EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Ms M Mulumba	**AND**	Partners Group (UK) Ltd (R1) Partners Group (USA) Inc (R2)

Heard via CVP on: 29 November to 12 December 2021 and 13 to 15 December in Chambers.

Before: Employment Judge Nicolle
Nonlegal members: Ms C James and Ms C Marsters
Representation

For the Claimant: Ms S Aly of counsel
For the Respondents: Mr D Craig QC and Ms F Onslow of counsel.

RESERVED JUDGMENT

1. The claim against the First Respondent fails and is dismissed on the basis that the Claimant was at all times employed by the Second Respondent.

2. The Judgment of the Tribunal is that the claims of direct sex, race and disability discrimination under s.13 of the Equality Act 2010 (the EQA), discriminatory dismissal under s.39 (2) (c) of the EQA, harassment under s.26 of the EQA, victimisation under s.27 of the EQA, whistleblowing detriments under s.47B of the Employment Rights Act 1996 (the ERA), automatic unfair dismissal under s.103A of the ERA against the Second Respondent fail and are dismissed

3. The claim for ordinary unfair dismissal under s.94 of the ERA against the Second Respondent succeeds but with remedy to be determined at a separate hearing, if not agreed.

REASONS

<u>The Claim and procedural background</u>

4. By a claim form presented on 28 January 2019, the Claimant brought complaints of direct race, sex and perceived disability discrimination (s.13 EQA harassment (s.26 EQA), victimisation (s.27 EQA), automatic unfair dismissal

(s.103A ERA), ordinary unfair dismissal and protected disclosure detriment against the Respondents.

5. Following an Open Preliminary Hearing which I heard on 3 and 4 December 2019 I determined in a judgment dated 10 January 2020 that the Tribunal had jurisdiction to hear the claim.

6. In a letter from the Respondents' solicitors dated 21 January 2020 they sought reconsideration of certain elements of the judgment. This primarily related to my failure to specify on which date the Claimant acquired UK jurisdiction.

7. I refused the application for reconsideration in a judgment with reasons dated 13 February 2020.

8. The Respondents appealed against the judgment in a Notice of Appeal dated 20 February 2020.

9. The appeal was referred to Judge Keith in accordance with Rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended) (the EAT Rules) and he decided that it disclosed no reasonable grounds for bringing the appeal.

10. The Respondents sought reconsideration of this decision under Rule 3(10) of the EAT Rules which was considered by the Honourable Mr Justice Linden who allowed the application to proceed in his Order dated 13 October 2020.

11. The appeal was heard by the Honourable Mrs Justice Eady DBE on 11 May 2021 and her judgment was handed down on 25 May 2021.

12. Following a remitted hearing before me on 19 and 20 August 2021 I concluded in a reserved judgment dated 27 August 2021 (and amended on 1 September 2021) that the Tribunal is properly seized of the matter i.e., the existence of international jurisdiction. Further, that UK statutory law is applicable to the determination of the Claimant's remaining claims. For the reasons as set out I did not consider that it would be appropriate to apply New York or US law and refer to my findings regarding the attempt by the Respondents to label the Claimant's employment relationship as being "at will". Finally, I determined that the UK employment tribunals and UK statutory employment law have territorial effect on the basis that I consider the circumstances of the Claimant's employment as it existed after 7 September 2017 were such that it could be reasonably considered that it was intended by Parliament that the relevant statutory employment rights would be capable of exercise by her.

13. Therefore the Tribunal has jurisdiction to hear the Claimant's complaints which arise on or after 7 September 2017. All causes of action in which she relies on an act or omission prior to 7 September 2017 were dismissed but can nevertheless be relied on by the Claimant as background matters.

Previous findings of the Tribunal

14. The Tribunal has already made (and is bound by) the following findings.

15. That the Claimant was aware that her ongoing employment after the end of the Associate Program was for reasons outside the normal Associate Program

16. That there was a distinction between the Associate Program and the Accommodation Period.

17. That the Claimant's status transferred from being on the Associate Program to the Accommodation Period on 6 September 2017.

18. That the Claimant's employment in London was significantly extended as a result of the Respondents' expressed wish to assist her, given her immigration status, and her wish to avoid returning to the DRC.

The Hearing

19. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

20. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

21. The parties were able to hear what the Tribunal heard.

22. The participants were told that it is an offence to record the proceedings.

23. From a technical perspective, there were no major difficulties.

24. Arrangements were made to ensure that interested observers had access to the documents which the Tribunal viewed. This was via a secure email address provided by the Respondents' solicitors. It was made clear to any observers that they should only view those documents which the Tribunal had seen, or was in the process of seeing, and that no screen shots or other forms of electronic retention or use of the materials were permissible.

25. The tribunal was provided with bundles in the following format:

Bundle A – Pleadings, orders (including reasons) and other applications of the parties.
Bundle B – This will include the witness statements and reply statements for the main hearing.
Bundle C – Contemporaneous documents.
Bundle D – Inter partes correspondence (including the chronology, cast list and updated list of issues)
Bundle E – Previous witness statements and skeleton arguments for hearings.
Bundle F –Claimant's supplementary bundle
Bundle G - Authorities bundle

26. We read the pages in the bundles to which we were referred. We also read the skeleton arguments and witness statements.

Case Management Hearing

27. It was agreed that the first morning of the hearing should take place as a closed preliminary hearing given that it involved case management issues and also an application by the Respondents in respect of the admissibility of sections of the Claimant's witnesses statement in reply and her additional bundle of documents. I ordered that the hearing should proceed on this basis and those participants who were not parties or legal representatives were asked to leave the hearing whilst case management issues were addressed in private.

Applications and other preliminary matters

Location of witnesses

28. I sought confirmation from Mr Craig that there were no legal issues with the Respondents' witnesses giving evidence from abroad. He confirmed that a prohibition existed under Swiss law against witnesses giving evidence in foreign proceedings. As such it had been intended that the Respondents' seven Swiss based witnesses would travel to London. However, as a result of recently introduced Covid-19 restrictions this would no longer be practicable. Arrangements were therefore made for these individuals to give evidence from the Respondents' Milan office.

The stenographer

29. As previously agreed, a professional stenographer produced a transcript of the hearing. Mr Craig sought permission that they should be permitted to record the hearing solely for the purposes of finessing the transcript of each day's proceedings. The Claimant had no objection. I therefore gave permission for the recording of the hearing solely for this purpose on condition that it should not be used for any purpose other than the finessing of the transcript and should be destroyed once each day's transcript had been finalised. It was agreed that once produced the transcript would be forwarded to the parties' legal representatives and to Employment Judge Nicolle who would forward to the non-legal members.

Claimant's appeal to the EAT

30. I raised with the parties that I had noticed at pages 368 and 369 of bundle A that the Claimant had appealed my Judgment sent to the parties on 28 August 2021, and amended on 3 September 2021, following the Open Preliminary Hearing on 19 and 20 August 2021, and the reconsideration Judgment in respect of that hearing dated 3 October 2021. The date of the appeal is 11 October 2021. I was concerned that the time of the Tribunal conducting a 12 day case with a substantial number of witnesses and voluminous documentation may be compromised with an outstanding appeal.

31. Mr Craig advised that the appeal had been rejected on the papers by Mr Justice Choudhury. However, the Claimant indicated her intention to make an application under Rule 3(10) of the Employment Appeals Tribunal Rules 1993.

32. Notwithstanding the appeal both parties indicated that they wished to proceed with the hearing. I agreed that the hearing should continue and that the Tribunal would reach findings of fact on the background matters relied upon by the Claimant which could, if necessary, be considered further by the Tribunal in the event that the EAT should allow the Claimant's appeal that all, or some, of the background matters should be converted to justiciable issues.

The list of issues

33. Unfortunately there was no agreed list of issues. There had been multiple drafts, but no finalised agreed version. Ms Aly referred to various matters in an earlier markup which had not been incorporated in the Respondents' most recent draft list. Mr Craig says that these matters are included or alternatively are outside the scope of the pleaded claim or seek to introduce matters which are not justiciable given that the Tribunal has determined that all matters prior to 7 September 2017 are non-justiciable.

34. I ordered that the parties should seek to agree the list of issues between themselves during the Tribunal's reading time. If the Claimant wished to make an application to amend to introduce matters not forming part of her pleaded case, she should do so in writing and the Tribunal would give a ruling prior to the commencement of the Claimant's evidence.

35. The Tribunal was asked by the parties to make rulings on the disputed issues to be included in the list of issues. It was accordingly updated to reflect the Tribunal's rulings and represents the document in respect of which we reached our findings of fact and conclusions.

The Respondents' application for specific disclosure dated 17 November 2021

36. This related to communications between the Claimant and the UK Immigration Authorities concerning the Claimant's self-sponsorship route to remain in the UK and any other relevant documents in respect of her status in the UK. Following an adjournment Ms Aly confirmed that the Claimant would voluntarily disclose these documents and therefore there was no need for the Tribunal to make a ruling.

The dismissal of the First Respondent from the proceedings

37. Mr Craig says that there is no requirement for the First Respondent to remain given the Tribunal's previous finding that the Claimant was employed by the Second Respondent at all times. Further, he refers to the assurance given on behalf of the Respondents that the Second Respondent would be liable for any Judgment and compensation awarded in the proceedings. Ms Aly opposed the application. She contends that the First Respondent should be liable for

dismissal and also its failure to make the Claimant an offer of continuing employment.

38. Given that I did not consider that the continuance of the First Respondent as a party to the proceedings would cause the Respondents any significant prejudice, given that the case has been prepared and the same witnesses would remain applicable, I invited Mr Craig to desist from making a formal application on the basis that the Tribunal would address the position of the First Respondent in its final decision. He agreed to this course of action.

Admissibility of sections within the Claimant's reply witness statement dated 19 November 2021 and Bundle F of additional documents

39. The Respondents' argued that paragraph 11-14, 16-20 and 27-32 of her reply statements in pages 43-88 of Bundle F should be excised from the statement and the Claimant's bundle on the basis that they were irrelevant and/or relating to matters not included in her pleaded claim. The Tribunal gave an oral ruling pursuant to which parts of the Claimant's reply statement were redacted but the documents at pages 43-88 at Bundle F were admissible.

40. As result of this ruling Mr Craig sought, and the Tribunal granted, permission, if necessary, for the Respondents, if required, to adduce limited additional documents and further witness evidence.

The Claimant's witness evidence

41. Mr Craig says that the Claimant's witness statement contains evidence which is either irrelevant, or in respect of matters which the Tribunal has already determined, to include territorial jurisdiction, the existence and knowledge of the Accommodation Period and the Respondents' contention that the Claimant was culpable of gross misconduct in covertly recording various meetings. He says that this material is therefore inadmissible or alternatively that it relates to matters not pleaded by the Claimant. For example, he refers to paragraph two in her skeleton argument which makes reference to sex and race based stereotypes. He says that it is not in the pleadings and nor is any individual referred to. He also refers to the allegation that the Respondents have violated an implied term of the Claimant's contract of employment.

42. I indicated to the parties that I would not permit any cross examination on matters which the Tribunal had already determined, or which were self-evidently irrelevant to the issue to be determined. However, I did not consider it was necessary to make any ruling in advance.

Outstanding disclosure from the Respondents

43. Ms Aly said that the Respondents had not fully complied with the Tribunal's letter of 3 November 2021 by making full disclosure of relevant documents relating to the withholding of the Claimant's Entry and subsequently issued shares and the tax liability pertaining to them. Mr Craig says that all relevant documents have been disclosed. Ms Aly confirmed that this issue went to

remedy rather than liability and would not be pursued further at this stage. In any event, I advised the parties that absent an application for the disclosure of a specific document, or categories of document, there would appear no basis for an order of the Tribunal for specific disclosure.

Claimant's amendment application

44. The Tribunal gave a ruling accepting the Claimant's application to amend to include the allegation that she was not offered a position on the London Listed Markets Team which she says took place at a date unspecified between August and November 2017. The application was opposed by the Respondents as set out in their detailed written arguments as to why it should not be permitted dated 30 November 2021. Having considered the respective arguments we decided that the balance of prejudice weighed in favour of the Claimant in permitting the amendment but expressly stated that this did not bind the Tribunal to accept that the subject of the amendment was necessarily justiciable given the Tribunal's earlier findings on the Accommodation Period and the date upon which UK statutory employment jurisdiction was acquired i.e. 7 September 2017.

Questions asked by the Employment Judge of the Claimant

45. Given an objection made by Mr Craig to questions asked of the Claimant by the Employment Judge at the end of her cross examination we consider it appropriate to summarise this exchange.

The Employment Judge's questions included

46. At what point did you perceive in your employment that it was not a meritocracy?

47. Do you accept that the 2015 AP class constitutes a very diverse group?

48. Do you consider that someone who is not a white male has a lower prospect of graduating from an associate to a permanent position?

49. Do you think the respondents recruit associates who are not white if they did not intend to give them an equal opportunity to progress?

50. When did you first perceive that there was a sexist culture at the Respondents?

51. When did you first perceive sexist attitudes coming from male employees?

52. When did you first perceive that black people do not get the same opportunities to progress as white people?

Mr Craig's response

53. Whilst he understood, in part the intention of my questions he said that it was very important that the Tribunal brings proper analytical rigour to the

allegations that are being made in this case. There is no pleaded claim of a racist or sexist culture. The Claimant has not alleged, apart from in parts of her statement that were ruled inadmissible in reply, that there was a sexist or racist culture. He expressed concern that my questions had been put on the basis that it is the Claimant's case that there is a sexist or racist culture when that is not the case and it is not the case we have come to meet.

54. He said that my question about the number of men and women in different positions and retention rates had effectively been ruled inadmissible

Employment Judge's response to Mr Craig

55. The reason for my questions was that the Claimant argues that there was a process where her grades were not reflective of her performance, she was not given the same opportunity as others and has named various white males who she says got opportunities to be promoted. So I considered it appropriate to put questions as to whether the claimant considers that there is a meritocracy because she is saying, in part, that others of different protected characteristics were favoured over her and which were not based on objective assessments of merit.

56. The more general questions I asked in terms of whether the Claimant experienced sexism or racism and at what point in time is in the context of a claim of alleged less favourable treatment on account of the Claimant's race or sex. So, in those circumstances I consider it normal and proper for a Tribunal to make enquiries as to when a particular claimant experienced particular issues. That is not to say the Tribunal is permitting issues other than the matters which form the list of issues and the case as pleaded to be adjudicated.

57. There had been significant cross-examination of the Claimant on the demographic profile of the 2015 Associate Program. My question as to why the Respondents would recruit people and not then give them an equal opportunity goes to that.

58. At the outset of his cross-examination Mr Craig took the Claimant to her particulars of claim and referred to the use of the word "campaign". He suggested that a campaign involves a co-ordinated group of individuals working collectively to achieve a particular objective.

59. There are a series of allegations involving individuals who have either been alleged to have behaved in an inappropriate racist or sexist way, so, for example, reference to Mr Jenkner at the mountain retreat and in the audio phone call. Further, the Claimant says that various individuals blocked her promotion.

60. Whilst I may have misused the word "culture", what I intended, and think entirely proper in the context of a claim of this nature, was to put to the Claimant why she says that she was subject to a campaign by a co-ordinated group of individuals working collectively to achieve a particular objective.

61. I reassured the Respondents that the Tribunal's findings would be carefully limited to the issues before us and would not involve detailed consideration of extraneous matters and that our conclusions would be confined to the list of issues.

Witnesses

62. The Tribunal heard evidence from the Claimant who gave a statement and a reply statement and on her behalf a former Partners Group employee Megan Burke-Leeds (Ms Burke-Leeds).

63. The Tribunal heard evidence from the following 12 witnesses on the Respondents' behalf.

64. Christian Truempler (Mr. Truempler) who gave a statement and a reply statement. At the relevant time, he was HR Business Partner and had responsibility for the Associate Program from an HR perspective.

65. Esther Peiner (Ms Peiner) now the Co-Head of the European Infrastructure business unit but at the relevant time was a Senior Vice President in the same team. In that capacity she oversaw the Claimant's final rotation on the Associate Program in the London Infrastructure team between March and August 2017.

66. Prabal Sidana (Mr Sidana) the current Global Head of the Liquid Private Markets business unit. He was previously Deputy Head of the same business unit and supervised the Claimant.

67. Reto Munz (Mr Munz) was the Head of the Liquid Private Markets business unit.

68. Rene Biner (Mr Biner) is the Chairman of Partners Group's Investment Committee and the previous Co-Head of Investment. Between 2016 and June 2017 he was the partner responsible for the Associate Program and in that capacity was involved from around January 2017 in the decision-making as to the Claimant's rotations.

69. Juri Jenkner (Mr Jenkner) is the Global Head of the Private Infrastructure Department at Partners Group. He was involved in the decisions in June 2017 as to whether to offer the Claimant a permanent role at the end of her final rotation on the Associate Program in the London Infrastructure team.

70. Angel Garcia-Altozano (Mr Garcia-Altozano) has now left the Respondents but he was employed as a Vice President in the Infrastructure team in London between March 2017 and February 2020.

71. David Daum (Mr Daum) is a Managing Director in the Respondents' Infrastructure team in Zug.

72. Urs Baumann (Mr Baumann), CEO of Partners Group Impact Investment.

73. Nicholas Long (Mr Long) is the Co-Head of Compensation and Benefits.

74. Pamela Alsterlind (Ms Alsterlind) Co-headed the Real Estate team globally.

75. Christopher Hardison (Mr Hardison), Managing Director within the Respondents' Private Debt Americas Business unit.

76. Further witnesses whose evidence is relied on by the Respondents, but who were not called are:

77. Doris Schürch (Ms Schürch), Vice President in Partners Group's Infrastructure team based in Zug. She was unable to give evidence as a result of personal circumstances.

78. Anette Waygood (Ms Waygood), Head of Corporate Legal and Data Protection Officer. She was responsible for the response to the Claimant's Data Subject Access Request (DSAR) of 6 July 2018. However, the Claimant gave no evidence on this issue and the Respondents therefore did not call her.

79. Sergej Kalaschnikow (Mr Kalaschnikow) who supervised the Claimant during her rotation in the Real Estate Asset Management team in Zug from December 2016 to March 2017.

80. Markus Pimpl (Mr Pimpl) who was part of the European Liquid Private Markets Team based in Zug while the Claimant was working on that team from September 2017.

81. Carmen Piccini (Ms Piccini), a member of the Respondents' Product Accounting team based in Zug.

82. Michael Bryant (Mr Bryant), Co-Head of the Respondents' London office and Co-Head of the Private Real Estate Business department and Co-Head of the European Private Real Estate business unit.

83. Whilst the Tribunal read these witness statements they were given limited weight saved to the extent to which their contents could be corroborated by other witnesses or where they were supported by contemporaneous documents.

The Claimant's Reply Statement

84. This included, in sections which were determined as being admissible by the Tribunal at the commencement of the hearing, the Claimant's contentions at paragraph 7 that the Respondents' witness statement have a common "editorial thread" and that they sought to defend the Respondents' culture and at paragraph 15 (c) that the Respondents had repeatedly discriminated against her by holding her to a different standard.

Findings of Fact

The New York Proceedings

85. As a result of the various matters, which in part form the basis of the claim before the tribunal, the Claimant instructed New York lawyers, Bailey Duquette P. C. and they sent a letter dated 3 January 2018 to Oliver Jimenez, Chief Compliance Officer of PG USA.

86. Bailey Duquette issued a Charge of Discrimination in the New York Division of Human Rights and New York City Commission on Human Rights dated 23 March 2018 (the "Complaint"). This stated that the named employer was PG USA. At paragraph 7 of the Complaint the Claimant stated she had always remained an employee of the U.S. entity as set forth in her offer letter, with decisions concerning her employment made in the US.

87. In a detailed letter dated 27 August 2018 Proskauer Rose LLP, acting for PG USA, responded to the Complaint sitting out a detailed rebuttal to the Claimant's allegations.

The Respondents' Group structure

88. Partners Group (USA) Inc ("PG USA"), is incorporated in Delaware. It has US offices in New York, Denver and Houston. It had an office in San Francisco, but this was closed in late 2017.

89. PG USA, Partners Group (UK) Ltd ("PG UK") and PG Switzerland are each part of a global private markets investment management business which is headquartered at Zug, Switzerland. The business operates from 20 offices worldwide.

The Respondents' Divisions

90. The four main divisions and areas of work within the PG investment management business are Private Equity, Private Real Estate, Private Debt and Private Infrastructure. The Claimant had a rotation in each of these.

91. The term "directs" is where the Respondents are effectively directly purchasing an asset. Primaries is where the Respondents are investing in a new fund in other words giving money to other firms for them to undertake investments. Secondaries is where the Respondents are investing into a fund that has already been established or in which they have previously invested. Assets Management is essentially managing the assets that the Respondents have purchased. Liquid or listed private markets invest in publicly traded securities.

92. PG Impact Investments (PG Impact) is a separate Partners Group offshoot.

The Respondents' HR Department

93. Mr Truempler explained that HR matters are primarily administered from Zug where there are between 15 and 20 HR personnel. London specific matters

are the responsibility of Ms Reimer in London and in the New York Office, there are between 3 and 5 HR personnel.

The Respondents' ESG and Corporate Responsibility Report 2017

94. This provides in the Chairman's introduction that there is currently an in balance in the ratio of males to females at the senior management level. It also states that the Respondents had 1036 professionals across 19 offices.

The Claimant

95. The Claimant has a passport from and is a citizen of the Democratic Republic of Congo (the "DRC"). Prior to commencing employment with the Respondents on 21 September 2015 the Claimant had been educated at higher education institutions and employed in both the UK and USA.

96. In an employment application dated 14 July 2015 the Claimant listed her most recent employers as being the World Bank based in Washington DC and prior to that eBay and Goldman Sachs in London.

The Claimant's immigration status

97. Given that this issue straddles the Claimant's employment it is more convenient to set out all matters pertaining to it in a single chronological section rather than interposed in the overall chronological order of the judgment.

98. As a citizen of the DRC the Claimant had no automatic entitlement to work in the US, UK or Switzerland. Her eligibility to work in these jurisdictions was therefore subject to her obtaining required work permits.

99. The Claimant was employed by PG USA under an OPT/F1 (student visa). This expired on 16 July 2016 at which point she ceased to be eligible to work in the US. The Respondents then secured a Swiss L-permit for a six-month period effective from 17 July 2016 and expiring on 16 January 2017.

