to be a disadvantage.

354. As recognised in ***Amnesty International v Ahmed*** the grounds for an action can be inherent in the action itself. We find that the use of a derogatory term about women (whether for benign motives or not) is inherently 'because of sex'. Accordingly, we find that the use of this expression in front of the Claimant was an act of direct discrimination because of sex.

355. We find that it is more likely than not that James Kinghorn stopped using the expression at some point in the middle of 2018. We will therefore need to address the question of whether or not the Tribunal has jurisdiction to entertain

the claim as these events took place more than three months before the Claimant contacted ACAS or presented her claim to the employment tribunal. We will return to that issue below (following the suggestion in the list of issues).

356. The second allegation that the Claimant makes is both levelled against James Kinghorn and Matteo Pasini (for whom Barclays would be vicariously liable). What is said was that they made remarks about a colleague in Japan always being available at all hours of the day. We have set out some findings in respect of that above.

357. We accept that the Claimant has broadly recalled the conversations that took place. It was not disputed by James Kinghorn that the colleague in Japan was expected to work unusual hours in order to liaise with the business in the UK. We find it more likely than not that jokes were made about this colleague always being available to work. We find that whether the jokes were made because of presenteeism, gender or race is irrelevant at the stage of asking whether being exposed to such 'humour' was something that an employee could reasonably consider a disadvantage. We find that it could. Many might consider the language to be light-hearted banter, but it is a joke at the expense of a colleague, and one could reasonably take the view that it was unkind. Much humour is. We find that the Claimant was offended. This is likely in her particular circumstances as she too was expected to work long hours.

358. Having accepted that there was a detriment the question then arises that amounts to less favourable treatment on the grounds of sex. In contrast to the allegation above the words used about the colleague in Japan are not inherently sexist. They could have been used about a man who was always available for work. This means that we need to consider the mental process of James Kinghorn and Matteo Pasini. Whilst the 'joke' might have been one which denoted the attitude that the Claimant attributes to James Kinghorn - that women should be available to work - that is not necessarily the case.

359. James Kinghorn explained that any remark that he made simply referred to the fact that the employee was extremely diligent in ensuring they were available to deal with any work. In other words, he says that any joke was about presenteeism and not gender specific. We accept his explanation. The words that the Claimant says James Kinghorn used are principally aimed at working long hours. James Kinghorn has satisfied us that it was the hours worked rather than anything to do with gender that prompted him to make the remarks he did.

360. We did not hear from Matteo Pasini. In those circumstances we approach the question of whether gender play any part in his joining in the 'joke' made by James Kinghorn by asking whether the Claimant has established facts from which we could infer that this was sex discrimination. We consider that the 'joke' is not inherently connected with gender. Even taking into account the fact that the butt of the joke was female we do not consider that the Claimant has established facts from which we could conclude that there was any discrimination by Matteo Pasini.

Unlawful deduction from wages sections 13 and 23 of the Employment

Rights Act 1996 and/or breach of contract.

361. The agreed list of issues set out the following questions:

> *3. Was C engaged by R1 in a contract of permanent employment in the period June 2016 to 13 April 2020?*
>
> *4. If so, were wages unlawfully deducted from C in breach of contract by way of:*
>
> *a. unauthorized change of hours of work (since at least 2017- 13 April 2020; disclosure of electronic access records required from R1 for accuracy of dates) [R1, R2, R3]*
>
> *b. unauthorized change of duties (since around October 2016 - 14 April 2020) [R1, R2, R3]*
>
> *c. denied full amount of duties & performance prescribed bonus [R1, R2, R3]*
>
> *d. denied 16-week sick pay (100% salary sick pay should not have been stopped in mid March 2019 but continued for another 8 weeks) and income protection (starting with July 2019)? [R1, R2, R3]*

362. The key dispute between the parties is set out in Issue 3. The question that is posed is whether the Claimant was engaged by Barclays under a contract of employment from the outset of her engagement in June 2016 right through to her dismissal that took effect on 13 April 2020. The answer to this question has an impact upon the ability of the Claimant to maintain a claim for any wages during the period prior to the point that Barclays accepts that there was a contract between them. It also impacts upon the Claimant's claim that she ought to have had a longer period of occupational sick pay (Issue 4(d)). It is common ground that the right to occupational sick pay depended on the length of service with Barclays. The removal of the occupational sick pay ended up causing the Claimant considerable hardship. Whatever sympathy we have for the Claimant we need to approach this applying the legal principles set out below.

363. It is necessary to summarise the parties competing positions. Ms Ruxandu argued that during the period prior to 2 January 2018 the Claimant had for all intents and purposes worked in a manner indistinguishable from a directly employed Analyst. She pointed to the manner in which the Claimant was recruited by recruiters she said integral to Barclays business. She referred to the fact that the Claimant was given a desk, an email account, a swipe card and all the other equipment necessary for her to perform her duties. She pointed out that the Claimant had no control over her working hours or the duties she was asked to perform. She was not free to negotiate her salary but was told what she was going to be paid. She placed particular emphasis on the degree of control exercised by Barclays and the managers whom it

employed. She relied upon ***Autoclenz Ltd v Belcher*** **[2011] IRLR 820 SC** as authority for the proposition that the Tribunal ought to take a realistic as opposed to formalistic view of the contractual situation. She contended that in reality the Claimant had always been an employee of the Respondent.

364. Ms Berry for the Respondents had anticipated this argument in an opening note and in closing repeated the submissions that she had made as well as referring the Tribunal to material passages of the IDS handbook. Her starting point was that there was no express contractual relationship between the Claimant and Barclays prior to 2 January 2018. Any contract was between the Claimant and Resource Solutions. She said that no contract could be implied between the Claimant and Barclays because the very high threshold of 'necessity' described in ***James v Greenwich BC*** **[2008] IRLR 302**

Legal Principles – who was the Claimant's employer before 2 January 2018?

365. Section 230(1) of the Employment Rights Act 1996 defines an employee as a person who works under a *'contract of employment'*. Absent a contract a person cannot be an employee.

366. A contract may be express or, depending on all the evidence it may be implied. A useful analysis of the proper approach to the question of whether a contract can be implied is set out in the judgment of Elias LJ in ***Tilson v Alstom Transport*** **2011 IRLR 169, CA**. The following passages review the authorities:

> *'7. The principles for determining when such implication can take place are now well established and they were not in dispute before us. First, the onus is on a claimant to establish that a contract should be implied: see the observations of Mance LJ, as he was, in Modahl v British Athletic Federation [2001] EWCA Civ 1447, [2002] 1 WLR 1192 , para 102.*
>
> *8. Second, a contract can be implied only if it is necessary to do so. This is as true when considering whether or not to imply a contract between worker and end user in an agency context as it is in other areas of contract law. This principle was reiterated most recently in a judgment of the Court of Appeal in James v Greenwich London Borough Council [2008] ICR 545 which considered two earlier decisions on agency workers in this court, Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437 and Cable and Wireless plc v Muscat [2006] ICR 975 . It is sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJJ agreed: (paras 23 — 24). Mummery LJ stated that the EAT in that case had:*
>
> *"…correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and*

the end-user, the test being that laid down by Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213 , 224:

> *"necessary … in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."*

As Bingham LJ went on to point out in the same case it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."

9. If an employment tribunal has properly directed itself in accordance with these principles, then provided that there is a proper evidential foundation to justify its conclusion, neither the EAT nor this court can interfere with the tribunal's decision.

10. It is important to emphasise that if these principles are not satisfied, no contract can be implied. It is not against public policy for a worker to provide services to an employer without being in a direct contractual relationship with him. Statute has imposed certain obligations on an end user with respect to such workers, for example under health and safety and discrimination legislation, even where no contract is in place between them. But it has not done so with respect to claims for unfair dismissal. It is impermissible for a tribunal to conclude that because a worker does the kind of work that an employee typically does, or even of a kind that other employees engaged by the same employer actually do, that worker must be an employee. As HH Judge Peter Clark observed in Heatherwood and Wrexham Park Hospitals NHS Trust v Kulubowila and Others UK/EAT/0633/06 :

"..it is not enough to form the view that because the Claimant looked like an employee of the Trust, acted like an employee and was treated as an employee, the business reality is that he was an employee and the ET must therefore imply a contract of employment."

11. Nor is it legitimate for a tribunal to imply a contract because it objects to the practice of employers entering into arrangements of this kind in order to avoid incurring the obligations they owe to their employees. In many cases that is undoubtedly the reason why employers enter into agency arrangements, although certainly not all. Some employees prefer these arrangements because they are perceived overall to be more beneficial to them, as this case demonstrates. But even where employers are seeking to avoid liabilities with respect to workers who would prefer to enter into an employment relationship, if as a matter of

law the arrangements have in fact achieved the objective for which they were designed, tribunals cannot find otherwise simply because they disapprove of the employer's motives. Section 203 of the Employment Rights Act 1996 renders void contractual terms under which employees contract out of their statutory rights, as the employment judge in this case rightly observed. But if there is no contract in place, then the rights do not arise in the first place and the section has no bite.

367. When ***James v Greenwich BC*** was before the EAT Elias J (as he was) suggested that the following matters may assist a tribunal in determining whether the test of necessity is met (that guidance being undisturbed in the Court of Appeal):

367.1. the key issue is whether the way in which the contract is performed is consistent with the agency arrangements, or whether it is only consistent with an implied contract of employment between the worker and the end-user

367.2. the key feature in agency arrangements is not just the fact that the end-user is not paying the wages, but that it cannot insist on the agency providing the particular worker;

367.3. it will not be necessary to imply a contract between the worker and the end-user when agency arrangements are genuine and accurately represent the relationship between the parties, even if such a contract would also not be inconsistent with the relationship;

367.4. it will be rare for an employment contract to be implied where agency arrangements are genuine and, when implemented, accurately represent the actual relationship between the parties. If any such contract is to be implied there must have been, subsequent to the relationship commencing, some words or conduct that entitle the tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually being performed;

367.5. the mere fact that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the two;

367.6. it will be more readily open to a tribunal to imply a contract where, as in Cable and Wireless plc v Muscat, the agency arrangements are superimposed on an existing contractual relationship between the worker and the end-user.

368. In ***Cable and Wireless plc v Muscat*** **2006 ICR 975, CA**, the Court agreed with the decision of an employment tribunal that it was necessary to imply a contract between him and the Respondent in order to give effect to 'business reality'. In that case the Claimant had been previously employed by

Cable and Wireless, he worked under the direction of the end-user's managers, arranged his holidays to suit the end-user, and was described as an 'employee' in company documentation.

Discussion and conclusion – employment status

369. We have set out in our findings of fact above how the Claimant was recruited. We have found that the role that she applied for and was offered was always intended by the Respondent to be filled by a 'contractor'. That is a person working through a third party on a short-term contract (subject to renewal) and on a daily rate.

370. We accept that the Claimant was interviewed by employees of Barclays as opposed to by Resource Solutions. The offer that was made to the Claimant was unequivocally made to her by Resource Solutions and it was that offer that she accepted.

371. We accept the submissions made by Ms Ruxandu that, on the evidence, the Claimant was treated by Barclays in numerous respects exactly like an employee. Her dealings with Resource Solutions were limited to the fact that they paid her daily rate and she (usually) completed time sheets. In addition, they were involved when the term of the assignment was extended but only to a small degree.

372. We accept that Barclays had a high degree of control over the Claimant. She accepted their mandatory training and followed instructions about what to do and how to do it. Her working hours were in practice governed by the amount of work that Barclays decided it needed done. She notified Barclays and not Resource Solutions if she was unwell and could not work or wanted to arrange leave.

373. In terms of the contractual arrangements there were some differences between the Claimant and a directly engaged employee. The Claimant could terminate the arrangement on short notice. She was paid a fixed daily rate that included holiday pay. She was not entitled to any of the benefits afforded to employees. She was unable to apply for internal positions.

374. We must take those facts and apply the legal tests we have set out above. Firstly, we find that there was a contract between the Claimant and Resource Solutions. We do not accept that the close business relationship between Barclays and Resource Solutions affects that conclusion. We would accept that in her early dealings the Claimant could reasonably have believed that the 'direct recruiters' she was dealing with were employees or agents of Barclays. However, at the point an offer of work was made it was in writing. If the Claimant had misunderstood what was going to be offered previously, she could not have reasonably believed that she was being offered a direct contract with Barclays at the point that the Resource Solutions agreement is sent to her. That agreement is plainly a temporary workers agreement whereby the Resource Solutions would supply the Claimant to Barclays. The effect of Ms Ruxandu's submissions was that we should treat that as a sham. We consider

that a sham in that context would be a situation where, as in ***Autoclenz Ltd v Belcher*** the written documents did not reflect the true agreement between the parties.

375. We accept Ms Ruxandu's submission that the approach in ***Autoclenz Ltd v Belcher*** is relevant, if not directly applicable. It seems to us that if we were to find that neither party intended the Resource Solutions agreement to govern the relationship it would be open to us to disregard it. Alternatively, it might be open to us to find that the agreement was entered into by Resource Solutions as agents of Barclays. However, on the facts of this case we find that the written agreement was intended by all parties to reflect the true agreement. The Claimant was to be 'a contractor' and by the time she was sent an offer she ought to have realised what that meant. She knew she was not being offered employment by Barclays but work by Resource Solutions.

376. We take judicial notice of the facts that many people performing work in organisations are not employed directly. During the hearing we referred to the fact that many tribunal staff are agency workers but carry out their duties in a way indistinguishable from the employed staff members. We accept that there may be a variety of business reasons for engaging staff in this way.

377. Finding that there was a contract between the Claimant and Resource Solutions is not fatal to a finding that there was a contract between her and Barclays. However, as there was no express contract the Claimant would have to show that on the facts before us it was necessary to imply such a contract. We do not consider that it is. The Claimant's presence in the Barclays' offices and the manner in which she carried out her work and was paid for that work are entirely consistent with the agreement with Resource Solutions. We accept that there was a very high degree of control in this case and the Claimant had little contact with Resource Solutions but despite this we find is not necessary to imply any other contract.

378. We therefore conclude that the contractual arrangements were those reduced into writing initially between the Claimant and Resource Solutions and latterly between the Claimant and Barclays.

379. Whilst issue 4 is expressed in terms that would suggest that if we disagreed with the Claimant in respect of issue 3 we need not go further it seems to us that our conclusion on this first point does not necessary mean that all of the claims must fail where they relate to the period of direct employment. We shall deal with each of them.

380. We note that in the list of issues agreed between the parties the final version refers to these claims as being claims for unlawful deductions from wages. There is no reference to claims for breach of contract. This is in contrast to the Claimant's second ET1 where the claims are said to be alternatives (as one might have expected). Given our conclusions it is no injustice to the Respondents for us to consider both alternatives and that is what we have done below.

381. The Claimant has named individual Respondents to these claims. The basis apparently being that she holds one or other or both of them responsible for the decisions. These claims can only be brought against the party with legal obligations under the contract of employment (or in the case of the unlawful deductions 'or otherwise'). As such they can only be advanced against Barclays.

4a. unauthorized change of hours of work (since at least 2017- 13 April 2020; disclosure of electronic access records required from R1 for accuracy of dates) [R1, R2, R3]

382. Our finding above is fatal to any claim arising whilst the Claimant was engaged via Resource Solutions. We go on to consider the claim from the time that the Claimant was directly employed. All four of these claims are brought in the Claimant's first claim when she was still employed. We are unable to consider any claim presented at the time the Claimant was still employed under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 as 'in employment' claims are excluded. However, they are then repeated in her second claim. We therefore have jurisdiction to consider the claims as a breach of contract claims.

383. Bringing the claim as a claim for unlawful deduction from wages the Claimant would have to establish that there was an agreement to pay her some additional sum in respect of any additional or non-contractual hours. A claim for unlawful deduction from wages requires the Claimant to establish some legal obligation to make payment - ***New Century Cleaning Co Ltd v Church*** **[2000] IRLR 27, CA**. The Claimant would also need to satisfy the tribunal that the claim was presented within the statutory time limit imposed by Section 23 of the Employment Rights Act 1996.

384. We have set out above the terms in the Claimant's contract of employment with Barclays that deal with payment for overtime. The terms of the contract clearly state that no payment is made for overtime. There is nothing unlawful about such a clause provided that the national minimum wage is paid. In this case the Claimant's salary was substantially in excess of the national minimum wage.

385. We also consider that the terms of the contract that deal with the hours of work are equally clear. Whilst normal hours of work are stated it is expressly stated that the Claimant was required to work '*such additional hours as are required for the proper performance of your duties'.* The effect of this clause is that Barclays was lawfully entitled to ask the Claimant to work in excess of her 'normal' hours. Whilst the effect of Regulation 4 of the Working Time Regulations 1998 was that the Claimant could not have been required to work in excess of an average of 48 hours over a 17 week reference period there is nothing in those regulations that requires an employer to pay for overtime. In any event we have found that the Claimant was not regularly expected to work in excess of 48 hours a week.

386. The Claimant has failed to establish any right to be paid for time worked

in excess of her normal hours. The answer that she was given both at the time and during the grievance procedure was correct. She had no contractual right to overtime. She may have had a strong moral claim, and Karen McGoldrick thought she did, but that does not give rise to any legally enforceable right. For these reasons this claim must fail whether brought as a claim for unlawful deduction from wages or as a claim for breach of contract.

4(b) Unauthorized change of duties (since around October 2016 - 14 April 2020) [R1, R2, R3]

387. As we understand this claim it refers to the fact that the Claimant was expected to train newcomers including managers and cover the work of other colleagues. We have made findings of fact in relation to this both in our general findings and in the equal pay claim. We have found that training and assisting colleagues was within the Claimant's duties. The Claimant worked very hard to cover the shortfall in staff but the tasks she did were within the tasks that she could be required to do.

388. The detailed terms and conditions of the Claimant's contract of employment included the following under a heading 'Duties':

'You will…..diligently and faithfully perform such duties and exercise such powers and functions as may reasonably be assigned to you by the Company in relation to its business and that of the Barclays Group to the best of your ability and with integrity, due skill, care and diligence'

389. We find that the job description per-se was not a contractual document and Barclays had a degree of latitude circumscribed only by the requirement to act 'reasonably' when assigning the Claimant work. The Claimant has not suggested that there was any agreement to pay for work carried out in excess of her job description. Absent an obligation to make payment there cannot be an unlawful deduction from wages - ***New Century Cleaning Co Ltd v Church***. The Claimant has not established that any additional wages fell due.

390. Treating the claim as a claim for breach of contract the Claimant would need to establish that she was required to undertake duties outside her contract and to establish that she had suffered any loss of damage as a consequence (excluding any damages for personal injury as these fall outside our breach of contract jurisdiction).

391. We do not find that the Claimant has established that she was required to work outside the terms of her contract. Training and assisting colleagues fell within the work that the Claimant could be required to do. Making up for staff shortages was clearly arduous but the duties again fall within the contract. This is fatal to the Claimant's case in this regard and the claim cannot succeed for that reason.

392. We were not provided with any evidence that the Claimant had suffered loss and damage as a consequence of undertaking any of the work she has (wrongly in our view) categorised as outside her contractual duties. She has

not established any financial loss but instead puts her case on the basis that she feels she was underpaid for the job she did. She may be right but that is a moral rather than legal claim. We accept that the Claimant has linked the tasks that she was required to do with her ill health. As noted above we have no jurisdiction to deal with a personal injury claim founded on a breach of contract. Even if we had found a breach of contract the Claimant could only have recovered nominal damages (which arguably fall outside of our jurisdiction).

4(c) denied full amount of duties & performance prescribed bonus [R1, R2, R3]

393. The Claimant never clearly explained the first part of this complaint 'denied full amount of duties'. It is either a complaint that she was taken off some project work or a complaint that she was not paid for all the duties she did. Put either way it suffers from the same defects as the claim above. The Claimant has not established any right to payment of wages and as such a claim for unlawful deduction from wages cannot succeed.

394. We have found no breach of contract in respect of the duties that the Claimant was asked to perform. We do not accept that the Claimant has any contractual right to any particular allocation of project work. In any event she has not established any loss and damage.

395. The second part of this relates to the payment of the annual bonus. Under a heading 'Discretionary Incentive Award' in the Claimant's contract of employment with Barclays is the following:

> *'6.1 You may be eligible to be considered for a discretionary incentive award on an annual basis. The value, form, conditions of delivery and timing of any such awards are at the Company's discretion. This discretion includes the right to make the award or a proportion of the award in a form other than cash, including an award of Shares and to defer an element of an award under the terms of a Barclays Group incentive plan……*
>
> *6.11 You have no contractual right to receive an award, and the making of an award in any year does not give rise to any obligation on the Company to, or legitimate expectation that the Company will, make an award in any future year.'*

396. Whether the claim is brought as a claim for unlawful deduction from wages or for a claim for breach of contract the Claimant would need to establish an obligation on Barclays to make payment. In the present case the contract of employment makes it clear that the bonus scheme is operated at the discretion of Barclays. Whilst there is a presumption that a statement in a commercial contract is intended to give right to legal obligations that presumption can be rebutted by clear words to the contrary - ***Pendragon plc v Jackson (No.2)*** **EAT 108/97**. In the present case the effect of clause 6.11 is sufficient to rebut any such presumption.

397. Our conclusion that there is no enforceable right to a bonus would not prevent the Claimant recovering a bonus as an unlawful deduction from wages that Barclays had (in its discretion) declared was due to her - ***Farrell Matthews & Weir v Hansen*** **[2005] IRLR 160**. However, it does stand in the way of a complaint as a claim for unlawful deductions that what was paid was unfair or insufficient. A claim for an unlawful deduction must be a claim for an ascertainable sum - ***Coors Brewery Ltd v Adcock*** **[2007] IRLR 440**. As such the claim cannot succeed as a claim for unlawful deduction from wages.

398. Treating the claim as a claim for breach of contract our finding that the scheme is discretionary is not necessarily fatal to the claim. The exercise of any discretion may breach the implied term of mutual trust and confidence (to use well understood shorthand). The test that has developed was first set out in ***Clark v Nomura International plc*** **2000 IRLR 766, QBD** and requires the employee to show that the discretionary decision was irrational or perverse. That test has been approved and applied in several decisions of the Court of Appeal and is consistent with the decision of the Supreme Court in ***Braganza v BP Shipping Limited and another*** **[2015] UKSC 17**.

399. We have dealt with the bonus separately in the Equality Act claims (where no contractual right is necessary). We adopt the findings of fact that we made there. We do not consider that the Claimant has satisfied us that the decision to pay her the bonus that she was paid was irrational or perverse. We are unimpressed with the lack of transparency but accept that an honest assessment of the Claimant's performance was undertaken and that her bonus was calculated by reference to that subject to regional differences. These are matters which Barclays was entitled to have regard to and its decision cannot be said to be perverse.

d. denied 16-week sick pay (100% salary sick pay should not have been stopped in mid March 2019 but continued for another 8 weeks) and income protection (starting with July 2019)? [R1, R2, R3]

400. The way that the Claimant puts this claim depends on the Tribunal accepting that she had been continuously employed from the outset of her engagement with Resource Solutions. The Claimant's argument is that the date of continuous employment set out in her contract of employment with Barclays was incorrectly identified.

401. The terms and conditions of the Barclays contract included the right to contractual sick pay. That scheme was set out in a document within the agreed bundle and was entitled Sick Pay Provisions. Those provisions provided that full normal pay would be paid for a period which varied depending on the length of service. For employees of between 1 to 2 years continuous service eight weeks of sick pay was payable. Between two and three years of service that rose to 16 weeks. Similarly, entitlement to income protection was dependent upon length of service.

402. We have set out above our reasons for finding that the Claimant was not employed by Barclays until 2 January 2018. That finding is sufficient to

dispose of these claims. The Claimant was not contractually entitled to additional sick pay or access to the income protection scheme because she had not been employed for long enough.

403. It seems to us that even if the Claimant had been right and there had been a contract between her and Barclays prior to 2 January 2018 it would not necessarily mean that she would have succeeded in this claim. Continuity of employment to statutory purposes is distinct from any agreement that might be reached at common law. At common law it is open to parties to agree the date upon which they should be treated as having commenced their relationship either for the purposes of contractual benefits or anything else. The Claimant told us that she asked for her complete service, as she saw it, to be reflected in the contract. She says that Barclays refused to do so. However, she agreed the terms that were on offer. We find that in doing so she agreed the contractual starting date as being 2 January 2018. Prior to that she had an entirely different contract even if it was with Barclays. Had we not found against the Claimant on the question of whether she had always been employed by Barclays we would have dismissed her claim on the basis that for contractual purposes she had agreed a later starting date than date that would apply for statutory purposes.