100. In an email from Mr Truempler to Mr McArdle dated 23 August 2016 he suggested that they should discuss a more permanent transfer to Europe for the Claimant and the possibility of her being localised in London rather than sending her on a costly assignment. This was on the basis of Mr Truempler's understanding that she would not be able to obtain a US work permit in the near future.

101. In an email from Mr McArdle to Mr Truempler of 31 August 2016 he asked what the costs would be but then saying: "If things did not work out that we will be bound by UK labor law to keep her for six months on salary". At no point did the Respondents "localize" the Claimant in the UK.

102. In September 2016 the Claimant became seriously ill and the Respondents obtained a B1/B2 US visa to enable her to enter the US for surgery and treatment. The Claimant was in the US for surgery and recuperation between 27

October 2016 and 26 November 2016 during which time she underwent surgery to remove a benign tumour from her abdomen.

103. In an email from the Claimant to Gabriela Reimer (Ms Reimer), Vice President and sole member of the Respondents' HR Department sitting in London of 17 January 2017 she said:

> "The only place that I have indefinite work authorisation is DRC, so naturally prefer to be in a situation where I am not living and working in London with an omnipresent countdown clock ticking in the background".

Emails of 25 to 27 January 2017

104. In an email from Amelia Raess (Ms Raess), Global Head of the Respondents' HR Department to Mr Biner and Thomas McArdle (Mr McArdle) Regional Associate Program Manager for the US Associates she said:

> "We will need to engage lawyers, immigration specialists and spend thousands of Swiss Francs on getting this case right, and the question is performance versus risk, and last but not least social responsibility and cost".

105. Mr McArdle responded saying that they would need to understand whether they could get the Claimant a visa for Switzerland. He went on to say: "If that is also not possible then potentially, we just note that we have been unable to get her a visa in any of our locations if we decide to separate".

106. Ms Raess then replied saying:

> "We could engage an immigration specialist to find a solution to get a visa somewhere and spend thousands of Swiss Francs, but I want to first to know who is willing to convert and keep her".

107. There then followed a lengthy discussion between the Claimant and the Respondents as to her preferred UK immigration route. The Respondents focused on an inter-company group transfer whereas the Claimant's preference was tier two general which she considered would provide greater optionality in the event that her employment with the Respondents should come to an end.

108. In an email from Ms Raess to Mr Biner and Mr Truempler she said that for the remaining four AP members, to include the Claimant, the goal is to confirm conversion by end of May 2017. She referred to a brief oral update being required in respect of the Claimant. She said to Mr Biner: "No details but at least mention performance, immigration, personal challenges etc". The Claimant interprets the reference to "personal challenges" as being to her medical leave.

109. Mr Truempler replied the following day to say that he had reworded the proposed wording neutrally and suggesting that an oral update should be given to the Claimant. He said: "let's not create a paper trail in case we need to present her an exit proposal without prejudice".

110. In an email from Ms Raess to Mr Biner and Mr Truempler of 27 January 2017 she said: "we need to start thinking the strategy because this is an opportunity of placing some messages depending on the direction we want to go, i.e. that the work permit and visa situation is very challenging etc etc".

111. In a further email that day from Ms Raess to Mr Biner and Mr Truempler she provided a summary of the Claimant's immigration status saying:

> "In a nutshell, US is a no, Switzerland will be difficult to extend and in the UK she could do one rotation on a graduate trainee visa which can be issued up to one year, but then starts the problem if she needs to apply from her home country or country of residence, which she has none. Health insurance is a topic overall in view of pre-condition".

112. She referred to a need to engage specialists. She then set out in a table the respective position in New York, Zug and London under the headings current situation, permit, possibility of local employment and health coverage.

113. At the Claimant's request she was transferred to the Respondents' London office, but still employed by the Second Respondent, with effect from 4 March 2017.

114. In an email from Mr McArdle to William Berry (Mr Berry), and Christopher Bone (Mr Bone), Head of London Debt team, of 16 July 2017 he stated that the Claimant "will have to be domiciled in London, we tried and could not get her clear to work in the US".

115. The Tribunal was referred to a significant number of emails regarding the Claimant's UK immigration status during the Accommodation Period. However, we do not consider it necessary to set out this material in detail. It is apparent that the Claimant had a different view as to her preferred immigration status i.e. she wanted to be eligible to remain in the UK under tier two general rather than under an inter-company group transfer. Her wish was to maintain optionality i.e. that her UK immigration status would enable her to work for an employer other than the Respondents. We consider this to be entirely understandable given the Tribunal's previous findings regarding the existence of the Accommodation Period and the likelihood that the Claimant would soon be leaving the Respondents' employment.

116. There was concern that the Claimant would need to leave the UK for a 12 month "cooling off" period. This did not arise in reality as the Claimant became aware of a means of staying for up to 12 months by the use of rolling three month graduate ICT visa extensions. She then made an application, without input from the Respondents, to remain in the UK pursuant to the tier one exceptional talent visa.

117. We find that towards the end of the Accommodation Period the Respondents' enquiries as to the Claimant's immigration status, and offer of legal support to her, was at least in part motivated by ascertaining what her self-achieved position was, what representations she had made to achieve it and seeking to elicit information and documentation from her which could potentially

be used in any subsequent litigation. We reach this finding notwithstanding our view that the Respondents' purported objective for the Accommodation Period i.e. to provide the Claimant with the opportunity to regularise her UK immigration status and secure alternative employment, if the London teams did not offer her a permanent position, was genuine.

118. It is apparent from the Claimant's disclosed documentation regarding her immigration status that she was taking steps in respect of the exceptional talent tier one visa from early 2018. This included enrolling on a course at Tech City on pricing strategy optimisation in early 2018. She applied for a Tech City exceptional talent visa specialist in early 2018. She was self-evidently looking to work in the UK digital technology sector. The Claimant says that this was to facilitate her long term objective of establishing a venture capital fund focussed on identifying and backing female and minority entrepreneurs in the UK.

The Claimant's recruitment

119. The Claimant says that as well as making an online application to PG US she had also made an online application to PG UK, but it was only the PG US application which proceeded to the next stage.

120. The Claimant received an offer letter from PG US dated 10 July 2015 (the "Offer letter"). Relevant provisions from this letter in the context of the jurisdiction issue are as follows:

> Your home region will be the Americas, and you will be a member of the firm's Associate Program;
>
> - Base annual salary of $120,000;
> - Provision for a discretionary cash bonus at the sole and exclusive discretion of PG USA;
> - Eligibility to participate in Partners Group's Employee Participation Plan with the amount of any reward being at the sole and exclusive discretion of PG USA; and
> - Provision that employment to be at will.

121. The Claimant accepted and worked under the terms of the Offer Letter.

The Claimant's pay and tax

122. Throughout her employment with the Respondents the Claimant was paid her salary in US dollars to her US bank account and subject to US tax.

123. As a result of spending more than 183 days in the UK she became eligible to UK income tax as of 5 September 2017. She was given a notional UK salary

for tax purposes of £81,000 as documented in an email to her from Ms Reimer on 4 October 2017.

124. Various email correspondence exists regarding the Claimant's tax status and in particular her concern that she was being adversely affected as a result of "double taxation" between her employment in Switzerland and then the UK but with US taxes being deducted. She complains that the Respondents failed to provide her with support in addressing her tax position.

The Associate Program

125. The Claimant along with other members of the 2015 cohort received an email from Jennifer Haas (Ms Haas) on 12 October 2015 attaching a document entitled Associate Program Objectives 2015. This included the following relevant provisions:

- Associate Program will last between 12-24 months, determined by business requirements;
- Each rotation will last 3-6 months;
- Your start location will typically be within your home office; and
- We strongly encourage the completion of at least one international rotation in the HQ in Zug, for all non-Zug based AP's. International rotations are driven by business needs.

Mr Truempler's evidence regarding the Associate Program

126. He has been in the Respondents' Human Resources team for 18 years. He has responsibility for the Associate Program. This includes conducting performance and talent reviews, pay reviews, promotion nominations and managing dismissals if required.

127. The Associate Program was established in 2006. The aim of the program was to recruit the most successful Associates into permanent positions and to identify future leaders of the business.

128. The allocation of rotations are decided by the Regional Associate Program manager and the Global Associate Program coordinator and following discussion with the Associate and the line managers of the hosting teams.

129. He explained that it was made clear to Associates when they were hired that they would complete rotations across different teams within the firm. Whilst the Respondents would try to meet individual requests to work in particular teams ultimately business requirements were the driving force behind placements and rotations.

130. He was sent reports with early views on the rotations and would get directly involved where there were performance issues with Associates, up to separation if needed.

Mr Biner

131. Mr Biner says that it is made very clear to Associates that they need to be very flexible in business areas and geography.

Associate performance reviews

The scoring system

132. Employees, to include Associates, are typically graded from one to four. One means: material deficits in current functions/position: two means still developing his/her skills to master the current function/position: three means fully living up to the current function/position and four means strongly over delivering in the current function/position.

133. Mr Treumpler said it was difficult to ensure that hosting managers adopted a consistent calibrated rating across the firm. He accepts that some assessors may have been stricter in applying the rating scale than others. He explained that the Exco decided in July 2017 that in addition to the feedback the Respondents should ask the question whether or not Associates would be offered a job, and that was the ultimate and single most important indication of performance.

134. He says that there was a tendency for managing hosts to avoid giving critical feedback particularly once they had decided they would not be making a permanent offer.

135. He said it was not practicable for a poorly performing Associate to go through a formal performance review. This would be outside the scope of three month rotations.

136. Mr Treumpler considered that there was a discrepancy between the way the Claimant perceived her own performance and that of her managers in the hosting teams. He says that the single most important feedback, and the only feedback, which is centrally collected, was whether an Associate had received an offer during their rotation. He says that performance scorings were merely indicative for this.

Converting onto a team

137. The Respondents referred to the process by which those on the Associate program are offered a permanent position on a team as “converting”. This can take place at between 12 month and generally no longer than 24 months on the Associate Program.

Were those on the Associate Program regarded as “permanent” employees?

138. The Claimant says that those on the Associate Program were hired as permanent employees. We do not consider this represents the case. Whilst there was an expectation that the majority of Associates would be offered permanent positions there was no guarantee with the Associates being required to

demonstrate a high level of commitment and performance to secure an offer from one of the teams through which they rotated.

Associates leaving during the Associate Program

139. Mr Treumpler says that Associates would normally get a strong indication that they may not have a future with the Respondents if they had not received one or more offers after 12 months. If an Associate does not receive offers of permanent employment or leave of their own volition, the last resort would be to start a without prejudice conversation with them.

Associate Program class of 2015

140. There were 19 recruits on the 2015 Associate Program. Five including the Claimant were listed as against the Americas. The Claimant said that the two Africa recruits were also considered as being assigned to the Americas. There were then seven assigned to Europe and five to Asia. Two of the recruits left without taking up their positions.

141. It is self-evident from the pictures of the recruits that they demonstrate a significant level of diversity in terms of gender with seven being women, and nationality/ethnic origin.

142. Chidozie Ugwumba (Mr Ugwumba) (a black man); Omar Kanafani (Mr Kanafani) (of Arabic heritage) and Rui-Min Chin (Ms Chin) (of Singaporean heritage) were viewed as stars and later awarded exceptional promotions. Mr Ugwumba and Ms Chin both converted early by August 2016 in Debt and Real Estate respectively.

143. The remaining 13 Associates were permanently placed as follows: Wyatt Laikind (Mr Laikind) in Private Equity Directs in New York New York; Joseph Coronna (Mr Coronna) in Private Equity Integrated in New York; Edward Kimotho (Mr Kimotho) in Private Equity Integrated in London; Jie Fu (Ms Fu) in Private Equity Integrated, Asia; Somit Guha in Debt, Asia; Mr Kanafani in Real Estate, London; Ishitia Bindal (Ms Bindal) in Real Estate, London; Leszek Wojtowicz (Mr Wojtowicz) in PG Impact, Zug; Aleks Joswik in Private Equity Directs, Zug; Daniela Wegner (Ms Wegner) in Private Equity Directs, Sydney; Bharath Rajagopalan (Mr Rajagopalan) in Infrastructure, Europe; Sunny Lee (Ms Lee) in Listed Private Markets, London; and Abigail Tan (Ms Tan) in Infrastructure, Europe.

144. Apart from the Claimant the only other individual not to convert to a permanent role was Jagjit Bhangal (Mr Bhangal). He was offered a job in Zug which he declined.

Associate Program planning memorandum dated 8 August 2016

145. This set out the status of the Associates on the programme. It listed Ms Fu, Ms Tan, Ms Chin) Mr Ugwumba, Ms Wegner and Mr Kanafani as having a "high" prospect of converting that autumn.

146. Ms Fu is of Chinese origin, Ms Tan is of Philippine origin, Ms Chin is of Singaporean origin, Mr Ugwumba is a black American, Ms Wegner is Australian and Mr Kanafani is of Lebanese origin.

147. The memorandum states that the Claimant's plan changed when she was unexpectedly denied a US visa. "We will rotate her in Zug and London to find a team".

Memorandum from Mr Trumpler to ExCo dated 6 February 2017 regarding AP 2017

148. The introduction stated that of the 17 AP class members of 2015, 13 have converted or are confirmed to convert in to the business by the Q1 2017. For the remaining four AP members, the Claimant, Mr Coronna, Ms Bindal and Mr Bhangal, the goal is to confirm conversion by the end of May 2017.

The Claimant's placements

149. Her first rotation was in the Real Estate team San Francisco from 21 September 2015 to January 2016. Her second rotation was in the Private Equity Department in San Francisco from January 2016 until April 2016. Her third rotation was in the New York Private Debt from April 2016 to July 2016. Her fourth rotation was in PG Impact Investments AG, in Zug, Switzerland from 17 July 2016 until October 2016. Her fifth rotation was in the Real Estate Asset Management team of PG Switzerland, in Zug from October 2016 to 3 March 2017. Her sixth rotation was in the London Infrastructure team between March 2017 and August 2017. Her final placement was in the London Listed Private Market team until the termination of her employment on 31 August 2018.

Rotation on Private Equity Directs

150. In her particulars of claim the Claimant contends that she was singled out by not being given a rotation on Private Equity Direct. She says that she perceived that white males were given more runway to be in that group. The letter from her US Attorneys Bailey Duguette dated 3 January 2018 stated that "rotation on the firm's Direct Private Equity Investment Team is considered a must for AP members", but the Claimant had not been allowed to participate in the rotation.

151. The assignment overview at page 423 of bundle C2 shows the departments to which members of the AP class of 2015 rotated. The Claimant together with six others, Ms Fu, Mr Ugwumba, Mr Coronna, Ms Chin, Ms Bindal and Mr Bhandal did not do a rotation in Private Equity Directs. This included a white man.

152. Mr Biner denies that he promised the Claimant a rotation in London Private Equity Directs from July 2017. He says that she had already had a rotation in the Private Equity Integrated in San Francisco.

153. The Respondents say there is not a single email in which the Claimant said that she wanted to do a rotation in Private Equity Directs. Further, they say that no guarantee was ever given to any member of the Associate Program that they would rotate into a particular team.

154. We find that there was no guarantee, or indeed expectation, that any member of the Associate Program would rotate to any given team. We find no evidence to support any inference that the Claimant not doing a rotation in Private Equity Directs had anything to do with her race, sex or perceived disability.

The Claimant's rotations and performance

Real Estate team in San Francisco from 21 September 2015 to January 2016

155. The Claimant would rather have started in New York but was sent to the San Francisco office. Jennifer Haas (Ms Haas), Regional Associate Program Manager for the US and member of the Private Equity Primaries team in San Francisco, sent an email to the San Francisco office on 18 September 2015 welcoming the Claimant and advising that she would be doing a Real Estate rotation.

156. Mr Treumpler disputed the contention that the San Francisco office represented a "satellite" office. He says that the Global Head of Real Estate was based out of the office. Ms Alsterlind said that rotations are primarily based on business needs rather than Associates' specific areas of interest.

157. The Claimant's rotation was exclusively in Private Equity primaries with her reporting to Ms Haas.

158. During her time in the Real Estate team in San Francisco the Claimant worked on three Investment Committee papers. Two of these were directs and one primaries.

Meeting between the Claimant and Ms Alsterlind in October 2015

159. Ms Alsterlind met with the Claimant in October 2015 the New York office. She says that she was "underwhelmed" by her. She felt she failed to use the opportunity to demonstrate enthusiasm and ask relevant business questions. It was not entirely clear how this meeting came about but it appears to have been suggested by Ms Hass given that there may have been initial concerns regarding the Claimant's performance but there is no documentation to this effect. We consider it to be unusual that such a meeting would have taken place within the first six weeks of an Associate's employment.

160. She said that the reference to the Claimant needing to "convey enthusiasm and engagement" in her initial quarterly performance review was a flag. She regarded it as something to watch.

The Claimant's complaint about Ms Haas

161. The Claimant accuses Ms Haas of "engaging in base sexual humour". She also says that she engaged in "nefarious activity" against her. A specific complaint made by the Claimant is that she shouted at her in a meeting room because she was not interested in primaries and only interested in directs. There was no evidence to corroborate the Claimant's complaint which in any event is not material to the background issues we have to determine.

162. Ms Haas left the Respondents on good terms in 2016 to take up another position.

Private Equity Department in San Francisco from January 2016 to April 2016

Claimant's quarterly review on 1 April 2016

163. The participants were Mr Truempler and Ms Haas. The Respondents say that Mr Truempler's attendance was because the Claimant's first performance review in Real Estate had not been good.

164. The review listed development requirements as being:

- Be more proactive;
- Be more resourceful; and
- Be more communicative.

165. It then set out actions to be taken in respect of these development requirements.

166. She was rated a 2 out of 4 (corresponding to "still developing his/her skills to master the current function/position)".

167. In terms of rotations it referred to spending time in Zug HQ in October 2016/Q4.

168. The Respondents contend that the review was a poor one. We consider that that the review document is very typical for Associates, or to use the analogy provided by Mr Craig trainee solicitors. It involves a template setting out positives, areas to be worked on and actions to be taken.

169. We do not consider that it could be described as poor as for a relatively new recruit it can be anticipated that they would invariably have development requirements and actions listed to be taken. It would be unusual for a relatively new recruit not to have any development requirements with resulting actions. Therefore, we do not consider that anything could be inferred from

this document to indicate that the Claimant was seen, or would have seen as herself, as a poor performer.

170. Hal Avidano (Mr Avidano), Managing Director in the US Private Equity Primaries team based in New York said in an email to Mr McArdle and Mr Hardison:

> "We were a 2 on her when she was on our team, I am fairly certain Ms Haas delivered some fairly tough feedback to her at the end of her rotation with us".

171. The Claimant says that she had barely worked with Mr Avidano.

Wildspitz mountain retreat in April 2016

172. The Claimant complains in her witness statement that Mr Jenkner told an inappropriate and racist joke at this event, Mr Jenkner disputes this. He refers in his witness statement to a recent holiday in the Philippines and an anecdote he told regarding his family's experience to include his son saying something like "they look at me like I am a monkey or I'm the monkey now". He disputes that this was in any way racist.

173. The Claimant does not accept that it was an anecdote but rather a racist joke. She complains that a proper investigation was not undertaken with Mr Jenkner being interviewed and those in attendance being asked for their views.

Private Debt in New York from April 2016 to July 2016

Claimant's quarterly review of 7 July 2016

174. This was undertaken by Mr Hardison and Mr Truempler. Development objectives were to be more communicative, keep teammates up to date on progress and be speedier. Actions to be taken involved communicativeness and speed.

175. Mr Treumpler said it was unusual for him to be asked to attend a quarterly performance review meeting. The fact that he had been asked was not a good sign. He did not consider that it represented a good review. He says that if after three months an Associate gets feedback that they should convey enthusiasm and engagement to him it is a red flag.

176. He explained that the quarterly performance review template used at that time did not involve scores.

177. The Respondents say that this review highlighted performance concerns. The Claimant does not accept this. We consider that this represents a standard quarterly performance review and not one from which any serious performance concerns could be inferred.

178. Jonathan Rothburd (Mr Rothburd), Vice President in the New York Debt team gave feedback to Mr Hardison in an email of 28 June 2016. He said that the Claimant was organised and thorough. Development areas were work speed and team integration.

179. Bill Bridges (Mr Bridges), Vice President in the New York Debt team provided feedback to Mr Hardison in an email of 6 July 2016. He said that the Claimant had tended to work at a slower pace than what really works for their deadlines and that things that should take an hour can end up taking half a day. He said that she should be more proactive, tends to do tasks that are assigned to her but does not go out of her way to tell people she finished something or request more work. He said that she needed to prioritise work.

180. It is apparent from these emails that Mr Bridges and Mr Rothburd were raising relatively serious concerns regarding the Claimant's performance. We consider that these go beyond the standard development type objectives as referred to in the quarterly performance reviews.

181. In an email from Mr Hardison to Mr McArdle 24 August 2016 he said that the Claimant fell between a 2 and 3.

Witness evidence of Mr Hardison

182. He says that he received feedback from more junior members of his team that she was not a strong performer. He says that he interacted with her relatively often. He says that her performance contrasted with that of top performing Associates who he describes as consistently proactive, raising their hand and getting involved. He says that he is close enough to Associates rotating through his team to form an impression of them.

183. He says that he gave the Claimant tips on how she could improve her performance but did not let her know what he described as the severity of her under performance.

184. He denies blocking her from a rotation onto the London Private Debt team.

185. He does not consider that there is a significant differential between the score of between 2 and 3 which the Claimant received in her quarterly performance review in August 2016 and the score of 4 out of 10 which was awarded by three separate individuals a year later. He says that the performance review score of between 2 and 3 was in isolation whereas the score between 1 and 10 was on a comparative basis with other Associates. That he says inevitably results in a wider band of scores.

186. Bill Bridges (Mr Bridges), VP in the New York Debt team in July 2016: "tends to work at a slower pace than what really works for our deadlines; things that should take an hour can end up taking a half day;" and that she "should be more proactive; she tends to do tasks that are assigned to her but doesn't go out of her way to tell people she finished something or request more work;" and "I think she has limited in-depth modelling expertise; building

up a model from the ground up took a long time and required significant input from me".

187. Mr Rothburd said in July 2016 that she was "slow to write papers;" and "could have more proactively asked about team deals and joined team discussions".

188. Thomas Libretto (Mr Libretto), Vice President in the New York Debt team said in July 2016 that she "seemed to be underwater" on a particular deal she was working on.

PG Impact in Zug, Switzerland from 17 July 2016 to October 2016

189. Mr Baumann emailed Ms Haas on 16 May 2016 about the Claimant's proposed rotation to PG Impact. He said that she might consider PG Impact as a full time option. He raised the possibility of her working from New York as opposed to Zug.

190. PG Impact is a global impact investment firm. It was founded in 2015 and is supported by, but independent from Partners Group.

191. Mr Baumann says that he saw better performance from five other members of the Associate Program, Mr Chidozie, Mr Wojtowicz, Mr Laikind, George Andriopoulos and Espen Haugen, than the Claimant. He says they were all more proactive, self-driven and better able to provide the support needed. He says that had the Claimant performed well during her rotation with them that they would have considered extending her an offer, but she did not perform well enough. He says that the Claimant was good, but not excellent and we strive to recruit based on excellence.

192. He said that PG Impact will only hire people from Partners Group if they have expressed a strong desire that they wish to leave Partners Group and do something more socially orientated. He says that this would have significant financial consequences for the individual as they would have to resign from Partners Group and lose their share options but also accept a much lower salary.

193. He says that PG Impact is always looking to recruit. He says that in 2017 five people were hired. He describes it as a highly diverse team.

194. He says that PG Impact is seen as "last in the food chain" of Partners Group and therefore does not have the same frequency of expression of interest from Associates as other teams.

195. Mr Wojtowicz was hired in the middle of July 2017. However, this would not have precluded the Claimant being hired if she had expressed a definite interest and had impressed with her performance and enthusiasm.

Claimant's presentation to the Investment Committee

196. Mr Baumann says that there is a small team at PG Impact, only four at the material time. Therefore, everyone is required to undertake a variety of duties to include taking minutes. He himself will often do so. Therefore, the Claimant being required to take minutes of a meeting at which she presented was not unusual.

Trip to Uganda

197. The Claimant accompanied Mr Baumann on a business trip to Uganda. He denies making comments during this trip, or at any other time, to the effect that "a woman's place is in the kitchen" or that "woman should be the ones to stay at home as they have smaller egos". He says that such comments would be totally contrary to his believes and actions. He says he values diversity and that this is evidenced by the demographics of PG Impact.

The Claimant's performance at PG Impact

198. Whilst the Claimant was only actively employed at PG Impact for six weeks prior to her sickness absence she worked on three projects. Mr Baumann considered this to be sufficient time to assess her performance. He says that an assessment of an individual's performance can typically be reached within a few weeks. He takes into account how people analyse things, draw conclusions and whether they take the initiative.

199. He says that performance is contextual and depends on the specific project.

The Associate Program Rotation Development & Evaluation Plan for PG Impact Investments

200. The Claimant gave a self-assessment score (ratings between 1 and 4) of 3.5 on the Fenix direct due diligence process whilst Mr Baumann gave her a 2.5. He gave areas of development as being:

- "Become more creative and challenge the status quo/information received.
- Leveraging analysis to create insights that are new for the team".

201. On conduct Grey Ghost Ventures/Unitus fund the Claimant gave herself a score of 2.5 and Mr Baumann gave her a 2.

202. On Create African Off Grid Solar Energy Market Overview the respective scores were 2.5 from the Claimant's self-assessment and 2 from Mr Baumann and overall a self-assessment of 3.2 and Mr Baumann's assessment of 2.5.

203. He says that his ratings of the Claimant were a true and fair view but also reflected input from Sara Scaramella, who was supervising one of the projects on which the Claimant worked.

Email from Mr Baumann to the Claimant providing AP rotation feedback dated 19 October 2016

204. He said "my ratings are somewhat lower than your self-ratings. This is in comparison with the other AP rotations we had, where we (in comparison) have seen more initiative to find new ways to challenge our thinking, and a bit more creativity and rigor in the analysis to get new perspectives and drive the thinking of the team".

205. Mr Baumann says that the Claimant had negotiated with Mr McArdle that the ratings given by him at PG Impact should be disregarded. However, he was not directly involved in this process and it is merely his understanding that they had been so disregarded.

206. He says that the rotation feedback meeting with the Claimant on 15 November 2016 was difficult. He described the difficulty being both in terms of her having been on medical leave but also the relatively negative feedback which was being provided. He says that the Claimant kept fighting back and disputing her rating. He described this as being unusual in his experience with Associates.

Mr Laikind

207. The Claimant sought to compare her performance assessment with that of Mr Laikind. Mr Baumann says that he showed great initiative and analytical rigor. He described his performance as being at a level not demonstrated by the Claimant.

Other 2016 emails regarding the Claimant

208. Mr Jenkner in August 2016 said "I would love the Claimant to rotate with the team on which there may be a potential opening" and his email to Mr Truempler where he said about the Claimant "I am hopeful she will work out [i.e. find a role]".

209. The Claimant says that she had an interest in Infrastructure. In an email from Mr McArdle to Mr Prater dated 15 August 2016 he asked whether the Claimant should rotate on the Infrastructure team in London or Zug? He said: "I would love her to rotate with the team on which there may be a potential opening within Infrastructure".

210. This email clearly suggests that Mr McArdle wanted to find the Claimant a permanent position. Mr McArdle had responsibility for the Associate Program.

211. In an email from Mr McArdle to Mr Truempler of 23 August 2016 he said:

> "From a cost prospective, if she does two more rotations and then we decide to separate is it still more cost efficient to have her localised in

> London. I am hopeful that she will work out, but her situation is up in the air, so I want to avoid taking on high fixed costs now".

212. It is significant that the above email was sent prior to the Claimant having a period of ill health absence. Therefore, it was self-evidently not the case that the discussion of the possibility of a separation of the Claimant from the Respondents at that point was as a result of her ill health and perceived disability.

Real Estate Asset Management team of PG Switzerland, in Zug from October 2016 to 3 March 2017

213. Mr Truempler on 12 December 2016 said:

> "Her current rotation with Real Estate Asset Management team in Zug is very important and we really want to see her development continue to track in a positive direction".

214. On 17 December 2016 Mr McArdle said following a meeting with the Claimant: "she got the message that next two rotations need to be good ones. She seems very motivated and wants to make it work".

215. In an email from Mr McArdle to Mr Prater of 20 December 2016 he said:

> "The Claimant has recovered well from the health complication and is ready to go for an Infrastructure rotation in London starting on 1 March 2017. If it works out, she would be very interested in joining the Infra team long-term at some point".

216. Brandon Prater (Mr Prater), Co-Head of the Private Infrastructure Department said on 20 December 2016 "[the Claimant] would be very interested in joining the INFRA team long-term at some point. I just wanted to confirm that your team is happy to get the additional help with the rotation. I think Shreya Malik (Ms Malik), Vice President in the Infrastructure team based in London, would be an excellent supervisor for her if that was possible".

217. In email in response to an email on 19 January 2017 from Ms Alsterlind asking whether the Claimant would be a good fit to fill an open position in Europe Mr Kalasohnikow replied later that day to say:

> "It is too early to reach a conclusion on the Claimant as this stage.
>
> "Based on my impressions thus far, I don't think that she would be interested in a permanent position in REAL AM. While she is curious, eager to learn and motivated, I don't feel that she is passionate about REAL AM. She is well organised but in terms of her detail-orientation (which is clearly an important skill/trait for REAL AM) I am not 100% sure yet. I need to see a larger sample size of her work".

Email from Ms Raess to Mr Biner and Mr McArdle dated 25 January 2017

218. She says that they would need to engage lawyers, immigration specialists and spend thousands of Swiss francs on getting this case right, and the question is performance versus risk, and last but not least social responsibility and cost.

Mr Biner

219. Mr Biner said that he had a one to one coffee meeting with the Claimant on 2 February 2017. She told him that she wanted to work in London for personal reasons, and specifically in the Private Equity Directs or London Infrastructure teams. He says that she made it clear that she was not interested in converting into the Real Estate Team. He says that Real Estate Asset Management had an open position at that time.

Emails of 2 February 2017

220. In an email from Mr McArdle led to Mr Prater and Mr Jenker he said:

> "Harmonie Mulumba is a class of 2015 AP that had previously been scheduled to do an Infra rotation in London last fall. She unfortunately had a health set-back and had to postpone the rotation. She returned fully healthy to PG in December and will complete her real estate asset management rotation in early March. She really wants infrastructure in London but I am cognizant of the fact that she needs to use her final two rotations with teams on which there is the possibility to find a permanent home.
>
> I wanted to see whether there is potential in London for a permanent home in H2 2017. If so then I wanted to see whether you would be interested in having Harmonie rotate on your team starting in March. She would then need to prove herself before any mention of securing a full time role would even be discussed but I wanted to make sure it would be a possibility before sending her to Infrastructure."

221. In an email from Mr McArdle to Ms Raess, Mr Biner and Ms Reamer he set out options in London for the Claimant as:

- "Real Estate Asset Management. I am now a vote against this option. I spoke briefly with the Claimant about the potential on REAM and she failed to embrace it. If she had been very positive, then I would have pushed it, but that team really needs someone who is committed to the team.

- Infrastructure I don't think the team will go for her (Rene to confirm). I would be supportive of the dialogue with the team and a three month test run but understand that visa issues complicate this.

  If neither of these options work then we need to figure out the separation process".

222. It is apparent from the above that whilst the Respondents were still considering the possibility of a permanent position for the Claimant, they were also mindful of the fact that there was a strong possibility that things may not work out and that they would move to a separation.

Emails of 8 February 2017

223. Mr Jenkner in an email to Mr McArdle said that he had a "nice/neutral" chat with the Claimant. He said that he had no predefined view. Mr McArdle responded by saying that he would "start to get the wheels moving on the Claimant".

Feedback from Mr Kalasohnikow dated 16 February 2017

224. In an email of 16 February Mr Kalasohnikow advised Ms Alsterlind that he had discussed the Claimant's performance with Michael and Jan, who worked with her on some projects. In conclusion he said he believed that she would not be a good fit for the Asset Management team on a permanent basis due to a lack of interest in Real Estate or Asset Management. He said that she could have communicated progress on deadlines and planned steps more clearly.

225. He described her as being "smart and has positive attitude and energy. She integrated well with the European Real AM team and I enjoyed working with her.

226. When asked in cross-examination whether this constituted a "positive" review Ms Alsterlind said that "it was ok" but she would have expected "more superlatives". We consider that she was excessively reluctant to bestow even modest praise on the Claimant and it appeared to us that she was applying a hyper- critical standard of assessment to her performance which was arguably not consistent with the contemporaneous performance reviews and feedback.

227. She also said that she had heard from Mr Biner and Mr McArdle in February 2017 that the Claimant did not have interest in Real Estate or Asset Management, and this combined with her "ok performance" meant that a permanent position was unlikely. In any event she said that Mr Kalashnikov did not have authority to make an offer to her. Any offer would have needed her approval.

228. She denies having shunned or ignored the Claimant.

Associate Program Rotation Development Education Plan dated 29 March 2017

229. The Claimant gave herself a rating of 3 all the way through whilst Mr Kalasohnikow rated her as a 2.8. The Claimant says that he made her an offer in the Real Estate Asset Management team in February 2017. This is denied by the Respondents.

Witness statement of Mr Kalaschnikow

230. He reported directly to Ms Alsterlind. He says that the Claimant was not the worst performer who had rotated through his team, but her performance was definitely not above average. He said that she was somewhere between "below average" and "average" based on the feedback received from members of his team. He says that in hindsight he was not sufficiently critical of her performance. He says that she did not perform well enough to merit an offer of a fixed position. He said that she had no great interest in Real Estate and had no demonstrated detail orientation.

231. He denies that at any time he offered the Claimant a permanent role in the European Real Estate Asset Management team. He says that he does not have the authority to make job offers. Ultimately, he did not think the Claimant was good enough to be offered a permanent role.

232. We find no evidence that such an offer was made absent any documentation, but also given Mr Kalaschnikow's negative feedback on her performance. For any team to make an offer to an Associate their performance would need to be exceptional and it is apparent that he, and his colleagues, did not consider that the Claimant met this threshold.

"Offer" in the London Real Estate Asset Management team in February 2017

233. The Claimant contends that she was made an offer of a permanent position by Mr Bryant, who at the time was a Managing Director in the Respondents' Private Real Estate Business Department. The Claimant says that he offered her an Assistant Vice President role on the London Direct Real Estate Investment team.

234. The Respondents deny that such an offer was made. When the Claimant's evidence was that there is a pattern of "interference" and she perceived that Mr Bryant may have been advised that she had cancer.

235. Whilst not called as a witness the Respondents' produced a statement during the hearing from Mr Bryant to rebut the Claimant's contention that he had offered her a position. He says that he had never worked with the Claimant in any capacity. He recollects meeting her for a coffee, at her instigation, in London in the summer of 2017. Whilst he acknowledges that he may have talked to her in general terms about open roles in Real Estate and how he saw the team evolving he does not consider that the conversation could reasonably have been interpreted as an offer of a permanent role to her.

236. We find that the Claimant was not offered a permanent role in the London Real Estate team. Whilst she may have interpreted her conversation with Mr Bryant as providing a potential opportunity there is absolutely no evidence to support her contention that it represented an offer given the complete

absence of any written documentation to this effect and the unequivocal rebuttal given by Mr Bryant in his witness statement.

Statement of Mr Biner to the external investigation dated 31 January 2018

237. The Claimant consistently stated that Mr Biner had confirmed that she had been made an offer of a permanent position in Real Estate Asset Management in London. However, it is apparent from the notes of his interview on 31 January 2018 that this was not the case. Whilst he records that Real Estate showed, at least orally, some interest in hiring her the note records that she had said she was not really interested in Real Estate and did not want to work in Zug. We therefore do not accept the Claimant's contention that she had received such an offer.

Email from Mr McArdle to Mr Jenkner and Mr Pratter of 3 February 2017

238. He says that she really wanted infrastructure in London, but he was cognisant of the fact that she needed to use her final two rotations with teams on which there is the possibility to find a permanent home. He sai d that he wanted to see whether there is potential in London for a permanent role in H2 2017. He stated that she would need to prove herself before any mention of securing a full time role would even be discussed.

239. Mr Jenkner responded to Mr McArdle and Mr Pratter that day by asking them to send her CV. He said that in principle he was not against giving her a fair chance. He inquired as to what her grades were at Virginia and HEC. He said that he would grab a coffee with her.

240. We consider it surprising that an inquiry was being made as to the Claimant's academic performance given that she had been employed by the Respondents for nearly two years and had presumably been recruited after an extensive interview and due diligence process. In our experience it is unusual for a relatively highly remunerated employee's academic credentials to be revisited several years into their employment. The expectation is that they are judged on their performance. Further, once someone has been onboarded their previous academic performance ceases to be a major factor as they are judged on delivery rather than academic potential.

241. This would arguably suggest a degree of scepticism about whether the Claimant's academic performance and CV were in accordance with the reality. Whilst the Respondents clearly had some concerns regarding her performance, we nevertheless consider this enquiry to be surprising, and it is at least capable of giving rise to an inference that there was a perception that she was not performing at a level commensurate with her professed academic and post education career trajectory.

242. Mr Jenkner says that he typically makes such enquiries particularly where Associates are nearing the end of their rotations and there may be a serious

possibility of considering them for a permanent position. He considers that academic grades are a strong pointer to likely performance.

The London Infrastructure team between March 2017 and August 2017

Feedback on the Claimant's performance from Mr Garcia-Altozano

243. At the end of March 2017 he wrote that the Claimant was "doing a superb job so far". He says that the context to this, was that a couple of people had left the Infrastructure team around this time and that he and the Claimant were therefore the only people on the Erasmus deal team and they had both recently joined.

244. He went on to say that the Claimant's performance was below that of Carlos Trejo (Mr Trejo), the other Associate who was rotating through Infrastructure He described Mr Trejo as a "superstar". He said that the Claimant's performance was well below that of Mr Gilhawley, an analyst and therefore junior to the Claimant.

Potential business development opportunity with Bechtel

245. The Claimant says that a business development opportunity she had sourced and raised with the Infrastructure team in April 2017 in respect of Bechtel was not properly pursued. She says that Bechtel is the third largest developer in the world. Ms Schurch sent an email to her saying "great effort. I look forward to speaking to your contacts at Bechtel Enterprises".

WhatsApp exchange

246. In her exchange of messages with Mr Bhangal the Claimant made negative comments regarding her colleagues' failure to provide appropriate interaction and support in respect of the Bechtel opportunity. This included her saying:

- "These people are so subpar its crazy".
- "They literally don't have basic commercial acumen".
- "The lack of talent (and wanton ignorance/contempt for actual talent) is striking".

Email from Mr Jenkner to Mr Pratter and Ms Peiner of 18 May 2017

247. He proposed that the Claimant's rotation be extended for another month or two whilst she was given further deal exposure and further feedback was obtained on her performance. He said that he had a view but did not want to put it in an email.

248. In an email from Mr Jenkner to Mr Pratter and Ms Peiner of 19 June 2017 he recorded that he perceived that she did not feel that she had been given

tough/critical feedback or at least did not realise it. Mr Jenkner said "let's be conclusive and move on if we are not convinced".

249. In an email of 20 June 2017 from Mr Pratter to Mr Jenkner and Ms Peiner he said that he had had a lunch with the Claimant about three weeks ago and whilst she is smart, he did not get the spark of interest or proactive attitude.

The INEA transaction within the Infrastructure team

250. The Claimant was a participant in this transaction and the paper was presented to Investment Committee and received negative feedback with particular criticisms that the document was too long at 113 pages and had no critical stance at all. The Claimant says that whilst the overall review was poor the risk section which she had completed was more positively reviewed.

Gigaclear deal team

251. Ms Peiner explained the inclusion of Mr Makar on the Gigaclear deal team as he had done original screening work. She says that it was in no way related to the fact that there would otherwise have been three women on the team.

Conversations between the Claimant and Ms Peiner of the position of working women in the workplace

252. Ms Peiner says that she had various conversations with the Claimant regarding her role as a working mother with a partner who also worked. She accepts that she may have contrasted her position with that of Mr Jenkner who and may have implied that he had a more "conservative" view of a women's role in a relationship.

253. She does not recall making a comment on 17 July 2017 that the Claimant needed to be "more aggressive, but not too much more aggressive, since you are a woman it will not go over well". She says that she may have advised the Claimant that she needed to be more assertive but would have given the same advice to a man.

Mr Biner

254. He says that he did not get the impression during a conversation with the Claimant in her time in London Infrastructure that she had any particular desire to stay in the team. He says that she had performed ok but not good enough for a permanent position. It was for this reason that a termination process was commenced at the end of June 2017. He says that it would not have been appropriate to extend the maximum 24 months of the Associate Program as she had already had "ample chances".

Ms Peiner's view of the Claimant's performance in Infrastructure

255. Ms Peiner's recommendation was that the Claimant should not be offered a permanent role because of concerns regarding her performance. She says that the Claimant's technical skills were less strong than other AP members. She considered that she had failed to demonstrate a strong passion for PG's business during her rotation with them and that her technical skills fell substantially short of the level required for entry level Associate positions. She said that Mr Daum and Mr Garcia-Altozano had also expressed the view that the Claimant was less technically skilled than what they would typically experience at Associate level. Their experience was that she had completed tasks at a slower pace and with an overall lower degree of quality in terms of analysis and commercial conclusions than her peers and also some analysts.

256. She considered the Claimant had less strong technical skills than her peers on the Associate Program. She says that she fell short of being able to critically assess how to convert a relationship into a business opportunity or whether a transaction would be fit for the Respondents. Further, she failed to demonstrate a strong passion for the Respondents' business. A further concern was the Claimant's slow pace of working and overall lower degree of quality in terms of analysis and commercial conclusions than her peers and some analysts, who were junior to her.

257. She says that the decision not to make the Claimant a permanent offer in the Infrastructure team was based not only on her experience of working with her but the feedback she had received from colleagues who had worked with her during her rotation in the Infrastructure team. She says that the Claimant's work was "miles away" from Mr Gilhawley's technical skills and commitment.

258. She says that she made a recommendation that the Claimant should not be offered a permanent position to Mr Pratter and Mr Jenkner in late June/early July 2017. In order to ensure that she provided her with constructive feedback around the rationale as to why she was not made an offer she asked members of the team to provide that feedback to her in writing.

259. She says that none of her team members had proactively approached her to say we have worked with the Claimant and we think she would be a great fit for our team, and we would recommend that we consider making her an offer. She says this contrasts with the experience of other Associates passing through the team.

260. Whilst she acknowledged the Claimant's networking and sourcing efforts as being a relative strength, she says that the next step as to the commercial assessment of how we can take the initial sourcing contact further to transform it into investment opportunity for Partners Group was not demonstrated.

<u>Project Cassiopea</u>

261. Her experience, to reflect feedback from her colleagues, was that the Claimant's work on this project did not involve undertaking financial analysis

with the same ease as other Associates. She also considered that the Claimant's analysis needed rounds of feedback and corrections.

262. She says that in her opinion the Claimant failed to demonstrate the required level of interest, engagement and passion for Infrastructure during her rotation.

263. She denies the allegation of shunning and ignoring the Claimant. She says she was not aware of the Claimant's illness when she started in the team.

Mr Jenker's view of the Claimant's performance in Infrastructure

264. Mr Jeckner did not consider that the Claimant had demonstrated the required credentials to be offered a permanent position. He says that she was an under performer in terms of analysis, modelling, commitment and interest regarding the asset class.

Emails of 28 June 2017 and more general comments on the Claimant's performance in Infrastructure

265. In an email from Mr McArdle to Mr Biner of 28 June 2017 he said that the EMEA Infrastructure team was going to pass on the Claimant. They noted that she lacks the technical skills to be an effective Associate and they are not convinced that she has the hunger to do what it takes to breach that technical gap in a short period of time. He went on to say that if she was to be given another rotation, he would recommend her to the Private Debt Team in London focused on CLO Credits. He said that the only rotation where she received somewhat positive feedback was from the Private Debt team in New York.

266. In an email from Mr McArdle to Mr Biner and copied to Mr Truempler he stated:

> "It is time to let her go but we will need to give her at least six months to find a new role. My recommendation would be to assign her to Debt for the six months and let her build more experience during the separation period".