The Equal Pay Claim – section 65 of the Equality Act 2010

404. The basis of the Claimant's equal pay claim was that she contended that she was engaged on 'like work' with James Kinghorn. She says that any difference in pay was unlawful. We have set out some general findings of fact above but for the purpose of this claim we repeat some of those findings and make the following additional findings in respect of the role of the Claimant and that of James Kinghorn.

405. The Claimant's role was described as a Business Analysis BA4. As we understand it, for the Claimant it was her first role in banking following her academic studies. The following passages of James Kinghorn's witness statement accurately set out the management structure. The structure itself was not disputed by the Claimant and we accept that it is accurate. He says:

> *'At that time I was employed as an AVP in the Middle Office. AVP stands for Assistant Vice President. An AVP role is a management position in our structure. Our entry/graduate level roles are graded at BA1. BA stands for Business Analyst. We then have grades BA2 – BA4 which are all business analyst roles. AVP is the start of the managerial level roles. We also have VPs and Director level roles. Finally, the Managing Director is the most senior role in the bank. Anca was employed as a Business analyst at the BA4 grade.'*

406. We find that the ROST IB MO team was intended to be managed by an AVP who in turn would report to a VP. This was the position when the Claimant first started. She reported to an employee we have identified as 'her first line manager' who was an AVP. That individual reported to Jade Green who was

at the time a Vice President. The Claimant's first line manager was replaced by Stephen Lane. His role was also that of an AVP. This was a gradual process and the two AVPs worked together in the team for some time. Jade Green moved roles and was replaced by Avneesh Singh who was at the time a VP. When Steven Lane moved on Avneesh Singh recruited James Kinghorn in October 2017. From that point on the formal managerial structure was that the Claimant reported to James Kinghorn.

407. Stephen Lane gave evidence about the differences between his role and that of the Claimant. His witness statements included the following passages:

> *'10. Anca was not carrying out the AVP ROST IB MO role during the period from November 2016 to August 2017; that was my role and Anca reported into me. There were some tasks that we both did such as carrying out the day-to-days tasks (as I was happy to support the team where they needed it). However, she did not have the same responsibilities as I did. She did not have a team reporting into her as I did.*
>
> *11. I had supervisory and management responsibilities for the AVP ROST IB MO team and a higher corporate grade than Anca. This meant that I managed the team, including Anca, for example I carried out 1-2-1s. I also had responsibility for mid-year and end of year appraisals and agreed objectives with permanent colleagues within the team. I also had the day to day management responsibility to ensure that the work was carried out as we needed it to be.'*

408. Stephen Lane's evidence was consistent with the evidence given by James Kinghorn. In his witness statement James Kinghorn says (at paragraph 5 of his witness statement):

> *'As an AVP my role is to manage the team and ensure that its work is carried out efficiently and well. The team has a number of daily tasks which have to be carried out which we refer to as the BAU which stands for "business as usual". The Business Analysts in the team carry that out and I help them as and when necessary. I estimate that I would spend about 50% of my time doing the BAU tasks. I am the line manager for the members of the team which means that I carry out one-to-ones with them and deal with any issues that they may have which arise either at those one-to-ones or at any other time. I also help and guide them with any career development that they have. I would spend about 25% of my time doing this kind of work. I have a more strategic focus than the Business Analysts and I am involved in a number of strategic projects involving other departments in the bank for example I liaise with other teams to ensure that my team work in the most efficient way to support trading. The remaining 25% of my time would have been*

spent on this. I have overall responsibility for my team and am accountable to my line manager and the senior management of the Bank.'

409. We accept that the Claimant reported to the AVP leading the team at any given time. There were numerous documents that supported James Kinghorn's evidence that he had managerial responsibility for the team. He was given responsibility for the final recruitment process when the Claimant was given a direct contract with the First Respondent. On the Claimant's own account, he was authorised to discuss her salary. He conducted the Claimant's annual appraisal. When the Claimant wanted to work from home, she would let James Kinghorn know (We put this neutrally she says that she needed to ask permission). When the Claimant needed time off for medical appointments she would ask or inform James Kinghorn. Whilst James Kinghorn said that if at all possible he would leave the team to arrange the BAU work between them there was one clear instance where he asserted his managerial status when he warned the whole team that if a rota was imposed it may have been stricter that the team wanted.

410. The Claimant accepted that a large part of her role (and her time) involved working on what the parties referred to as the BAU tasks. She also told us that from time to time she would be asked to undertake some project work. The Respondents did not dispute that this was the case. The Claimant's principal argument before us when comparing work with that of James Kinghorn turned on the fact that she was asked to, and did, train incoming team members including James Kinghorn himself on how to undertake the BAU tasks. In particular, the Claimant points to the responsibilities she undertook when Ivet Draganova was appointed.

411. Within the agreed supplementary bundle of documents was a generic job description for an AVP. It is clear from that document that an AVP is expected to exercise managerial responsibilities for a team. This is something that runs through the entire job description but is particularly emphasised in two sections Leadership Skills and Business Skills. The competency framework for a BA4 Analyst was included in the main bundle. That also has sections headed Leadership Skills and Business Skills. However there is a clear distinction between that competency framework and the generic AVP job description. There is no suggestion in the BA4 competency framework that the Analyst is expected to take on any managerial responsibilities.

<u>The legal framework</u>

412. The statutory framework governing the right to equal pay is contained in Chapter 3 of Part 5 of the Equality Act 2010. In summary:

412.1. By Section 66 of the Equality Act 2010 the terms of a woman's contract are treated as including a clause that has the effect of modifying any term of her contract where the term that applies to her is less favourable than that which applies to a man to eliminate any less favourable effect.

412.2. Section 64 states that for that Section 66 to apply the woman must identify a man doing 'equal work'. Section 65 sets out the circumstances in which work is treated as 'equal work'.

412.3. Section 69 provides that it is a defence to any claim for the employer to show that the difference in treatment is because of a material factor which is not itself discriminatory.

413. The material parts of the sections referred to above are set out below:

64 Relevant types of work

(1) Sections 66 to 70 apply where—

(a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;

(b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.

(2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.

65 Equal work

(1) For the purposes of this Chapter, A's work is equal to that of B if it is—

(a) like B's work,

(b) rated as equivalent to B's work, or

(c) of equal value to B's work.

(2) A's work is like B's work if—

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences.

(4) A's work is rated as equivalent to B's work if a job evaluation study—

(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or

(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

(5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

(6) A's work is of equal value to B's work if it is—

(a) neither like B's work nor rated as equivalent to B's work, but

(b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.

66 Sex equality clause

(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

(2) A sex equality clause is a provision that has the following effect—

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

(3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.

(4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).

69 Defence of material factor

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

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

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

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

414. When considering whether a woman and her chosen male comparator were engaged on 'like work' a 2-stage approach is necessary. In ***Waddington v Leicester Council for Voluntary Services*** **[1977] IRLR 32**, which dealt with similar provisions in the Equal Pay Act 1970, it was held that the first question is to examine whether the work actually undertaken was the same or of a broadly similar nature. If it was then it is necessary to ask whether there are any important differences in the tasks actually performed. Again, the focus is on the tasks actually performed rather than what might have been required under any contract or job description.

415. In assessing whether there are important differences between the work of the Claimant and any comparator it is necessary to have regard not only to the tasks undertaken but to the context in which they are undertaken. A greater degree of responsibility or more serious consequences that could follow from any error may mean that there are important differences between the two roles see ***Eaton Ltd v Nuttall*** **[1977] IRLR 71** and ***Waddington v Leicester Council for Voluntary Services***.

416. The approach to the two questions to be determined by the tribunal was explained by Bridge LJ in ***Shields v E Coombes (Holdings) Ltd*** **[1978] IRLR 263** where he said, at paragraph 66:

'The first question, whether the work of the man and woman to be compared is of the same or of a broadly similar nature, does not appear to have given rise to difficulties. In relation to the second question, whether differences between the things done by the employees being compared are of practical importance in relation to terms and conditions

> *of employment, I would respectfully adopt as correct the general approach expressed by Mr Justice Phillips giving the judgment of the Employment Appeal Tribunal in Capper Pass Ltd v Lawton [1976] IRLR 366, at page 367, where he said: 'In answering that question the Industrial Tribunal will be guided by the concluding words of the subsection. But again, it seems to us, trivial differences, or differences not likely in the real world to be reflected in the terms and conditions of employment, ought to be disregarded. In other words, once it is determined that work is of a broadly similar nature it should be regarded as being like work unless the differences are plainly of a kind which the Industrial Tribunal in its experience would expect to find reflected in the terms and conditions of employment.'*

417. Section 136 of the Equality Act 2010 applies to equal pay claims. The effect of this section is that it falls to the Claimant to show that she is engaged on terms less favourable than a man doing equal work. If she can do that then the burden shifts to the Respondent to show that the difference in treatment can be explained by a material factor. However, it is for the claimant to prove that she does the same work or work of a broadly similar nature, but the evidential burden of showing 'differences of practical importance' rests on the employer see ***Shields v E Coombes (Holdings) Ltd*** above.

418. In order for any matter or reason for a disparity in pay to amount to a 'material factor' it was held in ***Glasgow City Council and ors v Marshall and*** **ors (2000 ICR 196, HL** per Lord Nichol that:

> *"The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c), may be a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case."*

419. Whilst ***Marshall*** was decided under the Equal Pay Act 1970 the reasoning is equally applicable to the Equality Act 2010 the wording of which

codifies some parts of that decision. The 'rebuttable presumption' of sex discrimination remains the position under the Equality Act 2010 see ***CalMac Ferries Ltd v Wallace and anor*** **2014 ICR 453, EAT.**

420. A 'material factor' that is neither directly or indirectly discriminatory need not be justified by the employer. In other words, a material factor can be unfair and/or senseless and yet provide a defence to an equal pay claim. See ***Marshall*** and ***Strathclyde Regional Council and ors v Wallace and ors*** **1998 ICR 205, HL** and ***Villalba v Merrill Lynch and Co Inc and ors*** **2007 ICR 469, EAT**.

421. All that is required of the employer at the first stage of the enquiry is to have a factual explanation, good or bad, as to how the state of affairs came about **Bury Metropolitan Borough Council v Hamilton and ors; Sunderland City Council v Brennan and ors 2011 ICR 655, EAT.**

422. To establish the defence afforded by Sub-section 69(1) the 'material factor' must be the actual cause of the pay disparity – see ***Marshall***. Where the employer relies on a historical matter to justify a differential in pay it will be a question of fact for the Tribunal whether that matter is still operative see ***Skills Development Scotland Co Ltd v Buchanan*** **EAT 0042/10**

Equal Pay – Discussions and conclusions

423. The first issue for us is whether the Claimant has established that she performed like work to that of James Kinghorn. As we have set out above, we need to firstly address the question of whether the work done by them both was of a broadly similar nature. We find that it was. Both were engaged within the IB MO ROST team. The work they undertook had the broad common purpose of providing support to the Traders and ensuring that the BAU tasks were completed on a daily basis.

424. We then need to ask whether, in practice, there were any differences between the work done by the Claimant and by James Kinghorn. The way the Claimant put her case, which Ms Ruxandu had little option but to adopt was to focus on the similarities between the work done by the Claimant and James Kinghorn. In particular, focusing on the fact that the Claimant did the bulk of the training for any team member who joined the team and in particular her training of Ivet Draganova. She relied on the fact that when Ivet Draganova had attended on her first day she was asked to meet her and settle her in. She also said that she would pass information to James Kinghorn about Ivet Draganova for him to use at managerial meetings.

425. In other claims she has brought the Claimant complains about managerial decisions imposed by James Kinghorn. For example, she complains that he would not always let her work from home, she complains about his decisions to allocate her duties, she complains that he instructed her to return to work after attending a GP appointment.

426. Looking at the evidence as a whole we find that the expectation in the

generic job description that an AVP would have managerial responsibility reflected the reality of the daily work undertaken by James Kinghorn. It is not necessary for the purposes of our decision to list each and every instance where James Kinghorn exercised managerial responsibility but enough to set out the following examples:

426.1. James Kinghorn was expected to and did involve himself with recruitment of team members including the Claimant and acting in a managerial capacity when discussing salary; and

426.2. He was expected to and did schedule regular 1 to 1 meetings with his team members including the Claimant. During these meetings as the Claimant suggests there were discussions about workload and similar matters. When the professional relationship between the Claimant and Ivet Draganova soured towards the end of 2018 James Kinghorn used these meetings to attempt to resolve their differences.

426.3. James Kinghorn had at least some managerial responsibility for conducting the Claimant's 2018 appraisal.

426.4. When the Claimant wanted to work from home or needed to attend a medical appointment, she would inform James Kinghorn.

426.5. James Kinghorn, as he said in his witness statement was expected to and did attend regular managerial meetings. We do not doubt that the Claimant provided James Kinghorn with information which would have assisted him to prepare for such meetings, but we find that the responsibility to attend rested with James Kinghorn.

427. We find that the managerial responsibility vested in James Kinghorn was not simply theoretical but reflected the reality of the situation. We ask ourselves who would have been held responsible had there been any failure to complete the BAU work. We find that James Kinghorn was accountable to his managers for the work of the whole team. In contrast the Analysts were responsible only for their own failures. That is the normal consequence of accepting managerial responsibility.

428. We need to ask ourselves whether the requirement to hold and exercise these managerial responsibilities were trivial or whether they are the sort of differences that we would ordinarily expect to see reflected in the terms of James Kinghorn's contract of employment - ***Shields v E Coombes***. We find that these are not trivial differences. James Kinghorn was appointed as the manager of the team. That is the role that he was expected to undertake. We would have expected that that additional responsibility would carry with it a substantial differential in pay (as it does).

429. The Claimant has focussed on showing that her skills and knowledge of

the BAU work were as good as, or exceeded, her managers including James Kinghorn. She is correct that her experience resulted in her being asked and expected to train others including her managers. However, being as good as, or better than, James Kinghorn in respect of the BAU work or training does not entitle the Claimant to disregard the significant differences between her role and his. He was at all times her manager. He was responsible to his superiors for the performance of the team and he was required to, and did, exercise managerial responsibility for the team. These are significant differences of practical importance and ones where we would have expected James Kinghorn to have been paid significantly more than the Claimant. We find that the Claimant has failed to establish that she undertook like work for the purposes of Section 65 of the Equality Act 2010.

430. In case we have fallen into error we shall go on to consider whether assuming that the Claimant and James Kinghorn were engaged in like work the respondent has shown that there was a genuine material factor not tainted in any way by sex discrimination. The manner in which the defence is identified in the list of issues was not as well thought out as it might have been. Three 'material factors' are identified. They are: skills and experience; Length of Service and differences in the work carried out of practical importance. There was no evidence at all that length of service was a factor in setting pay. The Claimant and James Kinghorn had much the same length of service. The use of differences of practical importance in the work carried out goes to the question of whether the Claimant and James Kinghorn were doing like work at all.

431. We are left with 'Skills and Experience'. We suspect that the Barclays have struggled to identify or describe a material factor because it is so clear in this case that the Claimant and James Kinghorn were appointed to different grades. The Claimant's case was not put on the basis that all AVPs were male (or that a higher proportion were). There did not appear to be any evidence of that. The Claimant's first line manager was female and at least one of the Claimant's female colleagues was promoted to an AVP role.

432. We find that the decision to pay AVPs more than BA4 Analysts was not in any sense whatsoever tainted by sex discrimination. We find that the reason for the pay differential was that the AVP was expected to undertake a managerial role whereas the BA4 Analyst was not. We find that the Claimant has not established that she was undertaking an AVP role (see our findings here and throughout our reasons) but even if she had been able to demonstrate that James Kinghorn or her previous managers had delegated so much work to her as to make their roles indistinguishable we would not have concluded that there was any discrimination in the differential in pay. The differential arose on appointment. Barclays would never have anticipated and did not accept that the Claimant had so exceeded her job description that she was doing the same work as James Kinghorn. We cannot see that a male BA4 analyst would have been treated any differently. Matteo Passini was a high performing Analyst. He too was expected to put in long hours. He did not do quite as much training as the Claimant, but he did do some. He was not treated as or paid the same as

an AVP.

433. We would rather describe the material factor as being the expectation that an AVP would perform managerial role rather than 'skills and experience'. However, we consider that the Respondent has satisfied us that even if the Claimant far exceeded her job description or even if James Kinghorn fell far short of his the disparity in pay was not because of any sex discrimination but because and AVP was expected and required to act as a manager where a BA4 Analyst was not.

434. For these reasons the Claimant's claim for equal pay must be dismissed.

Did the Claimant have a disability for the purposes of Section 6 of the Equality Act 2010

435. At the outset of the hearing Ms Berry made a concession on behalf of all three Respondents that the Claimant met the statutory test of disability from December 2018 by reason of Endometriosis. No further concessions were made. As some of the claims made by the Claimant required her to show that she was disabled before that date we have had to make findings about when the Claimant met the statutory test.

436. The Claimant's position was set out in the list of issues as follows:

> *C relies on the following alleged impairments:*
>
> *a. Serious Stress and Generalised Anxiety Disorder; and*
>
> *b. Stage IV deep infiltrating endometriosis (C started suffering from symptoms of these disabilities in October 2016 and they worsened over time).*

437. There had been no application for any expert evidence. The evidence the Claimant relied upon was her own testimony, medical records and the report obtained from the Respondent's Occupational Health Advisors. The medical records included the records from her GP and letters and reports from the various specialists that she has consulted about her Endometriosis.

438. A thread running through the Claimant's ET1 and witness statement is her suggestion that the Respondents are responsible for her ill health. We have no jurisdiction to deal with a personal injury claim at common law but may award compensation where there has been an injury caused by unlawful discrimination. We indicated at the outset of the hearing that we would not deal with issues of remedy unless and until liability was established. Accordingly, we shall not stray into the question of causation. At this stage we are only concerned about the question of whether the Claimant met the statutory definition and if so when?

439. The Respondents did not dispute the accuracy of any of the medical

records that referred to Endometriosis. We shall summarise those reports below and accept that they contain an accurate description of the Claimant's health at the time the reports were written.

439.1. On 30 December 2017 the Claimant fell and injured her head. We have a translated medical report that shows that she attended A & E. No cause is given for the Claimant falling but the report is consistent with the Claimant's evidence that she fainted or passed out before banging her head. The Claimant visited her GP on return to the UK and reported that she had been told that she had had a vasovagal attack i.e. that she had fainted.

439.2. In July 2018 the Claimant visited a gynaecologist in Romania. She had a transvaginal ultrasound. We have seen a report written by a Dr Presco Dana. That report described endometriosis in her right ovary, follicles on her left ovary and suggests that there may be further endometriosis at the posterior of the uterus. The Claimant acknowledges in her witness statement that this was the first diagnosis that she had got of her condition.

439.3. The Claimant had a telephone assessment with AXA the Barclay's Occupational Health advisors on 13 February 2019. Their report sets out what the Claimant told them about her condition. Consistent with what the Claimant has told us she revealed that she had been experiencing significant pain and heavy menstrual bleeding. That there had been a diagnosis (by this time in the UK) of endometriosis and that advice on treatment was awaited. It is further recorded that the Claimant perceived an impact on her mental health as an accumulation of trying to cope with the physical symptoms and having felt highly stressed at work.

439.4. It seems that the same day that the Claimant spoke to AXA she had an ultrasound examination. The report of that examination concluded that the Claimant had stage IV endometriosis. This meant that the growth outside her womb had spread significantly affecting her ovaries and lower bowel. The Claimant's pouch of Douglas (the recto-uterine pouch) was described as being obliterated. The report was signed by Dr Priya Narayanan on 15 February 2019.

439.5. On 15 February 2019 the Claimant had a consultation with Mr Tsepov, a specialist gynaecologist specialising in endometriosis. His letter summarised the results of the MRI scan and gave a preliminary diagnosis of stage IV endometriosis. His recommendation was to treat the condition by surgery.

440. In addition to the medical reports we have evidence from the Claimant herself about her endometriosis. In her witness statement the Claimant says that she started to experience abnormal difficulties with her periods in April 2017. She says she took to wearing black tights to conceal any bleeding. She describes having to make frequent trips to the bathroom.

441. The Claimant says that she first raised these difficulties with Stephen Lane and asked him if she could work from home on occasions. We have found above that when James Kinghorn became the AVP the Claimant did raise the same issues with him.

442. The Claimant says in her witness statement that she had to explain her period pain and difficulties 'every single month' and found it distressing and humiliating. For these purposes it is sufficient for us to record that the Claimant did mention her periods in the context of asking to work from home. We accept that the Claimant's periods were abnormally painful.

443. There are a number of text messages from early 2018 that show that the Claimant was unable to work or unable to work in the office because of issues connected with her periods.

444. By the time that the Claimant had a formal diagnosis of endometriosis in the summer of 2018 the condition was already advanced. By February 2019 the condition had reached Stage IV. As the Claimant and Ms Ruxandu pointed out the condition must have developed over time. With this in mind we accept that the Claimant's gynaecological symptoms would have got progressively worse from April 2017 onwards.

445. In the final paragraphs of the Claimant's witness statement she discusses the decline in her health following on from her dismissal. We do not need to set out whet she says in full. It is enough to say that the Claimant's condition has not improved but has steadily got worse. She is now living with her parents and needs a great deal of care.

446. We find that, progressively from April 2017 onwards, the endometriosis caused the Claimant to alter the way that she dressed in order to conceal blood loss during her periods. It caused her to urgently use bathroom facilities thereby interrupting any activities she was engaged in. The Claimant suffered from pain to a degree in excess of what is normal during menstruation. We accept that this caused the Claimant to become fatigued and had an effect on her ability to focus on her work.

447. We shall deal separately with the evidence in respect of stress and any generalised anxiety disorder as the Claimant has identified this as a separate impairment. Having said this we are alive to the suggestion, apparently made by the Claimant to AXA that in part at least, the stress and anxiety was a consequence of dealing with what was later diagnosed as endometriosis. We have no expert evidence, but it seems to us that suffering regular physical pain may well impact a person's mental health.

448. The medical evidence relating to this is as follows:

448.1. As we have found above the Claimant was first signed off sick with stress at work in October 2017. No treatment was offered at this time.

448.2. We have referred above to the Claimant fainting on 30 December 2017. There is a reference to anxiety in the notes obtained from the hospital to the Claimant suffering from anxiety. When the Claimant returned to the UK she visited he GP and discussed having had panic attacks in 2017.

448.3. On 18 September 2018 the Claimant visited her GP. The records show that she reported stress and exhaustion as well as anxiety. She was advised to self-certify as being unfit for work.

448.4. On 23 November 2018 the Claimant again attended her GP surgery. She reported anxiety related to work. On this occasion there was a discussion about medication and the Claimant was proscribed Propranalol which we understand is proscribed for anxiety.

448.5. The final reference in any medical report is the record made by AXA that we have set out above.

449. Again, in addition to the medical reports we have the Claimant's evidence. The Claimant said that from mid-2017 she was suffering panic attacks on a daily basis. She says that she had to sit down on the way to work as she could not walk for more than 2-3 minutes. She talks of losing her vision and vomiting.

450. The Claimant describes falling ill in the office shortly after James Kinghorn started work. She says that she had a panic attack and was unable to speak prompting James Kinghorn to ask if she was OK. When James Kinghorn was interviewed by Karen McGoldrick, he had no recollection of the event. That does not mean that it did not take place. We are satisfied that it did.

451. The Claimant disclosed text messages between herself and her father. On 4 September 2017 the Claimant's father asks her how she is feeling. She replied *'I'm working from home. A lot of stress. Terror. I can't'*. On 20 September 2017 the Claimant says: *'My hair is going to fall out because of stress. Because of how much work there is'.* We accept that those text messages are a description of a high level of stress and anxiety consistent with the Claimant's evidence of how she was feeling.

452. We accept that the Claimant did experience panic attacks in 2017. We need to make findings as to their severity. In her witness statement the Claimant describes the impact this had on walking to work. She refers to having

to sit down and losing her vision. The Claimant did not approach her GP until October 2017. When she did, she describes panic attacks but there is no reference in the notes to loss of vision or vomiting. We accept that the notes are no more than a summary of what was discussed. We note that no treatment was offered other than refraining from work. It seems that both the Claimant and her GP agreed that she would be fit to return to work after a few days. We do accept that during any panic attack the Claimant's activities, be they work tasks or walking, would be effected as she would have to stop until her panic attacks subsided.

453. James Kinghorn accepted in his evidence that the Claimant was generally an anxious person. He referred to a fear of flying. We consider that supports the Claimant's evidence that she was suffering from anxiety. The Claimant in her witness statement refers to a reluctance to get into a lift unless it was with others. We find that that is accurate, and it is consistent with what James Kinghorn said about the Claimant.