267. On 13 July 2017 Mr Treumpler sent an email to Mr McArdle saying:

> "I discussed this with Rene, and we agreed not to flag it, i.e. not to label her as an official "potential exit candidate". We can let them know that so far she has not secured an offer from a team".

Mr Biner's opinion of the Claimant's performance

268. Mr Biner referred in his witness statement to a conversation with the Claimant when he got the impression that she did not have any particular desire to stay in Infrastructure. He was not able to provide any details as to why he formed this view.

Emails of 17 July 2017

269. Mr Daum said to Ms Peiner:

> "Needed various rounds of guidance, was not up to speed as some of our analysts. Not sure if she understood the commercial rationale behind all the sensitivities we worked on. Overall I would rate the performance below Kevin Gilhawley (Mr Gilhawley) and Ismail Afara (Ms Afara) Overall rating: If I had the choice between Ms Afara, Mr Gilhawley and Damien (hopefully) and we have limited headcount I would opt for them".

Ms Afara and Mr Gilhawley were both analysts and therefore more junior than the Claimant.

Mr Daum

270. In his evidence Mr Daum said that strong performance from an Associate was about being solution orientated, adding value but also the level of effort and enthusiasm demonstrated.

271. He described the Claimant's performance as below average for Associates who rotated through his team. He says that she did not demonstrate the same drive and motivation that he typically saw. Her performance was inadequate to justify the offer of a permanent role in Infrastructure. He says that he did not feel the "passion" from her for working in Infrastructure.

272. In an email from Ms Schurch to Ms Peiner she said:

> "On return calculations, she was not familiar with some of the infrastructure valuation methodologies we are using...which we walked through and she still had to (or has to) get more familiar with. We also needed to work through key valuation metrics overview.
>
> Overall I think her level is more comparable to an analyst who is doing an IC paper for the first time. Honestly, I have more confidence in the modelling of Ismail and Emmanuel before he left. Both of them worked more independently….
>
> From my perspective, our top analysts (Kevin, Ismail) and other APs (Mr Chidozie, Rob that I recently worked with) are/were ahead of Harmonie in terms of quantitative skills".

Mr Garcia-Altozano

273. In an email from Mr Garcia-Altozano to Ms Peiner he said:

> "Lack of commitment. Missed deadlines a couple of times and had to chase her in a couple of occasions

> Attention to detail. She needs to work on taking ownership of her work. She was sometimes over reliant on others review
>
> Modelling is an area for development
>
> Attitude: She has an ego and sometimes feel frustrated by her positioning in the team. Didn't help either that we isolated her on her cubicle away from the team
>
> Difficult for me draw comparisons with peers as I haven't worked that much with others. Nonetheless I think she is miles away from Kevin's technical skills and commitment to PG. Her attitude denotes frustration sometimes and that could be a problem."

274. He says that the Claimant's performance in the Infrastructure in London from March 2017 to August 2017 fell below the standard of other Associates. She was "ok", but her work was not great. He says that she was less committed than other peers and his impression was that she thought certain work was beneath her.

275. He was referred to an email he wrote in March 2017 when he said the Claimant was doing a "superb job so far". He says that the context for this comment was that a couple of people had left the Infrastructure team around this time, and the only people on the Erasmus deal team were him and the Claimant. He was new to the Respondents.

276. From the end of March 2017, he became the Claimant's direct report.

277. He says the Claimant's performance was significantly below that of another Associate who rotated through the London Infrastructure Team in early 2018, Mr Trejo, who he described as a "superstar". He also said that the Claimant's performance was below that of Mr Gilhawley, an analyst and therefore junior to her.

278. He says that she was bright and enthusiastic sometimes. He says that there were a couple of occasions when the Claimant would either complain about the task or try not to do certain more mundane admin tasks and even occasionally she would say that she thought people underestimated her because they were asking her to do mundane admin tasks.

279. He was interviewed on 24 January 2018 as part of the Levy investigation. In the note of that interview he is recorded making various negative remarks regarding the Claimant's performance to include:

- Not the easiest person to work with
- Had pretty high self esteem
- Sometimes not the most helpful or practiced
- Vocal about being given work that was probably not for her level
- She felt people were underestimating her intelligence
- Bragging about coming from Goldman

- High ego, sometimes thinks she's the smartest in the room
- General consensus that she was a bit of a difficult person to work with
- Inflated view of herself

He concluded by saying:

> "She is sharp but probably bragging to much re: background, network, being smarter than others".

280. In this interview he was asked regarding a Mr Jenkner's alleged, "off colour" comments. He said that he could have made one unfortunate joke.

281. The London Infrastructure team did not consider that she had performed well enough to be made an offer. Mr Daum's says that "I do not think that the Claimant merited the offer of a permanent role in Infrastructure based on her performance in our team" and his email of 19 July 2017 makes clear that there were various individuals, including those who were more junior to the Claimant, who had performed substantially better than her.

282. In an email from Mr Hardison to Scott Essex of 3 August 2017 he said:

> "I believe she did ok – not as strong as Joe or Chidozie, but certainly capable of producing and up to speed on our investment process".

283. In an email of 3 August 2017 Mr Hardison asked Mr Rothburd, Mr Bridges and Thomas Libretto (Mr Libretto), Vice President in the New York Debt team to give the Claimant and others marks out of 10.

284. Mr Rothburd gave Mr Chidozie 6, Mr Coronna 7, David Ng (Mr Ng) 8 and the Claimant 4.

285. Mr Bridges gave Mr Coronna 8, Mr Chidozie 7, Mr Ng 8 and the Claimant 4.

286. Mr Libretto gave Ms Chin 10+ , Mr Coronaa 8, Mr Ng 7, Mr Chidozie 7 and the Claimant 4.

287. The Claimant contends that this constituted reverse engineering with her being given artificially and manufactured lower scores. We find no evidence for this. It would, in our opinion, be highly improbable given the number of individuals from different offices and different teams who were asked to provide feedback. Further, we do not consider that any evidence exists to infer that the relatively low scores given to the Claimant had anything to do with her sex, race or perceived disability.

288. The Claimant says that the process was artificial, and in her view contrived, in that it involved seeking feedback a year afterwards. She says that the contemporaneous performance reviews were much more positive. However, we find no evidence to support this. It is not comparing like with like. A score on a 1 to 10 level is a much wider band and much more absolute, but also relative to her peers, than quarterly performance reviews

which reflect the performance of an individual in isolation. Further, there was a direct request for a relative evaluation of the performance of the various individuals. This points to a consistent pattern pursuant to which the Claimant scored less favourably than her peer group comparators.

289. Further, the Claimant says that it is inconsistent with her being a 2.5 previously. However, once again we consider it is not comparing like with like. A score on a scale of 1 to 4 will by definition involve narrower margins between individuals than on 1 to 10. Further, the passage of time provides additional opportunity for reflection and an evaluation of the relative performance of individuals at a time when they were moving much closer to the possibility of being converted.

290. In an email from Christopher Bone (Mr Bone), Head of London Debt team to Mr Hardison and Mr Essex of 3 August 2017 he asked whether they would recommend the Claimant. Mr Essex responded that the Claimant was at the bottom of the list in all reviews and he would not be supportive. This was in comparison with Ms Chin, Mr Coronna, Mr Ng and Mr Chidozie.

Recording of meeting on 8 August 2017 in which the Claimant alleges that Mr Jenkner made racist comments regarding Shreya Malik (Ms Malik), Vice President in the Infrastructure team based in London

291. The Tribunal listened to the recording. Mr Jenkner is heard saying “is it my English? I can barely understand her, blah blah blah blah”.

292. The Claimant says that whilst he made this comment Mr Jenkner was mocking Ms Malik in his body language and facial expression. She said that it was not just what he said it was the way he said it.

293. The Respondents say that he was simply saying that Ms Malik was speaking too fast. Having listened to the recording we agree that she was speaking extremely fast and it was difficult to fully comprehend everything she said. We do not consider it apparent that Mr Jenkner was mocking her on account of her accent or Indian nationality. Whilst we accept that the Claimant may have had this genuine interpretation it is not one, we consider to be justified based on the evidence we heard.

Claimant’s alleged protected disclosures of 9 August 2017

294. The Claimant says that she advised Mr Garcia-Altozano on 9 August 2017 that she was concerned and felt uncomfortable about the discriminatory words and actions of senior members of the Infrastructure team. She says that she specifically referred to Mr Jenkner’s alleged “monkey” comments, his mockery of Ms Malik and his negative verbal feedback to her which she contended was inconsistent with that given to others and in particular white males. She also complained about the alleged misogynistic statements and actions concerning women by other senior managers.

295. He says that he never understood that she was concerned about discriminatory behaviour. He considered the conversation to be more of an observation which included her referring to an "inappropriate joke" she overheard from Mr Jenkner at the April 2016 mountain retreat.

Emails of 24 and 25 August 2017

296. In an email from Mr Treumpler to Amanda Evans (Ms Evans), Vice President of HR of 24 August 2017 he said: "We would like to make a proposal to terminate the employment of the Claimant".

297. In a further email from Mr Truempler to Ms Raess and copied to Ms Evans of 25 August 2017 he said that this is a "hardship" case. He referred to the Respondents' decision potentially resulting in the Claimant's deportation from the UK to include her having to return to the DRC. He referenced the sensitivity of the case and the possibility of negative publicity, both internally and externally. He said that she had been diagnosed with cancer during her employment with the Respondents but had to the best of their knowledge recovered from her illness. He said that her performance both prior to and after her sick leave had not met expectations.

298. The Claimant complains about the reference to her being deported and specifically to her having to return to the DRC. However, in her email of 17 January 2017 to Ms Reamer and copied to Mr McArdle she referred to the DRC as being the only place she had indefinite work authorisation. Therefore, we consider it understandable that this would have been referred to by the Respondents in communications regarding her visa status.

August/September 2017

299. The Claimant says that she was not provided with a seat in the London office for about a month and having to sit with her laptop in the cafeteria or kitchen. She describes this as being humiliating. The Respondents accept that the Claimant did not have a regular seat during this period as she was between seats in the rotation. We accept that this would have been unsettling and somewhat humiliating for the Claimant. Nevertheless, we accept the Respondents' evidence that whilst her physical location within the office may have been different that she remained connected to other employees albeit without her own desk. Further, this situation was not directly attributable to her protected characteristics.

The Accommodation Period

300. The Tribunal has previously made findings regarding the existence of what has been referred to as the Accommodation Period. For the avoidance of doubt, this is the final 12 months of the Claimant's employment which the Tribunal has found to be outside the scope of the Associate Program.

301. Notwithstanding the Tribunal's previous findings the Claimant's position is that up until the meeting on 5 July 2018 that she regarded herself as a

continuing participant in the Associate Program with an opportunity of a permanent position with the Respondents. The Respondents say that it was made clear to the Claimant at a meeting on 31 August 2017 that her employment was being continued on a goodwill basis to enable her to obtain longer term immigration status in the UK and thereby avoid the possibility of having to return to the DRC and to secure alternative employment.

302. There were no notes of the meeting which the Respondents say was held with the Claimant on 31 August 2017. The Claimant denies that this meeting took place. An email from Mr Truempler to Mr McArdle on 21 March 2018 refers to a meeting with the Claimant on 31 August 2017 to include offering offer her a 12-month Accommodation Period.

303. Mr Treumpler rejects the contention that by November 2017 the Claimant had genuine expectations of being offered a permanent position. He says that he was in constant dialogue with her by phone to include checking on her status of finding employment outside of the firm. Whilst there was no prohibition on her being offered a permanent position there was nothing in the pipeline.

304. He says that the primary objective of the Accommodation Period was not to secure her permanent employment but rather to provide her with the opportunity of regularising her immigration status and securing alternative employment elsewhere.

305. We accept the evidence of Mr Treumpler and Mr Munz that whilst there was no expectation that the Claimant would secure a permanent position during the Accommodation Period that it remained a possibility if she demonstrated her credentials to an extent which made it attractive to the Listed Private Markets team in London to offer her a position. As it transpired her performance did not come close to achieving this objective.

<u>11 August 2017 to 18 September 2017</u>

306. Mr Munz was not aware that the Claimant did not have a physical desk. He believed that she was sitting next to Mr Sidana and solicited feedback from him regarding her initial performance.

<u>The London Listed Private Market team from September 2017 until the termination of her employment on 31 August 2018</u>

307. Mr Munz says that they are a small team comprising of six people. He would therefore have a clear view as to the performance of all team members.

308. He also sought input regarding the Claimant's performance, either at this point or subsequently during her time in the team, from Mr McArdle, Mr Treumpler, Mr Biner, Ms Peiner, Ms Malik and Ms Lee.

309. He discussed the Claimant's performance with Ms Peiner in Zug on 8 September 2017 who advised him that during her time in the Infrastructure team the Claimant had not demonstrated the standard expected from everyone at Partners Group.

18 to 21 September 2017

Mr Sidana

310. When the Claimant joined the Liquid Private Markets in London, he understood that her rotation was something different to the usual Associate Program. Further, he understood that she would be with the team longer than the usual rotation period.

311. The only feedback he received prior to the Claimant joining the team was from Mr Munz and he described this as being "a bit negative". He says that Mr Munz deliberately did not provide him with further details so that he could form his own assessment.

312. He says that overall, he was not impressed by her performance or attitude to work during her rotation with his team. He says that she showed little interest in the work performed by the team and that her enthusiasm and motivation to learn were rather low. He considered that she fell below the standard of other Associates and even analysts. He says that there were occasions where she copied and pasted most of the contents of investment papers from previous papers.

313. He had an expectation that she would reach out to him, but she failed to do so. He says that he tried to engage in discussions with her about public markets, the team, investments etc but did not get much response.

314. He says that there was significant difference between the quality of Ms Lee's papers and productivity and that of the Claimant. He also says that Mr Rabini also performed much better than the Claimant.

315. In an email from Mr Sidana to Mr Munz of 18 September 2017 he described the Claimant's motivation as quite low with her being away from her desk for hours and leaving just after 5pm. He said that she had shown very little inclination to understand what we do or discuss public markets or investments. He described his initial impression of her as being rather poor and that she did not have the curiosity to at least learn about what the team did.

316. In an email from Mr Munz to Mr Treumpler, Mr Biner and Mr McArdle of 19 September 2017 he said that he had spoken to a lot of people about the Claimant and that feedback is rather negative. Mr McArdle responded by saying that the Claimant's one year wind down period is conditional on performance.

WhatsApp exchange with Mr Bhangal on or about 21 September 2017

317. Mr Bhangal said to the Claimant at 7:49pm well you don't need to dumb down to their level for long and you will achieve better things after PG. We find this clearly indicative of Mr Bhangal having perceived that the Claimant did not have a long term expectation of remaining with the Respondents.

Stefano Rubini

318. On 22 September 2017 Mr Munz emailed Mr Sidana and Ms Lee to say that Mr Rubini would be joining the team for an AP rotation from the first week of October and be with us for three months.

319. Mr Munz denied that Mr Rubini and the Claimant were pitched against each other. He says that they worked in parallel and helped with a very heavy workload. Mr Rubini did not get an offer during his three month rotation in the team.

Emails of 23 November 2017

320. In an email from Mr Munz to Mr Sidana on 23 November 2017 he says: "If we believe she is extremely good we could try to retain her in the team (not to be communicated!) – my impression is she is ok but not a superstar".

321. Mr Sidana replied to Mr Munz to say: "My impression is also the same – not a superstar but working reasonably ok".

322. We consider that this represents evidence that whilst the Claimant was on the Accommodation Period that there still remained a possibility that, subject to her performance excelling, she could be offered a permanent position.

323. In an email of 22 January 2018 from Mr Munz to the Claimant he asked her how the job search is progressing. She did not reply.

324. In an email of 2 May 2018 from Benno Luchinger (Mr Luchinger) the European Head of the Associate Program to Baylor Miller (Mr Miller), CFA and Senior Vice President, Real Estate at PG USA, and the US Manager of the Associate Program, he stated as follows:

> "She is not on the European programme, very confidentially, this is a very special case handled directly by Rene and Christian Truempler".

325. Mr Truempler confirmed that the Claimant's "special" status, at least in part, related to the fact that lawyers acting for her had by this time initiated a discrimination complaint in New York.

Copying of previous templates

326. Mr Munz says that there were several occasions where team members complained to him that the Claimant had cut and pasted sections from previous

documents. There is no written record of such concerns or of feedback being given to the Claimant in this regard.

Associate position

327. Mr Munz said that after the appointment of Ms Lee there was no vacancy for an Associate. Whilst there was a vacancy for a financial analyst it was not considered that the Claimant would be interested. Further, her performance would not, in any event, have justified her appointment.

328. He considered that her output was sub-par, quality of work poor and lacking in analytical rigour and that she lacked enthusiasm and interest.

Mr Pimpl lunch on 28 June 2018

329. The Claimant says that she was excluded from a "team lunch" organised by Mr Pimpl in London on 28 June 2018. The only people to attend were Mr Sidana, who is of Indian heritage and Ms Lee who is of Asian heritage. We find that this was not a team lunch and nor was there any reasonable expectation that the Claimant would be invited. We therefore consider that there is no genuine basis for her to contend that she was excluded.

330. Mr Sidana does not think it at all unusual that Mr Pimpl only invited him and Ms Lee for lunch. He has relatively regular lunches with Mr Pimpl when he is in London. It would not have been a case of everyone in the team necessarily being invited.

331. In an email from Mr Sidana to Mr Munz of 3 July 2018 he stated:

> "Harmonie has not done a good job on the MIC update - she simply updated numbers from the previous update from Shawn, and in some places, did not even bother to change tables and charts. Even her valuation seemed unconvincing, and I have asked her to make quite a few changes, especially in the multiples. So I would rather not give her one of our current positions within LIA to update but to concentrate on an IR."

The Claimant's performance metrics as set out in paragraphs 30-34 of her witness statement

332. The Claimant uses an image showing the firm's investment professionals in the summer of 2017 in support of her above average performance. On this she receives a score of 3.08 on a scale of 0 to 4 and says that her average quality rating was one of the highest in the firm.

333. They are an average score of the Investment Committee papers that the Claimant worked on as part of much larger teams. Each paper was submitted by an entire team. Those papers were sometimes given ratings by the Investment Committee. Each individual on the team is given the rating for the paper (good or

bad), irrespective of what they contributed to the paper, and whether their individual work on the paper was good or bad.

334. The Respondents say that this document represents average scores on papers in which an individual has been involved, regardless of their seniority and level of contribution. They say the document is wholly misleading. For example, the top 50 performers include only three partners. The biggest cohort, 14 are financial analysts. He says that it is not used as a rating for Associates.

335. We find that this document does not provide any valuable evidence as to the Claimant's performance. Ultimately, a grading received by an Associate would primarily be based on the quality of the overall team with their role as a junior member being unlikely to significantly alter the overall score for a particular paper by the Investment Committee. We therefore consider that the Claimant's reliance on it as indicative of her high performance is misleading and should be discounted.

Sourcing

336. The Claimant did positive sourcing work when on her last rotation on the Infrastructure team in London between March and August 2017. This was something for which the Claimant was praised. Her sourcing was not, however, "exceptional" and in any event did not mean that the Claimant performed sufficiently well to secure a role.

Conversion to a permanent role

337. The clearest indication that an Associate is performing well is that they receive an offer of a permanent role; and for the really good associates there is something of a fight between different teams. The Claimant did not receive any offer from any team. We find that this reflects the reality that she did not perform well enough.

338. The Claimant's perception of her performance does not match the perception of a large number of different individuals who worked with her. As Mr Truempler says:

> "From my interactions with the Claimant, I felt there was a discrepancy between the way she described or perceived her own performance and the way this was viewed by managers in the hosting teams".

The Claimant's complaint regarding alleged misogynistic comments/behaviour by Mr Baumann and Ms Peiner

339. She complains that Ms Peiner said that Mr Jenkner thought women should stay at home in the kitchen. Ms Peiner and Mr Jenkner dispute this. Further, Mr Jenkner's wife works in the investment industry.

340. The Claimant further complains that Ms Peiner asked for a male member to be added to the Encampus deal team. Ms Peiner says that she asked for Igor Makar (Mr Makar), an Assistant Vice President to be added to the presentation. She says this was as a result of him having previously worked on the transaction and had nothing to do with him being a man. She says that she is perfectly happy with all female deal teams.

341. The Claimant alleges that August 2016 Mr Baumann said that women should stay at home. This is disputed. He says that PG Impact Investment's senior management investment team has three women out of seven and that five out of 14 investment professionals are women.

Meeting on 5 July 2018

342. Mr Treumpler rejected the contention that it would have been appropriate to provide the Claimant with warning of the meeting on 5 July 2018. This would have been unprecedented in his experience. He did not consider whether the Claimant should be offered the right of accompaniment.

343. The Claimant made a covert recording of this meeting. A non-verbatim note was made by Ms Reamer which the Claimant disputes as being an accurate representation of what was said.

344. Ms Reamer's note records Mr Truempler making the following observation:

> "I am not aware of anyone expressing an issue about working with you, in terms of not liking to work with you, however at the same time we did not receive a request from any team that they would like to offer you a permanent position. Since no one raised their hands and places you in their teams, I think it is important to talk about why that happened".

345. Mr Craig says it is significant that the Claimant omitted the words "in terms of not liking to work with you" from her witness statement. The Claimant says that she did not consider these words material. The Respondents say that they are important as they reflect the overall context. We consider that the Respondents' position is valid. There is clearly a distinction in that whilst there were from the Respondents' perspective concerns regarding her performance there were no concerns regarding her personality and interpersonal relationships with members of the teams with which she worked. We consider that this represented a deliberately misleading omission by the Claimant.

346. Mr Treumpler rejects the contention that the Claimant had been offered a permanent position. He says that any job offer would have gone through his desk and would have been in writing.

The Termination letter

347. Following the meeting on 5 July 2018 the Claimant was sent a letter dated 5 July 2018 advising her that her employment with Partners Group will be

terminated on 31 August 2018. The letter referred to reaching the end of a period of an additional 12 months' employment in the UK by way of a transitional period (referred to as the Accommodation Period by the Respondents). The letter was signed by David Layton, Director PG USA, Nicole Meade, Vice President PG USA, Sergio Jones, Director PG UK and Ms Reimer. It stated that it constituted notice on behalf of PG USA and PG UK.

348. Mr Truempler says that decision to dismiss the Claimant was jointly determined by Mr Layton, Chief Officer based in London and Andre Frei, Chief Officer based in Switzerland.