454. The Claimant describes in her witness statement suffering panic attacks at weekends. She says that this led her to spend her weekends alone and made it difficult for her to shop for groceries. We accept that at least for periods the panic attacks did cause the Claimant to refrain from going out. In her witness statement the Claimant suggests that things deteriorated to the extent that she did not eat or wash herself. We are not persuaded that the Claimant was unable to do these tasks at all but accept that when her anxiety was heightened, she found them difficult.

455. The Claimant's evidence was that these panic attacks persisted. We accept that they did but find that their impact on the Claimant varied. There is a gap between this matter being raised with the Claimant's GP of almost one year. We accept the Claimant's evidence that her panic attacks and anxiety persisted during this period but not to the extent that she needed to seek any medical intervention other than the occasion when she fainted in December 2017.

456. In her witness statement the Claimant describes the events that led to her hospitalisation in Romania on 30 December 2017. She says that she had a panic attack and fell hitting her head on the ground. We accept this account as it is entirely consistent with the hospital records and particularly the reference to anxiety within that record. It is also consistent with the note of the Claimant's GP when she returned to the UK.

457. On 16 May 2018 the Claimant sent a further text message to her father. In this message she complains about stress again. The context is her complaining about Ivet Draganova asking her questions.

458. We accept that from September 2017 onwards the Claimant was suffering from symptoms of stress and anxiety. We find that, as the Claimant says, this manifested itself in an inability to sleep, constant fatigue and a significantly reduced social life. These effects were at their worst from late 2018 onwards but to a degree we find that they had been present from late 2017

onwards. The Claimant's account at this stage is supported by the records of her GP.

The Law

459. The Statutory definition of disability is set out in Section 6 of the Equality Act 2010 the material parts of which are as follows:

> *6 Disability*
>
> *(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
>
> *(2) – (4) omitted*
>
> *(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*
>
> *(6) Schedule 1 (disability: supplementary provision) has effect.*

460. Section 212 of the Equality Act 2010 provides that the meaning of the word 'substantial' in Section 6 means that the effect is more than minor or trivial.

461. Schedule 1 of the Equality Act 2010 includes at paragraph 2 a definition of when an impairment will be treated as 'long term'. The material parts read as follows:

> *2(1) The effect of an impairment is long-term if—*
>
> *(a) it has lasted for at least 12 months,*
>
> *(b) it is likely to last for at least 12 months, or*
>
> *(c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

462. The statutory guidance produced under Section 6(5) of the Equality Act 2010 was published in 2011 and is entitled 'Guidance on matters to be taken into account in determining questions relating to the definition of disability'. That guidance does not have the force of law, but a tribunal should have regard to the guidance when assessing whether a person meets the statutory definition of disability.

463. In ***Goodwin v Patent Office*** **1999 ICR 302, EAT** the Employment Appeal Tribunal held that the starting point in determining whether a claimant had a disability would be to have regard to the way the parties put their respective cases in their ET1 and ET3. The Employment Appeal Tribunal identified for conditions that need to be met to establish that a person has a disability these are (1) the impairment condition (2) the adverse effect condition (3) the substantial condition and (4) the long-term effect condition.

464. Whilst a necessary element of the definition of disability is the existence of an impairment the Claimant need not provide a cause of diagnosis. Paragraph A6 of the statutory code says:

> *'It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa*.'

465. In ***J v DLA Piper UK LLP*** **2010 ICR 1052, EAT** the claimant argued that, if she could establish that there was a substantial adverse effect on her abilities to undertake ordinary day to day activities then there was no need for a tribunal to concern itself with what the impairment might be that caused those difficulties. The Employment Appeal Tribunal did not accept the entirety of that argument. It said:

> *'39. But we do not think that it follows – if Mr Laddie really intended to go that far – that the impairment issue can simply be ignored except in the special cases which he identified. The distinction between impairment and effect is built into the structure of the Act, not only in section 1 (1) itself but in the way in which its provisions are glossed in Schedule 1. It is also reflected in the structure of the Guidance and in the analysis adopted in the various leading cases to which we have referred, which have continued to be applied following the repeal of para. 1 (1) of Schedule 1 (see, e.g., the decision of this Tribunal (Langstaff J. presiding) in Ministry of Defence v Hay [2008] ICR 1247 – see paras. 36-38 (at pp. 1255-6)). Mr Laddie's recognition that there will be exceptional cases where the impairment issue will still have to be considered separately reduces what would otherwise be the attractive elegance of his submission. Both this Tribunal and the Court of Appeal have repeatedly enjoined on tribunals the importance of following a systematic analysis based closely on the statutory words, and experience shows that when this injunction is not followed the result is all too often confusion and error.*
>
> *40. Accordingly in our view the correct approach is as follows:*
>
> *(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.*
>
> *(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute*

about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above….'

466. Where there may be competing causes for any substantial adverse effect it is essential that the Tribunal makes findings as to whether the causes arise from the impairment relied upon by the claimant in his or her pleaded case see ***Morgan Stanley International v Prskavec*** **EAT 0209/13**. This will be of particular importance where, as here, knowledge of any disability and/or the fact that it placed the Claimant at a substantial disadvantage is an issue to be determined by the tribunal.

467. Where it is necessary to ask whether the effects of any impairment are 'likely' to last 12 months for the purposes of satisfying the long term condition the work likely is to be taken as meaning that 'it could well happen' as opposed to it being more likely than not. This is a significantly lower threshold - ***Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)*** **2009 ICR 1056, HL.**

468. The assessment of whether an impairment is likely to last 12 months or whether the effects of the impairment are likely to recur is to be approached on the basis of the evidence available at the time and not with the benefit of hindsight see ***McDougall v Richmond Adult Community College*** **2008 ICR 431, CA**. The employment tribunal is not at this stage concerned with any actual or constructive knowledge the employer may have had and accordingly the Tribunal should not consider only what evidence was available to the employer but all of the evidence– see ***Nissa v Waverly Education Foundation Limited and another*** **UKEAT/0135/18/DA** and ***Lawson v Virgin Atlantic Airways Ltd*** **EAT 0192/19**. These propositions are supported by paragraph C4 of the code which says:

'In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).'

Discussions and conclusions – disability

469. We shall deal with the issue of anxiety first before turning to the endometriosis. We adopt the approach suggested in ***J v DLA Piper UK LLP*** and look first at the question of the effects of any condition on the Claimant's ability to carry out day to day activities. We have found above that the Claimant did start to suffer panic attacks from at least the summer of 2017. We have accepted that during any panic attack the Claimant could not continue fully with any task she was engaged with until the panic

attack subsided. At their most extreme the panic attacks had caused the Claimant to fall over or to have to sit down.

470. We find that these panic attacks and the Claimant's heightened anxiety did have a substantial effect on the Claimant's ability to carry out ordinary day to day activities. In particular:

470.1. The Claimant had to stop what she was doing until the panic attack subsided; and

470.2. As a non-exhaustive example of that, the Claimant would stop walking during any panic attack; and

470.3. The Claimant would take the stairs in preference to an unoccupied lift; and

470.4. The panic attacks made it harder for the Claimant to undertake a grocery shop; and

470.5. The Claimant did not socialise outside her flat at weekends as much as she would otherwise have done; and

470.6. The panic attacks and anxiety interfered with her ability to get a good night's sleep.

471. From these findings we infer that the Claimant did have a mental impairment (which may or may not have been linked to the physical impairment of endometriosis). Her levels of anxiety and the way they manifested themselves we find is beyond any normal range. Whilst the nearest there is to a formal diagnosis is a short GP record on 23 November 2018 we are satisfied that the Claimant's stress and anxiety arose as the consequence of an impairment.

472. We need to ask when the effects of this mental impairment became substantial. We find that they were substantial from no later than August 2017. This is a few months before the Claimant was so overwhelmed that she was signed off work for the first time. We find that whilst the panic attacks and anxiety subsided for some time the panic attacks continued during the entire period that the Claimant was at work.

473. We turn to the impairment of endometriosis. The Respondents do not dispute the existence of that condition and accept that from December 2018 the Claimant did have a disability as a consequence. The Claimant says that the condition meant that she satisfied the test for a disability much earlier.

474. We find that the symptoms of endometriosis commenced long before the Claimant sought a formal diagnosis initially in Romania in July 2018 and later in the UK. As the Claimant rightly points out stage IV endometriosis does not appear overnight. Endometriosis involves the growth of tissue outside of the womb. It must therefore be a gradual process. We pause to say that the Claimant did not put her case on the basis that she had a progressive condition for the purposes of paragraph

8 of Schedule 1 to the Equality Act 2010 and, as it was not raised before us, or by us, we shall not consider that.

475. The diagnoses in July and December 2018 gave us confidence that the Claimant's account of her painful and difficult periods was accurate. We have accepted that these had the effect of:

475.1. Causing the Claimant to choose clothing to avoid showing bleeding; and

475.2. To visit the bathroom more frequently than would be normal; and

475.3. To suffer pain which in turn made it difficult for her to complete any task; and

475.4. To find leaving home more difficult.

476. We should emphasise that we are not considering whether an average menstrual cycle amounts to a disability. The Claimant's menstruation was not normal from April 2017 onwards and very possibly before that. It was exceptionally painful, and she regularly suffered from heavy bleeding as a consequence of endometriosis. We find that the effects of this were substantial.

477. Again, we need to ask when the effects of the endometriosis first cross the threshold of having a substantial effect on the Claimant's ability to carry out day to day activities. The Claimant suggests that her periods became heavier prior to April 2017 and that she started to wear thick tights at that stage. We have accepted that that was the case. We find that at that stage the effects of the endometriosis were such that the threshold of substantial was met.

478. We then turn to the long-term condition. We have found that the effects or the mental impairment were substantial from the beginning of August 2017 and that the effects of the physical impairment were substantial from April 2017. Each impairment would therefore satisfy the long-term condition after 12 months (April and August 2018 respectively). However, the Claimant's case is that she met the test for disability from September 2017. We therefore need to consider whether at some earlier point it was 'likely' that the effects of the impairments would last for more than 12 months.

479. We have set out above the legal principles we need to apply. In particular, we remind ourselves that when asking this question, we should not have any regard to matters that arose after the date of the putative discriminatory act(s). The fact that there was no formal diagnosis in respect of either impairment is not determinative but the absence of any clear diagnosis means that there was less evidence available to base a finding that it was likely that the effects of the impairments would last 12 months.

480. We find that there is a distinction to be made between the mental impairment and the physical impairment. In the case of the mental impairment we have found that the symptoms (mainly panic attacks) increased and decreased although we have

found there was always a substantial effect on day to day activities. With the physical impairment the symptoms became progressively worse.

481. We consider that as time goes by the fact that symptoms persist at a constant level or get steadily worse that is of itself evidence that nothing is likely to change in the near future. The longer that the symptoms persist the stronger that becomes. If the symptoms decrease, then that may point away from a conclusion that they are likely to persist in the future.

482. We find that in respect of the physical impairment once there was a clear pattern of the Claimant's periods causing significant pain and excessive bleeding there would be sufficient evidence to say that it was likely that the effects of the condition would persist for 12 months in total. We have to consider what period would amount to a sufficient pattern. We find that after 6 months there was sufficient evidence that taking an objective approach to the evidence that existed and avoiding any hindsight it was likely that the effects of the impairment would last a total of 12 months. It follows from that that we find that the Claimant met the statutory test for disability by 1 October 2017.

483. We take a similar approach with the mental impairment. Here the pattern was less clear. However, we have found that the panic attacks continued to cause substantial difficulties even though the Claimant was able to work. We take into account the guidance in the Statutory Code that we need to take the Claimant's characteristics into account when looking at what stage, if at all, it was likely that the effects of the impairment would continue for 12 months. One relevant characteristic is the fact that the Claimant had endometriosis. By the time that the Claimant needed time off work she had had a regular pattern of debilitating symptoms for over 6 months. In assessing whether the effects of the mental impairment were likely to persist for 12 months we find that the existence of a significant stressor is a matter that we are entitled to take into account. The symptoms were much less likely to recede whilst that stressor existed. The same is true of the working environment. The ROST Team were understaffed and worked long hours. The possibility of the symptoms of stress and anxiety needs to be seen against that. With those two matters in mind we consider that after a short period it would become 'likely' that the symptoms would persist for 12 months. We find that the Claimant met the statutory definition of disability in respect of this impairment by 1 January 2018.

Disability - Knowledge

484. The Claimant has brought claims under Section 15, 20 and 21 of the Equality Act 2010. Section 15(2) provides a defence where the employer did not know or could not reasonably be expected to know that the employee had a disability. Slightly more is required before an employer is required to make reasonable adjustments. Schedule 8 paragraph 20 of the Equality Act 2010 requires the employer to have knew or ought reasonably to have known of the disability and that the disabled person is placed at a disadvantage (here by some PCP operated by Barclays).

485. In ***Gallop v Newport City Council*** **2014 IRLR 211, CA** the Court of Appeal held that it will be sufficient to establish knowledge of disability if the employer knew or ought to have known the facts which when analysed satisfy the statutory definition

of disability. That requires knowledge of an impairment but not necessarily a diagnosis. Knowledge that that impairment has a substantial effect on ordinary day to day activities and knowledge of the facts that establish the long-term condition.

486. Paragraph 6.19 of the Statutory Code of Practice gives the following guidance about the steps it would be reasonable for an employer to take to ascertain whether an employee had a disability:

> *6.19*
>
> *For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially***.**

487. We consider the following factual matters to be of importance. As we have found above the Claimant's difficulties with her periods intensified from April 2017 onwards. She asked to work at home on occasions in order to cope with this during the time when Stephen Lane was her manager. We have accepted that when James Kinghorn started the Claimant told him about both the issues with her periods and that she had panic attacks.

488. In October 2017 the Claimant was exhausted and was signed off work for a week. The fitness for work certificate indicated stress at work. This was given to James Kinghorn. Whilst there was a 1 to 1 meeting on her return there was no reference by James Kinghorn to the respondent's OH provider. There was no formal back to work interview. Given that the Claimant had told James Kinghorn about her illnesses and also made it clear that the workload was excessive we are very surprised that there was no reference to OH. We find that the reason for this is that James Kinghorn had not been given adequate training on how to manage ill-health. Barclays ill health policy contains the following guidance:

> *Early identification of the reasons for absence can assist in the provision of the most appropriate support to help prevent the condition from getting worse and aid the employee's return to work. For these reasons it is particularly important that the Line Manager notifies ER Direct at the earliest opportunity of any absence resulting from:*
>
> *• Back, neck, shoulder, arm or wrist pain or any other limb disorder*
>
> *• Stress, depression or any mental health condition*
>
> *• Any disability.*
>
> *Line Managers should also seek advice from ER Direct for absences resulting from these conditions or where, for any health reason, where is persistent or recurring absence.*

489. We have accepted that the Claimant regularly raised the issue of her workload with James Kinghorn. He has said, in his evidence before us and during the grievance investigation that the Claimant's complaints focused on the pressures on the team rather than on her personally. James Kinghorn was aware that those pressures had caused the Claimant to need a week off work. As the Claimant was repeatedly mentioning those pressures James Kinghorn ought reasonably to have known that those pressures continued to impact on the Claimant's health.

490. Whilst the Claimant has said that she was uncomfortable discussing her periods with James Kinghorn she was not unwilling to do so. We have commented above that the Claimant would send text messages that gave details of her symptoms. We conclude from this that had James Kinghorn, or following an OH referral a medical practitioner, asked the Claimant about her symptoms she would have given full and honest replies.

491. Applying that law and guidance to the facts of this case we have come to the following conclusions.

492. Stephen Lane and James Kinghorn actually knew that the Claimant had difficulties with her periods to the extent that she asked to be excused from coming into the office on a regular basis. We find that the Claimant made it sufficiently clear that she was afflicted by exceptionally painful periods and excessive bleeding. In other words, something significantly more than ordinary menstruation.

493. James Kinghorn had observed the Claimant having a panic attack in the office (although we accept, he did not recall that) and he was aware that the Claimant had needed time off because of the pressure of work. From his own knowledge and from what the Claimant told him he knew that this pressure continued unabated.

494. We accept that James Kinghorn did not actually know how long any difficulties the Claimant had with her periods was likely to last. We accept that he was not aware of the day to day panic attacks that the Claimant experienced.

495. We turn to what the Respondents ought reasonably to have known. It seems to us that the Respondents ought to have made enquiries about the Claimant's health at an early stage. It is not unreasonable to expect the Respondents to follow their own policy. From April 2017 the Claimant's health was impacting on her work and this was known to the Respondent. By October 2017 the Claimant's endometriosis had been having a substantial effect on her day to day activities for 6 months. Her mental wellbeing was such that she needed time off work. At that stage she was signed off sick for the first time. We find that the Respondents ought to have made proper enquiries at that stage. We make no personal criticism of James Kinghorn for failing to recognise that this was the case as it does not appear, he had any, or any adequate, training. There is little point in having a sensible policy if its contents are not made known to those charged with day to day management. Equally those with day to day management responsibilities must be given the time and support to discharge those responsibilities.

496. We have found above that if the Claimant had been asked about her health, she would have given details about it. In October 2017 that would not have revealed

a diagnosis of endometriosis as the Claimant herself was unaware of that. However, it is not essential to knowledge of a disability that somebody knows the cause of any impairment. The Claimant knew how her periods affected her and the difficulties that gave her with day to day activities. We find that if the Claimant had been asked in October about her symptoms there would have been sufficient evidence of a pattern of ill health that the Respondents would have known how the Claimant was affected and that it was likely that the symptoms would have persisted for more than 12 months.

497. We therefore conclude that the Respondents ought to have known that the Claimant was disabled by reason of endometriosis by no later than the date she returned to work after her period of absence. That is 3 November 2017.

498. Whilst we consider it likely that there was a close link between the Claimant's endometriosis and the deterioration in her mental health if these are considered separately we do not believe that the information available in October 2017 was sufficient that the Respondents ought to have known that the Claimant's issues with her mental health were likely to last 12 months. We have reached our own conclusions about that above. We find that the Respondents were on notice of the underlying problem. An employer alive to the fact that the employee has fallen ill through stress at work and in circumstances where the Claimant continued to complain of the pressure (even if reference was to the team) ought reasonably to have made enquiries about the effect of that pressure on the Claimant's health. We find that if ongoing enquiries had been made it would have become apparent that the matter was not resolved and that there was still a substantial effect on the Claimant's ability to undertake day to day activities. In the same way that we have analysed the long-term requirement for ourselves the longer that the substantial effects continued the more likely that the long-term condition would be satisfied. Had the Respondents made reasonable enquiries they would have reached the same conclusions as we have and would have known that the Claimant was disabled by reason of her mental health by no later than1 January 2018.

499. We shall deal with the additional knowledge required in a claim under sections 20 and 21 of the Equality Act 2010 when we deal with each claim below.

Discrimination because of something arising in consequence of disability – the law

500. Section 15 of the Equality Act 2010 says:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

501. In ***Secretary of State for Justice and anor v Dunn*** **EAT 0234/16** the EAT confirmed the position in the Statutory Code of Practice para 5.2, that the four elements that must be made out in order for the claimant to succeed in a S.15 claim are:

501.1. there must be unfavourable treatment

501.2. there must be something that arises in consequence of the claimant's disability

501.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

501.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

502. The Statutory Code describes what might amount to a detriment in paragraph 5.7. It says:

For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

503. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme and anor*** **2019 ICR 230, SC** the Supreme Court approved the guidance in the Statutory Code with Lord Carnwath, giving the Judgment of the Court saying**:**

……little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.

504. In asking whether treatment is unfavourable there is no need to seek a

comparison with the treatment of others. The Statutory code says, at paragraph 5.6:

> *'Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.'*

505. At paragraphs 5.8 and 5.9 the Statutory Code says this about the requirement to show that there is 'something' that arises as a consequence of disability:

> *5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.*
>
> *5.9The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.*

506. The approach to the question of whether unfavourable treatment is 'because of' 'something arising in consequence' of disability is that set out in ***Pnaiser v NHS England and anor*** **2016 IRLR 170, EAT** where Simler P (as she was) said:

> *(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of

whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

507. To demonstrate that unfavourable treatment was 'because of' something arising in consequence of disability it is sufficient to show that the 'something' was an effective cause and, if it was, it is immaterial that there were other effective causes of the treatment see ***Hall v Chief Constable of West Yorkshire Police*** **2015 IRLR 893, EAT** and ***Charlesworth v Dransfields Engineering Services Ltd*** **EAT 0197/16**

508. An employer cannot be liable under this section for any unfavourable treatment unless they knew or ought to have known that the Claimant was disabled – see sub-section 15(2) above. However, once they know of disability it is irrelevant whether they recognised that the 'something' that caused their act or omission was because of disability, see ***City of York Council v Grosset*** **2018 ICR 1492, CA**.

509. The Statutory Code sets out the requirements of the justification defence – that the treatment is a proportionate means of achieving a legitimate aim. The material paragraphs are 4.26 to 4.32 and will not be reproduced here. The test is the same as in justifying treatment that would otherwise be unlawful direct discrimination. A convenient summary the relevant principles is set out in ***Chief Constable of West Yorkshire & another v Homer*** **[2012] ICR 708** in the opinion of Lady Hale where she said:

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means

of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

> *". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

> *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

510. Where the unfavourable treatment arises because the employer has failed to make reasonable adjustments, the employer is unlikely to be able to make out the defence of justification. See paragraphs 5.20 – 5.22 of the Statutory Code and see also ***Griffiths v Secretary of State for Work and Pensions*** **2017 ICR 160, CA**

Section 15 – Discussion and conclusions

511. The law we have set out above is not easy for a layperson to understand. The Claimant, whilst unwell and acting in person completed her two applications to the tribunal herself. Efforts were made over a series of preliminary hearings to clarify the claims. It is not the function of the Employment Tribunal during such preliminary hearings to determine the merits of the claims or to suggest how claims could be formulated to stand the best chance of success. The agreed list of issues is the product of that process. It was not suggested that, in this respect, the agreed list did not accurately encapsulate the case that had been put forward by the Claimant. Ms Ruxandu,

who came to the case very late, was constrained by pleadings she had not prepared. A stranger to this case might wonder whether some of the other claims might have been better formulated as claims under Section 15. We decline to speculate about that. We have decided the case as it was presented to us. We address the list of issues below.

512. The Claimant has identified the 'something arising' as a consequence of her disability in the list of issues as follows:

> *i. C's need to take time off during the working day to attend various medical appointments;*
>
> *ii. C's inability to focus for the demanded number of hours/ need for reduced hours and breaks;*
>
> *iii. C's inability to focus for the extremely large volume of tasks/need for reduced volume of work;*
>
> *iv. C's need to take regular days off sick and/or come in late/leave early due to physical and mental; illness/impairment (e.g. days she would bleed uncontrollably, days she would lose consciousness because of pain);*
>
> *v. C's need to work from home at short notice due to her inability to control her bowel or bleeding;*
>
> *vi. C's need to lay flat;*
>
> *vii. C's need for privacy.*

513. In the interests of brevity, we adopt our findings of fact set out elsewhere in determining whether the things relied upon by the Claimant arose as a consequence of her disability. We find that they did. Our brief reasons are as follows:

513.1. Attending medical appointments - By the latter part of 2018 the Claimant attended a number of medical appointments because of the symptoms of Endometriosis. It was this condition/impairment that gave rise to the Claimant's disability.

513.2. Inability to focus for the hours she was required to work – We find that the symptoms of Endometriosis together with the anxiety caused by having that condition made it harder for the Claimant to work the hours ordinarily required of her.

513.3. Inability to focus on tasks – Whilst there was never any criticism of the Claimant by the Respondents that is not inconsistent with her struggling to focus. We accept that the Claimant got progressively more unwell and that this would have made doing

her work harder for her to the extent that by late December 2018/ early January 2019 she was unable to focus on her work.

513.4. Needing days off sick – The Claimant's sickness record was by no means poor (until she could not continue at all) but we accept that she did have a number of days off sick and/or leave early as a consequence of her Endometriosis.

513.5. Needing to work from home – We have accepted the Claimant's evidence that the symptoms of her Endometriosis and in particular the heavy bleeding during her periods made it desirable that she worked from home during those periods and that she did in fact do so on a number of occasions. Working from home therefore was something that arose as a consequence of disability.

513.6. Need to lie flat – We accept that the symptoms of the Claimant's Endometriosis meant that on occasions she was more comfortable if she lay flat.

513.7. C's need for privacy – We did not hear much evidence about this but as a matter of common sense we infer that if the Claimant was bleeding through her clothing (which we accept that she did on occasions) she would need privacy to attend to this. We accept that this is a consequence of her Endometriosis.

514. The Claimant relies on two matters as amounting to 'unfavourable treatment'. We shall address each in turn. We shall firstly consider whether the Claimant has established any unfavourable treatment and then address the reason for any treatment that is established.

13 a. Being given an increased and excessive workload in response to the Claimant's difficulties in completing her normal workload, from late 2017 until 14 January 2019. [R1, R2 and R3]

515. We accept that during the period identified by the Claimant she had an excessive workload. In reaching this conclusion we have drawn on our findings of fact set out elsewhere. In particular, we have found that the Claimant worked in excess of the expected 35 hour a week on a regular basis. We have accepted her case that she was asked to train Stephen Lane, James Kinghorn and Ivet Draganova. We further accept that the long term sick leave of Employee A, the departure of Stephen Lane before James Kinghorn was appointed, the departure of Linh Thi Tyuy Luong in late 2017, of Hadrien Mademba-Sy spring of 2018, and of Matteo Passini in October/November 2018 all contributed to an increase in the workload of the Claimant.

516. We accept that where a team is short staffed and overstretched the impact on the team members could reasonably be seen as a detriment. In particular the need to consistently put in more than 35 hours a week in order to keep up placed the Claimant (and others) at a disadvantage.

517. We therefore need to look at the reason for the treatment. It is here that we consider that Claimant's case faces insurmountable difficulties. Essentially, she asks us to find that because of the symptoms and/or needs arising from Endometriosis her workload was increased.

518. We shall assume that the Respondent bears the burden of establishing why the Claimant was treated unfavourably (in the sense identified by her in this allegation). In fact, the evidence about the reason for the treatment came as much from the Claimant herself as it did from the Respondents. We find that the reason that the Claimant was asked to carry out the work and tasks that she undertook was that there was a turnover of staff throughout the period the Claimant has identified and that when new staff were recruited they needed training before being fully effective. The burden of that fell on the Claimant and to varying extents other team members.

519. There was no evidence at all that the matters the Claimant has identified as the 'something arising' from her disability played any part whatsoever in any decision to allocate her any particular role or task. We remind ourselves that a claim brought under Section 15 does not require any comparator but that is not to say that the treatment of others cannot provide evidence about the reason for any treatment. We have seen the door entry records for James Kinghorn and Ivet Draganova. We find that both of these individuals worked well in excess of 35 hours a week on a regular basis. When the Claimant sought payment for overtime the fact that the whole team was working in excess of 35 hours was acknowledged by James Kinghorn. There are text and other messages that show that Ivet Draganova often worked as late as the Claimant. The Claimant has never suggested that Matteo Passini did not do a fair share of the BAU work. The evidence suggests that he did and that he also took on other tasks. In other words – everybody was working very hard indeed. The Claimant's key complaint was that she did more training than others. We agree. However, we accept that that the reasons for this were not any of the matters 'arising' identified by the Claimant but the fact that she was best placed to do the Training and in particular to train Ivet Draganova.

520. We are satisfied that the only reasons why the Claimant was asked to undertake her workload was because the team were short-staffed, there could be no reduction in workload on a daily basis and the turnover of staff caused a greater need for training. In respect of the training the reasons why the Claimant was asked to assist was that she was best placed to do so. On the evidence before us we are satisfied that these decisions had nothing to do with the matters 'arising in consequence' of the Claimant's disability.

<u>13 (b) Being asked to return to work by R2 when she had been out of the office for medical appointments. [R1, R2]</u>

521. We have seen several exchanges of texts and messages between the Claimant and James Kinghorn relating to GP appointments. We add the following findings of fact. On 18 September 2018 the Claimant sent a text message telling James Kinghorn that she was going to visit her GP. She tells him that she will not be in the office until 11am. James Kinghorn gave no

instruction to that effect. The Claimant suggests that James Kinghorn was only concerned about her ability to work and not about her person. That may be the Claimant's perception but there is nothing in the messages we saw to support that. When the Claimant was unwell on 1 October 2018 and sent a text to James Kinghorn his response was to tell her to take care (of herself). A few days later Darren Gilhooly was told that the Claimant was suffering from a cold. His response was also friendly and compassionate.

522. The Claimant says in her witness statement that on 3 December 2018 she had a consultation with her gynaecologist after which she was expected back at work. She does not say that she was given any specific instruction to that effect, but James Kinghorn accepted that this would be a normal expectation. He did go on to say, and we accept, that this expectation would have been relaxed had there been a request made on any reasonable basis. We accept his evidence that this was the case. In fact, the Claimant did not return to work on that day. From her text message her appointment ended at about 17:00. She had clearly returned home and was informing James Kinghorn that she was *'trying really hard to cope with the news and keep it together'*. James Kinghorn did not respond immediately but the following day sent a compassionate BChat message apologising and asking if the Claimant wanted a chat. There is no suggestion that he had any concerns at all about the Claimant not returning to the office after a medical appointment.

523. We accept that there was an expectation that the Claimant would return to work after any medical appointment and that the effect of this was that she would feel obliged to ask if she wanted to go home. We are just persuaded that this is a matter that could amount to unfavourable treatment in circumstances where the Claimant had to attend several medical appointments.

524. We turn then to the question of whether the reason that the Claimant was expected to return to work after any medical appointment was because of the matters she has identified as 'something arising' as a consequence of her disability. We cannot accept that it was. The reason for the expectation the Claimant would return to work after medical appointments is that she was expected to work around these appointments unless she was unable to do so. Again, whilst no comparator is required, we find that the same expectation was applied to everybody. The expectation was a general expectation and we find that nobody gave any thought to whether it should or should not apply to the Claimant.

525. Assuming that the Respondent bears the burden of proof, we are satisfied that the reason for the treatment was nothing to do with the Claimant's personal characteristics and in particular the matters she says arise in consequence of a disability. We can see how this claim might be put as a claim for reasonable adjustments but absent the reason for the treatment being because of the matters relied upon as 'something arising' by the Claimant the claim cannot succeed.

526. We consider it important to say that we are satisfied that when the Claimant expressed a reluctance to return to work after a medical appointment

that was accommodated without difficulty. The general 'expectation' was not itself unreasonable provided that it was adjusted depending on the particular circumstances. On the evidence before us – it would have been had the Claimant ever requested it.

527. For the reasons set out above we do not need to deal with the issue of whether the Respondents have shown that any treatment was a proportionate means of achieving a legitimate aim. Our findings in respect of knowledge are set out below when considering the reasonable adjustments claim.

Direct Discrimination – relying on disability as the protected characteristic Contrary to sections 13 and 39 of the Equality Act 2010

The Law

528. We have set out the law in respect of the claims of direct discrimination relying on the protected characteristics of race and sex above. The law is common to all protected characteristics (with the exception of age) and so we need not repeat it.

Direct Discrimination (disability) discussions and conclusions

529. Before addressing each of the individual allegations we remind ourselves of the importance of not fragmenting the issues and to having regard for the whole picture. With this in mind, we shall address each of the individual allegations that have been made.

15 (a) being asked to return to work by R2 when she had been out of the office attending medical appointments [R1 and R2]

530. There was no evidence of any occasion when James Kinghorn had directly instructed the Claimant to return to work after a medical appointment. That said, James Kinghorn agreed that the general expectation was that employees should fit any medical appointments around their work commitments where at all possible and, where appointments were taken during working hours they would be expected to work on either side of such an appointment where practicable. Whilst this is not precisely the way the Claimant put her case, we would accept that being expected to work before or after a medical appointment is something capable of being a detriment if an employee was unwell.

531. James Kinghorn's evidence was that he would never have expected an employee to return to work if they were not well enough to do so. The text messages within the bundle show that on several occasions the Claimant informed James Kinghorn that she was not returning to work and on one occasion was not able to log in from home. No action was ever taken against the Claimant in these circumstances. We therefore accept James Kinghorn's evidence that he would have readily accepted that ill health was a good reason for not complying with the general expectation. As such we are not satisfied that the Claimant has established any detriment at all. However, if we are

wrong about that and being subject to the general expectation is of itself a detriment, we must ask why that was applied to the Claimant.

532. It is difficult to see how the Claimant can succeed in this part of her case. If there is a general expectation that applies to everybody then it cannot be discriminatory. We do not need to rely on the burden of proof in order to resolve this matter. We accept that the Claimant was subjected to a general expectation that she would return to work when medical appointments were taken during working hours. We ask what was the reason that this expectation was applied to the Claimant. The evidence before us was that there was a general expectation that employees would fit their medical appointments around their work commitments where at all possible.

533. We accept that, but for, the fact that the Claimant was disabled she would not be attending medical appointments as regularly as she did. That is not the proper approach in this case. We are satisfied that the Respondents have shown that the reason why the Claimant was treated as she was involved only the application of a general policy or expectation. That reason has nothing to do with disability. Accordingly, the Claimant has failed to establish that the treatment she complained of was because of disability.

15 (b) R2 telling C 'one way or another you have to do it' in response to C's pleas for help and insisting she continued to train and supervise Ivet Draganova [R1 and R2]

534. We have accepted above that James Kinghorn instructed the Claimant that she had to carry on working with Ivet Draganova. Whether he used the exact quoted phrase is not material in the light of our conclusions below. We accept that the Claimant was exasperated by dealing with any questions and queries raised by Ivet Draganova and we accept that the thrust of what was said by James Kinghorn was to require her to continue to work with Ivet Draganova. We find that the Claimant was, by late 2018 becoming increasingly stressed and exhausted. As such we find that she could reasonably consider that being required to work alongside a colleague who asked for help was a detriment. We reach this conclusion despite the fact that we do not accept the entirety of the Claimant's evidence about the amount of assistance that Ivet Draganova actually required.

535. Again, we do not need to rely on the burden of proof to deal with this claim. We are satisfied that the reason that James Kinghorn said that the Claimant needed to carry on working as she had been was that he believed that it was necessary to issue that instruction in order to ensure that the team functioned and that the work was completed on time. He saw the Claimant assisting Ivet Draganova as necessary to achieve that. That reason is not 'because of disability'. In other words, the same instruction would have been given to any team member whether they were disabled or not.

15 (c) The redundancy process applied to C in -

i. Placing C at risk of redundancy on 22 March 2019; [R1 and R3]

ii. Failing to consult with C regarding the redundancy; [R1 and R3]

iii. Failing to tell C that she would be scored by R as part of the redundancy process; [R1, R2 and R3]

iv. Giving C a low score in the redundancy process; [R1 and R2]

v. Failing to notify C of the stages of the redundancy process at the same time as her colleagues; [R1 and R3] and

vi. Failing to notify C of the outcome of the redundancy process at the same time as her colleagues which was on 2 April 2019. [R1 and R3]

536. These claims all address the redundancy process. We shall address each in turn but not in isolation. In addressing whether disability played any part in the decisions made during the redundancy process we have regard to the whole of our findings of fact wherever we have set them out. We have found that the Claimant and Employee A were treated differently than other employees in one respect namely that they were notified of the redundancy situation a few days after other employees. We were initially concerned to see the e-mails, referred to in our general findings of fact, which, on one reading, supported an inference that the Claimant and Employee A's absence from work was a broader factor in the decision to select them both for redundancy. However, we have accepted the evidence of Avneesh Singh that those e-mails related to setting budgets and not to do with the decisions relating to the redundancy process.

i. Placing C at risk of redundancy on 22 March 2019; [R1 and R3]

537. We understand that this is a separate allegation to the suggestion below that informing the Claimant after the other employees was discriminatory. This allegation appears to be that placing the Claimant at risk of redundancy at all is discriminatory. Equally we assume that this is intended to be separate to the allegation that the Claimant's selection score was discriminatory.

538. We would accept that being told that your role was at risk of redundancy is something that a reasonable employee could view as a disadvantage. As such we are satisfied that there was a detriment.

539. We then turn to the question of whether there was any less favourable treatment. Drawing on our general findings of fact we have accepted the Respondents' evidence that there were a large number of employees who were told that their roles were at risk of redundancy. 16 Analysts were informed of this and a number of more senior employees. We are entirely satisfied that this was a genuine exercise in the sense that business decisions had been taken to relocate work to Pune. Apart from the timing the Claimant was treated in exactly the same way as all of the other employees.

540. Were we to identify a comparator that person would be some actual or hypothetical BA4 Analyst. As a matter of fact, all of the BA4 Analysts were

treated in exactly the same way. We have no doubt that a hypothetical comparator, who would also have to be a BA4 Analyst working in London would have been treated in the same way as well.

541. We do not need to rely on the burden of proof. We find that the reason that the Claimant was at risk of redundancy was that she was a consequence of the business decision to relocate roles to Pune. That reason is entirely independent of any protected characteristic and in particular independent of disability. It is in no sense discriminatory and the claim fails on that basis.

ii. Failing to consult with C regarding the redundancy; [R1 and R3]

542. The Claimant has not been entirely clear about what element of consultation she says was not undertaken. We have set out our findings above. Avneesh Singh did explain the rationale behind the Respondent's business decisions to the Claimant. He also sent her copies of all relevant policies. There would ordinarily have been a first individual consultation meeting after a general announcement. That did not take place because the Claimant asked for matters to be dealt with in writing. Avneesh Singh sent the Claimant a detailed explanation of the Respondents' position and provided the scores that had been given to the Claimant. That prompted the claimant's e-mail of 11 April 2019 where she questioned those scores. We would accept that thereafter the Claimant asked for her comments to be addressed and that she got no formal response to the specific points she raised. She did not ask for the matter to be placed on hold pending her grievance. We would accept that she could reasonably believe that this placed her at a disadvantage. As such we accept there was a detriment in this respect. In case we have approached this too narrowly we shall take a broader approach when looking at whether this was discriminatory.

543. We consider that the proper comparator would be a person not coming in to work but without a disability who declined to attend any meetings either in person or on the telephone. That person would also have raised a grievance in which they referred to the redundancy exercise. We find that such a person would have been treated in exactly the same way as the Claimant. The Respondent has satisfied us that the reason that the Avneesh Singh did not respond to the Claimant's e-mail of 11 April 2019 was that he was advised by Fiona Nichols that the Claimant's grievance would be dealt with first. That was a decision which, whether wise or not, we are satisfied was not because of disability.

iii. Failing to tell C that she would be scored by R as part of the redundancy process; [R1, R2 and R3]

544. In our findings above we set out that, following his initial conversation on 22 March 2019 Avneesh Singh sent the Claimant a copy of the redundancy policy together with other documents including *'A Guide for Employees at risk of redundancy'*. A fair reading of those documents makes it clear that where there were not sufficient volunteers for redundancy a selection process might take place using agreed criteria. On 2 April 2019 Fiona Nichols sent an email

to the Claimant in which she set this out very clearly indeed. We find that the Claimant was told that she would be scored as part of the redundancy process, if there were insufficient volunteers . This finding means that this claim cannot succeed.

545. In case we are wrong, we shall deal with the issue of whether Avneesh Singh treated the Claimant less favourably because of disability. Any less favourable treatment under this heading could only occur during the telephone call that took place on 22 March 2019 and in the subsequent correspondence. The Claimant was told that she had been scored on 9 April 2019. We have found that the scoring had been started before any employee was notified of the potential redundancy situation. All employees were treated the same in that respect and we find that the decision to get the scoring process underway had nothing whatsoever to do with disability. By 22 March 2019 Avneesh Singh would have been aware that unless a large number of people volunteered for redundancy the Claimant's score meant that she was likely to be displaced from her existing role. He did not tell her that during the course of the meeting. We shall assume that that is capable of amounting to a detriment falling within this allegation. Avneesh Singh used a script that was generic and used for all announcements to the affected employees. He was sent that script and did not author it himself. We are satisfied that that script did not mention the selection process that had been started. As such all employees were treated exactly the same and the Respondent has satisfied us that disability did not play any part in the decision not to expressly discuss scoring with the Claimant.

iv. Giving C a low score in the redundancy process; [R1 and R2]

546. The Claimant has identified James Kinghorn as being the individual responsible for this claim. On the evidence before us James Kinghorn had no direct part in scoring the Claimant. That exercise was undertaken by Avneesh Singh although the process did draw on the end of year appraisal which was conducted by James Kinghorn. To do justice to the Claimant's case we shall consider whether either of the individual respondents acted unlawfully.

547. The Claimant categorises the score she got as being 'low'. If that is intended to suggest that she was assessed as being a poor employee that is not the case. 10 analyst roles were being moved to Pune. There were 16 analysts who were placed in a pool. One took voluntary redundancy which meant that 9 analysts out of the 16 were going to be displaced from their roles. Only 6 Analysts were going to be retained in their roles. The Claimant's score was not good enough to remain in her role, but it was not an obviously low score.

548. We would accept that being given the score that Avneesh Singh allocated meant that the Claimant was going to be displaced from her role and in that sense, she was subjected to a detriment.

549. We turn to the question of whether the treatment was because of disability. It is important to note that the question is whether the score given to the Claimant was because of disability and not whether the score given to Ivet

Draganova was because of (the Claimant's) disability. The Claimant did not put her case in that second way nor in our view would it have assisted her to do so. The pool of potentially redundant analysts contained 16 people. The Claimant was not competing only against Ivet Draganova but against all the other employees in the pool. Giving Ivet Draganova a higher score than she merited would disadvantage all of the people with the same score as the Claimant regardless of whether or not they had a disability. We shall therefore deal with the claim as it has been set out and analyse whether the score that the Claimant received was because of disability.

550. The Claimant passionately believes that she was the most knowledgeable and long serving member of the team. However, James Kinghorn considered that in her end of year appraisal her performance merited a strong-strong assessment. We accept that he genuinely believed that assessment was fair. We have set out the basis that above in considering the claim for a bonus payment. When Avneesh Singh was conducting the scoring exercise he did so drawing on information provided by others including Darren Gilhooly. The score given to the Claimant was examined by Duncan Lord we have set out his conclusions above. He considered that the Claimant was a good solid analyst but was competing against other very good employees. We are not bound by his views but have taken them into account in assessing whether the score given to the Claimant failed to reflect her abilities.

551. We find that Avneesh Singh, drawing on the information was given and from his own knowledge gave the Claimant the score which he genuinely believed reflected her abilities measured against the competencies in the matrix. He was of the view that the Claimant was a strong but not outstanding performer. We proceed on the basis that it is for the Respondents to satisfy us that disability did not play any material part in the decision-making process. We have had regard to all of the evidence and not just the evidence in relation to the scoring. We are satisfied that the reason that Avneesh Singh gave the Claimant the score that he did was because it reflected his genuine belief that it reflected her abilities that has nothing whatsoever to do with disability.

552. We also consider whether James Kinghorn gave the strong/strong rating because of disability. Again, we assume that the burden is on him to show that it was not. We are satisfied that the only reason that James Kinghorn gave the Claimant the rating that he did was because he did not believe that her performance met the definition of 'outstanding'. He has satisfied us that disability played no part whatsoever in his assessment of the Claimant. Accordingly, this particular claim fails on either basis.

<u>v. Failing to notify C of the stages of the redundancy process at the same time as her colleagues; [R1 and R3]</u>

553. The Claimant (and Employee A) were not told about the redundancy process at the same time as employees who were at work. We accept that an employee could reasonably believe that to be to their disadvantage even if the delay was for benign motives.

554. We need to consider whether this treatment was 'because of' disability. It is correct that 'but for' the Claimant's disability she would have been at work. That is not the proper test. We find that the proper comparator would be a person off work through ill health not amounting to a disability.

555. Drawing on our findings above, we are satisfied that the reason that the Claimant and Employee A were notified of the potential for redundancies later than the other employees was that each was on long term sick leave and a decision was taken to investigate/consider whether notifying them of the potential for redundancies would impact on their recovery. That is a decision contemplated by the Barclays guide *'A Guide for Employees at risk of redundancy'* which provides that it is usual for employees off sick to be notified at the same time as others but expressly states that this will depend on individual circumstances.

556. We find that this reason is not 'because of disability'. An employee absent from work would be treated the same way whether or not they had a disability. Whilst the claim might have been formulated as a claim under section 15 of the Equality Act it was not and we decline to adjudicate on a claim that was not before us.

557. For these reasons we are satisfied that the reason for the treatment complained of was not the Claimant's disability.

vi. Failing to notify C of the outcome of the redundancy process at the same time as her colleagues which was on 2 April 2019. [R1 and R3]

558. This allegation focusses on 'outcome'. We find that the employees who scored sufficiently highly to avoid displacement had no one-to-one meetings at all. The employees whose scores placed them at risk of redundancy were notified of that fact on or around 2 April 2019 (we do not know if every employee had a meeting on 2 April 2019). The Claimant was not informed of her scores and that she remained at risk of redundancy until 9 April 2019. It is clear from the e-mails sent by the Claimant that she was aware that other employees had been informed. We accept that this would have made her more anxious than she already was and could reasonably have been regarded as a detriment.

559. On 3 April 2019 Avneesh Singh did attempt to contact the Claimant by telephone and then by text. We find that his purposes in doing so was to convey the outcome of the selection process in exactly the same way as he had with the other affected employees. The Claimant then contacted Fiona Nichols who proposed a meeting with Avneesh Singh in person of by telephone. The Claimant then asked for communication in writing.

560. We proceed on the basis that the Respondents must show a non-discriminatory reason for the delay in notifying the Claimant of the outcome to the selection process. We find that Avneesh Singh was ready willing and able to speak to the Claimant and would have done so had the Claimant not indicated that she wanted communication in writing. We find that the delay was caused by this request. We are satisfied that this reason is in no sense

whatsoever because of disability. As such this claim does not succeed.

Failing to make reasonable adjustments Sections 20 & 21 of the Equality Act 2010

The Law

561. When dealing with a claim that there has been a failure to make reasonable adjustments the Tribunal are obliged to have regard to the relevant code of practice. For claims brought in the employment sphere the relevant code is the Equality and Human Rights Commission Code of Practice on Employment 2011. Paragraph 6.2 of that code describes the duty to make reasonable adjustments as follows:

> *The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.*

562. The reference in that paragraph to the right to have 'additional steps' taken reflects the guidance given by Lady Hale in ***Archibald v Fife Council*** **[2004] UKHL 32** which whilst referring to the Disability Discrimination Act 1995 is equally applicable to the Equality Act 2010.

> *……this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.*

563. The material parts of Section 20 of the Equality Act read as follows:

> *Duty to make adjustments*
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)…..

564. The phrase 'substantial' used in sub-section 20(3) is defined in section 212(1) of the EA 2010 and means only 'more than minor or trivial'.

565. Sub-section 39(5) of the Equality Act 2010 extends the duty to make reasonable adjustments to an employer of employees and job applicants.

566. The proper approach to a reasonable adjustments claim remains that suggested in Environment ***Agency v Rowan*** **[2008] IRLR 20**. A tribunal should have regard to:

566.1. the provision, criterion or practice applied by or on behalf of the employer; or

566.2. the physical feature of premises occupied by the employer;

566.3. the identity of non-disabled comparators (where appropriate); and

566.4. the nature and extent of the substantial disadvantage suffered by the claimant.

567. The code gives guidance about what is meant by reasonable steps at paragraph 6.23 to paragraph 6.29. Those paragraphs read as follows:

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be

reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26 [deals with physical alterations of premises].

6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise. Duty to make reasonable adjustments

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*
- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer.*

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

568. The requirement to demonstrate a 'practice' does not mean that a single instance or event cannot qualify but that to do so there must be an 'element of repetition' see ***Nottingham City Transport v*** **Harvey** **UKEAT/0032/12JOJ**. This might be demonstrated by showing that the treatment would be repeated if the same circumstances ever arose again.

569. Whilst the code places emphasis on the desirability of an employer investigating what adjustments might be necessary for a disabled employee, a failure to carry out such investigations will not, in itself, amount to a failure to

make reasonable adjustments although that might be the consequence ***Tarbuck v Sainsbury's Supermarkets Ltd*** **2006 IRLR 664, EAT**.

570. An employer will not be under a duty to make reasonable adjustments until it has knowledge of the need to do so. This limitation is found in schedule 8 paragraph 20 of the Equality Act 2010 and the material parts read as follows:

> *Lack of knowledge of disability, etc.*
>
> *20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*
>
> > *(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;*
> >
> > *(b) in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to* in the first, second or third requirement.

Reasonable adjustments – discussion and conclusions

571. The agreed list of issues deals with knowledge of disability (as we have above) and then sets out the following issues:

> 17. If so, did the Respondents apply a PCP which put C as a disabled person at a substantial disadvantage in comparison with those who are not disabled?
>
> The PCP relied upon by C is R1's custom and practice of making staff work over 48 hours a week, including early mornings (6.30/7am) and late at night to complete end of day processes.
>
> 18. If so, did the Respondents take such steps as were reasonable to take to avoid the disadvantage?
>
> 19. Did the Respondents fail to make reasonable adjustments by allegedly:
>
> a. failing to reduce C's workload from late 2017 to January 2019 in particular but not limited to failing to remove her responsibilities for training new and junior colleagues and managing the day to day work of Ivet Draganova [R1, R2, R3]
>
> b. failing to reduce C's working hours to at least 9 a.m. to 5 p.m. from late 2017 to January 2019 [R1, R2, R3]
>
> c. failing to allow C to work from 11 a.m. to 7 p.m. in February 2018 and/or September 2018 [R1, R2]

d. refusing to allow C to work from home on some occasions [R1, R2]

572. The first issue for us is to consider whether the Claimant has established that the Respondent applied the PCP she has identified to her. We have made findings of fact about the Claimant's working hours above. Our attention was never drawn to an occasion where the Claimant was required to start work at 6:30 or 7am. The only task that required such an early start was compressions. The Claimant was not required to do that task. We have also rejected the Claimant's suggestion that she regularly worked for more than 48 hours a week although we accept that on some occasions she did. We canvassed during final submissions whether the parties though that we should take such a strict approach to the list of issues or whether we should treat the PCP as being the amount of work the Claimant was required to do. The parties did not suggest that we should stick slavishly to the list of issues. We do not consider that there is any unfairness to the Respondents in us redefining the relevant PCP as being the hours of work that the Claimant actually did as a matter of obligation or expectation.