349. In answer to a question from the Employment Judge Mr Truempler said that the Claimant's dismissal was on the grounds of performance.

Claimant wrongly described as having had cancer

350. Mr Treumpler said that this represented an error made by members of his team on the basis of a wrong interpretation as to the nature of the Claimant's medical condition. Nevertheless, he says that to the best of his knowledge the only document in the bundle which refers to the Claimant having had "cancer" is the email he sent to the Exco on 25 August 2017.

2017 Bonus

351. Mr Treumpler explained that bonus payments were discretionary as provided for in the Claimant's offer letter dated 10 July 2015. He quoted the following:

> "You will not be considered employed if you have given notice of termination prior to the Bonus Payment Date or if prior to the Bonus Payment Date PG USA has informed you that your employment will be terminated".

352. He says that when someone is flagged in the Respondents' system as being likely to leave the organisation at a future point in time, any variable pay that is discretionally awarded to such an employee will be paid at the very end of their employment and offset against any outstanding liabilities. Therefore, the Claimant was treated in accordance with the standard practice applied to all prospective departees.

Treatment of shares allocated to the Claimant

353. New recruits receive Entry Shares with a value equivalent to one month's base salary. They have a one year vesting period. They are transferred to the employee at the end of a five year restriction period or, if earlier, on termination of employment. Mr Long says that the Claimant never specified an account for receipt of her Entry Shares upon termination. These shares remain held in trust on her behalf in PGHN's Credit Swiss custody account.

354. Paragraph 3 of the Stock Agreement between the Claimant and PGHN dated 5 October 2015 (the Stock Agreement) confirms at paragraph 3.1 that every shareholder is responsible for any tax on their Entry Shares.

355. The Claimant received awards of additional shares in PGHN under the Employee Participation Plan (EPP) in November 2015 and 2016. Article 14 of the EPP provides that "the Participant will immediately compensate the company for any such taxes or contributions which it paid out of its own funds based on a request by a governmental or similar authority". Participants agree that the company or its subsidiaries shall have the right to offset any amounts due to the company under the Plan with any claims the Participant may have against the Company or any of its subsidiaries.

356. Tax in the USA or UK has to be paid on the vesting of the shares whilst in Switzerland it is paid on their grant. The Claimant incurred taxes on her Entry Shares and EPP share awards. This resulted in her incurring taxes in Switzerland, the UK and USA given that she remained tax resident there.

357. Mr Long joined the Respondents in December 2017 and the first contact he had in respect of the Claimant was in July 2018 relation to the outstanding tax bill. He understood that her employment had been terminated and it was a sensitive topic, but he cannot recall if at that time he knew about the discrimination claims.

358. He says it is normal practice for the Respondents to use the shares they hold as collateral against the debt. They are then routinely released when the leaver has settled their tax liability.

359. The 99 EEP vested shares were in the Claimant's brokerage account and she has sold these. The 30 Entry Shares remain in the Credit Swiss account and Mr Long says they will be released on the Claimant settling the outstanding tax liabilities. They have a current value of circa £37,000.

<u>The Recordings</u>

360. The Claimant says that four of the covert recordings relate to meetings between her and Human Resources. She disputes that they contain confidential information. The other is of an Investment Committee Meeting. The Claimant denies that this was recorded covertly. She says that it was an encouraged and accepted practice for recordings to be made of Investment Committee meetings so that an accurate note could be made. She contends that she was treated inconsistently to other employees who she says were not subject to allegations of gross misconduct.

361. She retained these recordings on her employer issued I-Phone and saved them prior to the return of the phone to the R1 a few weeks after the termination of her employment.

362. When the Claimant's employment terminated on 31 August 2018, she owed the Respondents £8,667.04 in respect of tax on her EPP awards together with CHF 1,851.10 in Swiss taxes.

The Claimant's perception

363. Whilst the Claimant says that it was because of race, sex and her perceived disability when pushed by Mr Craig as to what the predominant reason was, she said that "perceived disability was the driving factor".

364. The Claimant says that race and sex impacts you on the margin. "It is being held to a different standard, it is having your work not recognised". She went on to say that the disability aspect made her a person of interest to senior employees to include the Global Head of HR.

365. In re-examination the Claimant said that her view was that not all minorities are treated in a certain way but rather people have different stereotypes that they associate with different minorities. She referred to black people being stereotyped as "lazy" and "not being particularly intellectual".

Witness statement of Ms Piccini

366. Ms Piccini, of the Product Accounting team based in Zug gave a witness statement but was not called by the Respondents as a witness. She is a black Latino woman.

367. As part of the Respondents' 2012 global corporate day followed by a Christmas party she participated in an entertainment act pursuant to which two of her colleagues painted their faces black because they wanted to dress up as Whoopi Goldberg. She says that she was not offended and that there was no malice or bad intentions involved.

368. She said that the photograph of her colleagues in black face was uploaded onto her Facebook account and subsequently printed and displayed on a filing cabinet in the Zug office.

Witness statement of Ms Schurch

369. As a result of a personal issue Ms Schurch was not called to give witness evidence however her witness statement was read by the Tribunal. She became aware of the Claimant when she joined the European Infrastructure team in March 2017. Whilst the Claimant was based in London she was based in Zug.

370. She says that the Claimant's technical skills were less developed than other people of comparable level but also those of analysts. She says that whilst she did an overall "ok" job, she lacked certain skills and her modelling skills were less developed than those of top performers.

The Law

Time limit for discrimination claims

371. S123 provides:

> (1) 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.
>
> (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.

372. For acts extending over a period, it is relevant to consider whether a discriminatory regime, rule, practice or principle, which had a clear and adverse effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

373. Guidance was provided in analysing what constitutes conduct extending over a period in Hendricks v. Metropolitan Police Commissioner [2003] IRLR 96 to include per Mummery LJ in the Court of Appeal at paragraph 48:

> "the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs, by the concept of an act extending over a period".

374. Extension of time under s123(3) is the exception rather than the rule Robertson v. Bexley Community Centre [2003] IRLR 434.

375. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: Neary v Governing Body of St

Albans Girls' School [2010] ICR 473. Section 33 requires the court to take into account all the circumstances of the case, and in particular the factors set out at s.33(3). Those factors which are relevant to the claim are:

a. the length of, and reasons for, the delay by the claimant;
b. the extent to which the cogency of the evidence is likely to be affected by the delay;
c. the promptness with which the claimant acted once she/he knew of the facts giving rise to the cause of action; and
d. the steps taken by the claimant to obtain appropriate professional advice once she/he knew of the possibility of taking action.

376. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, while the checklist in s.33 provides a useful guide for tribunals, it need not be adhered to slavishly.

Ordinary unfair dismissal

377. Under section 98(1)(b) of the Employment Rights Act 1996 (the ERA) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. This is the set of facts known or beliefs in the mind of the year decision-maker at the time of the dismissal which causes him or her to dismiss the employee Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. A reason may come within section 98(2)(b) if it relates to the capability of the employee. At this stage, the burden in showing the reason is on the respondent.

378. Under s98(4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.

379. In considering the fairness of the dismissal, a tribunal must have regard to Iceland Frozen Foods v Jones [1982] IRLR 439 and the approach summarised in that case. The starting point should be the wording of section 98(4) of the ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

380. A tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer: Newbound v Thames Water Utilities [2015] IRLR 735, CA, per Bean LJ at paragraph 61.

381. The tribunal must consider the context and gravity of any procedural flaw identified and it is only those faults which have a meaningful impact on the decision to dismiss that are likely to affect the reasonableness of the procedure.

Some other substantial reason (SOSR)

382. It is for the employer to show that the reason for dismissal was SOSR as per Terry v Sussex County Council 1976 ICR 536.

383. In Fay v North Yorkshire County Council 1985 ICR 133, the Court of Appeal approved the reasoning in Terry and set out the circumstances where the expiry of a fixed term contract can amount to SOSR, namely:

- it must be shown that the fixed term contract was adopted for a genuine purpose;
- that fact was known to the employee; and
- that the specific purpose for which the fixed term contract was adopted has ceased to be applicable.

ACAS Code on Disciplinary Procedures (the Code).

384. In reaching their decision, tribunals must also consider the Code. By virtue of s.207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence, and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be considered in determining that question.

385. The Code provides, with underlining added where applicable for emphasis:

Inform the employee of the problem

386. If it is decided that there is a case to answer, the employee should be notified of this in writing. It would normally be appropriate to provide copies of any written evidence with the notification.

Hold a meeting with the employee to discuss the problem.

387. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

388. At the meeting, the employer should explain the complaint against the employee. The employee should be allowed to set out their case. The employee should also be given a reasonable opportunity to ask questions and present evidence.

Allow the employee to be accompanied at the meeting

389. Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued; or
- the taking of some other disciplinary action
- the confirmation of a warning or some other disciplinary action (appeal hearings).

390. The statutory right is to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. Employers must agree to a worker's request to be accompanied by any companion from one of these categories.

Polkey reduction

391. In Software 2000 v Andrews [2007] ICR 825, EAT, Elias P summarised (at paragraph 54) the authorities on "Polkey" reductions and made the following observations:

(a) in assessing compensation for unfair dismissal, the tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

(b) if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

(c) there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

(d) however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere

fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence; and

(e) a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e., that employment might have been terminated earlier) is so scant that it can effectively be ignored.

Sex, race and disability discrimination and the burden of proof

392. Under s13 (1) of the Equality Act 2010 (the EQA) read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of sex/race than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

393. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of sex/race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

394. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

395. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA). The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

396. Those bare facts 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."

397. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870. "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to

offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Conscious or unconscious thoughts of the alleged discriminator

398. An act may be rendered discriminatory by the mental processes, conscious or nonconscious, of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877, HL. In such cases, the tribunal must ask itself what the reason was for the alleged discriminator's actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that answers the question of whether the claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin. per Lord Nicholls: "In every case…it is necessary to enquire why the claimant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance because the claimant was not so well qualified for the job. Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

399. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, per Lord Nicholls at paragraph 10.

As set out by Lord Nicholls in at [11], and albeit assuming a difference of treatment (which the Claimant cannot do): "…employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others." It is permissible for the tribunal to answer the hypothetical comparator question by having regard to how unidentical but not wholly dissimilar cases have been treated: Chief Constable of West Yorkshire v Vento (No.1) [2001] IRLR 124, EAT, per Lindsay J at paragraph 7; approved in Shamoon, per Lord Hutton at paragraph 81.

400. A benign motive is irrelevant when considering direct discrimination: Nagarajan at 884G-885D, per Lord Nicholls. It is irrelevant whether the alleged discriminator thought the reason for the treatment was the protected characteristic, as there may be subconscious motivation: Nagarajan at 885E H:

"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. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds."

Drawing of inferences

401. It is not sufficient for to draw an inference of discrimination based on an "intuitive hunch" without findings of primary fact to back it: Chapman and Anor v Simon [1994] IRLR 124.

402. The process of drawing inferences is a demanding task. If a tribunal is to make a finding of discrimination on the basis of inference, per Mummery J in Qureshi v Victoria University of Manchester [2001] ICR 863:

> "It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. An intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion."

403. In determining whether a claimant has established a prima facie case, the tribunal must reach findings as to the primary facts and any circumstantial matters that it considers relevant: Anya v University of Oxford and Anor [2001] IRLR 377 (CA). Having established those facts, the tribunal must decide whether those facts are sufficient to justify an inference that discrimination has taken place.

404. Where there are multiple allegations, the tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an "across the board approach" when deciding if the burden of proof shifted in respect of all allegations: Essex County Council v Jarrett UKEAT/19/JOJ.

405. The tribunal may cast its net widely to look for facts that are consistent with discrimination and may therefore give rise to a prima facie case. The tribunal may take account of circumstantial evidence, including matters occurring before the alleged discrimination (even those outside the limitation period) and matters occurring afterwards if they are relevant. However, there must be "some nexus between the facts relied on and the discrimination complained of": Wheeler & Anor v Durham County Council [2001] EWCA Civ 844.

406. Din v Carrington Viyella Ltd [1982] ICR 256 is authority for a tribunal being able to take account of matters that took place prior to the discrimination complained of in order to assist it in drawing adverse inferences against a respondent.

407. The less favourable treatment must be because of a protected characteristic and that requires the tribunal to consider the reason why the claimant was treated less favourably in accordance with the guidance in *Nagarajan.* The tribunal needs to consider the conscious or subconscious mental processes which led the respondent to take a particular course of action in respect of the claimant and to consider whether her gender played a significant part in the treatment: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Perceived direct disability discrimination

408. The EQA considers diagnosis of cancer as a disability. You do not have to have symptoms or consider yourself disabled by your cancer to be covered.

409. Given that the Respondents perceived that the Claimant had cancer she has protection under the EQA from suffering direct discrimination on account of disability.

410. Under s13(1) of the EQA, direct discrimination takes place where a person treats the claimant less favourably because of disability than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

411. Discrimination includes, in the employment context, subjecting a worker to a detriment, or dismissing her (S.39 EQA).

412. In a direct discrimination case, where a tribunal is concerned with the state of mind of an alleged discriminator which caused him or her to act in the way alleged, the alleged discriminator must have actual knowledge rather than constructive knowledge of the disability; or at least the actual facts from which it can be concluded that the employee was potentially disabled.

413. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the disability. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

Harassment

414. Under s26, EQA, a person harasses the claimant if he or she engages in unwanted conduct related to a protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

415. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, where Mr Justice Underhill (as he then was) gave this guidance:

> "An employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. 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 discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

416. General Municipal and Boilermakers Union v Henderson [2015] IRLR 451 provides that a single incident is unlikely to be sufficient to create an environment sufficient to give rise to an offence of harassment.

Victimisation

417. Under s27 EQA, it is victimisation for a respondent to subject a claimant to a detriment because she had done a protected act. A 'protected act' includes making an allegation (whether or not express) that someone has contravened the EQA.

418. For the test that needs to be applied useful guidance is provided in Shamoon and that an unjustified sense of grievance cannot amount to a detriment. The test to be applied in determining whether a detriment exists is if a reasonable worker would, or might, take the view that the treatment was in the circumstances to his or her detriment. This must be applied by considering the issue from the point of view of the victim. While an unjustified sense of grievance about an alleged discriminatory decision cannot constitute detriment a justified and reasonable sense of grievance about the decision may do so.

Detriments and automatically unfair dismissal for making protected disclosures

419. Under section 43A of the ERA, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B of the ERA:

> (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following (with only the potentially relevant subsections being set out):
>
> (a) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
> (b) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

420. The following questions must be addressed: first, is there a disclosure of information; second, does the disclosure of that information tend to show one of the matters referred to in section 43B(1)(a)-(e); third, what was the belief of the employee making the disclosure; and fourth, was a belief reasonably held that the disclosure tends to show one or more relevant failing and was made in the public interest. All of these elements must be satisfied if the claim is to succeed.

421. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under Section 43C, to the worker's employer.

Disclosure of information

422. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain information, whether expressly or impliedly (see Kilraine v Wandsworth LBC [2018] EWCA Civ1 1436). Each case will turn on its own facts.

423. In Kilraine the Court of Appeal clarified that "allegation" and "disclosure of information" are not mutually exclusive categories. What matters is the wording of the statute; some "information" must be "disclosed" and that requires that the communication have sufficient "specific factual contents".

424. What does matter is that the Claimant has a reasonable belief that the information disclosed tends to show one or more of the matters in S43B (1). In Kraus v Penna Plc [2004] IRLR 260 at para 24 the EAT held that "likely" in this context means "more probable than not".

425. As noted in Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT it is not sufficient that the claimant has simply made allegations about the wrongdoer (especially where the claimed whistleblowing occurs within the claimant's own employment, as part of a dispute with his or her employer). According to Slade J:

> "The ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information."

426. In Western Union Payment Services UK Ltd v Anastasiou UKEAT/0135/13 (21 February 2014, unreported) Judge Eady, following and applying the Cavendish distinction between information on the one hand and the making of an allegation or statement of position on the other, commented that 'the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive."

427. On further appeal to the Court of Appeal, it was held that whatever is claimed to be a protected disclosure must contain sufficient information to qualify under the s.43B(1); the position being that in effect there is a spectrum to be applied and that, although pure allegation is insufficient (the actual result in Cavendish), a disclosure may contain sufficient information even if it also includes allegations. Kilraine was cited and applied subsequently by the Court of Appeal in Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601.

428. The question therefore is whether there is sufficient by way of information to satisfy s 43B and this will be very much a matter of fact for the tribunal. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide.

Legal obligation relied upon

429. It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see Bolton School v Evans [2006] IRLR 500 EAT).

Reasonable belief

430. What is required is that the worker has a reasonable belief. It is not necessary for the information itself to be actually true. A disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect (Darnton v University of Surrey [2003]

IRLR 133, EAT). Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief, the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

431. The test is a subjective one; the ERA referring to the reasonable belief of the worker making the disclosure. It follows that the individual characteristics of the worker need to be taken into account and the relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief (Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT).

432. The mental element required by ERA in this context imposes a two stage test: (i) did the claimant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing? This point was considered further in Ibrahim v HCA International [2019] EWCA Civ 207, [2019] 1 WLR 3981 where it was held that the claimant's motivation for making the disclosure is not part of this test; the claimant in that case was not necessarily ruled out because at the time he had been concerned to clear his name of slurs and re-establish his reputation; As the judgment of Underhill LJ puts it: 'the necessary belief is simply that the disclosure was in the public interest' and 'the particular reasons why the worker believes it be so are not of the essence."

433. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief. Reasonable belief requires a subjective belief that is objectively reasonable (see Babula v Waltham Forest College [2007] ICR 1026, per Wall LJ).

In the public interest

434. The public interest element was added in 2013 to address the decision in Perkins v Sodexho Ltd [2002] IRLR 109, EAT. This has been considered by the Court of Appeal in Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979. Underhill LJ gave the lead judgment and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see paragraph 32). He declined to interfere with the tribunal's decision and set out his reasons at paragraph 37.

> "The correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker… The question is one to be

answered by the tribunal on a consideration of all the circumstances of the particular case."

435. The tribunal must consider all the circumstances, Underhill LJ gave some general guidance. He said that a tribunal must first ask whether the worker believed, at the time he was making the disclosure that it was in the public interest and if so, whether that belief was reasonably held. At paragraph 27 he stated:

> "First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula ... The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable."

436. In Parsons v Airplus International Ltd UKEAT/0111/17 (13 October 2017, unreported) the EAT pointed out that the determination that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest does not prevent a tribunal from finding on the facts that it was actually only one of them. Thus, where the claimant made a series of allegations that in principle could have been protected disclosures but in fact were made as part of a disciplinary dispute with the employer which eventually led to her dismissal for other reasons, the tribunal was held entitled to rule that they were made only in her own self-interest and so her claim of whistleblowing dismissal was rejected. The judgment of the EAT makes two subsidiary points of interest in a case such as this: (1) the fact that in these circumstances a claimant could have believed in a public interest element is not relevant; and (2) a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination.

Aggregation of disclosures

437. It is possible to aggregate separate incidents to amount to a composite disclosure: see Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 340 EAT.

Burden of proof on establishing the relevant failure

438. The claimant bears the burden of proof on establishing the relevant failure (Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06 (3 May 2006, unreported) Judge McMullen said:

> ''As to any of the alleged failures, the burden of the proof is upon the claimant to establish upon the balance of probabilities any of the following:
>
> > (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.

> (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

Detriments on account of making protected disclosures

439. Under S47B ERA, a worker has a right not to be subjected to a detriment by any act, or deliberate failure to act, on the part of his or her employer done on the ground that the worker has made a protected disclosure.

440. A detriment is something that a reasonable worker would consider to be their disadvantage in the circumstances in which they have to work. Something may be a detriment even if there are no physical or economic consequences for the worker, but an unjustified sense of grievance is not a detriment: see Shamoon at paras 34-35 per Lord Hope and at paras 104-105 per Lord Scott.

441. Section 47B ERA provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Whilst the burden is on the employer, the Claimant must raise a prima facia case as to causation before the employer will be called upon to demonstrate that the protected disclosure was not the reason for the treatment; see Serco Ltd v Dahou [2017] IRLR 81 para 40. As such the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under S136 of the EQA.

Automatic unfair dismissal

442. Section 103A of the ERA provides:

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

443. The burden of proof in relation to the reason for dismissal lies with the respondent as stated in Maund v Penwith District Council [1984] IRLR 24:

> "It is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue, or to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal."

444. This principle was affirmed by the Court of Appeal in Kuzel v Roche Products Ltd [2008] EWCA Civ 380, which indicated that although an employee may make a positive case about an alternative reason for dismissal, such as a protected disclosure, the burden would still rest on the

employer to show this wasn't the case if the employee had sufficient service to claim unfair dismissal.

445. In Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT, where a tribunal had found automatically unfair dismissal under s.103A because it was satisfied that the whistleblowing had been 'on the respondent's mind' when dismissing, the EAT held that it had applied the wrong test (i.e. the s 47B test) and allowed the employer's appeal. Similarly, in Mid-Essex Hospital Services NHS Trust v Smith UKEAT/0239/17 (5 March 2018, unreported) the EAT allowed an appeal against a tribunal's finding of unfair dismissal under s 103A because it had not applied Kuzel where Mummery LJ said that if the employer fails to establish its alternative reason it will often be the case that the tribunal will find the claimant's automatically unfair reason (here, whistleblowing) established, but that is not a rule of law – it may still be the case that it finds another reason established on the facts, which can still defeat the claimant's claim.

446. When considering the dismissal, it is necessary to consider the thought processes of the individual or individuals who dismissed.

447. The following paragraphs in LJ Mummery's judgment Kuzel are particularly helpful:

448. The unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the tribunal to identify only one reason or one principal reason for the dismissal.

449. The reason or principal reason for a dismissal is a question of fact for the tribunal. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

450. The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.

451. One or more of the protected disclosures must be the sole or principal reason for the dismissal. It is for us to decide, as a question of fact, what is the reason for dismissal. In deciding that reason, it may be appropriate to draw secondary inferences from primary findings of fact. The reason for dismissal is disputed. We are required to draw an inference, or find directly on the primary findings of fact, that the sole or principal reason for the Claimant's dismissal were the protected disclosures.