573. We find that the Claimant was required to do sufficient hours to ensure that she and the other team members completed the BAU tasks. We have found above that this required her to work for an average of between 40 and 48 hours and that within this she had to work beyond 7pm on a number of occasions. That we find is the PCP that applied to the Claimant. The size of the team fluctuated over the time that the Claimant was engaged by Barclays and with that the expectation or requirement that the Claimant would work long hours varied. The contractual obligation to work the hours necessary to complete the work was present from the outset of the Claimant's employment. This was not a one off or reactive requirement and is capable of amounting to a PCP ***Nottingham City Transport v* Harvey.**

574. When Karen McGoldrick reached her conclusions in the grievance process she found that the Claimant had not been specifically instructed to work late or to undertake some of the tasks that contributed to her fatigue but that there was a recognition within the team that these tasks needed to be completed. We agree with that finding. It was the very nature of the BAU work which required to be completed on a daily basis that meant that it was practically impossible to leave some of that work to the following day. In the list of issues the PCP has been defined as 'making staff work'. As we have found elsewhere there was a contractual obligation to work in excess of the ordinary hours of work. We do not consider that the fact that no instructions were given, and that Barclays relied upon an expectation that the work would be done falls outside the agreed formulation that the Claimant was 'made' to work the hours she did. We find that she could not realistically fail to comply with the expectations placed upon her. The case is on all fours with ***United First Partners Research v Carreras*** **[2018] EWCA Civ 323 (28 February 2018)**.

575. The next issue for us is whether that PCP placed the Claimant at a substantial disadvantage in comparison to people without her disabilities. There was evidence that all the team members felt that they were overworked.

The Claimant refers to Ivet Draganova complaining about this in particular in May 2019. However, the fact that all of the team members struggled with the working hours does not mean that the Claimant has failed to establish a comparative disadvantage. The proper question is whether she struggled more than the others without her disability. It was not disputed that the Claimant raised the issue of the workload and hours regularly. We accept that, particularly as her illness progressed the Claimant became progressively more exhausted until she was ultimately signed of sick in January 2019. We would accept that working as hard as the team did was tough on everybody but doing so whilst coping with endometriosis and stress and anxiety would make it very much harder. We shall not repeat at length all of our findings above but taken together we are satisfied that the Claimant has established that being required to work for the long hours did place her at a substantial disadvantage compared to others without a disability. We find that she satisfied this condition by no later than 1 October 2017 when she first met the statutory definition of disability by reason of her then undiagnosed endometriosis.

576. The nature of the disadvantage suffered by the Claimant was principally that she became fatigued. However, her text messages to her father show that this added to her anxiety. Her fatigue together with her anxiety contributed to her being unwilling or unable to socialise or, at times, go out shopping.

577. We need to deal with the second element of knowledge – the requirement that the employer knows or ought to know that the PCP is likely to place the employee at a disadvantage. We find that the Respondents did know that the Claimant was placed at a disadvantage. We have found that the Claimant regularly raised the issue of workload and hours. To satisfy this element of knowledge there is no need for the Claimant to establish that the Respondents knew of any comparative disadvantage. However, if that were a requirement we find that the Respondents ought to have recognised that the long hours that the team was expected to work would have had a greater impact on the Claimant who they knew or ought to have known has substantial issues dealing with her periods and suffered from stress and anxiety (even if that had not yet met the long term condition). Knowledge of either or both would convey sufficient information that the respondents ought to have recognised that the Claimant was likely to be more disadvantaged than a person without those illnesses. We find that the Respondent knew that the Claimant was disadvantaged by the hours that she was required to work from 1 October 2017.

578. The Claimant has proposed 4 adjustments that she says would have been reasonable. These are set out below. We shall deal with each in turn.

579. The first adjustment proposed is to remove the Claimant's obligation to train Ivet Draganova. We find that the Claimant was very capable of training Ivet Draganova and was very good at it. We have not accepted that Ivet Draganova was quite as slow at picking up the work as the Claimant has suggested. We do accept that the Claimant became increasingly exasperated at dealing with Ivet Draganova but find that that was a consequence of her fatigue and anxiety rather than the cause of it. We find that the principle

disadvantage that the Claimant suffered was the consequence of working long hours rather than what she did in the hours that she worked.

580. We do not accept that removing the expectation that the Claimant would train and assist Ivet Draganova would have done very much at all to alleviate the disadvantage that resulted from the PCP applied to the Claimant. If she had not been training Ivet Draganova but had continued to be expected to work the same hours she would still have become exhausted. We do not accept that dealing with Ivet Draganova substantially increased the hours that the Claimant had to work.

581. We can take the next two adjustments together. They both propose a variation to the Claimant's hours. The first adjustment proposes limiting the Claimant's hours to ordinary office hours and the second proposes a late start if the Claimant worked until 7pm. Both suggestions would involve a reduction in the hours that the Claimant worked.

582. We find that reducing the Claimant's hours by either of the means suggested would have significantly reduced the substantial disadvantage that resulted from the expectation that the Claimant would work long hours.

583. The Respondents did not lead any evidence directed specifically at the question of whether it was reasonably open to them to make these adjustments. Karen McGoldrick's grievance investigation found that with the exception of Avneesh Singh it was recognised that the entire ROST IB MO team were working for excessive hours. In her notes placed on the HR system she includes this assessment of what she has been told:

> *KM: As previously – James confirms these discussions [1-2-1 meetings] took place. He raised the workload issue with his line manager (Darren) who raised it with Avneesh. The message that came back was consistent, i.e. there will be restructuring and additional hires. The additional hires did not materialise. I believe that James accurately relayed the information he was given. I have been unable to establish why James was provided this information (a significant number of new hires will be made) if this was known not to be the case.*

584. We have made findings about the lack of authority of managers to hire staff. It appears that even hiring staff through an agency was surprisingly slow and bureaucratic. We find that throughout the time of James Kinghorn's employment the fact that the ROST IB MO team was working excessively was well known to his managers as he told them exactly what the problem was. It appears from Karen McGoldrick that the fact that there was to be a restructure (we assume the 'offshoring' of roles to Pune) was considered a reason for not taking more immediate action.

585. The issue for us is whether we find that it would have been reasonable to reduce the Claimant's hours of work. When Employee A had fallen ill the solution that was found was to expect the other team members to pick up on

her work. That may have provided a solution for Employee A, but it was not a solution for the rest of the team. We do not accept that this sort of firefighting exercise was the only solution available to Barclays. A sensible way of reducing the working hours of the ROST IB MO team was to increase the staffing levels of that team.

586. Barclays is a substantial company. We accept that companies have responsibilities to their shareholders, and we do not treat Barclays resources as a bottomless money pit. We accept that there would be potentially a cost associated to increasing the staffing levels of the team. We say potentially as we note that employee A's salary was apparently being met by an insurer.

587. We note the decision to pool the Claimant with 16 other Analysts. We have accepted the Respondents evidence that that was reasonable as they all did broadly similar work. We also note that Matteo Passini, who was hired for an FX role was transferred to the ROST team. What we infer is that there were transferrable skills. That gives the potential for drawing on the resources of other teams to support the ROST team. We accept that this was not canvassed in the evidence and do not consider that this was the only solution.

588. We find that it would have been reasonable to have hired additional staff. We have found that Barclays has a close working relationship with Resource Solutions. If there were bureaucratic obstacles to hiring an agency worker to cover for employee A or to assist the team generally then we were not told why those obstacles existed. We find that Avneesh Singh ought to have recognised the urgency of the situation. His superiors ought to have allowed him to address the situation promptly.

589. We need to consider whether the proposed adjustment would have eradicated or alleviated the disadvantage. This is not entirely straight forward. The Claimant's endometriosis developed over a period of time and the effects have got steadily worse. The symptoms/condition of stress and anxiety has also got worse. We do not consider that it is necessary for us to stray into the area of causation at this stage. It is sufficient for us to say that had the Claimant's working hours been reduced from the point that we have found that Barclays had constructive knowledge of the endometriosis amounting to a disability the Claimant would have not been as fatigued as she was. There may have come a point where, even with reduced hours, the Claimant could no longer have continued working. We shall leave any argument about that to a remedy hearing. For these purposes it is sufficient to say that we find that the adjustment contended for would have reduced the substantial disadvantage attributable to the PCP.

590. The final adjustment proposed by the Claimant is that she be permitted to work from home 'on some occasions'. We have preferred the evidence of the Respondent in respect of this issue. We have found that where the Claimant had a medical reason for needing to work from home she was permitted to do so. Whether by accident or design the Respondent has made this adjustment by default. We accept that the manner in which the adjustment was made required the Claimant to give a reason for wanting to work from

home and that that she felt uncomfortable with this. We were not specifically asked to consider whether the Respondents should have allowed the Claimant to work from home without explaining why. We can see that there may be interesting arguments raised about how that might work and it would not be fair to the respondent to deal with a case that was not actually brought or argued.

591. We have found that there was a failure to make reasonable adjustments to the Claimant's working hours. We deal with the issue of whether the Tribunal has jurisdiction to entertain this claim below (the time point). This issue was at the heart of the Claimant's case. She may have been better off focusing on this rather than adding the many other claims she has asked us to consider. Regrettably she only obtained legal assistance at a very late stage and after she had become very entrenched in her views of the Respondents. Having said that, Barclays failure to adjust the Claimant's hours is in our view a serious act of discrimination and one even without actual knowledge that was exceedingly thoughtless. We accept that James Kinghorn raised the issue of long hours on a regular basis, but his voice was lost in the wilderness.

592. Ms Berry argued that only Barclays could be held liable for a failure to make reasonable adjustments. We do not agree that in every case only the employer can be liable for a failure to make reasonable adjustments. However, on the facts of this case we accept that only Barclays are liable. It was Barclays that was responsible for the contractual arrangements for the hours worked and for the existence of the PCP that placed the Claimant at a substantial disadvantage. We find that it is Barclays who has acted unlawfully.

Harassment – Section 26 of the Equality Act 2010

The law

593. A claim for harassment under the Equality Act 2010 is made under section 26 and 39. The material parts of Section 26 reads as follows:

> *26 Harassment*
>
> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2) A also harasses B if—*
>
> *(a) A engages in unwanted conduct of a sexual nature, and*

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

594. The Statutory Code of Practice at paragraph 7.18 says the following about when conduct should be taken as having the effect of creating the circumstances proscribed by Sub-section 26(1)(b):

7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be

hypersensitive and that another person subjected to the same conduct would not have been offended.

595. In ***Pemberton v Inwood*** **[2018] IRLR 542** Underhill LJ explained the effect of Sub-section 26(4) as follows [para 88]:

'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment4 created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

596. In ***Richmond Pharmacology v Dhaliwal*** **[2009] IRLR 336**, which dealt with the legislation in place prior to the Equality Act 2010 there is a reminder of the need to take a realistic view of conduct said to be harassment. At paragraph 22 Underhill P (as he was) said:

'*Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.*

597. In ***Forbes v LHR Airport Ltd*** **[2019] IRLR 890, EAT** it was held that a timely and sincere apology may mean that it was not reasonable to regard conduct as having the effect or creating the circumstances proscribed by Section 26(1)(b).

598. The question of whether unwanted treatment 'relates to' a protected characteristic is to be tested applying the statutory language without any gloss ***Timothy James Consulting Ltd v Wilton*** **UKEAT/0082/14/DXA**. In ***Bakkali v Greater Manchester Buses (South) Ltd*** **[2018] IRLR 906, EAT** Slade J held that the revised definition of harassment in the Equality Act 2010 enlarged the definition. She said:

'In my judgment the change in the wording of the statutory prohibition of harassment from 'unwanted conduct on grounds of race …' in the Race

Relations Act 1976 s 3A to 'unwanted conduct related to a relevant protected characteristic' affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be 'related to' a relevant characteristic even if it is not 'because of' that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, 'related to' such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted 'the mental processes' of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant.'

599. The need for a tribunal to take a rigorous approach to the question of whether conduct related to a protected characteristic was recently emphasised in ***Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam*** **[2020] IRLR 495, EAT** where the EAT said:

'The broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be.'

21 (a) R3's failure to respond to a complaint made by C on 3 November 2016 about Louisa Horswill's treatment of her. [R1 and R3] [race]

600. In our findings of fact set out above we have found that Avneesh Singh did not fail to respond to the Claimant's complaints about her first line manager. He was not the Claimant's line manager and so was not the person who would ordinarily have been expected to deal with any issues within the team. Avneesh Singh spoke to Jade Green and informed him of the issue. Thereafter jade Green spoke to the first line manager.

601. These findings mean that we do not accept the Claimant's case that there was a failure to respond to the complaint. We find that there was a response and that it was a sensible and proportionate to report the Claimant's concerned to the person responsible for managing the team. We have rejected the Claimant's case that she referred to race during her discussions with Avneesh Singh. Had we not done so we would have accepted that Avneesh Singh would have been expected to promptly elevate the matter to a more senior manager of the HR department. We find that there was no such specific complaint. There was no formal grievance and in the circumstances the manner in which Avneesh Singh dealt with the complaint was unsurprising.

602. We reject any suggestion that Avneesh Singh's acts or omissions were for the purpose of subjecting the Claimant to the circumstances proscribed by Sub-section 26(10(b) (hereafter 'the proscribed circumstances'). Such a suggestion is inconsistent with our finding that Avneesh Singh did take appropriate action in response to the complaint.

603. The Claimant did not raise any formal complaint at the time about any failure off Avneesh Singh to take action. We would accept that the actions of the first line manager (as described by the Claimant) could give rise to the proscribed circumstances. However, it is not those actions we are concerned with. We need to ask whether the acts or omissions of Avneesh Singh had the effect of creating the proscribed circumstances. As a part of that we must ask the question posed by sub-section 26(4)(c) whether it was reasonable for the conduct of Avneesh Singh to have that effect. Given the lack of any complaint at the time we doubt that the Claimant subjectively regarded the actions of Avneesh Singh as creating the proscribed circumstances, but we do not need to decide the claim on that basis. Even if the Claimant did subjectively view the conduct as amounting to harassment then we find that it was not reasonable for her to do so. The Claimant might have wanted Avneesh Singh to do more but, objectively, any failure to do so in these particular circumstances does not approach the threshold of creating the proscribed circumstances.

604. For completeness, having found that the Claimant did not mention her race or race discrimination to Avneesh Singh even having regard to the entirety of the evidence there is no basis upon which we would have been able to conclude that any act or omission of Avneesh Singh related to race.

<u>21 (b) R2's conduct on 3 September 2018 when he refused to help C when she asked for support at 18.30 and explained that she was unable to work any later. He replied 'what do you want me to do', and left the office to play football. [R1, R2] [sex, disability, race]</u>

605. We have set out our findings about this incident above. We have accepted that James Kinghorn spoke to the Claimant and that he said words to the effect that he was unable to assist her and Ivet Draganova with the issue that had arisen. We have found that James Kinghorn had left the office in order to pick up his daughters from nursery.

606. We find that insofar as James Kinghorn's words indicated that he was

unable to assist this was because that was the case. The issue that had arisen was being dealt with by the Claimant and Ivet Draganova. The person undertaking the BAU task would usually be best placed to resolve any issues. James Kinghorn had left the office at about 4:30pm. This was a Monday and it is likely that he played football on that day. As such he was in no position to offer any assistance until later in the evening when he logged back on at which point the issue had been resolved.

607. We do not accept that James Kinghorn's actions had the purpose of subjecting the Claimant to the proscribed circumstances. We have seen numerous contemporaneous texts and messages where James Kinghorn has been pleasant towards the Claimant. In the messages exchanged on 3 September 2018 James Kinghorn expresses his thanks for the efforts of the Claimant and Ivet Draganova. There is no evidence of animosity in that message exchange or any other.

608. We would accept that the Claimant found working so late in local time (or indeed UK time) very difficult. In assessing whether the actions of James Kinghorn had the effect of creating the proscribed circumstances we move directly to consider whether it was reasonable for the Claimant to regard James Kinghorn's actions as having that effect. We find that it was not. James Kinghorn made his commitment to pick up his daughters before the issue arose that required the Claimant to work late. She had started to resolve the issue. Approaching the matter objectively it was not unreasonable for James Kinghorn to leave the Claimant and Ivet Draganova to resolve the issue. We have found elsewhere that James Kinghorn had constructive knowledge of the Claimant's disability and that there was a failure to make reasonable adjustments. However, we consider that not every failure to make a reasonable adjustment will have the effect of creating the proscribed circumstances. Looking at all of the surrounding circumstances we find that James Kinghorn's actions do not amount to having the effect of creating the proscribed circumstances.

609. If we are wrong about this, we consider whether the conduct related to race, or sex. We find that it did not for the following reasons:

609.1. There was no reference whatsoever to race and no evidence to support any inference that there was any connection at all between the Claimant's race and the conduct complained of. The fact that the Claimant was in Romania and was therefore working very late in local time is not in our view sufficient to find that the actions of James Kinghorn related to race.

609.2. We accept that both the Claimant and Ivet Draganova were female and that James Kinghorn left them to resolve the difficulty. We do not consider that this is a sufficient basis for concluding that his conduct related to sex. We find that James Kinghorn would have left the office to pick up his daughters regardless of the gender of the employees left at work. We find that he would have gone on to play football again regardless of

the gender of the employees left at work. We find that there is no basis on which we could find that James Kinghorn's conduct related to sex.

610. We accept that the Claimant was at this time unwell as a consequence of her disability. Being required to work late was especially difficult for her. Had we found that the conduct complained of had the effect of creating the proscribed circumstances we would have accepted that this related to disability.

21 (c) R2's refusal to allow C to start work at 11 a.m. from February 2018 (which used to be a shift start time), claiming that "management would not allow it". Yet R2 nearly always started his shift at 11am. [R1, R2] [sex, disability, race]

611. We accept that from February 2018 there was a renewed emphasis on requiring the team to work from 9am. This was a decision taken in the belief that sufficient steps had been put in place to facilitate a New York handover. We accept that such steps had been put in place, but they did not entirely reduce the need for the London team to work late. We find that whilst there was an expectation that the Claimant (and other team members) would start at 9:00am this was not strictly enforced. Karen McGoldrick undertook a review of the time the Claimant started work in 2018. Her conclusions were based on the touch in/out records and are we find broadly accurate. She concluded, and we accept the accuracy of her conclusions, that the Claimant arrived at work after 10am on 62 occasions during the year. There are particular instances, 3 September 2018 being an example where after the team had worked late James Kinghorn suggests a later start. We also find that it is simply wrong to say that James Kinghorn 'always started his shift at 11am'. We had a large sample of his touch in touch out records and these show that he usually arrived in the office between 9 and 10am. He accepted that he would often be in after 9 as he took his daughters to nursery.

612. The proposal that the team start work at 9am was not targeted at the Claimant but applied to the whole team. The Claimant would have known that the change was intended to reflect the possibility of being able to leave earlier due to a New York handover. Whilst this was not 100% effective the Claimant and other team members would have recognised that the change in hours was intended to improve the situation and not to make it worse.

613. We accept that the Claimant did benefit from an 11am start where that had the effect of reducing her hours overall. To a very great extent the records show that the Claimant continued to have a late start. We accept that the Claimant was concerned at being told to start at 9am whilst the New York handover was not 100% effective.

614. We reject any suggestion that this change was introduced with the purpose of creating the proscribed circumstances. We have set out above our finding that the purpose was to ensure that the team members worked more usual office hours. The changes were intended to benefit them.

615. We then turn to the issue of whether the changes had the effect of creating the proscribed circumstances. Again, we put to one side the Claimant's perception and move directly to the question of whether she could reasonably have regarded this change as creating the proscribed circumstances. In doing so we have regard to the fact that the Claimant was more likely to be negatively impacted than her colleagues. Despite this we find that the Claimant could not have reasonably regarded this change as creating the proscribed circumstances.

616. There was no evidence whatsoever to support a conclusion that implementing these changes related to race of sex. The changes were introduced for the whole team made up of three nationalities and one male and two females. The changes were made for sensible business reasons intended to have more favourable working patterns for the team. There is nothing that would support a conclusion that the actions related to race or sex.

617. We would accept that the Claimant might have been most effected by these changes, had they been enforced, and the handover proved ineffective. On that basis it was arguable that the changes 'related to' disability but we do not need to decide that as the claim fails at the earlier stage.

21 (d) R2 repeatedly questioned C's need to work from home despite being fully aware of her ill health. [R1, R2] [sex, disability, race]

618. We have found that the Claimant was permitted to work from home on an occasional basis. We find that the majority of times that the Claimant worked from home the reason for requesting this related to her health. However, there were occasions when the Claimant wanted to remain at home for domestic reasons.

619. We have accepted James Kinghorn's evidence that he was generally flexible about working from home but that some level of cover in the office was required. We accept that there were occasions when Stephen Lane and later James Kinghorn asked the Claimant why she needed to work from home. We were not told of any occasion when the Claimant raised her health as the reason that she needed to work from home where this was actually refused.

620. We do not accept that the purpose of asking the Claimant the reason she wanted to work from home was to create the proscribed environment. The purpose of asking the Claimant's reasons we find was to allow the manager to weigh up whether the request to work from home needed to be accommodated. We find that there was no intention whatsoever to cause the Claimant any offence.

621. We turn to whether these requests had the effect of creating the proscribed environment. There was no evidence before us that the Claimant was asked any detailed questions about any medical reason for wanting to work from home. Overall, the evidence was that the Claimant would freely volunteer information to James Kinghorn. The Claimant sent text messages which sometimes spelt out her health issues. We have found elsewhere that

James Kinghorn was reluctant to go into depth about the Claimant's condition. That was what he told Karen McGoldrick during the grievance investigation. We note that when reasons were sought for the Claimant working from home by text messages the question was curt 'why?'. We consider that text messaging is often by its very nature a blunt tool for communication. Taking these matters together we find that the manner of asking the Claimant why she needed to work from home was always reasonable.

622. We shall move straight to the issue of whether the Claimant could reasonably regard the conduct as having the effect of creating the proscribed environment. The Claimant would have known that it was considered desirable for some team members to work in the office. She knew that she had been permitted to work from home when she said she was unwell. We do not consider that it was reasonable for the Claimant to regard being asked her reasons for wanting to work from home as having the effect of creating the proscribed circumstances. The questions were asked for a proper purpose and in a reasonable manner.

623. It is not necessary to deal with the question of whether the conduct complained of related to race sex or disability. However, there was no evidence whatsoever that the conduct had anything to do with race or sex. We would have had no hesitation in dismissing these claims on that basis in addition to our conclusions above. We would accept that being asked about needing to work from home when the request was made because of the symptoms of a disability could be said to relate to disability but as we have not found that the conduct passed the necessary threshold we dismiss this claim in any event.

<u>21(e) R2 asked C to continue to perform the work she had been assigned during a meeting on 14 January 2019. [R1, R2] [sex, disability and race]</u>

624. On 14 January 2019 the Claimant met with James Kinghorn. We have found above that she raised the issues of her workload and complained about training Ivet Draganova. We accept that James Kinghorn suggested that the Claimant needed to carry on with her work. Where there is a difference it is with the emphasis on training. The Claimant perceived herself as still training Ivet Draganova on basic tasks. James Kinghorn did not share the Claimant's perception that Ivet Draganova needed constant training and assistance. He believed her to be quickly coming up to speed. We find that it is more likely than not that James Kinghorn told the Claimant that she would need to keep working with Ivet Draganova. That is consistent with his evidence that he wanted to try and improve the working relationship. We do not accept that he used any language that suggested that the Claimant should train Ivet Draganova.

625. Given that the Claimant was no longer willing to assist Ivet Draganova with her work we would accept that an instruction to do so was unwanted conduct.

626. We reject any suggestion that the purpose of this conduct was to create the proscribed circumstances. We find that the purpose behind James

Kinghorn's remarks was his wish to try and restore the working relationship between the Claimant and Ivet Draganova.

627. We then turn to the issue of whether the conduct had the effect of creating the proscribed environment. As before we shall assume that the Claimant perceived the conduct as having the effect of creating the prescribed circumstances. We need to consider whether it was reasonable for the conduct to have that effect.

628. We reject the idea that the Claimant was being instructed to spend a large amount of her time training Ivet Draganova. She could not have reasonably assumed that this was the case. What she was being asked to do was to work well with her colleagues. We do not think it can be reasonably said that this instruction had the effect of creating the proscribed circumstances. We find that it was a reasonable management instruction.

629. We had no evidence that this instruction related to race or sex. The nature of the instruction had nothing whatsoever to do with race or sex. We do not find that James Kinghorn's thought processes were influenced by those matters at all.

630. We accept that the Claimant was unwell and struggling with her workload and was expressing her frustration about being asked questions by Ivet Draganova. We would readily accept that the Claimant's disability was a material cause of her perception that expecting her to respond to her colleague was an unreasonable burden. That said the reason for James Kinghorn's stance was not motivated by the Claimant's disability in any way and the instruction itself did not relate to disability. We find that there is no evidential basis for concluding that the unwanted conduct complained of related to disability.

<u>21 (f) R2 repeatedly asking C to keep pleading for a detailed work reference letter from around 10 to 14 September 2018 to January 2019. [R1, R2] [sex only]</u>

631. It was common ground that the Claimant had asked James Kinghorn for a reference and that he had not provided one despite some reminders to do so. We have commented above that James Kinghorn expressed no unwillingness to provide a reference and he asked the Claimant to remind him. The failure to provide a reference is in our opinion unwanted conduct.

632. We are satisfied that the reason that James Kinghorn did not provide a reference was not that he was unwilling to do so but a combination of not knowing how Barclays dealt with such matters and forgetting to make the necessary enquiries to move the matter on. Those conclusions lead us to find that the James Kinghorn did not act with the purpose of creating the proscribed circumstances. We do consider that James Kinghorn was thoughtless in this respect and he could have done better.

633. We turn to the question of whether the conduct had the effect of creating

the proscribed circumstances. We have no doubt that the Claimant believed that she needed a reference in order that she could find another position. As she was by then very unhappy in her role, we would accept that she would have been upset and annoyed by the failure to provide a reference. We shall assume that the Claimant subjectively considered that the failure to provide her with a reference created the proscribed circumstances.

634. The issue for us is whether it was reasonable for that conduct to create the proscribed circumstances. We accept that the conduct was irritating and that it added to anxiety. However, we do not think that it was reasonable to regard that conduct as violating the Claimant's dignity. It is in no sense intimidating. We asked ourselves whether it could be considered hostile, degrading humiliating or offensive. We do not believe that this conduct could reasonably be regarded as having that effect.

635. If we are wrong, we would need to consider whether the conduct related to sex. We have no idea why the Claimant identified sex as the relevant protected characteristic but that is her case. There was nothing about the failure to provide a reference that was inherently related to sex. We do not accept that James Kinghorn was influenced in any way at all by the Claimant's gender. We find that his reasons for failing to provide a reference are entirely independent of gender. This may have been unwanted conduct, but we see no link whatsoever between that and gender. Accordingly had we found that the conduct reached the relevant threshold we would have dismissed the claim on the basis that the conduct was not related to sex.

21 (g) C was required to carry out her own work, the work of departing members of staff in her team and the training and managing of new members of staff who joined her team from around July 2016 until she went off sick on 15 January 2019. [R1, R2 and R3] [sex, disability, race]

636. We have set out above our findings in respect of the Claimant's duties. We have accepted that the ROST team had a high turnover of staff and this meant that there were often not enough people to do all of the necessary work within normal working hours. We have accepted that the Claimant was expected to contribute to, and as a matter of fact undertook a great deal of training of new staff members. We do not accept that the Claimant had anything that could properly be described as managerial responsibilities. We have accepted that the Claimant was overall under a great deal of pressure and that she found the excessive work very arduous and progressively more so as a consequence of her ill-health.

637. We do not find that the requirements and/or expectations imposed on the Claimant were for the purpose of creating the proscribed environment. The requirements were imposed on all the team members. Whilst we accept that the Claimant was less able to cope with the excessive workload she was not singled out. We find that the purpose of imposing these requirements was that there was considered to be an imperative to complete all of the BAU work at the end of every day regardless of how short staffed the team was. The

purpose of the requirements/expectations was directed only at this and not to creating the proscribed environment for the Claimant.

638. We turn to the question of whether the requirements/expectations had the effect of creating the proscribed environment. We accept elsewhere that the Claimant was a very competent analyst. It was well within her capabilities to train others on the day to day tasks she performed. It was not the difficulty of the tasks themselves that caused the Claimant any significant difficulty but the fact that they could not be completed within ordinary working hours. We have found elsewhere that the failure to reduce the Claimant's working hours was a failure to make a reasonable adjustment. This is something that we bear in mind when assessing whether the same treatment amounts to unlawful harassment.

639. We accept that the Claimant did raise the issue of working late and the workload in general on a number of occasions. We accept that she was subjectively very concerned by this. We do not accept that she considered that the failures to reduce her workload to a manageable level either violated her dignity or created the proscribed environment on any other basis. We find that had she regarded the failure as creating the proscribed environment she would have raise it to a higher level of management or to HR.

640. We do not accept that it was reasonable for the conduct complained of by the Claimant to have the effect of creating the proscribed circumstances. The language used to describe the proscribed circumstances is strong and, in our view, sets a threshold above the facts as we have found them. The conduct complained of amounts to poor management and thoughtlessness. Whilst we do not intend to trivialise the effect on the Claimant, we do not consider that it meets the required threshold.

641. Had we found that the conduct had the proscribed effect we would have needed to deal with the issue of whether it 'related to' any protected characteristic. We do not accept that the conduct related to either sex or race. We find that the requirements/expectations complained of here would have been imposed on the ROST team whatever its gender/racial makeup. Whilst the Claimant did a great deal of training, we have found elsewhere that the reason for asking her to assist in that regard was that she was experienced and able to pass on that experience. We do not accept that that had anything to do with her gender or race. We make the same finding in respect of covering the duties of departing employees.

642. We accept that the Claimant suffered disproportionately because of the heavy workload. However, that by itself does not mean that the unwanted conduct was related to disability. The reason for the treatment was the perceived business imperative to complete the work. We do not consider that that means that the unwanted conduct related to disability.

<u>21 (h) Not reducing C's working hours to at least 9 a.m. to 5 p.m., or alternatively from 11 a.m. to 7 p.m., from late 2017 to January 2019 [R1, R2, R3] [sex, disability, race]</u>

643. The allegation at (i) above arises out of the same factual circumstances. The ROST team had too much work to do and was often understaffed. We have upheld a complaint that the failure to reduce the Claimant's hours amounted to an unlawful failure to make a reasonable adjustment.

644. As we understand it the complaint is aimed at the decision to move away from the previous practice of having two start times to working within normal office hours. We have found elsewhere that the rational for this was to prevent a long hours culture and that this could be facilitated with a New York handover. We have found that in practice this was not as effective as had been anticipated and some late-night working was still required. We have also found that the Claimant continued to arrive at work later than the proposed 9am start time frequently not coming in to work before 11am.

645. There is considerable overlap between this claim and the claim above. It is sufficient to say that for exactly the same reasons as we have set out above, we dismiss this claim. We do not accept that the change in shift pattern was undertaken for the purpose of creating the proscribed environment and objectively do not accept that it was reasonable for the unwanted conduct to have that effect. We think it important that the change was intended as being beneficial. If we are wrong about that then we do not accept that the conduct related to any of the protected characteristics relied upon.

21 (i) R2's statement to C in or around 10-14 September 2018 that "if I can't trust you guys to split the work I will have to assign it myself and I don't think you're going to like that! I will be monitoring you very closely and I will be requiring much stricter deadlines" [R1, R2] [sex only]

646. We have set out our findings about this event above. We have broadly accepted the Claimant's account that she was told that she and Ivet Draganova needed to co-operate or a solution might be imposed upon them. We have rejected the suggestion that this would have included 'much stricter deadlines'.

647. We accept that the Claimant might reasonably conclude that James Kinghorn was criticising her approach to the issues between her and Ivet Draganova and as such that amounted to unwanted conduct.

648. We find that the purpose of James Kinghorn speaking to the Claimant in the way he did was a necessary part of his managerial role in attempting to resolve conflict between two team members. In no sense whatsoever was it his purpose to create the proscribed environment. He was attempting to assist and encourage and not to offend the Claimant.

649. We find it highly unlikely that the Claimant viewed this conversation as amounting to having the effect of creating the proscribed environment at the time. It is more likely than not that she has come to believe that through the lens of later events.

650. We find that James Kinghorn's actions were understandable and appropriate. He was trying to encourage two employees to work together

better. He did not share the Claimant's view that Ivet Draganova was slow to pick up the necessary skills or was a particular drain on the Claimant's time. We find that this assessment was more accurate than the Claimant's own assessment. In those circumstances we find that it was not reasonable for the actions of James Kinghorn to have the effect of creating the proscribed environment. Any subjective belief that the Claimant had was unjustified and oversensitive. Accordingly, we do not find that the conduct of James Kinghorn had the purpose or effect of creating the proscribed environment.

651. If we are wrong, we would need to deal with whether the unwanted conduct related to sex. There is nothing inherently sexist about the words that we find were used by James Kinghorn. The Claimant asserts that this conduct related to sex and we assume that her case is that her and Ivet Draganova's gender that played a part in James Kinghorn's decision to give the advice he did. We have had regard to the totality of the evidence (including our findings where we have upheld the allegation in respect of sexist remarks. We assume that the Respondents bear the burden of proof – we are satisfied that in giving the managerial advice he did, James Kinghorn was not influenced by the Claimant's gender or that of Ivet Draganova. We are satisfied that the unwanted conduct did not relate to sex in any way.

21 (j) R2 would repeatedly call out C's name until she went to the trainer's desk, ignoring her pleas that she was too busy for training [R1, R2] [disability, sex]

652. We have set out our findings above in respect of training to undertake compressions. We have found that the Claimant was asked to undertake training. We have rejected the suggestion that any request was made in a rude or forceful way. It was common ground that the Claimant had said that she did not want to be responsible for undertaking the compressions task and that, having explained this, she was not asked to do the whole task. All other team members were not only trained but were also expected to undertake compressions. We find that James Kinghorn recognised the fact that the Claimant was under pressure and he afforded her special treatment to assist her. This is consistent with our view that where James Kinghorn recognised there was a problem he would attempt to offer assistance and/or a constructive solution.

653. We accept that the Claimant did not want to take on any more work or any description and saw the compressions training as unnecessary. James Kinghorn gave evidence, which we accept, that whether or not the Claimant would actually carry out the entirety of the Compressions task she needed to be trained in order that she could lend a hand, if necessary, during the working day. That seems entirely sensible to us. We accept that however reasonable and necessary the instruction might have been the Claimant could reasonably have considered the imposition of an additional task as unwanted conduct.

654. We do not accept that in asking the Claimant to undertake this training James Kinghorn acted with the purpose of creating the proscribed

environment. His purpose was to ensure that the Claimant was trained in order that she could assist with the task of doing Compressions.

655. Whether or not the Claimant subjectively felt that this instruction had the effect of creating the proscribed environment we are satisfied that it was not reasonable for the conduct to have that effect. We are satisfied that the Claimant was asked to undertake training that James Kinghorn reasonably believed was necessary for her to undertake. We accept that the Claimant was very busy but do not consider that James Kinghorn's instruction was of itself in any way improper. For these reasons we find that the instruction did not have the purpose or effect of creating the proscribed environment.

656. In case we are wrong we shall consider whether the conduct related to any protected characteristic. We find that it did not. It was a straight- forward management instruction that was not inherently connected to gender or disability. We do not accept that James Kinghorn's reasons for giving the instruction were related in any way to sex or disability. On the Claimant's own case both she and Matteo were trained at the same time. Had we found that the conduct had the purpose or effect of creating the proscribed environment we would not have found that the conduct related to sex or disability and the claim would have failed in any event.

Victimisation Contrary to Sections 27 and 39 of the Equality Act 2010

The law

657. A claim for victimisation is brought under section 27 of the Equality Act 2010. The material parts of that section read as follows:

> *27 Victimisation*
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> > *(a) B does a protected act, or*
> >
> > *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> > *(a) bringing proceedings under this Act;*
> >
> > *(b) giving evidence or information in connection with proceedings under this Act;*
> >
> > *(c) doing any other thing for the purposes of or in connection with this Act;*

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

658. Victimisation in the employment field is rendered unlawful by reason of Section 39(4) of the Equality Act 2010. That sub section provides, amongst other things, that it will be unlawful to victimise an employee by subjecting her to a detriment. The meaning of 'detriment' is the same as we have set out above when considering the claims of direct discrimination.

659. No comparator is required to establish victimisation ***Woodhouse v West North West Homes Leeds Ltd*** **[2013] IRLR 733**. What is necessary is that the employee establishes that they did a protected act and that they have suffered a detriment. Thereafter the examination turns to the reason why the detriment was suffered and is subject to the burden of proof provisions which we have set out above. The question is whether the reason for the treatment was because the worker had done a protected act or that the employer knew that he or she intended to do a protected act, or suspected that he or she had done, or intended to do, a protected act? See - Baroness Hale in ***Derbyshire and ors v St Helens Metropolitan Borough Council and ors*** **2007 ICR 841, HL**, and Lord Nicholls in ***Chief Constable of West Yorkshire Police v Khan*** **2001 ICR 1065, HL** both cases decided before a change in the wording included in the Equality Act 2010 but not affected on this question.

660. The test of causation 'because' is not to be approached by asking 'but for the Claimant doing the protected act would the treatment have occurred' but by asking whether the protected act was the reason for the treatment ***Greater Manchester Police v Bailey*** **[2017] EWCA Civ 425** and ***Nagarajan v London Regional Transport*** (above).

661. An employer's failure to investigate a complaint of discrimination or harassment will not constitute victimisation under S.27 unless there is a link between the fact of the employee making the complaint and the failure to investigate it — ***A v Chief Constable of West Midlands Police*** **EAT 0313/14**.

Victimisation discussion and conclusions

662. The list of issues sets out protected acts in paragraphs 22 a-h. Some of these are clearly individual acts but some refer to more than one occasion where it is alleged that a protected act was done. That is unfortunate. It really fell to the Claimant to say what she said or did and when she did it. That would

enable the Tribunal to say whether there was or was not a protected act. We have dealt with those issues by having regard to what the Claimant has said in her ET1s her further particulars and what she said in her witness statement.

663. We need to determine whether the Claimant has done any protected acts as she alleged, and we shall address each in turn. In doing so we import our general findings of fact but where necessary make specific findings in respect of each alleged protected act.

22 (a) C complained of sex discrimination to R2 on several occasions between February 2018 and December 2018 in the public office space in front of other colleagues, including Mateo Pasini and Ivet Draganova.

664. As we understand this it relates to the Claimant objecting to James Kinghorn using the expression 'birds'. We have accepted that this expression was used for a period by James Kinghorn. James Kinghorn accepts in his witness statement that the Claimant said that he should not use that word. The language is plainly sexist (whether misplaced irony or not). We find that when the Claimant told James Kinghorn that he should not use such language she was, by implication if not expressly, making an allegation that he had contravened the Equality Act 2010. We therefore find that this was a protected act falling within Sub-section 27(2)(d) of the Equality Act 2010.

665. We make the additional finding that we accept that the manner in which the Claimant reminded James Kinghorn that his attempt at humour was unacceptable passed off without him realising that he might have seriously offended the Claimant or her female colleagues. We find that he was at the time under the impression that his language had been understood as light-hearted. We find that his further joke about not being reported to HR was not intended to be serious. We find that it had not crossed James Kinghorn's mind that somebody might actually be so offended that they would take the matter any further.

b. C complained of disability discrimination to R2 in weekly one to one meetings that began in November 2017 and culminated on 14 January 2019.

666. We have found elsewhere and repeat here our findings that the Claimant would regularly raise the issue of the work she was expected to do during one to one meetings with James Kinghorn. We have found above that she had also given him sufficient information that he had constructive knowledge that she had a disability. We have found he had no actual knowledge. The Claimant does not say in terms that she made any reference to the Equality Act 2010 during any one of these meetings. In particular she gives a description of the meeting of 14 January 2019 in her witness statement that does not say she made an express allegation of any infringement of the Equality Act 2010.

667. We make the following additional findings. James Kinghorn accepted that the Claimant would regularly raise the issue of workload. However, he said that when she did so she would refer the workload of the team and not to her

own specific circumstances. We broadly accept that evidence. That said the Claimant was a member of the team and so she was clearly making a complaint on her own behalf as well as more generally. We accept that the Claimant would have raised her disquiet at the proposal to start work at 9am when the New York handover was proposed. She mentioned this to her GP and that is consistent with it being something that particularly concerned her. However we are not satisfied that the Claimant ever expressly linked any difficulties with her workload to her disability.

668. Having found that there was no express allegation of an infringement of the Equality Act 2010 we need to consider whether there was an implicit allegation. The question for us is whether a complaint about workload coupled with sufficient facts to give rise to constructive knowledge of disability is sufficient to amount to an allegation that there is a breach of the Equality Act 2010. We do not find that that would be sufficient to amount to an implicit allegation. Had the Claimant proposed an alteration to her hours or working practices to accommodate her disability we would have concluded that would be sufficient. Here what the Claimant expressly and implicitly stated fell short of any allegation of breach. For completeness we have considered whether the Claimant could rely on Sub-section 2792)(c). We cannot see that the Claimant did anything in those meetings for the purposes of or in connection with the Equality Act 2010.

c. C made complaints of race discrimination and harassment to R3 from November 2016 to March 2019.

669. We repeat on our general findings of fact above. We note that the manner that this issue has been identified would tend to suggest that the Claimant made numerous complaints of race discrimination during the period outlined above. This was not the manner in which the claim was actually pursued before us. It was put to Avneesh Singh that the Claimant had mentioned race when she first complained about the treatment by her first line manager. No other more general allegation was pursued. We have found above that the Claimant did not make any reference to race discrimination to Avneesh Singh either at the time of her complaints about her first line manager or at any other time. As such we do not find that the Claimant did any protected act by making complaints of race discrimination to Avneesh Singh prior to the submission of her grievance in March 2019.

d. C also made a complaint to Jade Green in early November 2016 (which resulted in [the Claimant's first Line Manager] being stripped of her managerial responsibilities). This was shortly after she had made a complaint to R3 about [the Claimant's first Line Manager].

670. Again, we do not accept that the Claimant ever made any reference to race discrimination when she complained about her first line manager to Jade Green. As such we do not accept that the Claimant has established that she has done any protected act.

e. C made complaints of race and disability discrimination to the Respondents during the redundancy process. (The redundancy process started on 22 March 2019).

671. The Claimant has not been as clear as she could have been about the occasions that she says she did protected acts. However, from January 2019 all communication between the Claimant and the respondents was in writing (with the exception of a telephone call with Avneesh Singh). On 15 October 2019 the Claimant sent grounds of appeal against her redundancy selection and notification. Those grounds of appeal include allegations of victimisation and discrimination relying on the protected characteristics of nationality and disability. We find that that e-mail does make allegations that the Respondents have breached the Equality Act 2010. As such the e-mail does amount to a protected act falling within Section 27(2)(d).

f. C made complaints of race discrimination in the Grievance process. (The Grievance process started on 1 April 2019 with C's written complaint and ended on 21 August 2019 when the Grievance Appeal outcome was delivered).

672. The Claimant's grievance letter of 1 April 2019 does include allegations of discrimination and refers to the protected characteristics of race (including nationality) and sex discrimination. The letter also includes references to disability discrimination. Whether or not the Claimant's letter identifies with any precision the exact allegations she is making there are numerous references to discrimination. We find that the Claimant does make allegations that the Respondents have breached the Equality Act 2010. As such the e-mail does amount to a protected act falling within Section 27(2)(d).

673. The Claimant's subsequent correspondence during the grievance process makes further references to discrimination. Each of these e-mails would amount to a protected act for the same reasons as set out above.

g. C expressed during a phone call on 12 March 2019 to R2 that she intended to bring an Employment Tribunal claim.

674. In her witness statement the Claimant identifies 13 March 2019 as the date on which she spoke to James Kinghorn. It was common ground that the Claimant had spoken to James Kinghorn on or around that date and James Kinghorn had told the Claimant that her request for a discretionary extension to her contractual sick pay had been refused. It is agreed that the Claimant asked for the name of the person who had made that decision and that James Kinghorn declined to give that name. The Claimant says in her witness statement that at that juncture she said, *'I intended to bring my complaints in court anyway'*. Whilst we accept that James Kinghorn has no recollection of this, we find that it is more likely than not that there was an express or implied threat of court proceedings. The Claimant goes on to say *that 'lawyers will have to deal with it'*.

675. The subject matter of the telephone call focussed on the refusal to extend contractual sick pay. That is a claim that might be pursued in civil proceedings or might be framed as a claim under the Equality Act 2010. We do not consider that it was clear from what the Claimant actually said that she was intending to bring proceedings under the Equality Act 2010. We need to ask whether this vague threat of litigation qualifies as a protected act. It is sufficient that 'person A' believes that 'person B' may do a protected act. The word 'may' suggests a possibility rather than a certainty. However, it would be necessary that, however fleetingly, that belief was actually held.

676. We find that James Kinghorn never thought about how the Claimant might put any claim relating to sick pay. As such we do not accept that he had any belief that the Claimant may bring proceedings under the Equality Act 2010. As such the actions of the Claimant cannot qualify as a protected Act under sub-section 27(2)(a) as the claimant had not issued any proceedings nor did James Kinghorn believe that she had done so or might do so.

677. It was not suggested by the Claimant that her actions would be a protected act under sub-section 27(2)(b). We do not see how they could be.

678. Sub-section 27(2)(c) is widely drawn and is capable of including many acts preparatory to or in anticipation of proceedings. We find that the Claimant's professed intention to put the issue in the hands of lawyers is something that is not by itself doing something 'in connection with' the Equality Act 2010. If we had any evidence to support a finding that the Claimant was proposing to engage lawyers to advise her of any claim, she might have under the Equality Act 2010 then we might find that this was a protected act. The Claimant did not say that she had given the matter any thought at that stage and there is nothing to support such a finding. Absent any subjective intent to do something referable to the Equality Act 2010 we do not think that the Claimant has established that she did a protected act under this sub-section.

679. Lastly, we consider sub-section 27(2)(d). We accept that the Claimant expressly or implicitly made an allegation that the failure to extend her sick pay was unlawful. However, what she said fell short of making an allegation that there had been a breach of the Equality Act 2010. There was no reference to that act nor to any of the ways that conduct might be unlawful under that act. This sub-section requires either an express or implicit allegation that there has been a breach of the Equality Act 2010. We find that a vague allegation of taking legal action without some reference to how such a claim might be brought under the Equality Act 2010 is not sufficient to amount to a protected act.

<u>h. Claim number 3201295/19 in respect of the acts of detriment set out in claim 3201137/20</u>

680. It was not disputed that issuing claim No 3201295/19 was a protected act falling under sub-section 27(2)(a).

681. Having dealt with the question of whether there were protected acts we

move to the two questions of whether the Claimant has suffered any detriments and, if so, whether any detriment was imposed because the Claimant had done any protected act or acts. We remind ourselves of the need to avoid a fragmented approach and have had regard to the whole picture that emerged from the evidence when making the individual decisions set out below. We address each of the alleged detriments in turn following the order set out in the list of issues. In all there are

23 (a) R2 reassigned a project on trade calibration from C to Ms Draganova around 24 September 2018 [R1, R2]

682. This allegation refers to the Exotics Desktop TLO project. We have set out our findings above. We have not accepted the Claimant's case that the project was reassigned to Ivet Draganova. The Claimant was asked to do some work on this and Ivet Draganova was later asked to do a different piece of work. The Claimant's work was not moved to Ivet Draganova. This was perfectly normal and was not something a reasonable employee could consider to their disadvantage. As such we are not satisfied that the Claimant has established that she suffered any detriment at all. On this basis the claim cannot succeed.

683. For completeness we shall address the reason for the decision to ask Ivet Draganova to undertake work on this project. We shall assume that the burden falls on the Respondents to satisfy us that the reason for this was nothing whatsoever to do with any protected act. For completeness we shall consider not only those acts we have found were protected acts but also those which we find did not satisfy the relevant definition.

684. We find that James Kinghorn was not concerned in the least by the Claimant telling him off for using the expression 'birds'. He assumed that the Claimant saw his actions as light-hearted banter. His subsequent dealings with the Claimant do not disclose any grudge or suggest any desire to retaliate. We find that for him at least the matter was almost immediately put to one side.