452. Where an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the

evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

453. Having heard the evidence of both sides relating to the reason for dismissal we need to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

454. We must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the Respondents to show what the reason was. If the Respondents did not show to our satisfaction that the reason was what it asserted it was, it is open to us to find that the reason was what the Claimant asserted it was. But it is not correct to say, either as a matter of law or logic, that we must find that, if the reason was not that asserted by the Respondents, then it must have been for the reason asserted by the Claimant. That may often be the outcome in practice, but it is not necessarily so.

455. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to us to find that, on a consideration of all the evidence, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.

Submissions

456. On day 11 the parties provided extensive closing submissions with the Claimant's running to 48 pages and the Respondents' (to include appendixes) 182 pages. The Tribunal read these in full and Counsel spoke to them. It is not necessary to set out in detail the submissions made but it is appropriate to highlight a few principal points made by respective Counsel. Those submissions relating to the law are already reflected in the section above on the law and the Tribunal will confine its reasoning and determinations on the issues to the conclusions section.

Respondents

457. In summary points highlighted by Mr Craig were as follows.

458. It is the act of which complaint is made and no other that the Tribunal must consider and rule upon. In relation to the "background" matters the Tribunal will need to guard against those matters obscuring its analysis of the "live" issues. English law does not apply to those background matters given that the Claimant did not acquire statutory rights in England until after territorial jurisdiction was established on 6 September 2017.

459. The claim is not about “stereotypes”, a discriminatory “culture” and the Claimant being judged to a higher standard.

460. There is a fundamental inconsistency at the heart of the Claimant’s case in that the Respondents were contemplating the possibility of a separation prior to her becoming ill on 23 August 2016 with what the Respondents wrongly perceived was cancer.

461. The Respondents went to substantial lengths to help the Claimant and in no way treated her less favourably, indeed their treatment of her was more favourable.

462. That as the Claimant brought her claim to the Tribunal on 30 January 2019 the only acts potentially in time are those which occurred on or after 30 August 2018 namely:

- The termination of her employment with effect on 31 August 2018
- The withholding of her Entry Shares in September 2018
- Part of her complaints about the DSAR

463. Mr Craig made detailed submissions regarding the correct analysis of the Claimant’s dismissal and whether she was dismissed in July 2018 or August 2017. These are outside the scope of this summary. However, the question of the Claimant’s dismissal, and its timing, is addressed in the conclusions.

464. The Claimant’s dismissal was on the grounds of “some other substantial reason” and it was reasonable for the Second Respondent to treat that as a sufficient reason for dismissal.

465. For the Claimant to establish that those acts which are prima facia out of time should be regarded as in time it would be necessary for her to demonstrate that the earlier acts form part of an act extending over a period and extending until at least 30 August 2018. Alternatively, the onus would be on the Claimant to adduce evidence as to why it would be just and equitable to extend time and the Respondents say she has not.

466. The Claimant was confused as to the basis upon which her claim was being pursued. In response to questions in cross examination she frequently referred to alleged acts of less favourable treatment being because she is a “black woman”. This is inherently wrong as s.14 of the EQA, regarding dual characteristics, has never been enacted and therefore the Tribunal will need to consider each of the protected characteristics relied upon separately.

467. The claims of harassment have been brought only on the grounds of race or sex and not perceived disability. The Claimant has given no evidence as to the effects of any alleged harassment.

468. That the background allegations largely concern different individuals, different times and in different places. In particular Mr Jenkner is a significant

figure in the background allegations but was not involved in any of the post September 2017 allegations.

Claimant

469. The Tribunal should take account of the background matters in order to assist it in drawing adverse inferences against the Respondents.

470. All of the Claimant's claims fall in time in that the Respondents' treatment of her constitutes a continuing act for the purposes of s.123(3) of the EQA or alternatively it is just and equitable for the Tribunal to extend time.

Witness credibility

471. Both parties contended that the evidence given by their respective witnesses should be preferred.

Conclusions

472. We consider it most appropriate to first set out our findings in relation to the background matters given that this is consistent with the narrative chronology. As discussed with the parties we do so for clarity and completeness and without any acknowledgement that these matters are in time (our conclusions are set out below) and/or are matters which are within the territorial jurisdiction of the Tribunal and the application of English employment law. We have sought to achieve an appropriate balance between proportionality in accordance with the overriding objective and all elements of the judgment being Meek compliant.

Background matters

Being required to begin the Associate Program in the Firm's San Francisco satellite office instead of the New York office?

473. We find that this did not constitute less favourable treatment of the Claimant than other persons of a different sex or race. We reach this finding for the following reasons:

474. All members of the Associate Program were informed that their rotation to any of the Respondents' offices would be in accordance with business need. There was no guarantee that the first, or subsequent, rotations would be in an Associate's home office.

475. We do not consider that San Francisco represented a "small satellite" office as contended by the Claimant. With approximately 40 employees it was undoubtedly smaller than New York with approximately 120 but it nevertheless represented the "hub" for the Respondents' Real Estate Department. There is no basis to perceive that the quality of work from the office was lower than that in New York or elsewhere.

476. We do not accept that by spending her first two rotations in San Francisco the Claimant's ability to progress was hindered. Whilst the office was smaller there would remain the opportunity to develop relationships, build networks, whether in person or remotely, and demonstrate her credentials as a member of the teams in which she rotated.

477. Further, we do not accept that it was known that the San Francisco office would be closing at the time of the Claimant's rotations. In any event, even if it had been perceived that the office may at some point close, we do not consider that this would in itself have been less favourable treatment. The Claimant would have been in no different position to others within the office, and given that she was at the start of a series of rotations, there is no basis to infer that being in San Francisco would disadvantage her potential progression to a permanent position.

478. There is no reason to infer that the Claimant's rotations to San Francisco had anything to do with her sex or race and therefore the burden of proof does not shift to the Respondents. Therefore, this background matter fails.

Ms Alsterlind refusing to allow the Claimant (and two other black Associate Program members, Mr Owusu-Opoku and Mr Kimotho) to rotate onto the Direct Real Estate Investment team in October 2015 despite Mr Raleigh, a Vice President on the team, expressly asking the Claimant to work with him on a deal

479. We find that Ms Alsterlind did not block the Claimant from working on a deal with Mr Raleigh. She said that it was fine, subject to ensuring that she was not needed elsewhere.

480. Pieter Nelissen confirmed that it was fine and Ms Alsterlind told Mr Raleigh to "go ahead!" with including the Claimant on the deal. The Claimant did in fact work on the deal.

481. We therefore find that the act complained of (Ms Alsterlind refusing to allow the Claimant to work on the deal) did not as a matter of fact occur.

482. There is no reason to infer that this allegation had anything to do with the Claimant's race or sex and therefore the burden of proof does not shift to the Respondents. Therefore, this background matter fails.

Mr Jenkner sharing an anecdote at an offsite event in or around April 2016, the clear intention of which was to equate black people to monkeys?

483. We gave careful consideration to Mr Jenkner's account of the anecdote at paragraph 14 of his witness statement. We compared this with the version of the anecdote as given by the Claimant in her handwritten note as part of the Levy investigation as at page 2444 in the bundle. We consider that the respective descriptions of the anecdote are broadly consistent but clearly the Claimant's interpretation of the intent pertaining to the anecdote differs substantially from that of Mr Jenkner.

484. The evidence of Ms Burke-Leeds does not add significantly to that of the Claimant. She cannot recall the specifics of the anecdote but says that she considers that it was inappropriate and had "racist overtones towards black people".

485. We consider that there are grounds to infer that this allegation involved harassment of the Claimant on account of her race and therefore that the burden of proof shifts to the Respondents. We therefore need to consider the explanation provided by the Respondents and specifically Mr Jenkner.

486. We consider that the Claimant and Ms Burke-Leeds held the genuine impression that the anecdote had racist overtones. However, this does not in itself mean that it did. It is not clear if they were directly engaged in conversation with Mr Jenkner and could therefore hear everything he said, as opposed to being bystanders partially listening and not necessarily picking up on the nuance of the anecdote. It is perfectly possible that the Claimant, Ms Burke-Leeds and potentially others partially overhearing a story involving reference to a foreign holiday and the use of the words "I am a monkey" or "am I the monkey now?" could have construed this as a story or anecdote having racist overtones.

487. We except the Respondents' explanation that this anecdote did not have the purpose of violating the Claimant's dignity or creating an adverse environment for her. Having carefully considered the parties' accounts of what they consider was said we do not consider that the most natural interpretation is that Mr Jenkner's intention was to cause offence to the Claimant or others amounting to harassment pursuant to S.26 of the EQA.

488. Nevertheless, we consider that in publicly sharing in a professional environment an anecdote containing terminology which could have been misconstrued that Mr Jenkner displayed an error of judgment albeit not one we have found to have any overt racist intent.

489. Therefore, this background matter fails.

Mr Baumann stating to the Claimant in August 2016 that "women should be the ones to stay at home, as they have the smaller egos".

490. Mr Baumann denies making such a comment and says it would be completely contrary to his beliefs and actions. Absent any independent corroboration, or contemporaneous complaint or notes by the Claimant, we find on the balance of probability that such a comment was not made. We also consider it significant that the Claimant makes a strikingly similar allegation in respect of Mr Jenkner and on the balance of probabilities, we consider it unlikely that she would have been exposed to virtually identical comments from two separate senior employees.

491. Therefore, this background matter fails.

Mr Jenkner repeatedly questioning the Claimant about her qualifications as standardised testing scores at a coffee meeting in March 2017 in the cafeteria in the Firm's Zug office and emailing HR to verify her business school grades.

492. We consider it surprising that Mr Jenkner, or anyone else at the Respondents, would consider it necessary to verify the educational qualifications/grades of those on the Associate Program. We would have assumed that as part of the pre-employment due diligence the Respondents would have established to their satisfaction that those recruited to the prestigious Associate Program were of the requisite calibre. We therefore consider that the Respondents are required to provide an explanation as to why this was considered necessary in the specific circumstances of the Claimant.

493. We consider that the Claimant could reasonably perceive that this involved aspersion being cast on her academic credentials. This would therefore constitute less favourable treatment. We then need to consider whether such less favourable treatment was on account of the Claimant's protected characteristics. We find that it was not and reach this finding for the following reasons.

494. Mr Jenkner says that he would often request such verification. Whilst it would not normally be the case for those in the early stages of their rotations it would be something he would do in the context of an Associate nearing the end of their rotations where the serious possibility existed of them converting during that rotation. Therefore, we find that this did not represent an action specific to the Claimant.

495. Whilst the Claimant contends that the position had changed from prior to her being absent on account of ill health and therefore infers that her perceived cancer must have been the reason for the change of position we do not accept this. First, there is no evidence that at the time of Mr Jenkner's request for clarification i.e. March 2017 that he was aware as to her illness and the Respondents' mistaken belief that it was as a result of cancer. We find that the earliest date when he may have been aware of this was the 25 August 2018 email to the Exco.

496. We consider it much more likely that the reason for his seeking verification of the Claimant's educational and academic performance was as a result of his having received feedback that her previous reviews were negative. This was in the context of her potentially moving to a rotation on the Infrastructure team. In these circumstances we do not find that there is any basis upon which to infer that the Claimant's sex, race or perceived disability was the reason for his actions. Even if we had considered that grounds existed for such an inference we consider that the Respondents have satisfied the burden of proof by their explanation as to the circumstances pertaining to the verification request.

497. Therefore, this background allegation fails.

Ms Peiner telling the Claimant in the Firm's London office in or around July 2017 to add a male to an otherwise all female deal presentation specifically because it was going to be presented to Mr Jenkner and telling the Claimant *"*you know how Juri is, he thinks women should stay at home in the kitchen"?

498. We accept the Respondents' position that Mr Makar had been added to the Gigaclear deal team as he had already worked on it. Ms Peiner explained that the deal was "originally screened" by Mr Makar and therefore his continuing involvement was completely natural. We accept her evidence. The Claimant remained part of the deal team.

499. We do not accept the Claimant's assertion that there was a causative or temporal juxtaposition between Ms Peiner's decision to add Mr Makar to the deal and her alleged comment that Mr Jenkner thought women should stay in the kitchen.

500. With the alleged comment we consider it striking that the Claimant asserts in virtually identical language that Mr Jenkner said "women should stay at home in the kitchen" and Mr Baumann said that "a woman's place is in the kitchen". Whilst it is possible that they made virtually identical comments we consider it possible that the Claimant's evidence may have become confused as we consider it improbable that both of them would have made almost the same wholly unprompted comments to the Claimant on entirely separate occasions, or alternatively in the case of Mr Jenkner to Ms Peiner, and yet there is no evidence that anyone else overheard or expressed concern.

501. Further, given that Ms Peiner is self-evidently a senior and self-assured senior professional business woman, we consider it highly unlikely that her decision as to the composition of a deal team would have been influenced by any perception as to Mr Jenkner's preferences as to the gender balance of such teams.

502. Therefore, this background allegation fails on the basis that whilst Mr Makar was added to the deal team it was not because he was a man and not because Ms Peiner was concerned about Mr Jenkner's likely negative reaction to an all-female deal team but rather that it was a decision made in the ordinary course of a team being composed to reflect relevant prior experience of the transaction in question and/or compatibilities of the team members in skills and experience to optimise collective team capability.

Ms Peiner providing the Claimant with the following unsolicited advice in the Firm's London office on or around 19 July 2017 as to how to be successful at the Firm: *"*You should be more aggressive, but not too much more aggressive, since you are a woman it will not go over well."?

503. We consider it likely that Ms Peiner said to the Claimant that she, and women more generally, should be "more assertive". As such we consider that the burden of proof shifts to the Respondents.

504. Whilst we consider it possible that she may also have said that she should be "more aggressive" we consider that if said this was more likely to be as a result of a linguistic misinterpretation given that English is not her first language and she gave evidence that she may have incorrectly used the word "flippant" in her interview as part of the Levy investigation.

505. We find that Ms Peiner was providing guidance to the Claimant as a more junior female employee in Private Equity. We find it difficult to construe how the Claimant considers that such advice could have been less favourable treatment on account of her sex or race.

506. Therefore, this background allegation fails on the basis that we consider that the respondents, and Ms Peiner, specifically have provided a satisfactory explanation to rebut any inference of the Claimant suffering less favourable treatment on account of what self-evidently must be the grounds of her sex.

Mr Jenkner muting the London office's video conference microphone in order to mock the accent of a female Indian colleague during a presentation to the Global Infrastructure team on 8 August 2017. And while he attempted to engage the Caucasian male intern in the room in mocking the female Indian AVP, he did not attempt to engage the Claimant.

507. We listened to the relevant section of the audio file on three separate occasions. As a finding of fact, we consider that Ms Malik was talking very fast. We therefore consider that Mr Jenkner's muting of the call and saying "blah blah blah" was for this reason. Whilst this undoubtedly represented a somewhat inappropriate and disrespectful action, we consider that it was not related to Ms Malik's gender or race. We therefore do not accept that the act complained of occurred as a matter of fact. Whilst the conversation took place the allegation of Mr Jenkner mocking the accent of an Indian female colleague is not substantiated.

508. Further, we do not understand the Claimant's contention that by engaging with the Caucasian male intern in the room but not her that this constituted less favourable treatment. It would appear contradictory that if the Claimant perceived that Mr Jenkner was "mocking" Ms Malik on account of her race or gender, that she would then complain that he did not engage her in his response.

509. In any event we consider that no basis exists that even if such conduct had taken place, which we have found it did not, that it was directed at the Claimant. Whilst the Claimant is a woman, she does not share Ms Malik's race or nationality.

510. Therefore, this background allegation fails.

Mr Jenkner making negative remarks during a conversation with the Claimant on or around 18 May 2017 via video conference while the Claimant was in the Firm's London office about the fact that she had not

worked on a deal beyond the teaser stage resulting in the Claimant's rotation being extended beyond the standard three months? By contrast, Mr Jenkner had positive words of praise for two Caucasian males, Mr Garcia-Altozano and Mr Makar, who had joined the team before the Claimant, were not analysts and were both yet to work on a deal past the early stages.

511. We do not consider that the Claimant could reasonably have construed this conversation as casting a negative assertion on her. We accept Mr Jenkner's evidence that the majority of deals do not progress to execution, or even beyond the teaser stage, and further that there would have been absolutely no basis for insinuating that this was in any way as a result of any deficiency of the Claimant. It would inevitably be the case that whether a deal progresses, or not, is entirely outside the influence of an individual Associate forming part of the deal team.

512. We consider that Mr Jenkner's comment was in the context of discussing with the Claimant her overall levels of experience. We consider that he was taking a genuine interest in her and the comment was not to cast a negative assertion but rather to discuss with her what opportunities may exist for providing her with greater deal exposure. We consider that this would have been motivated by his wishing to provide her with the best opportunity to demonstrate her credentials in the context of potentially being considered for a permanent position in the London Infrastructure team.

513. Therefore, this background allegation fails on the basis that the act complained of did not as a matter of fact happen.

Mr Jenkner, Ms Peiner and Ms Schurch downplaying and criticising the Claimant's sourcing efforts in relation to Bechtel (in or around April 2017) and Broadnet (on or around 18 May 2017). By contrast, a Swiss male analyst (Mr Gilhawley) was lauded as a strong modeller and subsequently promoted to Associate later that year despite making a catastrophic modelling error in a key document submitted directly to the investment committee; another white male hire (Travis Chulivk) was encouraged to cultivate a link with Bechtel (by requesting introductions from the Claimant after she left the Infrastructure team); and Mr Garcia-Altozano, Mr Makar and Mr Gilhawley were taken for long dinners by Mr Jenkner to encourage them in their sourcing work.

514. We find that the Claimant's efforts in relation to Bechtel and "sourcing" more generally were praised. For example, in Ms Schurch's email of 2 May 2017 she said that the Claimant had made a "great effort". Further, in an email to Ms Peiner of 17 July 2017 she said that the Claimant had "proactively initiated the Bechtel contact" and "brought Broadnet to the deal flow". Further, the feedback of Mr Garcia-Altozano of 17 July 2017 refers to the Claimant's "strong professional network and that she has been proactive in sourcing new opportunities by using her contacts".

515. We therefore find no evidence to support the Claimant's assertion that her role in sourcing Bechtel, Broadnet or otherwise was "downplayed and criticised" as alleged.

516. Whilst the Claimant repeatedly referred to Mr Gilhawley having made a "catastrophic modelling error" we heard no evidence as to the specifics of this allegation. It was denied by all of the Respondents' witnesses when it was put to them. We therefore make no findings in this respect. In any event we do not understand the link the Claimant is seeking to draw between what she contends was here sourcing efforts being downplayed and criticised and Mr Gilhawley's promotion to an Associate.

517. Further, we do not find any evidence to support the Claimant's assertion that her efforts in respect of Bechtel were downplayed or that she was marginalised from the potential investment opportunity pertaining to Bechtel. She was praised and the Respondents decided that Mr Chulivk, in their Houston office, was best placed to explore the optionality of the Bechtel relationship. We do not consider that this could possibly be construed as less favourable treatment of the Claimant on account of her race or sex.

518. We heard no evidence as to the allegation that Mr Garcia-Altozano, Mr Makar and Mr Gilhawley were taken for "long dinners" by Mr Jenkner with the Claimant being excluded. In any event all of them were permanent members of the team unlike the Claimant and therefore it would have been natural for them to have spent time with him.

519. Therefore, this background allegation fails on the basis that the act complained of did not as a matter of fact happen.

The Claimant being blocked from placements on the Firm's San Francisco Direct Real Estate team (in October 2015), London Direct Private Equity team (in July 2017) and London Debt team (in August 2017) during her employment? A white male colleague (Carlos Trejo) was offered the rotation on the Direct Private Equity team instead of the Claimant and a white male intern (Jose Ferrero) was offered the rotation on the London Debt team instead of the Claimant. Both went on to become permanent members of the respective Teams. Mr Ferrero was an MBA intern and Mr Trejo a class below the Claimant in the Associate Program

520. We find that Associates are not entitled to any particular placements. Their rotation to any specific team is based on business needs. We consider that this was made clear to Associates at the commencement of the Associate Program.

521. Further, we do not accept that the Claimant was blocked from these placements.

522. In relation to Private Equity Directs we find that no promise was made by Mr Biner, or otherwise, that the Claimant would have such a rotation. Mr

Biner says that Claimant had already had a rotation in the Private Equity team in San Francisco.

523. We do not accept the Claimant's assertion that a rotation to Private Equity Directs is "virtually mandatory" and is a "must". This is self-evidently incorrect given that seven of the 18 members of the 2015 Associate Program class did not do a rotation in Private Equity Directs. The seven included Mr Corrona, a white male.

524. Further, the Claimant's exchanges with Mr McArdle in July 2017 make no mention of her perception that she was being "blocked" from doing a rotation in Private Equity Directs.

525. In relation to London Private Debt rotation we do not accept the Claimant's allegation that Mr Essex overruled the decision of Mr Hardison. We accept Mr Hardison's evidence that he never made a decision that the Claimant would do a further rotation in London Private Debt. We accept his evidence that any such rotation would have been conditional on positive feedback being received and that this was not the case given that she had been given scores of 4 out of 10 by Mr Libretto, Mr Rothburd and Mr Bridges.

526. Further, there is no evidence to suggest that Mr Essex perceived the Claimant to have cancer. Mr Hardison said that he had no idea at the time that she had any health issues.

527. In relation to the San Francisco Direct Real Estate Asset team we have already set out our finding above that being on primaries as opposed to directs was not less favourable treatment. Further, we have found that the Claimant was not blocked from working on a deal with Mr Raleigh.

528. Therefore, this background allegation fails on the basis that the act complained of, i.e. blocking the Claimant's rotations to the designated teams, did not as a matter of fact happen but, in any event, we accept the Respondents' explanation as to why the Claimant did not rotate to the specific teams as set out.

The Claimant being blocked from a permanent role on the London Real Estate Asset Management team in March 2017, the Infrastructure team in June 2017 and on the London Listed Private Equity team in August 2017. A white male colleague (Kevin Dunn) was offered the role on the London Asset Management team instead, in spite of the fact that Mr Dunn announced via email that he was resigning from the Firm weeks prior (due to no longer wanting to live in Zug, Switzerland)

529. For the reasons set out above we do not consider that the concept of "blocking" was applicable. There was no expectation that any given Associate had an entitlement to a permanent role. This in effect represented a "matching" process and the reality was that the Infrastructure team, or indeed any other team, did not consider that the Claimant's performance had

reached the threshold which would have attracted them to make her such an offer.