685. The explanation given by James Kinghorn for why he allocated work to Ivet Draganova was that project work was assigned to team members with capacity. We have accepted James Kinghorn's evidence that there was not one continuous stream of work on the Exotics Desktop project but a series of individual tasks. We find that the reason that the work was allocated to Ivet Draganova was that she had capacity to take it on and was on the Claimant's own account pushing to be allocated additional duties. That is a reason that has nothing whatsoever to do with any protected act and for those reasons this claim does not succeed.

23 (b) Not reducing C's (i) workload in response to requests at weekly meetings and in respect of covering the work of departing members of staff or training new members of staff; or (ii) working hours to at least 9 a.m. to 5 p.m., or alternatively from 11 a.m. to 7 p.m., from late 2017 to January 2019. [R1, R2, R3]

686. We have accepted the fact that the Claimant's workload was not addressed elsewhere. We direct the reader in particular to our findings in respect of the failure to make reasonable adjustments. It follows from that that the Claimant has established the unwanted treatment she complains of.

687. In terms of the timing of such an allegation it seems that the Claimant can only really be complaining about the period before she went on long term sick leave. Thereafter there was no discussion about adjusting her hours. The importance of that is that only the protected acts which predated this point in time can possibly have been operative.

688. We have found that there was one protected act that occurred whilst the Claimant was at work – the complaint about James Kinghorn's language. We ask whether the Claimant has proven facts from which absent any explanation from the Respondent we could infer that the reason her workload was not adjusted was because of that protected act (and for completeness any other alleged protected act. We are entitled to have regard to the fact that it was not only the Claimant who was overworked although we remind ourselves that no comparator is required.

689. We do not find that the Claimant has proven any facts from which we could possibly infer that the Respondents have victimised her in respect of this matter. Accordingly, we find that the burden has not passed to the Respondent to show the reason for any such treatment.

<u>23 (c) Being denied extended sick pay on 12 March 2019 and income protection pay by R1, R2, R3. [R1, R2, R3]</u>

690. The Claimant's request to extend her contractual sick pay was refused on 12 March 2019. The fact the sick pay would not be extended was communicated by James Kinghorn. There is no evidence that Avneesh Singh had any input or say in the matter whatsoever. We have set out our findings about this above. We find that James Kinghorn acted on the Claimant's request that he ascertain whether sick pay might be extended as a matter of discretion. He made enquiries which were dealt with in New York. It is the HR Manager in NY that made the decision that the Claimant's circumstances were not sufficiently exceptional that sick pay should be extended and not James Kinghorn. There is no evidence that the individual in New York had any idea about any protected act that predated the decision they made.

691. We would accept that a refusal to exercise a contractual discretion can amount to a detriment.

692. We do not find that the Claimant has proven any facts that would permit us to infer that the reason her request was refused was an act of unlawful victimisation. On that basis the claim must fail. However, in case we are wrong we would add the following. We do not accept that here was any evidence that he HR manager in New York knew anything about any protected act. The contractual sick pay scheme that Barclays operated was already generous. The Claimant was seeking a substantial further indulgence. We find it

unsurprising that the scheme would only be extended on grounds of truly exceptional circumstances. The Claimant's circumstances were tragic but they were not exceptional. We find that the reasons that the discretionary sick pay was not extended were for those given and nothing whatsoever to do with any protected act.

693. The allegation includes a further suggestion that the reason that the Claimant was not given the benefit of the income protection scheme was an act of victimisation. We can deal with that swiftly. The reason that the Claimant was not given the benefit of that scheme is that she did not have sufficient qualifying service to be eligible. We have rejected the Claimant's case on qualifying service above. Whether that was fair or unfair we find that that was the only reason that the Claimant was not offered the benefit of this. That had nothing whatsoever to do with having done any protected act.

23 (d) not being notified that she would cease to receive her full salary as sick pay [R1, R2]

694. It is clear from the e-mails sent by the Claimant that she was aware that her salary would run out in March. That is why she asked James Kinghorn to ask for a discretionary extension. We understood what the Claimant to be saying was that when the Respondent wrote to her to formally tell her this it sent the letter to the office address.

695. An unjustified sense of grievance is not sufficient to establish a detriment. The Claimant knew that her full pay would run out in March 2019. She did not need to be told that. We consider that the Claimant could not reasonably believe that the fact that the HR department sent a letter confirming this to the office address was to her disadvantage in any way.

696. If we are wrong about that we must ask what the reason for this treatment was. We assume that the burden was on the Respondents. It seems to us that the reason is obviously not anything to do with any protected act. There is no reason whatsoever why anybody would think that withholding formal confirmation of what an employee will either already know or will inevitably discover when they look at their pay would be a means of retaliating because of a protected act. We find that the reason that letter was misaddressed was administrative incompetence or uncertainty about the Claimant's actual address (she was moving around this time). That reason is nothing to do with any protected act.

23(e) R2's refusal on 12 March 2019 to tell C the name of the HR partner to make a complaint to regarding the failure to continue sick pay [R1, R2]

697. The Claimant is correct in making this factual assertion. James Kinghorn did refuse to disclose the name of the individual in New York who had made the decision not to extend the contractual sick pay. We would accept that the Claimant wanted to know this person's name because she wanted to make direct representations about her/him or because she wanted to bring a grievance. Refusal to name the person was capable of amounting to a

detriment.

698. We shall assume that the burden of showing the reason for the treatment was not victimisation fell to the Respondents. James Kinghorn told us that the reason he withheld the identity of the individual who made the relevant decision was that he was not sure that it was his place to reveal that name. We say straight away that we do not think that was a very good reason. He could have asked somebody else if he was unsure and we are certain he would have been told that there was no reasonable basis for withholding the name. Against this we have made other findings, including our finding that James Kinghorn appeared unaware of the return to work process that would suggest that James Kinghorn had little managerial experience of HR matters. We find that in banking there is a heavy emphasis on confidentiality.

699. Taking all of the evidence into account, foolish and perhaps unkind as it was, we accept that James Kinghorn's refusal to give the relevant name to the Claimant was his belief that it would not be an appropriate thing for him to do. He has convinced us that this had nothing whatsoever to do with any protected act.

23 (f) Being given a rating of "Strong" rather than "Outstanding" in her 2018 end of year performance review in December 2018 by R2. [R1 and R2]

700. We have dealt with the same factual allegations at issue 1(d) above where the claim was put as a claim of race discrimination. We invite the reader to import those findings into this part of our decision. We found that James Kinghorn reached the genuine view that the Claimant's performance did not meet the threshold for an outstanding rating.

701. We have found that there was only one protected act that predated the end of year appraisal. We assume that James Kinghorn had the burden of showing that this matter had nothing whatsoever to do with his assessment of her performance. We find that he regarded being reminded about his language as trivial. We repeat our findings that the assessment is very positive. Barclays expect only a few exceptional employees to be rated as outstanding. We accept his evidence that he conducted a genuine assessment of the Claimant's performance with no regard to anything the Claimant might have said to him.
23 (g) Even with a rating of "Strong", being paid a bonus in March 2019 of only £1,600 which did not reflect the C's rating or hard work. [R1, R2 and R3]

23 (h) Denying C business updates and communication with R2, her line manager, from April 2019 onwards in breach of R1's Ill Health Policy. [R1 and R2]

702. The Claimant is correct about 2 things. Firstly; she is right that she had no further contact with James Kinghorn shortly after he communicated the decision that the Claimant's contractual sick pay would be extended. Secondly; that the Barclays absence management policy envisages a manager keeping in touch with an employee on long term sick leave.

703. We would accept that ordinarily an employee would want to be kept abreast of developments in the workplace and discuss their absence with their manager. As such a failure to do so might ordinarily amount to a detriment. Here the situation is different. The Claimant considered James Kinghorn responsible for numerous matters which she set out in her grievance. In particular she was particularly distressed about the failure to extend her sick pay. On 1 April 2019 she put all of these matters in a grievance. In that grievance the Claimant complains extensively about James Kinghorn. In those circumstances we are troubled by the suggestion that the Claimant considered the failure of James Kinghorn to contact her to be a disadvantage.

704. We shall assume that the Claimant did feel that she was disadvantaged. We shall also assume that the Respondents need to show the reason for any treatment. We find that James Kinghorn never gave any thought to following the absence management policy. He had scheduled regular 1-2-1 meetings with the Claimant but cancelled the electronic invitations once the Claimant commenced long term sick leave. Once the Claimant had sent her grievance letter of 1 April 2019 (which was a protected act) James Kinghorn knew that the Claimant had made a series of complaints against him.

705. We find that there were mixed reasons why James Kinghorn did not contact he Claimant. He was entirely unaware that this was something that was expected of him. In respect of developments within the business he knew that Avneesh Singh had opened up a line of communication with the Claimant and he believed that it was not his place to discuss the changes. Finally we find that he believed that the Claimant would not welcome any contact from him. We consider that to have been a reasonable assumption in the circumstances. The first two reasons we have set out are nothing whatsoever to do with any protected act. The last one requires some consideration. We would accept that 'but for' the fact that the Claimant had brought her grievance James Kinghorn might not have believed that she would not welcome any contact. However, we do not find that the reason for James Kinghorn not contacting the Claimant was because she had done a protected act itself. A comparator is not necessary, but we find that James Kinghorn would have acted in the same way had the grievance not referred to matters under the Equality Act 2010. That provides some evidence about his reasons. We are satisfied that James Kinghorn has shown that his reasons for not contacting the Claimant are in no sense whatsoever because of any protected act.

23(i) The redundancy process applied to C in -

i. Placing C at risk of redundancy; [R1 and R3]

ii. Failing to consult with C regarding the redundancy; [R1 and R3]

iii. Giving C a low score in the redundancy process; [R1 and R2]; and

iv. Failing to notify C of the outcome of the redundancy process at the same time as her colleagues which was on 2 April 2019. [R1 and R3]

706. We have dealt with all of these claims above as allegations of direct discrimination because of race, sex and disability. We have set out our findings about the reasons for and the reasonableness of the process in dealing with the unfair dismissal claim. Rather than repeat those findings once again we shall ask the reader to import those findings into this section.

i. Placing C at risk of redundancy; [R1 and R3]

707. We would accept that each of the matters relied upon by the Claimant amounts to a detriment. The issue is therefore whether the reason for any of that treatment was because the Claimant had made protected disclosures. We are able to state our conclusions relatively shortly.

708. It is clear from our findings elsewhere that 16 Analysts were placed at risk of redundancy together with a large number of other employees including James Kinghorn, Ivet Draganova and Employee A. We are satisfied that the decision to conduct such a wide scale reorganisation was nothing to do with the Claimant personally. In particular it had nothing to do with any protected disclosure. In reaching that conclusion we assume that the Respondent has the burden of proof.

ii. Failing to consult with C regarding the redundancy; [R1 and R3]

709. We have found that in one respect there could be said to have been a failure to consult the Claimant. That is that there was no meeting to discuss the scores the Claimant was given before a decision was taken to confirm her redundancy. We have found that the Respondents offered a meeting to the Claimant suggesting various means by which this could take place. There is no evidence of any unwillingness to meet. It was the Claimant who asked for matters to be concluded in writing.

710. We have found that the Claimant rejected the suggestion that the consultation should be put on hold pending the grievance. As such we find that she could reasonably have expected a response from Avneesh Singh.

711. The e-mail correspondence between Fiona Nicholls and Avneesh Singh discloses that Avneesh Singh believed that no response was needed from him because the grievance process was progressing. Once the grievance process is completed there were long delays by the Claimant in communicating with the Respondent caused by her ill health. A decision is then taken to confirm her redundancy.

712. We would accept that this could have been done better. It would have been better if Avneesh Singh wrote a detailed repost to the Claimant. We accept that the failure to do so could be seen as a detriment.

713. We need to consider if the Claimant has established facts from which we could infer that the failure to respond by e-mail was an act of victimisation. We do not believe that we could draw such an inference. The evidence was that Avneesh Singh was ready willing and able to discuss the reasons for the

scoring. We find that the Claimant had not established facts from which we could draw an inference that the reason for this treatment was that the Claimant had done any protected act.

714. If we are wrong about that we go on to consider the reason for the treatment having regard to the Respondent's explanation and assuming that the Respondents have the burden of proof. We find that there was a misunderstanding evidenced by the correspondence at that time. Avneesh Sing sent an e-mail to Fiona Nicholl in which he set out his understanding that he was not required to do anything more pending the grievance outcome. He was not contradicted. We find that Fiona Nicholl failed to tell Avneesh Singh that he should respond to the Claimant if she would not attend a meeting. We do not find that she was influenced in any way by the fact that the Claimant had done any protected acts. We find that if she had misunderstood what was required it was a mistake and no more than that. When the process is resurrected, we find it unsurprising that after so much time a decision is taken to confirm the redundancy and offer the Claimant an appeal. Again, we are satisfied that the reason for this was not that the Claimant had done any protected act. We find the reason for this was the delay that had taken place and a wish to bring the process to some conclusion. None of these reasons is because the Claimant had done a protected act.

23 (j) Being denied fair internal complaints processes (grievances and appeals): [Claim No. 3201137/2020 (the "Second Claim")]

> i. denied fair grievance by being removed access to work profile since 22 January 2019 [R1]
>
> ii. denied fair appeal (raised 15 October 2019) being:
>
> > I. contacted on 21 October 2019 and 11 November 2019 - 15 November 2019 by a redeployment employee and, [R1]
> >
> > II. removed system permissions 22 October 2019 before outcome of appeal [R1]

715. Ms Berry complained, with some justification, that the scope of this allegation was unclear. Ms Ruxandu suggested that it was clear enough that the Claimant was complaining about the grievance process as a whole as well as the minor specific manner that had been identified. In the event we considered the claim on the wider basis but given the broad-brush nature of the allegations we can not do better than to deal with the allegations relating to the grievance in the same manner.

716. We have set out above our findings about the grievance process. The correspondence from the Claimant suggests that there were extensive delays. We have disagreed. Barclay's grievance procedure gives indicative time for dealing with grievances, but that document is careful to recognise that there may be exceptions. We have noted a slight delay in appointing Karen

McGoldrick but accept that she was the second person to be asked. We see a slight delay in proposing a meeting but that is explained by Karen McGoldrick's professional commitments. Thereafter, when there is to be no face to face meeting, we find that Karen McGoldrick does a comprehensive job of trying to extract from the claimant what it is that she is complaining about and asking her for any evidence. Had there been a face to face meeting that would have been quicker. Thereafter we find that Karen McGoldrick had work to do interviewing employees and gathering evidence. Overall we find that the grievance process is reasonably rapid and far quicker than many we have dealt with in other cases.

717. In this claim we are not concerned with the outcome of the grievance unless that casts any light on whether the process has been an unlawful act of victimisation. Here we find that Karen McGoldrick approached the grievance with an open mind. She finds for the Claimant in respect of the crucial issue of working in excess of contractual hours (although not accepting the Claimant's whole case). It is clear from the internal correspondence that she thought that the Claimant had a moral right to remuneration but was persuaded that this should not result in any payment. We do not think she just rolled over she was persuaded that there was no legal right to pay and that rewarding the Claimant would create a difficult precedent. In one respect we find that Karen McGoldrick was rather too easily persuaded to find against the Claimant. That is in respect of the 'birds' comment where she found there was insufficient evidence. We do not think her analysis of that was as thorough as it could be.

718. Clearly Karen McGoldrick knew that the Claimant had done protected acts as the grievance itself was a protected act. The question for us is whether there is any basis to find that the reason that the grievance was conducted as it was and whether the reasons that were given in the outcome were because of any protected act.

719. We were impressed by Karen McGoldrick as a witness. She was prepared to find fault with Barclays where she felt it was merited. She was clearly annoyed not to have been given the full picture about the scheme for awarding a bonus. We have confidence in her independence. We find that her reasons for adopting the process she followed and the conclusions she reached had nothing to do with the fact that the Claimant had done any protected act. In those circumstances the broad attack on the grievance process must fail.

720. The first sub-paragraph of this allegation is plainly an error. The Claimant was not permanently denied access to the Respondent's IT system until 22 January 2020 by which time the grievance procedure was concluded. The Claimant was, very briefly, denied access to the system when Steven Thuong sat at her desk. We do not find that this had any impact on her ability to bring a grievance. As such we do not find that the Claimant has established that being denied access to the IT system has affected her ability to bring a grievance and the claim must fail on that basis.

721. The Claimant then addresses the appeal against her dismissal for

redundancy. In her final submissions Ms Ruxandu did not suggest that Duncan Lord victimised the Claimant himself. Her attack on his conclusions was limited to the fact that he relied on information provided by Avneesh Singh. We shall therefore deal with this allegation on the rather narrow basis found above.

722. The first complaint is that the Claimant was contacted by the person assigned to assist her to find another role before the appeal is determined. As we have indicated above the Claimant failed to realise at the time and failed to accept Fiona Nicolls word for it that it was perfectly possible for the Claimant to entertain the idea of seeking alternative employment whilst appealing her selection for redundancy at the same time. Offering the Claimant assistance on a contingent basis was sensible. If the Claimant sees this as evidence of an unfair appeal, she is wrong. In any event it is impossible to see how the Claimant could invite the Tribunal to infer that by offering her assistance in a redeployment exercise the reason for that was to victimise her. We find that there was no detriment and the Respondents have satisfied us that the actions were not because the Claimant had done any protected act.

723. Whilst we have not made any separate findings the Claimant is correct that her IT permissions were removed for a brief period from 22 October 2019. That date is the date that the Claimant would have started her displacement leave had she not opted to defer it. Barclays' IT department were notified of this and followed their standard practice of blocking access to the IT system. The Claimant protested about this and her access was restored shortly after that before it was cut off at the start of her displacement leave on 22 January 2020.

724. We find that the reason that the IT access was shut off was a mistake. The fact that the Claimant had an option to defer her displacement leave had been overlooked. When that was noted the Claimant's IT access was swiftly restored. We find that the mistake that was made was just that, an error or misunderstanding, that was the reason for the treatment complained of. We find that had nothing whatsoever to do with the fact that the Claimant had done any protected act.

<u>23(k) Being denied personal data (solicited via Subject Access Request) by both withholding and redacting in the period 19 December 2019 to present) [R1] [the Second Claim]</u>

725. The Claimant complains that when she made a subject access request some documents were so redacted as to provide no information, and some were not disclosed at all. We find that she is correct in her complaints. We accept that not being provided with documentation a person believes might support their claims against their employer amounts to a detriment.

726. We were told, and accept that it is the case, that Barclays has a separate department dedicated to subject access requests. We were told that it was that department that had redacted documents. We are entitled to have regard to that evidence in assessing whether the Claimant has established facts from which we might infer that the reason for this treatment was that she had done

a protected act. We conclude that she has not.

727. If we are wrong about this, we will look at the reasons for the treatment complained of. We find that Barclays do have a separate department that deals with subject access requests. There is no evidence that anybody in that department had any knowledge of any protected acts when the request was made. However, that would have become apparent if anybody looked at the claimant's grievance. We find that the redactions that took place were extensive. We bear in mind the fact that a subject access request allows a person to see their personal data. They are not entitled to see the personal data of others. We find that that distinction was robustly policed when redacting documents. That also gives us the reason for the treatment which we accept is the only reason. The reason for the redaction is the belief that the redacted parts of the documents are not disclosable. That is not because the Claimant did a protected act.

728. The claimant also complains that the exercise missed documents. We have regard to the fact that a vast number of documents were disclosed. Those missing did not assist the Claimant in her case. Even the documents that Avneesh Singh disclosed very late in the proceedings helped the Respondent as much as they helped the Claimant. There is no evidence to support a finding conscious or subconscious that documents were withheld because the Claimant had done a protected act. We find that insofar as documents were not disclosed these were administrative errors. That is not an act of victimisation.

<u>23 (I) Removing access to work profile 22 January 2020 preventing access to information and employer-provided healthcare [R1] [the Second Claim]</u>

729. The Respondent's redundancy policy provides for a period of displacement leave and then a period of contractual notice. Employees serving their notice are generally not required to work. As a matter of policy where an employee is serving their notice the Respondent restricts access to its IT systems.

730. The Claimant's access to the Respondent's IT system was cut off on 22 January 2020. We would accept that, at that time, the Claimant found that access useful in order that she could access documents about the scope of her medical insurance. Whilst the IT system was not the only source of this information it was a convenient source. As such we would accept that the Claimant has established that she has suffered a detriment.

731. We move directly to the reason for the treatment and assume that the Respondent has the burden of proof. We are satisfied that the reason that the Claimant's access to IT was cut off was that she was working her notice and, as a matter of IT security, it was considered necessary to stop her access. We accept that this is entirely routine, and it appears to us to be very sensible. We are satisfied that the only reason for this treatment was IT security and was nothing whatsoever to do with the fact that the Claimant had done any protected acts.

Unfair dismissal

The law

732. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. It is a right available only to those who have been continuously employed for at least two years or those dismissed for what are generally referred to as automatically unfair reasons. Where, as here, there is no dispute that an employee with more than two years continuous service was dismissed, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

> *"98 General.*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) 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.*
>
> *(2) A reason falls within this subsection if it –*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee*
>
> *(c) is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *(3) ...*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), 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.

733. The first part of the test focuses on reason for the dismissal. The burden of proof is upon the Respondent to show that the dismissal was for a potentially fair reason. Where there is more than one reason for dismissal it is necessary for the Respondent to show that the principle reason was potentially fair.

734. In this case the Respondent says that the principal reason for the dismissal was 'redundancy'. A dismissal will not be by reason of redundancy unless the statutory definition of redundancy is met. Redundancy is defined in section 139 of the Employment Rights 1996. The material parts of that section read as follows:

139 Redundancy.

(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.

(2) - (5)….

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

(7) …

735. Sub-section 139(1)(b) of the Employment Rights Act 1996 refers to the 'requirements' of the employer. Where the employer has taken the decision to

reduce the numbers of employees for a genuine business reason it is not open to a tribunal to investigate whether that decision was sensible see- ***James W Cook & Co (Wivenhoe) Ltd v Tipper*** **[1990] IRLR 386**. That does not preclude a tribunal from investigating whether the employer held a genuine belief in the facts relied upon to conclude that employees needed to be made redundant. In forming that belief, it was said by Slynn J in ***Orr v Vaughan*** **[1981] IRLR 63,** that the employer must act on reasonable information reasonably acquired.

736. In ***Safeway Stores plc v Burrell*** **[1997] IRLR 200**it was suggested that there are three questions: First, has the employee been dismissed? Secondly, if so, has the requirement of the employer's business for employees to carry out work of a particular kind ceased or diminished? And thirdly, if so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

737. The existence of facts that might support a genuine need to make redundancies does not by itself demonstrate that an employee dismissed in those circumstances was dismissed for the reason, or principle reason, of redundancy. Whether that is the case is a question of fact and causation for the tribunal see ***Manchester College of Arts and Technology (MANCAT) v Mr G Smith*** **[2007] UKEAT 0460/06**

738. If the Employer is unable to show that a dismissal was for a potentially fair reason, then the dismissal will always be unfair. If that burden is discharged, then the Employment Tribunal must go on and apply the test of fairness set out in sub-section 98(4) of the Employment Rights Act 1996 set out above.

739. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions, but both of those decisions might be reasonable.

740. The Employment Appeal Tribunal in ***Williams v Compair Maxam Ltd*** **[1982] IRLR 83** gave general guidance to the factors that need to be considered when assessing the fairness of a dismissal by reason of redundancy. It was said:

> *'In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are*

currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

(1) *The employer will seek to give as much warning as possible of impending redundancies 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.*

(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 those criteria.*

(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.*

(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.*

(5) *The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'

741. When choosing who should be made redundant and who should be retained an employer may need to identify a pool of employees from which the

redundancies will be made. There is no requirement that the pool be limited to employees doing the same work see ***Taymech v Ryan*** **[1994] EAT/663/94**. The question will be whether the employer has genuinely applied its' mind to the question and whether its conclusions fell within a band of reasonable options see ***Capita Hartshead Ltd v Byard*** **[2012] IRLR 814**.

742. Whilst the focus of the EAT in ***Williams v Compair Maxam*** was towards collective consultation the importance of consultation in general but also with individual employees was emphasised in ***Mugford v Midland Bank plc*** **1997 ICR 399**, EAT where HHJ Clarke giving the judgment of the tribunal said:

> *'(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.*
>
> *(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.*
>
> *(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.'*

743. The suggestion in ***Williams v Compair Maxam*** that fair selection criteria should be capable of being objectively checked does not mean that it a dismissal will be unfair just because assessment against some ostensibly fair criteria requires some exercise of judgment by the manager doing the scoring. In ***Samsung Electronics (UK) Ltd. v Monte d'Cruz*** **(UKEAT/0039/11/DM)** , at para. 27) Underhill J (as he was) said:

> *' "Subjectivity" is often used in this and similar contexts as a dirty word. But the fact is that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement….'*

744. Where an employer has adopted a reasonable system for selecting between employees affected by a redundancy system then, absent any conduct which mars the fairness of the scheme the employer will have acted reasonably - ***British Aerospace plc v Green and ors*** **1995 ICR 1006, CA**. It follows that it is not the role of the employment tribunal to minutely scrutinise any scores allocated by an employer absent any underlying unfairness.