530. We consider that the Claimant's position is confused. On the one hand she complains about being blocked from a permanent role on the London Real Estate Asset Management team, but she also contends that she received offers from both Mr Kalashnikov and Mr Bryant. We find that no such offers were made.

531. We consider that the evidence is consistent with Mr Kalashnikov, Ms Alsterlind, Mr Bryant and others giving genuine consideration as to whether the Claimant would be a suitable permanent recruit to Real Estate Asset Management. However, the consensus was that she had not performed well enough and nor, and potentially more significantly, was not enthusiastic about Real Estate.

532. Therefore, this background allegation fails on the basis that the act complained of, i.e. blocking the Claimant from being appointed to a permanent role on the designated teams, did not as a matter of fact happen but, in any event, we accept the Respondents' explanation as to why the Claimant was not offered a permanent appointment to the specific teams as set out.

The Claimant scoring better on a blind review of investment documents produced during her Infrastructure Team rotation when her identity (in particular her race and sex) was not known

533. We consider that this allegation is wholly misconceived. We find that the Claimant has incorrectly interpreted the scoring on the investment documents as being correlated to her own individual performance. This is wholly inconsistent with the reality of the papers being scored generically and not attributable to any individual contributor. Given that by necessity the overall quality of a paper would be more of a reflection of the senior investment professionals on the paper the contribution of any individual Associate to substantially influence the overall score would be relatively limited. We accept the Respondents' evidence that there would be a degree of randomness to the scores Associates receive. Further, we accept Mr Treumpler's evidence that scores on Investment Committee papers were not used as a measure of Associate performance. Had they been used this would almost certainly have resulted in an extremely random and unfair process.

534. In relation to the Ineo deal paper whilst we accept that the Claimant's contribution to the risk section may have been relatively positively reviewed in the context of what was an overall very poor assessment of the quality of the paper we do not consider that this in itself provides any significant evidence of her overall performance. This represented a paper which overall was regarded as significantly below the expected standard.

535. In any event Ms Malik had overall responsibility for the risk section and therefore it would be impossible to attribute any particular responsibility for the relatively higher quality of this section, in an overall very poor paper, to the Claimant's individual efforts.

536. Further, we do not accept that the Claimant was excluded from subsequent communications on the debrief on the Ineo project. We accept the Respondents' explanation that the inclusion of Mr Gilhawley was because of his involvement in a particular aspect of the modelling. It is also significant that a white male member of the team, Adrian Hojerslev, was also not involved in the email chain in respect of which the Claimant complains of her exclusion.

537. Therefore, this background allegation fails on the basis that the act complained of did not as a matter of fact happen.

The Firm planning to "manage the Claimant *out"* of the business in June 2017.

538. We find that by the end of June 2017 the possibility of the Claimant leaving the business was clearly envisaged by the Respondents. However, we consider that there are no grounds to infer that this was an account of the Claimant's race or sex.

539. She had not secured a permanent role, was on her sixth rotation and was nearing the end of the maximum 24 month period on the Associate Program. It was therefore only natural that the Respondents should commence considering what her position would be if no permanent offer was forthcoming in her final rotation in London Infrastructure.

540. We accept Mr Truempler's evidence that most Associates who do not receive an offer in the first 12 to 15 months start considering alternative options. Further, we accept that where they do not the Respondents commence without prejudice negotiations with a view to separation under a settlement agreement. As such we find that the Claimant was being treated no differently to any other Associate in a similar position. Further, we find that the Claimant was treated more favourably in that rather than her employment being terminated at 24 months she was given the opportunity of up to a further 12 months during which she could seek to demonstrate to London Listed Private Markets that she was worthy of the offer of a permanent place but if not endeavour to secure alternative employment and regularise her UK immigration situation.

541. Therefore, this background allegation fails on the basis that whilst as a matter of fact the Respondents were contemplating the Claimant's managed departure from their business we find that this had nothing to do with her protected characteristics.

Mr Garcia-Altozano stating on 9 August 2017 that he was used to Mr Jenkner making "off colour" comments after the Claimant raised various concerns with him about Mr Jenkner's behaviour

542. Whilst it is possible that he may have made such a comment we do not consider that it could in isolation constitute less favourable treatment of the claimant on account of her sex or race where we have already found on the balance of probabilities that Mr Jenkner did not make inappropriate comments.

543. In any event Mr Garcia-Altozano said that he did not think he said anything along these lines.

544. Therefore, we find that this background allegation fails.

The Claimant being told in August 2017 that she should spend an extended period with a team that she would like to stay with while internal HR emails in July 2017 stated that she was to be deliberately kept in the dark about her next rotation being "her last" and that she "will not receive an offer from us"

545. We find that in August 2017 the Respondents were giving consideration to what steps could be taken to assist the Claimant. Given that a proposal pursuant to which she remained in employment for up to 12 months would involve a significant cost to the Respondent it is entirely credible that this would have needed sign off from the Exco together with legal input. We therefore accept the Respondents' position that this resulted in a temporary hiatus before the Claimant was informed of the outcome. Further, we accept that the Claimant would not have been copied in on these communications which were clearly confidential, and nor could she have had any reasonable expectation that she would have been included in such communications.

546. Further, we do not accept that the Claimant spending an "extended period" with the London Infrastructure team constituted less favourable treatment. It is not clear why the Claimant would contend that this was less favourable treatment given that at that point she was still on the Associate Program and would have been aware that she was approaching the 24 month cut off point.

547. Therefore, we find that this background allegation fails on the basis that we find the treatment complained of was not on the grounds of the Claimant's race or sex.

The Claimant not being offered a permanent position on the Infrastructure Investment team in 2017 at the behest of Ms Peiner before she had asked to see any feedback on the Claimant's work.

548. We do not accept the contention that Ms Peiner only obtained feedback on the Claimant after the decision had been made not to offer her a permanent

role in the Infrastructure team. We find that Ms Peiner from her own experience, and informal feedback from team members, had sufficient insight on the Claimant's performance to make a rationale decision that she had not met the required standard to be offered a permanent position. We further accept her evidence that with a view to providing constructive feedback on the Claimant's performance that she then requested written feedback from relevant team members.

549. In any event we accept that Ms Peiner did not make the ultimate decision not to offer the Claimant a permanent role on the Infrastructure team but rather it was Mr Jenkner and Mr Pratter. She made a recommendation to them to this effect.

550. Therefore, we find that this background allegation fails on the basis that we accept the Respondents' explanation that feedback was obtained by Ms Peiner before the decision not to make the Claimant an offer of a permanent position on the Infrastructure team was made.

The fact that on 25 August 2017, the Firm's HR Department emailed the Firm's Global Executive Committee stating that the Claimant had been diagnosed with cancer.

551. The Respondents acknowledge that this was a mistake. Clearly it was unacceptable. However, we do not consider that any nefarious inference can be drawn. It is self-evidently a case of relatively junior members of the Respondents' HR Team perceiving that reference to a "tumour" automatically signified cancer. This error was then replicated up the corporate chain.

552. We do not consider that Mr Truempler's email of 25 August 2017 can be construed as less favourable treatment on account of the Claimant's perceived disability. As a matter of fact, she had been absent on account of ill health but not cancer. The email was in the context of his seeking approval from the Exco for the proposed Accommodation Period. Had it been the Respondents' intention to terminate the Claimant's employment because they perceived that she represented a risk and potential cost as a result of a cancer history it would have been easy for them to do so by bringing her employment to an end after 12 months without a permanent offer on the Associate Program. They did not. They sought to explore the optionality of continuing her employment.

553. We consider that the contemporaneous evidence is consistent with the Respondents continuing to explore whether the Claimant could be found a permanent home. This continued subsequent to her return following her ill health absence. We find that Mr McArdle, Mr Jenkner, Ms Peiner, Mr Biner, Mr Munz and others all gave genuine consideration as to whether the Claimant could be found a permanent position. At some point all, or at least some, of them would have been aware of the misconception that she had been diagnosed with cancer but notwithstanding this they continued to explore options to her potential advantage.

554. Moreover, separation was already contemplated before the Claimant became ill. Therefore, we do not consider that any inference can be drawn that she was in any way treated less favourably on account of a misconceived perception that she had cancer.

555. Therefore, we find that this background allegation fails on the basis that whilst the Respondents were culpable of an admitted error we find that there was no less favourable treatment of the Claimant on account of her perceived disability or otherwise.

Direct Race / Sex Discrimination

Was the Claimant treated less favourably than the relevant comparator (named below, otherwise the Claimant relies upon a hypothetical Caucasian male comparator) in the following respects as alleged by the Claimant:

By Ms Peiner downplaying and criticising the Claimant's sourcing efforts in relation to Mongstad (on 31 October 2017, after the Claimant had completed her Infrastructure team rotation)?

556. Whilst the Claimant gave relatively significant evidence in respect of Bechtel, she gave no evidence in relation to Mongstad. Further, we do not find that the Claimant's sourcing efforts in relation to Mongstad were criticised or downplayed by Ms Peiner.

557. More generally we find that the Claimant's networking/sourcing efforts were regarded positively by the Respondents and this was communicated to her in performance review meetings.

558. There are no grounds to infer that this allegation involved any less favourable treatment of the Claimant on account of her sex or race and it therefore fails.

By the Claimant being left without a rotation position or a seat in the office for a full month between 11 August and 20 September 2017, which stigmatised her in the eyes of her professional colleagues and jeopardised her immigration status.

559. Whilst we find that the Claimant's situation in this period was unusual in that she was not progressing between standard rotations as part of the Associate Program we do not consider that any grounds exist to infer that this was on account of her sex or race. Therefore the burden of proof does not shift to the Respondents. Further, we do not consider that her unusual position in this period either stigmatised her in the eyes of her colleagues or jeopardised her immigration status. We reach this decision for the following reasons:

560. The Claimant's position was unusual as during this period the Respondents were giving consideration to whether in view of her unique

circumstances an extension of her employment could be arranged, and this required sign off from legal and the Exco. This inevitably resulted in a hiatus whilst the position was considered. We do acknowledge that the Claimant may have felt somewhat isolated and conscious of being in a different position from her peers during this period. This was in our view an inevitable product of her specific situation rather than as a result of her race or sex.

561. Whilst the Claimant says that she was literally left without a team and a physical desk during this period we do not accept that her position was as isolated as she states. We accept Mr Sidana's evidence that the Claimant was working proximate to him and his team for at least part of this period. Further, we accept that the Respondents may genuinely have had a shortage of physical desk space and as such there would be some hot desking which would almost inevitably have a higher impact on those in more junior positions and particularly those who were, for whatever reason, between teams. This had nothing to do with the Claimant's sex or race.

562. At the beginning of the period there remained an expectation that the Claimant may be able to sit with the London Debt team. This ceased to be a practicable option by the end of her period on the Infrastructure team on 10 August 2017. Further, she was on holiday between 14-18 August 2017.

563. The Claimant's previous visa lasted until 19 September 2017. The certificate of sponsorship for her next visa was issued on 8 September 2017. Therefore, we do not accept that her immigration status was jeopardised as alleged. Further, we consider that the Respondents were using their reasonable endeavours to assess the best options to facilitate the Claimant's ability to continue living and working in the UK.

564. We find no grounds to infer that any aspect of the Respondents' treatment of the Claimant's UK immigration situation constituted less favourable treatment of her on account of her sex or race. Whilst the Claimant's UK immigration situation was in part a consequence of her race the Respondents' treatment of her was not on account of her race. As a matter of fact we find that the Respondents did not treat the Claimant less favourably on account of her UK immigration situation but to the contrary used their reasonable endeavours to facilitate the best achievable outcome. This allegation therefore fails.

By Ms Alsterlind, Mr Garcia-Altozano, Ms Peiner, Patrizia Buser, and Ms Malik shunning and ignoring the Claimant, refusing to acknowledge her presence or respond to her communications and refusing to take the same elevator as her in the office.

565. In her witness statement, the Claimant only gave evidence in respect of Mr Garcia-Altozano. We therefore do not consider that the Respondents have any case to answer in respect of the other individuals named.

566. In relation to Mr Garcia-Altozano the Claimant's contention is that he started to shun her with effect from February 2018. However, she had made

her alleged protected disclosure/undertaken a protected act to him on 8 August 2017. It therefore would have been inconsistent for him to start "shunning" her approximately six months' later.

567. We also consider it relevant that the Claimant's evidence in cross examination was that it was more likely that it was the possibility of knowledge of the letter of complaint filed by her US lawyers on 5 January 2018 which would have caused people to "shun" her. In this context we accept that any individuals who were aware that the Claimant was a potential litigant, making serious allegations of discriminatory treatment, may have had some reluctance to interact with her. We are not saying that this did happen, nor that it would be acceptable, but merely providing it as a potential explanation for any perception the Claimant may have had that she was being shunned or ignored.

568. In any event given what would by definition be fleeting events, and absent any specific evidence in respect of them, it would be impossible to reach a finding on the balance of probabilities that these matters took place and that the reason they took place was as a result of the Claimant's sex or race. Inevitably in any office environment there will be occasions where, for whatever reason, individuals may choose to get into an elevator with one colleague, or colleagues, rather than others and there may be perfectly legitimate reasons for that, for example, they are working on the same transaction together, they have shared interests etc. It does not follow that the failure to associate briefly with a particular colleague has any untoward explanation.

569. We also consider it significant that the allegation made in respect of Ms Peiner is demonstrably inaccurate given that she gave birth in February 2018 and would not have been able to attend the London office, as alleged in February 2018, or indeed January 2018, given that she was late in her third semester and unable to fly.

570. We therefore find that as a matter of fact the act complained of did not happen and this allegation therefore fails.

By the Firm refusing to sponsor a Tier 2 General visa for the Claimant and stating instead that they would only sponsor a Long Term Tier 2 ICT visa.

By the Firm making no effort to renew the Claimant's right to work in the UK before it is due to lapse in February 2018. The Claimant was then forced to pursue an independent exceptional talent visa application which enabled her to remain in the UK and have the work authorisation that she used for the rest of her employment.

571. Whilst these allegations appear as (d) and (h) under s.4 of the List of Issues we consider it appropriate to deal with them together as they in effect involve the same issue but at different stages. Our findings are the same in relation to both allegations.

572. We find no grounds to infer that the Respondents' actions in relation to these matters involve less favourable treatment of the Claimant on account of her sex or race. In any event much of the considerable evidence on this issue involved consideration as to what the most appropriate immigration routes were, the details of the advice provided by the Respondents and their legal advisers, the Claimant's preferred options, the viability and legality of potential immigration routes and the Claimant's alleged reluctance to provide full disclosure to the Respondents and their lawyers of her own efforts. Very little of this evidence had any direct connection to allegations of less favourable treatment on account of the Claimant's protected characteristics.

573. It is outside the scope of our decision to form a view as to the viability and preferability from the Claimant's perspective of the different immigration routes. Nevertheless, we find that, albeit at her instigation, the Respondents willingly cooperated with the proposal pursuant to which she could remain on short-term Tier Two IC Graduate visas for up to 12 months, i.e. until March 2018. We find that the Respondents were then considering what legitimate options existed for a continuation of her UK work visa status. We accept that the Respondents had genuine concerns about the legitimacy of the Claimant's preferred option of a Tier Two General Visa particularly given that they say it would not have been available for someone who was not a new starter, would have involved having to undertake a resident labour market test and potentially have compromised their sponsorship status.

574. Further, we consider that there is some doubt as to whether the Claimant's professed interest in an analyst's position was genuine, as opposed to being utilised in an attempt to demonstrate that the Respondents could have satisfied the resident labour market test, as this had remained an unfilled vacancy for a significant time. We do not consider it probable that the Claimant had a genuine interest in such a position and the suggestion that it could have been upgraded to an equivalent status and remunerative package to that of an Associate is a matter of conjecture and in any event one the Respondents said would not have been available given their concerns regarding her performance.

575. We find that this allegation therefore fails. First, there are absolutely no grounds to infer that it had anything to do with the Claimant's sex and whilst the Claimant's UK immigration situation was in part a consequence of her race the Respondents' treatment of her did not constitute less favourable treatment of her on account of her race. To the contrary we have found that the Respondents used their reasonable endeavours to procure the optimal outcome to alleviate the Claimant's UK immigration and work status concerns.

By Mr Rubini being placed next to the Claimant in her new rotation in the Listed Private Markets team in September 2017 for the purpose of directly competing with her.

576. Whilst we accept that it was an unusual situation with both the Claimant and Mr Rubini being in the London Private Markets team concurrently, we do

not consider that grounds existed to infer that this involved less favourable treatment of the Claimant on account of her sex or race. Therefore, we did not consider that the burden of proof shifted to the Respondents. We reach this finding for the following reasons.

577. The Claimant was outside the normal scope of the Associate Program given previous findings that she was in the Accommodation Period.

578. There was a relatively brief period of crossover between the Claimant and Mr Rubini, who commenced on or about 1 October 2017 and only remained in the London Listed Private Markets team for approximately six weeks, prior to transferring to Zug.

579. If the Claimant was competing with Mr Rubini, he was by definition competing with her. Therefore, the alleged less favourable treatment cannot have been specific to the Claimant as it would have applied equally to him.

580. The Claimant had been advised that she would need to perform exceptionally to obtain an offer of permanent employment in Listed Private Markets. This would have applied regardless of Mr Rubini's rotation through the team. Her situation was exceptional, and we consider it had been made clear to her that the primary purpose of the Accommodation Period was to facilitate her to address and regularise the UK immigration issues and seek to secure alternative employment outside Partners Group.

581. Further, we find that the Respondents had a legitimate reason for engaging both the Claimant and Mr Rubini in that there was a significant backlog of work which needed to be completed.

582. This allegation therefore fails.

By the Claimant being refused a bonus for the 2017 financial year despite her performance having been good? By contrast, the Claimant's peers on the Associate Program all received a bonus for the 2017 financial year.

583. We do not consider that any grounds existed to infer that the refusal to pay the Claimant a bonus for the 2017 bonus year constituted less favourable treatment on account of her sex or race. We reach this decision for the following reasons.

584. The Respondents' bonus policy made it clear that an employee would not be considered if they had been given notice of termination prior to the Bonus Payment Date or if prior to the Bonus Payment Date the Second Respondent had informed them that their employment would be terminated. Whilst the Claimant had not, in our view, been given notice of termination it was nevertheless the case that there was high probability that her employment would not be continued. In these circumstances we consider that it was perfectly rationale that the Respondents in accordance with their policy, but also the normal business rationale behind a bonus scheme i.e. the

incentivisation of employees, did not include the Claimant in the 2017 bonus award.

585. We accept the Respondents' evidence that this was consistent with its normal practice and was not particular to the Claimant's specific circumstances. There was a high probability that she would leave, and the payment of a bonus to her would not involve the incentivisation and enhanced prospects of retention of an employee, but in effect a payment to someone who was likely to leave.

586. This allegation therefore fails.

By the Claimant being excluded from a team lunch organised by Mr Pimpl on 27 June 2018.

587. We find this allegation entirely unsubstantiated and there to be absolutely no grounds to infer that it had anything to do with the Claimant's race or sex. We accept the Respondents' evidence that it constituted an informal lunch and that it would have been natural for Mr Pimpl to have invited Mr Sidana, who he knew and had lunch with approximately four times a year when he visited London, and Ms Lee, another member of the team. There is no suggestion that the Claimant and Mr Pimpl knew one another.

588. Further, we accept the Respondents' evidence that it was an informal spontaneous event and not a formal team lunch and that had the Claimant been at her desk they would have casually invited her to join them. The Claimant has not given evidence that she was in the office on the day in question and may well have been absent. The Claimant accessing the Outlook group calendar noticed this event and assumed that there must be a sinister explanation behind it. We consider that to be completely contrary to the way lunches and other informal social events are organised in an office. It does not follow that every visiting colleague will invite every member of a particular team to lunch or drinks. We do not consider that there was any direct intention to exclude the Claimant and nor that it was reasonable for her to infer such.

589. If, which we do not consider to be the case, the Claimant was excluded we consider it far more likely that the reason would have been knowledge that she was almost certainly going to be leaving the Respondents' employment but also that she was a potential litigant bringing serious allegations of discriminatory treatment against the Respondents and many of its senior employees. Whilst we do not have any evidence that this was a factor in Mr Pimpl not inviting the Claimant, we consider that this would have been a far more likely explanation than her sex or race.

590. This allegation therefore fails.

By the First Respondent refusing to acknowledge the Claimant's DSAR until 17 July 2018, by stating that they required her assistance in "clarifying the scope of her request", by then only providing the Claimant with four

documents from her HR file on 2 August 2018 in response, by refusing to provide any further documents for a further two months, by then only producing further documents over five months after the DSAR was made and by that DSAR response being incomplete.

591. We find no basis to infer that any alleged shortcoming, if indeed there was any, was on account of the Claimant's sex or race. We reach this finding for the following reasons.

592. Mr Treumpler acknowledged the Claimant's DSAR on the day it was submitted; 6 July 2018. Ms Waygood followed this up on 17 July 2018.

593. The Claimant had made a very wide ranging, in fact there were no limitations to it, request for the disclosure of materials falling within her DSAR. This would have involved a very extensive and time consuming search followed by a process of review, redaction, consolidation, ordering and then ultimate disclosure to the Claimant. This would be a protracted exercise given both the time it would incur but also competing business requirements.

594. Ultimately, the Respondents did make extensive disclosure of documents albeit in tranches. Whilst the disclosure process took place over a relatively significant period up until December 2018 it was delayed as a result of without prejudice discussions in October 2018. We do not consider the Respondents' position to be unreasonable and more significantly there is no basis to infer that it was in any way delayed, compromised or obstructed as result of the Claimant's protected characteristics.

595. This allegation therefore fails.

By the Claimant being refused a copy of the minutes of the meeting of 5 July 2018 with Mr Treumpler and Ms Reimer.

596. We find no grounds to infer that this had anything to do with the Claimant's sex or race and find the allegation to be unsubstantiated. We reach this finding for the following reasons.

597. The minutes of the meeting were provided to her on 13 July 2018. She was invited to provide any comments or edits on the document. She was subsequently provided with a word version of the document on 17 July 2018.