745. An employer should take such steps as are reasonable to secure alternative employment for an employee displaced because of redundancy. As a general rule it would be reasonable to provide the employee with such information about the terms and conditions applicable including the financial prospects see ***Fisher v Hoopoe Finance Ltd*** **EAT0043/05.**

Unfair dismissal - discussions and conclusions

746. There was no dispute that the Claimant was dismissed and by the time of that dismissal had sufficient service for the purposes of Section 108 of the Employment Rights Act 1996 to bring a claim of 'ordinary unfair dismissal and that she presented her claim within the time limit imposed by Section 111 of that act. The first matter identified as an issue was whether the reason for the Claimant's dismissal was for the potentially fair reason of ''redundancy'.

747. The statutory definition of redundancy is set out above. We are entirely satisfied that if, as Barclays says in this case, it took a decision to have work formerly done by employees in London to Pune then, an employee dismissed in London for that reason would be dismissed by reason of redundancy. The Claimant's challenge to this is quite narrow. She asserts that as a matter of fact the work carried on by her in London continued to be carried on in London. The evidence she says supports this is her assertion that Steven Throng and Kumar Pradhan undertook the work she did in London.

748. We have set out in our general findings of fact set out above that Steven Truong was not recruited to fill the Claimant's position. He already worked for Barclays and his reporting line was transferred to James Kinghorn. We accept that he did not do the Claimant's work. The fact that he briefly sat at her desk is the only evidence put forward to support the suggestion that he did. We have preferred the evidence of James Kinghorn in respect of this. Duncan Lord also reached the same conclusion having investigated the matter.

749. We have not set out any findings in respect of Kumar Pradhan but do so here. The Claimant has simply asserted her belief that Kumar Prahhan was undertaking the work that she did and that she assumed that he did so based in London. There was no evidence at all to support that assertion. James Kinghorn told us that Kumar Pradhan did joint the ROST team but that he was based in India. We accept that evidence and it could not be reasonably contradicted by the Claimant.

750. We have accepted that the decision to move 10 BA4 Analyst roles to Pune was part of a wide-ranging reorganisation that included Barclays reallocating work from the London Office. We find that this led to the Claimant being displaced from her existing role and, that when she did find or take up any other role that was the reason that her employment contract was terminated. We find that that reason satisfies the definition of redundancy and accordingly Barclays has satisfied us that there was a potentially fair reason for the dismissal. Accordingly, we turn to the issue of whether the decision to treat that reason as a sufficient reason to dismiss the Claimant was fair or unfair.

751. The first suggestion made by the Claimant was that her dismissal was unfair because of a lack of consultation. In her appeal against her dismissal the Claimant says that there was '*an absence of any consultation process'*. We do not accept that this was the case.

752. We have set out in our general findings that we accept that the Respondent engaged in collective consultation. There was not a great deal of evidence about what was or was not discussed during that consultation. The selection criteria that were used in this case are plainly selection criteria used in other exercises.

753. As we have set out above the fact that there is collective consultation does not relieve an employer of the need to consult employees individually - see ***Mugford v Midland Bank plc***. However, where there has been collective consultation and the results of that are that there is no change to the proposals to make redundancies and agreement is reached to use existing selection criteria then, the content of individual consultation might reasonably exclude those matters and focus on the position of the individual.

754. The Claimant was notified of the redundancy situation after other employees. We have set out our findings of fact above (and elsewhere when considering the discrimination claims), The reason for the delay was that further information was awaited as to the reasons why the Claimant and Employee A were off work. It is clear that some thought was given as to whether their health would be adversely impacted. We find that a short delay in these circumstances did not adversely impact upon the Claimant to any real extent. We do not consider it unreasonable to factor in the impact to health of notifying an employee of the possibility of redundancy when an employee is absent from work through ill-health.

755. Once the Claimant is notified of the redundancy situation she is told of the proposals and for the reasons for them by Avneesh Singh. He used a standard script which we find gave a clear and accurate picture of what was proposed. Avneesh Singh also sent the Claimant policy documents which are clear and, had they been read and understood, would have explained that if there were insufficient volunteers under the redundancy process, compulsory redundancies would follow using selection criteria. If that was not clear to the Claimant, then we do not think that she could have failed to recognise that that was the case when she received a response from Fiona Nichol to her e-mail of 1 April 2019. Fiona Nichols' e-mail does explain to the Claimant what is happening and why.

756. Avneesh Singh did attempt to contact the Claimant on 2 April 2019. Had the Claimant felt well enough to take the call we have no doubt that Avneesh Singh would have followed the standard script that was used for all of the employees who were 'Impacted' (which means that they had been selected for redundancy. There is a short delay until 9 April 2019 to impart that information because the Claimant was asking that all further communications were in writing. In her e-mail of 4 April 2019 the Claimant says (with our emphasis added: *'On Tuesday., 2nd of April I was told by my Line Manager to :expect a*

phone call from Avneesh to be informed of the outcome of the preference stage and I think also decisions'. We find that the reference to decisions could only be a reference to the decisions about who was selected for redundancy and who was not. Accordingly, we find at the time the Claimant had a reasonable understanding of the fact that there was a selection process. She did not know that the desktop selection exercise had been undertaken some weeks before.

757. Avneesh Singh's e-mail to the Claimant of 9 April 2019 included her scores and repeated the reasons for the redundancy exercise. We find that communication was clear, and that the Claimant would have understood that she, and 9 others, had ben displaced from their roles because of the decision to move those roles to Pune. The e-mail sets out the steps that would be followed. There would be a meeting to discuss the outcome and thereafter various steps would be taken to explore redeployment.

758. Taking all of these communications together we do not find that there was any failure to inform the Claimant about what was happening and why and what would happen in the future. We accept that at this point the Claimant had not had an opportunity to discuss her scores with Avneesh Singh. The reason for this is that she had expressed her preference or need to communicate in writing. Accommodating that wish did mean that the information about the scores was imparted without any discussions which could have taken place had there been a face to face meeting. We have regard to the fact that throughout this period Fiona Nicholls seeks to persuade the Claimant to engage in a meeting either in person or by telephone.

759. The Claimant sent an e-mail on 14 April 2019 in which she sent out her critique of the scores she was given. She never got a response from Avneesh Singh that dealt with the points that she made. This appears to be the central point made by the Claimant and one which she has categorised as a lack of consultation.

760. We find that there are various reasons why the Claimant's scores were not discussed with her at that stage. The first is that she had brought a wide-ranging grievance. This initially prompted Fiona Nicholls to suggest that the consultation was put on hold. Once the Claimant made it clear that she did not want this to happen Fiona Nicholls continues to suggest a meeting. We have no doubt that Fiona Nicholls sought to persuade the Claimant to engage in a meeting because she thought that this would be the best forum to discuss the issues. However, we also find that the Claimant had made her position clear that she did not want to attend a meeting by any means at all. What happens is that there was a delay. When Fiona Nicholls attempted to get things moving again there were delays in the Claimant responding as she was by that time very unwell.

761. Ultimately a decision was made to tell the Claimant she was to be dismissed without any response to the challenges that she had made to her scores. However, when she complained about this it was treated as an appeal and Duncan Lord undertook an appeal which included reviewing whether the scores given were fair and rational. He concluded that they were.

762. This part of the process could have been done better. Avneesh Singh could have responded to the Claimant. He could have explained why he had come to the conclusions that he did. It is unfortunate that he did not. However, had he done so we find that he would not have altered the scores and the Claimant would not have been satisfied with his response. Nevertheless, we consider this to be an error by Barclays that needs to be assessed in the round when considering the fairness of the dismissal.

763. We are satisfied that the decision taken to pool all 16 BA4 Analysts was one open to a reasonable employer. The level of responsibility was similar as broadly was the field of work. The BA4 analysts had a common job description. An Analyst appointed to one role could be required to do a similar role – Matteo Pasini being one example of that.

764. We turn to the question of the scores. The Claimant says that her scores were too low. She then says that Ivet Draganova's scores were too high (or perhaps that they could not have been higher than hers). The Claimant focussed on showing that Ivet Draganova did not merit the score she was given. We pointed out that even if that were correct, as the Claimant had the same score as all but one of the analysts selected for redundancy the result of showing that Ivet Draganova was unfairly favoured was not necessarily that the Claimant would have been retained.

765. The Claimant has suggested that Ivet Draganova (amongst others) was a slow learner and unable to come up to speed. However, as we set out above, she complains that Ivet Draganova was encouraged to seek out new tasks (which in the Claimant's mind she would not be capable of). We have not accepted that Ivet Draganova was as slow as suggested by the Claimant. In this claim our view is in any event irrelevant. What is important is the view of her managers. We need to consider whether the score given by Avneesh Singh was an honest assessment of the Claimant and Ivet Draganova.

766. The Claimant has commented that Ivet Draganova is, by default, given a strong/strong score for 2017 and 2018. We find that it was reasonable to take this approach. The policy of the Respondent was that 75% of employees would be given such a score. They had to be exceptionally good or exceptionally bad to get any other score. Defaulting to needs improvement for an employee who had less than 2 years' service would have the effect of them being made redundant on that basis alone. The Claimant herself was a beneficiary of this approach as she had not been assessed in 2017.

767. We have found above that the strong/strong assessment of the Claimant in 2018 was an honest and reasonable assessment of her abilities. We note that this took place before the Claimant was on long term sick leave and well before the redundancies were announced.

768. In her e-mail of 14 April 2019 complaining of her scores the Claimant pointed to praise she obtained in 2019 and the fact that she had received a commendation for her work. We agree that those matters point to a good employee. However, we agree with the Respondent that they do not

necessarily mean that the Claimant was an exceptional employee.

769. We considered whether the score given to Ivet Draganova indicated any possibility of unfairness. As we have noted above it would not necessarily follow that if Ivet Draganova was unfairly favoured the Claimant would have been uniquely disadvantaged. We did consider whether there was any evidence that a decision had been taken to retain one BA4 Analyst to do the ROST IB MO work in London. We asked some questions about that during the course of the hearing. Our reasons for doing this were that it appeared to us that there was little time to handover that work to Pune. Only James Kinghorn and Ivet Draganova were at work. If Ivet Draganova was selected for redundancy any training she could give would be limited. Avneesh Singh was adamant that this was not a consideration. He acknowledged that making the entire team redundant would add to the pressure, but he did not think that insurmountable. The documentation we have seen is not consistent with a pool within a pool. We see that James Kinghorn was also placed at risk of redundancy (although he scored highly). We have concluded that there is no evidence to support the theory that Ivet Draganova was scored highly simply because she was the last BA4 Analyst in the London team. There were other teams including in New York who could have assisted in any handover. This and the evidence as a whole, gives us the confidence to accept Avneesh Singh's explanation.

770. Ivet Draganova did better than the Claimant (and others) because she was given a score of 8 for customer focus. The starting point for asking whether this was justified (in the sense that it was unreasonable or unfair) was to look at the comments section of her scoring and compare that to the comments given to the Claimant and others. Ms Ruxandu pressed Avneesh Singh on this point during cross-examination. She made the forceful point that there really was nothing said about Ivet Draganova in the comments to the competency section that would justify a higher score than that given to the Claimant. We agree. There is really nothing in the comments that would suggest that Ivet Draganova is performing to an exceptional level.

771. We also considered it important to note that in the 'top secret' e-mail of 5 November 2019 the Claimant ranked just above Ivet Draganova. It seems to us that this indicated that at the time Ivet Draganova was not identified as exceptional (nor was the Claimant in contrast to Matteo Passini). On the other hand this e-mail would not indicate that Ivet Draganova was more favoured than the Claimant.

772. We have set out in our findings of fact that the Claimant herself identified Ivet Draganova as putting herself forward in new areas. This corresponds with what Duncan Lord found during the appeal process from his conversations with Avneesh Singh. The redundancy selection exercise took place in mid-March. By then the Claimant had been absent for 2 months. An assessment of a persons ability in March may well be different than an assessment undertaken 3 months earlier. It is not our role to decide for ourselves whether Ivet Draganova's performance improved allowing her to overtake the Claimant. We need to decide whether the assessment that she

had was tainted by any unfairness (and elsewhere any discrimination). There was clear evidence of Ivet Draganova putting herself up for additional work. That is the sort of behaviour likely to justify a higher score for customer focus. There was no evidence that Ivet Draganova made any errors. The Claimant says that she spoke to her in May 2019 and she complained of working incredibly long hours. This suggests she was putting in a great deal of effort. Taking all of these matters into account we believe that there was a rational basis for giving Ivet Draganova a score of 8 for customer focus. This is not fatally undermined by the failure of Avneesh Singh to make that clear from the comments that he added to her scoring sheet.

773. We consider the scoring system was reasonable in its design and, we find that in respect of the Claimant and Ivet Draganova, Avneesh Singh made a reasonable and fair assessment of their abilities. Others may have come to different conclusions. The Claimant certainly does not agree. We consider that when Duncan Lord reviewed the scores on appeal, he did so with an independent eye alive to questions of unfairness. We agree with his assessment that there was nothing unfair about the assessment.

774. We then turn to the issue of attempts to seek alternative employment. We have set out in our findings above that the Claimant refused to engage with the assistance offered to her in securing a new role. She initially took the view that it was improper to ask her to do so before the outcome of her appeal was known. However, even after her appeal was turned down, she did not pursue any internal role. We have set out in our findings of fact our conclusion that had she done so there were vacancies that came up that she could have applied for and, had she been able to take them up, she could have retained a job. We have noted that even the weakest candidate of the 16 Analysts managed to find a role. Some of the employees successful in the selection exercise had resigned before the Claimant's dismissal took effect creating new vacancies. These vacancies were advertised internally, and the Claimant could have applied but did not. Several vacancies were specifically brought to the Claimant's attention.

775. We find that reasonable efforts were made to explain to the Claimant that she could apply for vacancies without prejudice to her appealing the selection process. We find that she was appropriately encouraged to engage with this process.

776. We were told that Ivet Draganova resigned before the Claimant's dismissal took effect. Avneesh Singh was asked why in those circumstances the role was not just offered to the Claimant. His response was that no decision had been taken at that stage whether Ivet Draganova would be replaced and if she was where that role would be based. His evidence was consistent with his evidence around the recruitment of the Claimant. The departure of one employee did not mean that there was automatically a vacancy to fill and obtaining authority to do so was a slow exercise. Accordingly we accept his evidence.

777. When assessing the fairness of the decision to dismiss the Claimant we

need to look at the entirety of the process. We have accepted that the redundancy process was genuine and that the selection pools and selection criteria were ones a reasonable employer might have adopted. At the heart of this case was an attack on the scores given to the Claimant and Ivet Draganova. We have not found any unfairness. We may not have allocated the same scores, but it is not for us to substitute our view. We have found that there was a failure to respond to the Claimant's criticism of her scores until the appeal process. However, we find that there was a review of the scores at that stage. We find that Barclays did make reasonable efforts to seek an alternative post. The Claimant was either unwilling or unable to engage with this. In the circumstances we find that overall Barclays acted reasonably in treating the redundancy of her existing role as a sufficient reason to dismiss the Claimant. Accordingly we find that the dismissal was fair.

778. During submissions Ms Berry asked us to consider whether, if we found the dismissal unfair, we would have reduced any compensatory award on the basis that the Claimant's health had deteriorated to such an extent that she would inevitably have been fairly dismissed for that reason at some point. There was certainly some evidence that might support that conclusion. The Claimant had told us that it was pointless engaging with the issue of redeployment because she could not work. Our conclusions above mean that it is not necessary to conduct this exercise and we decline to do so. We do not yet know how the Claimant will put her case on remedy in respect of the claims that have succeeded and we do not wish to make any findings that would trample on that exercise unless it is necessary to do so.

Time limits for the claims brought under the Equality Act 2010.

779. Section 123 of the Equality Act 2010 imposes a time limit for the presentation of claims to an employment tribunal. The material parts say:

> *'123 Time limits*
>
> *(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
>
> *(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*

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

(3) For the purposes of this section—

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

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

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

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

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

780. The leading case on the meaning of the expression 'act extending over a period' used in sub section 123(3) of the Equality Act 2010 is ***Commissioner of Police of the Metropolis v Hendricks*** **2003 ICR 530, CA** as confirmed in ***Lyfar v Brighton and Sussex University*** Hospitals ***Trust*** **2006 EWCA Civ** 1548**, CA.** The test is not whether the employer operated a policy practice or regime but to focus on the substance of the complaint and ask whether there was an ongoing situation or continuing state of affairs amounting to an 'act extending over a period as distinct from a succession of isolated or specific acts. Even where there is an act extending over a period it is necessary to show that that continued to a point where a complaint relying upon a single act would have been in time.

781. In ***Hull City Council v Matuszowicz*** **2009 ICR 1170, CA** the Court of Appeal confirmed that a failure to make reasonable adjustments is an omission. Sub-Sections 123(3) and (4) of the Equality Act 2010 provide that where there is a decision not to act that time will run from that decision but whether there is no decision at all time will run from the point at which an inconsistent act is done or where there is no such act the point at which it would have been reasonable to act.

782. If any claim has been presented after the ordinary time limit imposed by sub-section 123(1)(a) of the Equality Act 2010 (a period within 3 months extended by the provisions governing extensions of time for early conciliation) then the tribunal cannot entertain the complaint unless it is just and equitable to do so. The following propositions have emerged from the case law:

782.1. ***Robertson v Bexley Community Centre t/a Leisure Link*** **[2003] IRLR 434, CA** reminds a tribunal that whilst the discretion to extend time is wide the burden is on the Claimant to show why time should be extended and as such an extension is the exception and not the rule.

782.2. In deciding whether or not to extend time a tribunal might usually have regard to the statutory factors set out in ***the*** Section 33 of the Limitation Act 1980 see ***British Coal Corporation v Keeble and ors*** **[1997] IRLR 336, EAT**.

782.3. Whether there is a good reason for the delay or indeed any reason is not determinative but is a material factor ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **2018 ICR 1194, CA**.

782.4. It will be an error of law for the Tribunal not to consider the relative prejudice to each party ***Pathan v South London Islamic Centre*** **EAT 0312/13**

783. We have found that the Claimant has succeeded in 2 claims. These are the direct sex discrimination claim where James Kinghorn used the phrase 'Birds' and the claim that there has been a failure to make reasonable adjustments. As we have set out above a failure to make reasonable adjustments is an omission. Accordingly, on our findings, there is no act extending over a period. We should say that even if there was it would still be necessary to make a finding whether it would be just and equitable to extend time. It is necessary to consider each or the two successful claims separately.

784. We have found above that James Kinghorn used the phrase 'Birds' on a few occasions. We have concluded that this stopped in the early months of 2018. The Claimant did not present her first claim until May 2019. Accordingly, the claim is around 10 months out of time. That is a significant delay.

785. The Claimant did not specifically address issues of time in her witness statement. In particular she does not say why she did not present a claim any earlier. The fact that the Claimant has not dealt with this expressly does not prevent us from looking at the entirety of the evidence and reaching our own conclusions. Our starting point is to consider why the Claimant issued her claim when she did. We find that the trigger to the Claimant deciding to bring a claim was the decision by the Respondent that there would be no discretionary extension to her sick pay. The fact that the Claimant's salary ended put her in a very difficult position. At that point the tone of her correspondence changes radically. She does not hold back from criticising the way she has been treated.

786. We have regard to the fact that this was the Claimant's first job in investment banking. As such we would accept that she would be keen to do well and did not want to be seen as a troublemaker. An example of this was her raising her concerns about workload as a team issue rather than just an issue for her. We find that the Claimant would have been reluctant to raise the issue of James Kinghorn's sexist language for fear that her career would be damaged if she did. We also find that whilst she was offended by this language, she was not so offended that it would have been worth the risk of raising this. When the Claimant did raise it, we find she recognised she had nothing left to lose.

787. We infer that a further matter that affected the timing of the claim is the fact that through 2018 and into 2019 the Claimant became progressively more unwell. She had a great deal on her plate. In those circumstances it is unsurprising that bringing proceedings was not a priority.

788. We must consider prejudice. We do so from the position of having heard all of the evidence. That allows us to make a good assessment whether the Respondents have been evidentially prejudiced by the delay. We note that James Kinghorn broadly admitted what the Claimant had said during the grievance procedure. We accept that his recollection was not perfect. We doubt whether it would have been much closer to the events. We find that James Kinghorn did not then or now consider that he had done anything serious. We find that there is no evidential prejudice whatsoever caused by the delay. There really was no substantial challenge to the Claimant's account.

789. The respondent will be prejudiced in that if we extend time it will not be able to avail itself of a statutory defence. Given the length of the delay we would agree that this is a relevant factor of some weight. Normally a respondent would not expect to deal with a minor incident of discrimination that occurred so long ago.

790. The prejudice to the Claimant of us not extending time is that she will not be entitled to a remedy for an act we have found to be unlawful. We have not heard any submissions on remedy but, realistically, this was not the most serious instance of sexist language. The Claimant did not formally complain at the time and she cannot anticipate a substantial award of compensation. Nonetheless to refuse to extend time would deprive the claimant of a remedy she would otherwise be entitled to.

791. Taking all of these matters and looking at all of the circumstances of the case we are persuaded that, applying the principles set out above, it would be just and equitable to extend time. We find that the junior nature of the Claimant's position made her particularly vulnerable to having to stay quiet to fit in and get on. That is a matter which in our view outweighs the factors that suggest that time should not be extended. We conclude that the Tribunal does have jurisdiction to deal with this claim.

792. We need to identify, as precisely as we can, when time ran for the failure to make reasonable adjustments. We have found that the Claimant met the statutory definition of disability in respect of endometriosis (although not then diagnosed) by 1 October 2017. We have also found that the Respondent had sufficient constructive knowledge of the disability and the disadvantage suffered by the Claimant on the same date. We find that there was no decision not to adjust the Claimant's hours nor an act inconsistent with making a decision. We find that it would have been reasonable to have acted 1 month after having sufficient knowledge to give rise to a duty to make adjustments. The effect of this finding is that the claim that there has been a failure to make reasonable adjustments is 18 months out of time.

793. We repeat our findings about the reason for the delay. We would add to those the fact that the difficulties experienced by the Claimant in respect of working long hours became progressively worse. She was consistently told that the matter would be addressed but it never was.

794. We do not consider that the Respondents have suffered any significant evidential prejudice. The fact that the ROST IB MO team worked for long hours was clearly documented. We accept that the facts relied on by the Claimant to establish the point at which she met the statutory definition of disability were in part supported only by her oral evidence. However, that would have been the case even if the claim had been brought earlier. If there had been any evidence to suggest that the adjustment contended for by the Claimant was unreasonable then we find that it would have been available to the Respondent had it chosen to deploy it.

795. We accept that the Respondents will not be able to avail themselves of the statutory defence if we extend time. The delay in this case is substantial.

796. It is self-evident that refusing to extend time would prejudice the Claimant. This claim was very much at the heart of her grievances and at the heart of the claims presented to the Tribunal. We have found that the respondent acted unlawfully. In seeking a remedy, the Claimant will point to the effect that this had on her and the period over which there has been a failure to assist her.

797. We find that it would be just and equitable to extend time for the Claimant to present this claim. The Claimant raised the issue of long hours time and time again. The Respondent did little about that. It would be inequitable to deprive the claimant of a remedy which she would otherwise be entitled to because she soldiered on and put up with an increasingly difficult situation.

<u>The Advocates</u>

798. It is usual to thank the parties' advocates for the assistance they invariably give the Tribunal and we did so at the conclusion of the submissions. However, we would like to repeat those thanks here. This was a difficult hearing to conduct remotely. Some case management decisions were made late in the day. Through no fault of the advocates additional documentation was introduced piecemeal throughout the case. Each worked hard to advance their client(s) case.

799. With Ms Berry's agreement we shall single out Ms Ruxandu. She stepped in to assist the Claimant long after the case was formulated. She had to come up to speed in an area of law which is not her usual area of practice and she showed an excellent grasp of the relevant principals (even if we have not always found in her favour). She has had to communicate with the Claimant remotely in circumstances where the Claimant is in poor health. To cap all of this, she has acted throughout without making any charge. She has given up

perhaps a month of her professional life to assist the Claimant. She has helped the Claimant and she helped us. We are very grateful.

Employment Judge Crosfill
Dated: 7 September 2021