598. We consider it significant that notwithstanding that the Claimant had a covert recording of the meeting that she did not provide any substantive comments. Further, we consider that repeated request for the "original" version of the minutes is contrary to Ms Reimer taking a typed note during the meeting and therefore this was not a case of handwritten notes being subsequently typed up. Whilst it may have been possible that an original version of the minutes would have been saved, and a new version created, this would not necessarily have been the case as the original version may have been proof read and tidied up before being provided to the Claimant. In these circumstances there would be no original version.

599. This allegation therefore fails.

By the Claimant not being fairly considered for a role on the Listed Private Markets team from August 2017 (i.e. before she joined the team, but after joining discussions had begun) to November 2017 while she was on the team.

600. We find no grounds to infer that this had anything to do with the Claimant's race or sex. We reach for this finding for the following reasons.

601. The Claimant was no longer on the Associate Program. Further, we consider that she was considered for a role on the team albeit that she would have to demonstrate exceptional performance. We accept Mr Munz's evidence that he was open to the possibility of the Claimant being found a permanent position. We consider that the contemporaneous evidence points to him giving genuine consideration to her potential suitability for a permanent role. For example, he asked Mr Sidana for feedback on 18 September 2017. It was possible that his feedback could have been positive albeit this was not the case. Had it been positive it may have well have been that Mr Munz would have been more inclined to explore further the optionality for continuing the Claimant's employment on an ongoing basis whether in an Associate position or via the mooted alternative route of upgrading an analyst's position.

602. As such there was no failure to consider her, albeit it may have been unlikely it was not an impossibility. We accept the Respondents' position that the Claimant simply failed to demonstrate the outstanding level of performance which would have been a prerequisite of serious consideration.

603. The Claimant's progression to a permanent role during the Accommodation Period was always conditional on her performance but also the availability of a role. This had not been discounted before she started or indeed in the early weeks or months of the Accommodation Period. Whilst there is no specific date at which the possibility of progression ceased to apply it became increasingly unlikely and we consider that this would have been apparent to the Claimant. This is consistent with the evidence that she became progressively demotivated and spending an increasing amount of her time pursuing other activities to include seeking to secure alternative employment, addressing her immigration status, considering the possibility of setting up a venture capital type investment business, attending training and so on.

604. Given our findings on background matters as set out and the allegations of a direct sex and/or race discrimination referred to above we find that the Claimant was not subject to any less favourable treatment on account of her race and/or sex.

605. This allegation therefore fails.

Direct Disability Discrimination (s. 13 EQA)

Did the First and/or Second Respondent perceive the Claimant to have cancer and therefore to be disabled within the meaning of s. 6 EQA by reason of her having a benign tumour in her abdomen removed in October 2016?

606. This is accepted by the Respondents and therefore there is no need for us to make a finding.

Was the Claimant treated less favourably than a hypothetical non-disabled comparator on this basis

a) In any of the alleged respects at paragraph 4 above and/or

b) by its being assumed internally that the Claimant's perceived health condition amounted to a "pre-existing condition" complicating her continuing employment?

607. Given our findings above that the Claimant was not treated less favourably in respect of the matters set out in paragraph 4 that applies equally in respect of direct disability discrimination.

608. Whilst the Claimant was perceived to have a health condition amounting to a pre-existing condition i.e. cancer, we do not consider that this gave rise to less favourable treatment than a hypothetical non-disabled comparator. We reach this decision for the following reasons.

609. First, the Respondents were not treating the Claimant less favourably as result of their false perception that she had cancer, but to the contrary, were at least in part because of this false perception, seeking to treat her more favourably. It was arguably a contributory factor to the goodwill inherent in their decision to extend her employment by up to 12 months beyond the Associate Program. We do not consider that this was the main reason, but it may have been a contributory factor.

610. Whether it was regarded as a benign abdominal tumour or cancer it nevertheless constituted a "pre-existing condition". Therefore, we do not consider that the mistaken label of cancer in itself gave rise to any less favourable treatment. We consider this analogous to an employee being erroneously labelled as being gay, which would not be regarded as less favourable treatment, unless approached from the premise that people consider it to be less favourable treatment for someone to be erroneously assumed to have cancer, another disability or a different sexual orientation. We do not consider this to be the case.

611. We do not consider that the background allegations have any bearing on our decision as set out above.

612. This allegation therefore fails.

Harassment (s. 26 EQA)

Did any of the matters alleged at paragraph 0 and 8 above constitute unwanted conduct relevant to the Claimant's race, sex and/or perceived disability which had the purpose or effect of violating her dignity and/or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for her within the meaning of s. 26 EQA?

613. We find that they did not for the reasons set out above but further that there is no evidence that the "purpose" of the alleged conduct was to have the purpose or effect of violating her dignity or so on as required under s.26.

614. Further, we do not consider that any of the background allegations have any bearing on this decision.

615. This allegation therefore fails.

Victimisation (s. 27 EQA)

Did the Claimant make the following alleged disclosures to Mr Garcia-Altozano on 9 August 2017 (and, if so, which)? If so, did they (or any of them) constitute a protected act within the meaning of s. 27(1)(a) EQA in that by those disclosures, the Claimant alleged contraventions of the EQA by the Firm and by Mr Jenkner personally in the form of discrimination and harassment on the grounds of race and sex:

That she was concerned and felt uncomfortable about the discriminatory words and actions of senior members of the Infrastructure Investment team, in particular, as alleged by the Claimant:

a) That Mr Jenkner shared an anecdote at an offsite event in or around April 2016, the clear intention of which was to equate black people to monkeys.

b) That Mr Jenkner muted the London office's video conference microphone in order to mock the accent of a female Indian colleague who was presenting an investment to the Global Infrastructure team via video conference on 8 August 2017.

c) Mr Jenkner's negative remarks during a conversation with the Claimant on or around 18 May 2017 via video conference while the Claimant was in the Firm's London office about the fact that she had not worked on an Infrastructure deal beyond the teaser stage, resulting in the Claimant's Infrastructure rotation being extended beyond the standard three months. By contrast, Mr. Jenkner had positive words of praise for two Caucasian males, Mr. Garcia-Altozano and Mr. Makar, who had joined the team before the Claimant, were not analysts and were yet to work on a deal past the teaser stage; and/or

d) Any other misogynistic statements and actions concerning women by other senior managers.

616. We find that the disclosures at (a), (b) and (d) above constitute protected acts under s.27(1)(a) of the EQA but not that at (c). We consider that they fall within s.27(2)(d) in that they involved the Claimant making an allegation (whether or not express) that A or another person has contravened the Act. That is not to say that we find the allegations to be substantiated, they need not be for the purposes of acquiring protection.

617. We do not consider that (c) above involves such an allegation under the EQA. We reach this decision for the following reasons.

618. We do not consider that Mr Jenkner's remarks were "negative" as alleged by the Claimant. We find that he was simply making an observation and not in any way imputing criticism of the Claimant's performance. It would have been self-evident that whether any given Associate had worked on a deal beyond the teaser stage would be entirely beyond their own control or influence. We find that he was exploring the Claimant's position with a view to considering what steps could be taken to provide her with additional deal exposure. We consider that this was consistent with him having a genuine concern to enhance her experience with a view to increasing the possibility of her demonstrating the requisite technical accomplishments to be considered for a permanent position.

619. Further, we do not consider that any positive words of praise that Mr Jenkner may have bestowed upon Mr Garcia-Altozano and Mr Makar could be considered as acts that involved him treating them as men and/or not of the same race as the Claimant as giving rise to a breach of the EQA. In any event we heard no direct evidence on this particular point.

620. Given our findings in relation to paragraphs 4 and 8 above the protected acts did not give rise to the Claimant suffering any detriments amounting to victimisation and this allegation therefore fails.

Did the Claimant make the following protected disclosures? If so, did they (or any of them) constitute protected acts within the meaning of s.27 of the EQA in:

621. We consider that the reference in the list of issues to "protected disclosures" above was intended to read protected acts and have approached our determinations on this basis.

A letter dated 3 January 2018:

622. The Respondents accept that this constituted a protected act.

A conversation with Ms Raess and Ms Evans on 27 February 2018

623. We do not consider that this constituted a protected act. We consider that this involved the Claimant enquiring as to the position in relation to the Levy investigation and expressing dissatisfaction regarding its scope and outcome. We find that this was not in itself a protected act.

Communications with the Respondent (including with Ms Evans and Ms Raess around late February 2018) before she was dismissed in August 2018 and before her vested Entry Shares were "withheld" in September 2018.

624. We find that this was not a protected act. First, it is extremely general and without specifics as to exactly what alleged protected act is relied on it would be virtually impossible to form a view that any given action within a relatively long time period constituted a protected act.

Was the Claimant subject to alleged detriments, namely, the withholding of her Entry Shares from September 2018; because of the alleged protected acts set out at paragraphs 0 and 0?

625. We find that she was not.

Discriminatory Dismissal (s. 39(2)(c) EQA)

What was the reason for the Claimant's dismissal? Was the Claimant dismissed:

(a) as the Respondents contend, because she had come to the end of the Accommodation Period or,

(b) as the Claimant contends, because of her race and/or sex and/or perceived disability?

626. We find that the Claimant was dismissed because she had come to the end of the Accommodation Period. Given our findings above in relation to her individual allegations of alleged discriminatory treatment on account of her protected characteristics this in effect follows automatically. Whilst we have found that the Claimant undertook some protected acts, we find that there was no causative connection between these and her dismissal. We reach this finding for the following reasons.

627. There is no evidence that Mr Garcia-Altozano disclosed his conversation with the Claimant to anyone else. He was not, in any event, involved in the decision to terminate her employment.

628. There was evidence that from as early as March 2017 the possibility of a separation with the Claimant was being considered and therefore substantially predating her conversation with Mr Garcia-Altozano on 9 August 2017.

629. The Claimant was on the Accommodation Period. She had not received an offer of permanent employment whether during the Associate Program or

in the Accommodation Period. Therefore, we consider that the overwhelming evidence supports the reason her employment was terminated as being because she did not have a permanent position rather than because of her protected characteristics.

630. This allegation therefore fails.

Whistleblowing Detriments (s. 47B ERA)

If they were made, did the disclosures set out at paragraph 0 above (or any of them) constitute qualifying disclosures within the meaning of s. 43B(1)(b) ERA in that:

(a) They contained information which the Claimant reasonable believed tended to show that the Firm, Mr Jenkner, Ms Peiner, Ms Alsterlind and other senior managers had failed to comply with their legal obligations under the EQA; and

(b) The Claimant reasonably believed that she was making her disclosures in the public interest.

If so, did these qualifying disclosures (or any of them) amount to protected disclosures within the meaning of S.43A and S.43C (1) (a) of the ERA?

If so, was the Claimant subject to the alleged detriments as set out paragraphs 4 and 8 above on the grounds of having made the protected disclosures (or some of them) within the meaning of S.47B (1) and/or S.47B (1A) (a) of the ERA?

631. Whilst we consider that the Claimant undertook some protected acts under s.27 of the EQA we do not consider that she made any qualifying protected disclosures within the meaning of s.43A and s.43C(1)(a) of the ERA.

632. We reach this decision primarily because we do not consider that it was the Claimant's intention during her conversation with Mr Garcia-Altozano on 9 August 2017 to make a disclosure that in her reasonable belief the Respondents had failed to comply with any legal obligation. Rather we consider that this constituted a casual conversation and not one pursuant to which she could reasonably expect he would act on any information provided.

633. We accept his evidence that he contemporaneously interpreted it as matters being raised in conversation rather than the Claimant making a disclosure to him, which she anticipated him to action, of the Respondents breaching their obligations under the EQA or otherwise. We consider it to be significant that the Claimant did not contemporaneously document her concerns nor take any further action when it must have become apparent to her after the conversation that he had taken no further action. Had the matter been an immediate cause of serious concern to the Claimant that she expected Mr Garcia-Altozano to act upon, we consider that she would have

mentioned it to him again, or raised it with Ms Raess, Mr Truempler or others with whom she had direct and regular lines of communication.

634. We need to consider whether the conversation engaged the public interest element of the ERA. The Claimant was making allegations against individual employees of the Respondents. Whilst it is unequivocal that an allegation of, for example, institutional racism by a police officer against the Metropolitan Police would have the public interest element to qualify as a protected disclosure we consider it to be more nuanced whether an employee alleging that one or more individuals made inappropriate comments or conducted themselves inappropriately on separate occasions satisfies the public interest element for there to be a qualifying protected disclosure.

635. Given the nature and potential seriousness of the allegations the Claimant made in a conversation with Mr Garcia-Altozano on 9 August 2017 we are balance of the opinion that the public interest element was engaged.

636. Nevertheless, we consider that it would not invariably follow that any complaint by an employee that a colleague had breached the terms of the EQA would constitute a protected disclosure and in each case specific findings are based on the facts, circumstances and relative seniority of the employees involved.

637. Further, and importantly in relation to this aspect of the claim, we accept Mr Garcia-Altozano's evidence that he did not communicate his conversation with the Claimant on 9 August 2017 to anyone else. He was also not subsequently involved in the decision to terminate her employment or save for his alleged "shunning" of her, (which we have found not to have taken place) none of the alleged detriments. We find that even if we had found that the Claimant had made a protected disclosure to him, which, on balance we have not, there was no causative connection to any detriments or dismissal.

638. Given the above finding that the Claimant made no qualifying protected disclosures and in any event that those making the decisions about her employment did not know about the conversation with Mr Garcia-Altozano, she could not have been subject to any alleged detriments on account of having done so. Further, and in any event, we do not consider that any of the alleged detriments, to include dismissal, were causatively connected to, or materially influenced by, the alleged protected disclosures. This allegation therefore fails.

Automatic Unfair Dismissal (s. 103A ERA)

Was the Claimant dismissed by reason (or principal reason) of having made the protected disclosures set out at paragraph 0 above?

639. We find that she was not given that we have found there were no protected disclosures. In any event we have found that the Claimant's dismissal was as a result of the expiry of the Accommodation Period for the reasons previously set out.

Unfair Dismissal (s. 94 ERA)

Was the Claimant dismissed for a potentially fair reason, namely capability or some other substantial reason?

640. We find that the Claimant was dismissed on the grounds of some other substantial reason (SOSR). Whilst Mr Treumpler said, in response to a question from the Employment Judge, that she was dismissed on performance grounds we find that the actual reason for her dismissal was SOSR i.e. the expiry of the Accommodation Period. Whilst the Claimant being on the Accommodation Period was to an extent a result of her performance not being of the requisite standard to convert during the Associate Program, we do not consider that this as a consequence became a capability related dismissal.

641. The Respondents' position is that the Claimant performed satisfactorily but not to a sufficiently high standard to attract interest from any given team so that she converted. We accept the Respondents' position that the invocation of any performance improvement process would have been contrary to the operation of the Associate Program with three month rotations and what the Respondents say was an expectation that Associates would either convert or realise after say 12 to 15 months, that they were unlikely to do so and then look to secure alternative positions. It would have been highly humiliating, in our view, for the Claimant to have been placed on a performance improvement plan particularly where the concerns were more subjective i.e. that she did not show the requisite enthusiasm or interest rather than that she was simply not capable of performing core parts of her duties.

Did the First and/or Second Respondent have a genuine belief in a fair reason for the Claimant's dismissal?

642. We find that they did. This was the end of the Accommodation Period and therefore SOSR.

Was a fair process followed in dismissing the Claimant?

643. We find that it was not. We therefore find that the Claimant's dismissal was unfair. We reach this finding for the following reasons.

644. First, we find that the Claimant was not, as averred by the Respondents, given notice on or about 30 August 2017. Whilst it may have been the Respondents' intention to make it clear to the Claimant that her ongoing employment was of finite duration, whether for six months or an eventually extended period of 12 months, this was not unequivocally communicated to her and it is accepted was not put in writing. We would have expected any notice of the intended termination of employment to have been documented. In its absence there was scope for uncertainty.

645. Further, given the Respondents' position that the possibility remained that the Claimant could, in the event of exceptional performance, have converted

we would have expected written updates to be have been communicated to her as to her possibility of converting and further at what point it was considered that this was no longer a possibility. There was no clear communication. Whilst there may have been oral communications, for example, enquiries as to how the job search was going, there were no communications consistent with unequivocal notice of termination having being given.

646. We therefore find that it was not until the meeting on 5 July 2018 that the Claimant was unequivocally advised that her employment was being terminated.

647. We consider this to be relevant in the context of applicable case law on the application of SOSR in similar circumstances and in particular Terry v Sussex County Council and Fay v North Yorkshire County Council in which the Court of Appeal approved the reasoning in Terry and set out the circumstances when the expiry of a fixed term contract can amount to SOSR, namely:

- It must be shown that the fixed term contract was adopted for a genuine purpose;
- The fact was known to the employee; and
- That the specific purpose for which the fixed term contract was adopted has ceased to be applicable.

648. Whilst we do not consider that a fixed term contract existed, we find that similar principles applied in the Claimant's case. It is relevant that the Court of Appeal in Fay said that the fact of the existence of a fixed term contract must be known to the employee and that the specific purpose for which the fixed term contract was adopted has ceased to be applicable. We consider that the Respondents failed to properly communicate the fact to the Claimant, and whilst arguably mistaken and contrary to all the prevailing evidence, the Claimant remained uncertain as to what her exact position was, or at least arguably did so, until relatively late in the Accommodation Period. Had the Respondents felt there was no ambiguity regarding her position, and the Claimant was aware that her employment would automatically terminate on 31 August 2018, it would have been inconsistent for Mr Treumpler to consider it necessary to travel to London and attend a meeting lasting two hours to inform her of this fact.

649. The issue then arises as to whether this made any difference to the outcome. Arguably had a fair procedure been followed the Claimant would have been dismissed at or about the same time i.e. 31 August 2018. What, if any, Polkey reduction should apply and whether the Claimant's alleged gross misconduct in making the Recordings should reduce or extinguish any compensation will, if necessary, be considered at a separate remedies hearing.

650. We do not consider that it would be appropriate to increase the compensatory award as a result of any failure to follow the ACAS Code in the

circumstances of what we consider to be a dismissal on the grounds of SOSR. The shortcoming we have identified was as a result of a failure of this unequivocal and properly documented communication to the Claimant rather than there being a deficient capability or conduct dismissal procedure which we have found not to have been applicable

Time Bar

Are the claims (or any of them) out of time?

Did any or all of the facts and matters constitute a continuing act for the purposes of s.123(3) EQA?

If not, would it be just and equitable within the meaning of s.123(2)(b) for the Tribunal to extend time to permit the Claimant to bring her claims of discrimination?

651. Dealing first with s.123(2)(b) we find that it would not be appropriate to extend time. We reach this decision given that the Claimant has provided no evidence as to why it would not have been possible for her to commence proceedings earlier. She had the benefit of professional legal advice both in the US and UK. She was clearly aware of the matters potentially giving rise to claims under the EQA. She issued a series of ACAS early conciliation notices. She delayed commencing tribunal proceedings until the last available date in respect of her dismissal; namely 30 January 2019.

652. The Respondents have accepted that termination on 31 August 2018, the withholding of her Entry Shares and her complaints about the DSAR are in time and therefore we do not need to consider this further.

653. In relation to those matters which are out of time as set out in s.4 we find that the following formed a continuing course of conduct:

a. The Claimant being left without a rotation position between 11 August and 20 September 2017.

b. Mr Rubina being placed next to the Claimant.

c. The Claimant not be fairly considered for a role on the London Listed Private Markets team from August 2017.

d. The Claimant being refused a copy of the minutes of the meeting of 5 July 2018.

654. We consider that the matters above were all at least arguably connected given that they all related to the circumstances of the Claimant progressing to and through the Accommodation Period and therefore had a sufficient level of causational and temporal connectivity to form a continuing course of conduct. That is not to say that they constituted acts or omissions on account of a

protected characteristic merely that they are not in our view isolated and unconnected incidents.

655. We consider that the allegations below did not form part of a continuing course of conduct given that they represented discreet issues without a common theme or chronological context.

a) Ms Peiner downplaying and criticising the Claimant's sourcing efforts

b) The 2017 bonus

c) The allegation of shunning and ignoring

d) The immigration issues

e) The exclusion from Mr Pimpl's lunch.

Overall conclusions and Tribunal comments

656. Our detailed findings in relation to the list of issues have been set out above. However, at the conclusion of the judgment we consider it appropriate to make some overarching observations. Whilst we consider that the Claimant had genuine belief that her progression with the Respondents had been stymied, we nevertheless consider that she progressively developed a mindset pursuant to which she sought to combine a series of individual acts and omissions into what she clearly construed as being a coordinated campaign to prevent her progression. Whilst undoubtably elements of her employment could have been handled better by the Respondents, for example, the mistaken reference to cancer and a lack of documented clarity regarding the Accommodation Period, we nevertheless consider that looked at in totality the Respondents sought to provide her with the opportunity to progress notwithstanding their belief that her performance was suboptimal.

657. The Respondents clearly require a very high level of commitment and technical expertise of their Associates and therefore not being taken on to a "permanent" role does not connote poor performance but rather that an individual's performance had not reached the very high standards which would cause one or more teams to, as the Respondents describe it, "put their hands up". Whilst the Respondents do not accept that Associates needed to be "superstars" to progress we consider it significant that this was a term used by a number of senior employees in email communications and whilst perhaps the precise phraseology may not be significant the underlying mantra of excellence being a pre-requisite of progression is almost certainly consistent with the Respondents' position.

658. We do, however, consider that there were instances of the Respondents appearing very reluctant to bestow praise on the Claimant, and in some instances perhaps retrospectively, overly keen to infer or imply undue negativity to her performance reviews. We refer specifically to her early quarterly performance reviews which the Respondents regarded as "red

flags" as to future performance when we applying our knowledge and experience of workplace practice would consider the performance reviews to be entirely standard and commensurate with the early stages of a trainee/associate office rotation.

659. We also consider that the Claimant demonstrated an increasing tendency to seek to find evidence of discriminatory conduct, for example, Mr Jenkner's conduct on the call with Ms Malik, the "blackface" photo in the Zug office, et cetera, albeit that these individual incidents were not directly attributable to a course of conduct pertaining to her.

Dismissal of proceedings against the First Respondent

660. The claim against the First Respondent fails and is dismissed on the basis that the Claimant was employed by the Second Respondent throughout her employment.

661. The claim for unfair dismissal against the Second Respondent succeeds, but subject to what, if any, deduction should be made to be determined at a remedies hearing if required but all other claims fail and are dismissed.

Employment Judge Nicolle

Dated: 4 January 2022

Sent to the parties on:

4 January 2022

For the Tribunal Office